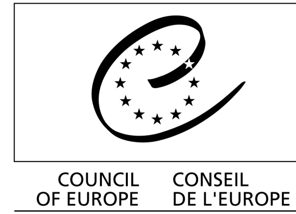

DH-MIN(2006)013final

Strasbourg, 2 April 2009

COMMITTEE OF EXPERTS ON ISSUES RELATING TO THE PROTECTION OF NATIONAL MINORITIES (DH-MIN)

ELECTORAL SYSTEMS, PARTY LAW AND THE PROTECTION OF MINORITIES

Report prepared by David HINE*

* Department of Politics and International Relations, University of Oxford

This report was prepared upon the request of the Secretariat of the Framework Convention for the Protection of National Minorities and of the DH-MIN, initially for the fourth meeting of the Committee of Experts on Issues Relating to the Protection of National Minorities (DH-MIN), 19-20 October 2006, Strasbourg, France. This revised version has been prepared further to new contributions received from Member States and recent developments in electoral laws.

The views expressed are those of the author.

1. Preface

This paper reviews the principles of electoral and party law that affect national minorities. It evaluates their likely impact, discusses how good practice might be identified, and lists issues for further exploration. The remit raises definitional and normative issues that need brief preliminary comment.

i. Identifying national minorities. The rediscovery, or in some cases the recognition for the first time, of the rights of minorities that, through state-building and migration, have suffered cultural, religious, and economic disadvantage, has been a major achievement of democracies in Europe and elsewhere since the middle of the last century. But different types of minority pose different challenges. Partly this is because minorities are not all equally visible or assertive or cohesive. Partly it is because the configuration of minorities, especially in complex societies, creates different domestic political relationships and different needs for protection.

On the matter of visibility, in some societies, generally the highly divided ones, members of minorities are registered and are identifiable. In others, territorial and/or language boundaries identify them with reasonable clarity. But elsewhere the identities and lines of division are blurred by close cohabitation, inter-marriage, and stronger and weaker identities. This often makes it impossible to identify the exact size or location of the minorities in need of protection, especially where there are sensibilities about information gathering. The difficulty is even greater when different organisations compete to represent the same minority. A one-to-one correspondence between a minority and a party may not exist, and "protection" may be achieved by representing the minority through other, more broadly-based, party lists that are not primarily "minority" lists. But information of this type is difficult to come by. Often, it is politically sensitive to collect, and makes measurement of the impact of particular arrangements impossible.

We might in fact identify at least three different cases in which "minority" status arises:

> i. cases where there is at least one minority group, based on language, religion, or ethnicity. The minority will be small in number (say up to 10% of the national population but often far less) and will either reside in border areas of countries (e.g. Italy, Denmark, Spain, Hungary) or be widely dispersed (as in several West European states with Roma or Moslem immigrant minorities)
>
> ii. cases where the country is divided between a clear and cohesive majority and a large minority, such as Northern Ireland
>
> iii. cases where there is no natural majority at all, but rather a series of "de facto" minorities, each with a distinct and mutually-recognised identity, and perhaps covering virtually the entire population or perhaps leaving residual groups (Bosnia and Herzegovina) lacking any special minority identity

Each case poses a different challenge. It is clear in the first case that the basic challenge in protecting a minority is likely to be to find ways of ensuring representation of small parties. But in the other two cases the problem is more complex. Case ii suggests a permanent winning majority, and hence a permanent loser. Representation is a start, but only a start. The loser may be represented, but may not be protected. Permanent minority status can de-legitimise institutions in the eyes of the minority. The main objective may then be devising a power structure which forces a degree of power-sharing, rather than ensuring representation *per se*. Similar considerations might apply to case iii, though when there is a significant group of "others" there are complications of the type which has arisen in Bosnia following the Dayton Agreement, where, before accepting any form of constitutional order at all, the most distinctive groups demand special rights. Often those rights seem to jeopardise the rights of those who are not part of any group at all.

ii. How is "protection" best achieved? In the academic literature on democratization, there is a widespread perception that the relationship is very complex between ethnicity - one of the most important determinants of minority status - and democratization. The conventional wisdom in

democratization studies tends to divide into three parts: firstly, that political parties are generally a pre-requisite for democratic stability; secondly, that fewer parties are generally better than many; and thirdly, that multi-ethnic, inclusive political parties are generally better than exclusive ones. Associated with this view is the idea that ethnic parties are programmatically often rather weak and poorly institutionalised. This can apply not only to democratizing states but to some very long-established democracies as well. As a result the focus of recommendations for institutional engineering is often on overcoming ethnic divisions, rather than protecting minorities.

Of course overcoming ethnic divisions is not incompatible with protecting minorities. Ethnic parties are not always irredentist and the provision of special protection can in the right circumstances help ethically-defined minorities without causing wider harm to the system. But exactly how to do so can raise fundamental normative issues. If special provisions are in place to foster multi-ethnic parties, because the latter offer the best chance of managing conflict, this can hamper the creation of a body of party law that protects ethnic minorities. Certainly, a good deal of literature, and quite a body of practical case-law, has been focused on efforts to engineer parties that transcend ethnic conflict.[1] But this involves a high degree of imposition, and runs up against practical problems of securing agreement and consent. It may also run counter to basic principles of free association. So while it is often asked whether parties representing ethnic minorities should be allowed to exist at all, this has to be balanced against the concern that prohibiting them might well be an infringement of human rights or minority rights.[2]

iii. The dimensions of an electoral system An electoral system is composed of different elements and the component with the greatest impact on the representation of minorities is not always obvious. The most widely discussed in the academic literature is the central mechanism for translating votes into seats. However, there are other features which are almost as fundamental. These include district magnitude – the number of seats per constituency – and the so-called threshold of votes that a party requires for representation (that threshold expressed either in absolute terms or as a share of total vote, and either nationally or sub-nationally). These latter two criteria, along with the core vote/seat translation mechanism, probably have the biggest impact on the representation of small parties. But other features also contribute. They include:

- the way candidates are selected;
- whether voters play a role in choosing between candidates of the same party through some system of ordinal preferences;
- whether voters have just one vote or more than one vote;
- whether voters can split their votes between candidates from more than one party;
- whether there are several different tiers of seat and seat distribution, so that the effects of the vote/seat translation process at one level are, by design or otherwise, offset to some degree by the translation process at another level.

Clearly, some of these processes are inter-connected. Other than through state-run primaries, for example, it is unusual for voters to be involved in choices between candidates of the same party in single-member single-seat contests; the existence of two votes per elector is normally associated with complex ballot structures with two tiers of seat distribution.

iv. The meaning of "party law". The report covers both electoral law and the law on parties as organisations. The latter is a more difficult area to review. Party law varies far more than electoral law for the obvious reason that to elect an assembly is impossible without electoral law, but perfectly feasible without much in the way of laws governing parties as organisations. Most parties in long-

[1] For a discussion of these issues see, *inter alia,* Horowitz, D.L. (1985) *Ethnic Groups in Conflict.* Berkeley: University of California Press, and Reilly, B. (2001) *Democracy in Divided Societies: Electoral Engineering for Conflict Management,* Cambridge: Cambridge University Press, and Sisk, T.D. (1996). *Power Sharing and International Mediation in Ethnic Conflicts*. Washington DC: United States Institute of Peace Press

[2] For a discussion of some of the normative issues lying deeper below this discussion, see, *inter alia*, Taylor, C. (1992). *Multiculturalism and the Politics of Recognition*. Princeton NJ: Princeton University Press, and Walzer, M. (1997). *On Toleration*. New Haven: Yale University Press.

established democracies arose without any clear body of party law. Constitutions in some European societies are sources of general statements about parties and their role, but rarely go into any depth. Regulation by ordinary law has become more common because of growing concern in modern democracies about corruption and party funding. But it remains more piecemeal than electoral law, and tends to focus on certain themes: registration for electoral purposes, the party labelling of candidates, public subsidies, funding sources generally, and transparency in accounting. Overall micro-management of party organisation in *advanced* democracy is rare.

v. The focus of academic literature on electoral systems. The bulk of the academic literature on electoral systems has focused on their impact on the shape and operation of the party system: in particular, on how many so-called "effective parties" gain representation in the relevant assembly[3], and to a lesser degree on how they interact.[4] To the extent that an index of party-system fragmentation is a guide to the likely legislative representation of small parties, included among which minority parties as a specific category, that literature is applicable to the central purpose of this paper – the protection of minority parties themselves. But it should be noted that very little of this work is devoted to minority representation *per se*. The central issue has been the index of proportionality in legislative representation, and whether general propositions about the effect of particular electoral mechanisms can be tested. So for the most part such work does not discriminate between minority parties and small parties in general, and it has that limitation in the present context. It is geared towards producing generalisations from aggregations of data across a number of countries.

That said, the field has certainly expanded rapidly in recent years, and the academic results have has been widely used in newly democratising countries. There is now a rich literature and at least some agreement on the consequences of electoral system change.[5] Of course, given that the *objectives* of reform, particularly in terms of the shape of the party system, are much disputed, there may be less agreement about the desirability of a particular type of change than about its consequences. But there is much more known about the specific contexts in which reform operates than a couple of decades ago, and the most sophisticated literature has helped explain why the resulting patterns are so complex. The simple relationships originally posited fifty years ago by Maurice Duverger[6] and others have been replaced by explanations that include not only Duverger's binary distinctions between plurality and proportional systems, but also the number of pre-existing issue dimensions in the system, the size of electoral districts, and the inter-relationship between these latter two: the number of legislative parties rising with district magnitude as the number of pre-existing cleavages increases.[7]

---

[3] Laakso, M. and Taagepera, R. (1979) '"Effective" Number of Parties: A Measure with Application to West Europe', *Comparative Political Studies*, 12/1: 3-27. The so-called *index of fractionalization* was an earlier and cruder version of this. See Douglas Rae, see Rae, D. W. (1971) *The Political Consequences of Electoral Laws*, 2nd edn. New Haven, CT: Yale University Press.

[4] The question of party system operation is often seen simply as a consequence of fragmentation, but it is clearly distinguishable from it. An electoral system may have features which are specically designed to force parties to work in cooperation with one another and to sustain parliamentary coalitions. It may do so directly, by requiring parties to nominate a chief-executive candidate and joint-party candidate lists, with the winning alliance securing the prize, perhaps a bonus of seat-share, and perhaps an associated eventual penalty should the coalition collapse. Or it may do so indirectly, by a two-ballot structure, under which parties cooperate at the first ballot, through stand-down agreements or at the second ballot through withdrawals or declarations of mutual support, creating a form of moral pledge to legislative cooperation or formal coalition. See Pasquino, G. (2007) 'Tricks and Treats: The 2005 Italian Electoral Law and Its Consequences', *South European Society & Politics*, 12, 79-93, and Elgie, R. .'Two-Ballot Majority Electoral Systems' *Representation*, 34/2: 89-94.

[5] Prominent in that literature are the following collections from the last decade: Colomer, J. (2004). *Handbook of Electoral System Choice*. London: Palgrave; Gallaher, M. and Mitchell, P. (eds.) (2005). *The Politics of Electoral Systems*. Oxford, Oxford University Press; Lijphart, A. (1994). *Electoral Systems and Party Systems: A Study of Twenty-seven Democracies, 1945-1990*. Oxford: Oxford University Press; Norris, P., (2004). *Electoral Engineering: Electoral Rules and Political behaviour*. Cambridge, Cambridge University Press; Reynolds, A. and Reilly, B. (1997). *The International IDEA Handbook of Electoral System Design*. Stockholm: International Institute for Democracy and Electoral Assistance.

[6] Duverger, M. (1954). *Political Parties: Their Organisation and Activity in the Modern State.* London: Methuen.

[7] Shugart, M. (2005) "Comparative Electoral Systems Research: The Maturation of a Field and New Challenges Ahead", in Gallaher, M. and Mitchell, P. (eds.) , op. cit. 25-55

The same applies to what Duverger originally called the "psychological effect" – broadly the extent to which voters are deterred from voting for parties with little chance of winning. Here too, a simple model has given way to a more complex one, where it is recognised that as district size increases, the likelihood that voters can acquire reliable information about party prospects, and therefore pre-filter their choices, decreases, and in the process assists smaller parties.[8]

Research has also focused on the ways in which different district magnitude between different types of area can affect representation. This has drawn attention to the complex effects of two-tier systems of seat allocation. As we shall see in the next section, minorities that are extremely small in national terms, but territorially concentrated, may do best, in terms of representation, under non-proportional rather than proportional systems. A proportional system ostensibly designed to facilitate representation of smaller parties, but based solely on a higher tier of relatively large districts, may not always protect minorities as well as a mixed system. In a mixed system, single-member districts may offer minorities a chance of representation where they are very small but territorially concentrated. Similarly, larger districts employing a compensatory principle, or indeed a separate national compensatory district, can give minorities that are larger than micro-parties but have supporters dispersed across the relevant territory, the chance to win seats at that level. Indeed the same minority could have both characteristics, and benefit doubly from a mixed system.[9]

These are the principal conclusions that flow from recent cross-national research. It is evident that in broad terms they provide some general indications about the prospects of representation for minorities. What they do not provide is a more precise guide to the likely fortunes of minorities given particular sets of rules, to which question we therefore now turn.

2. From votes to seats: the core electoral system and small parties

The basic distinctions political scientists make between electoral systems generally lead to a three-fold categorisation of electoral systems:

- systems in which representatives are elected in single-member territorial constituencies via a single count and the securing for the winner of a simple plurality (so-called first-past the post (FPTP)); a two-round ballot with elimination of less well-placed candidates after the first round (the second-ballot); or ordinal preference-ranking with transfers of the votes of eliminated candidates, where second and subsequent preferences are expressed by voters, all in a single ballot (the alternative vote (AV)

- systems of so-called proportional representation, in which representatives are elected in multi-member constituencies, and where the objective is to secure some combination of various objectives: a degree of proportionality between groups or parties, the opportunity for voters to express votes for more than one candidate on a party list; a guarantee (or high probability) that votes cast are actually used in the election of a candidate, even if not the voter's first choice candidate.[10]

- systems in which there is an attempt to mix the two sets of principles just listed, generally by combining single-member seats with a system that also elects candidates on a proportional basis to compensate for the lack of proportionality of outcome in single-seat elections. "Mixed" systems can in fact be as proportional in their effect as "proportional" ones.

[8] Cox, G.W. (1997). *Making Votes Count: Strategic Coordination in the World's Electoral Systems*. Cambridge: Cambridge University Press.
[9] Shugart (2005), op. cit. 32-3
[10] The inclusive category defined here is not of course fully coterminous with "proportional representation", since the effect of a vote-transfer system (the single-transferable vote in particular) is not necessarily proportional in outcome.

There is no clear basis to determine which of these three best protects minorities, though some general principles can be identified, if by "protect" we mean initially to assist in securing the election of representatives of minority parties which generally represent small segments of the population. Of course, what follows is less applicable to ethnically deeply-divided societies in which everyone is part of a "minority". We return to that situation later.

i._ Single-seat plurality or majority systems: If the minorities are territorially very concentrated in a heartland, then they may do better under single-member, simple-plurality arrangements (FPTP) than under certain types of proportional representation (PR). They are very likely to do so if the minority in question achieves an evenly-distributed simple plurality across several seats within its heartland, and is not split across more than one party. That way, few votes are wasted piling up over-size pluralities or absolute majorities. Territorially concentrated minorities that are super-dominant in their own region will obviously win all the seats in their region if the constituencies are coterminous with it, but may waste votes (compared to the performance of national parties) in doing so. If the seat/population ratio is lower in an area in which a minority is concentrated than that in the country as a whole, (this might be part of a self-conscious design to help such parties) fewer votes are required to elect each representative and this will increase the proportionate seat share of a minority party in an assembly, and help mitigate the effect noted above.

These considerations assume that minorities concentrate their votes on one (or very few) parties. Any splitting of a minority vote may mean that the magnification effect of territorial concentration can disappear and indeed go into reverse. A minority that was split, for example, between radicals and moderates (a not-uncommon state of affairs) could end up highly *under*-represented, even if the minority itself was the largest single group in its own heartlands. There are ways around this under PR, explored later. One way around it in single-seat contests is for parties to engage in mutual stand-down arrangements. A second ballot system or AV gives voters the chance, under certain circumstances, to vote for a second-choice minority party if the first is eliminated, though the propensity of voters to do so will depend on the intensity of the cleavage *within* the minority.

To sum up, we might claim that the ideal outcome for a small party concentrated in a limited area under FPTP is thus to have no competitors for its "natural" minority vote and to win in the largest number of seats by the smallest possible margin.

ii. Proportional systems: The further circumstances move away from this ideal state, the more likely it is that a minority party will do better under some arrangement other than simple plurality.

The impact of PR on minorities is complex. It appears that proportional representation *can* ensure that minorities get representation when they would not secure it under plurality arrangements, but this will only happen under certain conditions. PR will in any case do no more than ensure a roughly proportional representation of a minority, which can of course still, depending on its size and the capacity for alliance-building of its representatives, condemn it to isolation and impotence in an assembly.

The type of PR system that would benefit a small minority party seems to depend on three main factors:

- constituency size
- the formula used for allocating seats in each constituency
- the distribution of the party's vote between a possible "heartland" and other areas

The best way of securing representation for minority parties, assuming any significant degree of territorial concentration (short of one allowing parties to win outright in single-member seat contests), is through relatively large multi-member constituencies which reduce the intra-constituency "threshold" (the barrier below which the party gets no seats) to modest levels. Obviously in multi-party systems, the maximum number of parties to which a PR formula can allocate seats is the number of seats available. In practice larger parties will win more than one seat. So assuming the number of seats in a constituency is limited to say 5-8, PR probably only benefits a small party if it can get to

somewhere between third, fourth, or fifth ranking in the constituency. The larger the constituency, or the more territorially concentrated the minority, the better chance a party of any given size has of winning seats.

But much depends on the seat-allocation formula. The most basic distinction among PR systems is that between the "highest remainder" formula and the "highest average" formula. But there are variants on each, which make some difference to the degree of proportionality:

- for the *largest remainder* formula, the fortune of a small party depends to a large degree on the calculation of the so-called "quota". This is the number of votes required to entitle a party to one seat. The quota is normally the total valid vote, divided by the number of seats to be allocated *or* by one, or two, more than the number of seats to be allocated. The higher the divisor, the smaller the quota. The smaller the quota, the larger the number of seats allocated by the primary allocation mechanism (the number of times the party's total vote exceeds the quota). The smaller the quota the fewer seats remain to be allocated via "remainders", which latter, we can assume, will benefit small parties. The larger the quota, the better chance there is that a small party may have a remainder large enough to be among the largest at the secondary allocation stage. In general therefore, under the highest remainder formula, larger quotas benefit smaller parties.

- for the *highest average* formula (more commonly used) remainders are replaced by divisors. There are two types: D'Hondt and Sainte-Lague, distinguished according to the size of the intervals between successive divisors. Each party's total vote is divided by the first and subsequent divisors, and a seat is allocated at each division to the party with the highest resulting number. Once a party is allocated a seat, its divisor increases to the next rung on the scale of divisors. So the larger the interval between divisors, the more quickly a party with a large total vote cedes a seat to a party with a smaller total share, but one that, at that round, has a higher average. So in general Sainte Lague benefits smaller parties more than D'Hondt. But there are different versions of the Sainte Lague intervals, with different consequences for small parties, as Table 1 shows.

In general terms, it is believed that the largest difference in proportionality results from the largest remainder formula, where a large quota makes for one of the most proportional forms of PR, while a small quota, along with the D'Hondt highest average formula, makes for the least proportional system. In between these parameters, lie the largest remainder using a large quota, and the Sainte Lague highest average formula.[11]

The example set out in Table I compares hypothetical outcomes in a constituency with 100,000 valid votes and 5 seats to allocate, when there are candidates from four national parties and one minority party. It considers four versions of PR: (a) the largest remainder formula, (b) D'Hondt, (c) pure Saint Lague, and (d) modified Saint Lague. From the table, it can be seen that the minority party would only win a seat under the largest remainder formula and pure Sainte Lague. Under D'Hondt it gets nothing. With a modified version of Sainte Lague, under which the first divisor is increased from 1 to 1.4 (but leaving subsequent-stage divisions unchanged (3,5 etc)) the minority party average at all distributions is reduced to only to only 8,929, and in this case the fifth seat would be allocated to national party b, and the minority party e would emerge with no seats. It would also modify the order in which other parties were allocated seats, but not the number the others emerged with.

Aggregated over many small or medium-sized constituencies, these differences can make a critical difference to whether minority parties secure seats in constituencies, and thus at national level, to the overall representation parties enjoy, and hence to the feasibility of various coalition formulae. So the formula employed is far from a trivial matter.

[11] See inter alia Lijphart, A., *Electoral Systems and Party Systems: A Study of Twenty-Seven Democracies*, Oxford, Oxford University Press, 1994

Table I: **The impact of different versions of list-system PR**

(a) Largest remainder formula: Quota 20,000

	1st round vote	Quota	Seats	2nd round remainder	seats	Total seats
National party a	39,000	20,000	1	17,000	1	2
National party b	29,500	20,000	1	7,500	0	1
National party c	15,500	-	0	15,500	1	1
National party d	3,500	-	0	3,500	0	0
Minority party	12,500	-	0	12,500	1	1

Minority party wins one seat

(b) Highest average formula (D'Hondt formula)

	Party a	Party b	Party c	Party d	Minority party
Votes cast	39,000	29,500	15,500	3,500	12,500
1st distribution (all divided by 1)	**39,000 (1)**	29,500	15,500	3,500	12,500
2nd distribution (a by 2; others by 1)	18,500	**29,500 (2)**	15,500	3,500	12,500
3rd distribution (a,b by 2, others by 1)	**18,500 (3)**	14,750	15,500	3,500	12,500
4th distribution (a3, b2, others1)	13,000	14,750	**15,500 (4)**	3,500	12,500
5th distribution (a3, bc2, others1)	13,000	**14,750 (5)**	7,250	3,500	12,500

Minority party wins no seat

(c) Highest average formula (pure Saint Lague formula: first divisor = 1)

	Party a	Party b	Party c	Party d	Minority party
Votes cast	39,000	29,500	15,500	3,500	12,500
1st distribution (all divided by 1)	**39,000 (1)**	29,500	15,500	3,500	12,500
2nd distribution (a by 3; others by 1)	13,000	**29,500 (2)**	15,500	3,500	12,500
3rd distribution (a,b by 3, others by 1)	13,000	9,833	**15,500 (3)**	3,500	12,500
4th distribution (abc3, others1)	**13,000 (4)**	9,833	5,366	3,500	12,500
5th distribution (a5, bc3, others1)	7,777	9,833	7,250	3,500	**12,500 (5)**

Minority party wins one seat

(d) Highest average formula (modified Saint Lague formula: first divisor = 1.4)

	Party a	Party b	Party c	Party d	Minority party
Votes cast	39,000	29,500	15,500	3,500	12,500
1st distribution (all divided by 1.4)	**27,857 (1)**	21,071	11.071	2,500	8,929
2nd distribution (a by 3; others by 1.4)	13,000	**21,071 (2)**	11,071	2,500	8,929
3rd distribution (a,b by 3, others by 1.4)	**13,000(3)**	9,833	11,071	2,500	8,929
4th distribution (a by 4,b 3, others1.4)	9,750	9,833	**11,071(4)**	2,500	8,929
5th distribution (a 4, bc3, others1.4)	9,750	**9,833 (5)**	5,167	3,500	8,929

Minority party wins no seat

iii. Other systems: A party with widely distributed support with a small overall national following might secure no seats in any constituency under some or all of the forms of PR described above, even when the constituencies themselves were large. In that case, it would benefit from an electoral system with a pooling arrangement that took all the "remainders" (votes that made no contribution to electing candidates in constituencies) and pooled them in a notional "national" constituency, where some seats were allocated proportionately. This might be expected to help parties that had secured no seats. This arrangement operates in Norway (it is actually incorporated into the Norwegian Constitution). It operated in Italy for the Chamber of Deputies from 1948 until the electoral reform of 1994.

A mechanism with a similar effect is the "two votes system" in Germany that allows voters to vote for a candidate in a single member constituency (first vote) and for a party (*land* list – second vote). Although all the seats are distributed by PR, seats won in the constituencies remain with the party, even if the total number of party votes would not allow for a seat. As the 5 % threshold does not apply for parties of national minorities, to be represented in parliament those parties only have to gain at least one constituency with the first votes or enough second votes for at least one seat.

However, a condition for success for both types of safety-net is generally that the "threshold" for access is low. Often, in the belief that fragmentation is undesirable, the designers of PR systems have placed such a threshold somewhere around the 3-5% level (as a share of the total national vote cast). For minorities this is probably a high threshold. A 1% threshold would be a better guarantee, but this might not be acceptable in that it might be perceived to encourage fragmentation in the party system as a whole, in which case it might be necessarily to make the lower threshold available to parties recognised and registered as representing a minority – which would of course raise other types of difficulty.

The above considerations are probably the most important abstract considerations. They indicate that *if maximising the representation of minorities in an assembly were the only consideration is the design of an electoral system* (a highly improbable condition), then the key determinants to consider would be the size, territorial distribution, and political cohesion of the minorities. In general, the greater the territorial spread of a minority, the more favourable a proportional system would be to that minority, assuming high political cohesion in the minority (itself perhaps less likely the wider the spread) and large constituency size, and/or arrangements for unused votes to be aggregated at national level. The more the minority was concentrated, the more likely it would be to survive, or even benefit – comparatively – from, plurality arrangements. These arrangements *might* also encourage a higher degree of political cohesion. However, it is not clear that abstract argument of this type takes one very far. It might, for example, be impossible to know how big or widespread a minority was. In any case, such conditions might change over time, and there might be more than one minority in a territory, with each minority having different characteristics, so a measure that protected one might do little for another,

3. Miscellaneous special provisions in electoral law

Since minority-protection is unlikely to be the primary consideration in designing an electoral system, the next question to consider is what add-ons to an electoral system might be constructed specifically to favour minorities, without fundamentally altering arrangements determined to achieve other purposes. This section lists some of the most common.

We should note first that in democratic electoral systems, there is a presumption of equal treatment between voters. In certain cases, however, *effective* equality may require special measures to accommodate minorities and integrate groups with strong identity, status or security issues. But this may sometimes actually require equal-treatment provisions to suspended in the interests of assisting minority representation. If this happens, there may be not only predictable politicised reactions but also genuine disagreement over which principle should prevail. This can apply to provisions on minimum threshold clauses for access to an assembly, equal constituency sizes, language requirements on electoral documents and electoral literature, or the principle that everyone has the same number of

votes (as opposed to so-called dual voting where national minority voters may be allowed to vote for national political parties *and* minority representatives).

To give one real-world example of this dilemma, the Constitutional Court of Montenegro recently rejected two articles of the 2006 Minority Rights Act[12], under which minority parties would have needed fewer voters to elect representatives to parliament than "national parties" (groups comprising between one and five per cent of the population would get one seat in parliament and three seats if they constituted over five per cent). It did so on the grounds that the measure contravened the principle of equality between citizens as laid down in the Constitution. In the dissenting opinion to this judgment,[13] it was pointed out that special measures introduced with a view to ensuring the representation of minorities in elected bodies cannot be considered to be discriminatory, their aim being to achieve equality with the majority population.

In other contexts, however, Constitutional Courts have interpreted such conflicts of principles differently. Notably, the German Constitutional Court in 1990 approved separate 5% thresholds for the former east and west German territories for the 1990 elections, and ruled in 2004 in its judgements on the 2004 Parties Act that the thresholds for the access to party funding should not be too high. Disproportionately high thresholds would discriminate small parties. The Parties Act and the Federal Electoral Act provide for special regulations for minority parties: exemption from the 5 % threshold (Art. 6 Para 6 Federal Electoral Act), no need for signatures for the nomination of party lists and candidates (Art. 20 Para 2, Art. 27 Para 1 Federal Electoral Act), the right to receive funding from abroad (Art. 25 Para 2 No. 3 b), and the exemption from the thresholds for the access to state funding (Art. 18 Para 3). Similar exemptions to the 5% hurdle provisions apply in Brandenburg and Schleswig-Holstein, and in these states there are also provisions exempting minorities from certain language requirements in connection with candidacy in elections.[14]

In Germany, in short, the argument that parties of national minorities do not have the same capacity to obtain votes and financial support as national parties was not seen as constituting any form of "preferential treatment" undermining an equal-treatment principle but was rather considered as an acceptable form of positivist compensation for difficulties. How beliefs in this form of positivist intervention are to be fostered – if it is thought desirable that they should be fostered - raises complex issues. International conventions that steer legislators or constitutional court judges in the direction of a positivist interpretation similar to that handed down in Germany are difficult to draft tightly enough to guarantee, without unforeseen adverse side effects, that in any conflict of principles, minorities will always be protected. Provisions such as Art 15, FCNM ("effective participation in public affairs") provide at least the groundwork. But certainly the process is not always uni-directional, as seen recently in the Ukraine where the 2001 Elections Law seemed to reverse the letter (if not the spirit) of art. 7,1-2 of the earlier 1997 legislation to the Chamber of People's Deputies that set out specific

---

[12] Decision of the Constitutional Court of the Republic of Montenegro of 11 July 2006.

[13] Dissenting opinion of Mr Veselin Rackovic, judge of the Constitutional Court of the Republic of Montenegro.

[14] The provisions just described have required the development of principles to identify the minority parties eligible to receive privileged treatment. Cf. Higher Administrative Court of Schleswig-Holstein, ruling of 25 September 2002, file ref. 2 K 2/01; Federal Constitutional Court, ruling of 17 November 2004, file ref. 2 BvL 18/02 and ruling of 14 February 2005, file ref. 2 BvL 1/05. The author is grateful to the German delegation to the Council of Europe DH-MIN (Inter-governmental committee on national minorities) for supplying this information and for clarifying that on the basis of the above jurisprudence a party must not merely represent the minority's interests but must also have originated within the minority and have its support. Its programme and staff must reflect the minority's identity. It must thus be a party *of* the minority and not merely *for* the minority. In summary, five tests must be satisfied: (i) in its party programme, the national minority party must work on behalf of the minority's aims and interests; (ii) it had to have originated with the minority and in particular have been founded by members of the minority; (iii) the majority of party members and party officers must be members of the minority; (iv) in its programme and representation, the party must demonstrate its solidarity with the minority's ethnic identity; (v) the party must be linked with the national minority in organizational terms by being in close contact with the minority's cultural organizations and institutions.

provisions to assist minorities in the drawing of electoral boundaries, and the public justification appeared to be an appeal to a higher "equal treatment" principle.

With these caveats, listed below are some mechanisms that can be of assistance to minorities:

i. Electoral boundaries: An obvious form of protection is the drawing of constituency boundaries, and/or the design of representative institutions to enable some part of them to represent territorial units where minorities are strongly present or are indeed local majorities. It is certainly not an exercise to be undertaken lightly. Differences in constituency size are obviously more acceptable when embodied in "upper house" federal-style arrangements, and look less like electoral manipulation. However, even where federalist arrangements do not apply, constituency boundaries can in some circumstances be drafted to help or hinder minorities, especially in the case of very small minorities which will not otherwise secure representation, and which have a strong sense of identity and potential insecurity. Alternatively, a *combination* of a specifically-designed constituency and a special electoral procedure may achieve the same effect (for example, PR for most constituencies, but simple-plurality for a few designated minority areas regarded as "special" because containing a concentrated minority). There may be costs to such boundary manipulation, in the shape of dissatisfied voters who are not part of the minority, and now find themselves to be minorities within areas where opposing "minorities" have become majorities. This is a very common border-definition problem in ethnically-divided communities, nowhere more so than in the states that have emerged from the former Yugoslavia, and it can have serious and de-stabilising consequences.

ii. Separate institutions and dual-voting provisions: At the other end of the scale, when the minority population is spread so thinly and evenly that there is little chance of securing the election of any candidates, special country-wide constituencies may be created, allowing voters to register in those constituencies, rather than in geographically-based ones.

A related alternative is the now quite long-standing Hungarian model of minority self-governance. Minorities can establish local self-government through popular election and even a second-order national self-government system, to promote minority interests in areas of education, culture, media and use of languages. Self-governments of this type promote minority culture at national level, and have the right to be consulted on certain national issues. There are of course significant issues that arise in this context: connected with dissemination of information and awareness, with resources, and potentially even with how confidential the register is and what guarantee is offered to minorities who may be concerned about possible future discriminatory use of the register.

The principles embedded in this can also be pursued through the possibility of so-called "dual-voting", where registered voters may be allowed to vote for national political parties and enjoy a second vote for minority representatives for the same assembly. This is used both in Slovenia and Cyprus. Although, in the latter, the minority representatives (of Armenians, Latinites and Maronites) have advisory rather than full legislative status, full legislative status *is* accorded when a member of the group is elected to the national parliament whether as a member of a political party or as an independent candidate. In fact a member of the Armenian group elected as a member of parliament (and heading a political party) has also recently been elected by members of parliament as its President.

The practice has given rise to significant case-law firstly over the proportionality of the means to protect minorities, especially in Slovenia, where the two representatives of the Italian and Hungarian minorities each have legislative rights, and secondly over its compatibility with equal-treatment principles. However in 1998 the Slovenian constitutional court did, with some qualifications about voter-registration procedures, judge this compatibility positively. Croatia has recently toyed with similar provisions. Art 15.3 (Rights of Foreigners, Cultural Rights) of its 2004 Constitution contains the following clause: "Besides the general electoral right, the special right of the members of national minorities to elect their representatives into the Croatian Parliament may be provided by law". Political support for the implementation of this right has been forthcoming from the President of the Republic. However, to date it has been preferred to use simply a provision by which members of minorities can opt either to vote for minority lists, or in the national ballot.

The broader legitimacy of dual voting is a vexed issue, illustrating the difficulty of making hard law compatible with general principles such as those enshrined in the ECHR. The basic issue is whether granting some voters two votes is compatible with a basic tenet of Art 3.1 of the Convention: namely that an electoral system "will ensure the free expression of the people in the choice of the legislature", where the Convention's principle of non-discrimination requires equal suffrage. In practice there are several ways in which voting procedures can be discriminatory while remaining formally (numerically) equal: uneven district magnitude may do this, as may the introduction of a threshold for representation. These effects have on occasions been tested in front the ECommHR, which established clearly that parity in the translation of votes into seats is not always an overriding requirement, though equally the EComHR has backed away from the notion that there is any *obligation* to secure positive discrimination.[15] The guidelines in such cases are unlikely to become very precise, but given that elections serve multiple purposes (they elect representatives, but indirectly they also create executives, which need to be stable, and they tie citizens in to the political system through their legitimising function) any justification for unequal vote weights is obviously likely to be linked to the achievement of other purposes than those predicated on the simple numerical equality of individual votes.

It has been pointed out that permissible derogations from equal treatment in the translation of votes into seats are unspecified in the ECHR, whereas the restrictions placed on any departures from the freedoms of Arts 10 and 11, ECHR explicitly specify the types of competing principle which allow derogations from the core purposes of these articles, and require their specification in law. [16] It might well be an aide to the clarification of the principles underlying each national electoral system if they were required to specify in law each competing purpose to be achieved in the electoral process. This would assist in determining their legitimacy, though it is unclear whether such purposes could ever be described with enough specificity to be enshrined in a Protocol to the ECHR itself, and it is unclear whether the outcomes could be satisfactorily tested against these purposes in a court of law. It also remains unclear what limits should be placed on any variation from equal voting itself, and hence what can be regarded as a legitimate, proportionate and necessary departure from that fundamental principle. There certainly seems a strong case for specifying the conditions under which it might be permissible, and minority protection would be an obvious candidate. But it is always going to be difficult to establish under what circumstances its necessity might outweigh its negative consequences, and in particular the exacerbation of ethnic differences, when there are various other vehicles available to deliver the same ends, as described in the following sections.

iii. Preference voting: A third form of protection, achievable in certain electoral systems, would be preference-voting: a common practice giving voters the chance to determine which candidates on a party's list actually get elected. Lists can be *closed* (the order of precedence determined in advance by the party itself) or in various ways *open*. Both practices offer the opportunity for the election of minorities on national-party lists. Closed lists obviously require a willingness on the part of national parties to present any minority candidates at all. In the case of single-seat contests this may require at least some local selection committees to be willing to do so. In the case of multi-seat constituencies, it requires a willingness on the part of the party to place minority candidates in a sufficiently prominent position on the list of candidates to secure election. In the case of open lists with preference voting, it requires that minorities can identify their own candidates on a national party list. National parties seeking to maximise their vote and seat tally in the relevant constituencies, (or even across many constituencies if the minority vote is spread out), might find it beneficial to list candidates drawn from, or appealing to, a minority. These representatives might actually form a specific sub-group or separate legislative party following election.

The potential for, or the lessons from, preference-voting are frequently raised in the context of two cases: Bosnia and Herzegovina, and Northern Ireland. The constitutional framework of BiH, set out in

[15] ECommHR, *X v. Iceland*, Decision 8 December 1981, Appl. No. 8941/80, *DR 27* (1981), 145; ECommHR, *Lindsay and Others v. the UK*, Decision of 8 March 1979, Appl. No. 8364/78, *DR 15*, 247, and ECommHR, *Silvius Magnago and Südtiroler Volkspartei v. Italy,* Decision of 15 April 1996, Appl. No. 25035/94.

[16] Lewis-Anthony, S., "Autonomy and the Council of Europe - With Special Reference to the Application of Article 3 of the First Protocol of the European Convention on Human Rights", in Markku Suksi (ed.), *Autonomy: Applications and Implications*, The Hague, Kluwer Law International, 1998, 335

the Dayton Agreements, recognises ethnic differences, and bases collective rights on the representation of its constituent peoples *collectively*. Indeed, the consequences which flow from this highlight all the fundamental normative problems which beset attempts to determine how best to protect "minorities" through electoral and party law. The need to reflect ethnic divisions in the electoral, judicial, and administrative arrangements for governing the federation, its constituent states and the cantonal sub-divisions, means that rights are secured collectively *through* ethnicity, leaving little space for non-aligned citizenship, even though a significant part of the population could best be described as falling into this category, and even though the Dayton Agreements themselves set, as a long-term goal, the overcoming of ethnic segregation through the return of displaced populations removed through ethnic cleansing. What is clear is that the decision to base representation so clearly on ethnic proportional representation tended to discriminate *in favour* of the *de facto* minorities which had the strongest identity in their respective areas (in the Republika Srpska, the Serbs; in the Entities, the Bosnians and Croats) and which had separate list systems of proportional representation. It also appears that that separation of the electorates into distinct ethnic identities encouraged votes *for* nationalist-minded parties, and *against* moderate or ethnically-mixed parties, and has done so consistently since Dayton, and notwithstanding the constitutional reforms of 2002.

In Bosnia and Herzegovina, therefore, it has been argued by those who believe that "minorities" will only be fully protected when attention is turned away from the tutelage of the interests of the dominant ethnic minorities in specific areas (in reality ethnic *majorities* in their respective areas) and towards the numerically smaller minorities and the "others" not identifying strongly with any list. In this regard, it has been argued strongly that the solution is a radical change in the electoral system. While preserving the principle of separated representation (i.e. a certain number of seats in the assembly reserved for representatives of the key ethnic communities), this would actually allow voters to vote *across* ethnic divides by giving them votes in the separate ballots for all three main communities (Croats, Bosniacs, and Serbs) and would hence influence the sorts of parties elected. In essence, this would work as follows: voters would face a choice between radical nationalists and possiblist moderates. They would vote for the former in their own ethnic community, but would vote for moderates (and it would, under certain assumptions, be rational to do so rather than abstain) when voting in the other two community ballots. The outcome, it is argued,[17] would be significantly different from the separated structure that has emerged from Dayton. In short, BiH is a case where minority protection implies measures to encourage cross-community voting for moderate or possibly multi-ethnic parties, and to open up the currently closed party lists under PR for the Federation House of Representatives, to give voters a chance to influence the type of candidates that currently get elected.

The Northern Ireland case is also instructive about the uncertainties of preference voting. Since partition of Ireland in 1922, Northern Ireland has used a variety of electoral systems, including the single transferable vote, FPTP, and for the 1996 110-seat Northern Ireland Forum, a closed-list system of D'Hondt highest-average PR, modified by the principle that the largest ten parties should each receive an additional two seats. Both through the Government of Ireland Act, 1920, and for most elections in the last decade (other than in elections to the UK Parliament where FPTP is used), the UK government opted for use of the single transferable vote (STV). From 1922 until the dissolution of the Northern Ireland assembly in 1972, FPTP for assembly and local elections. The recent use of STV has been intended to foster reconciliation by bolstering moderate parties. STV involves the use of second and subsequent preferences. If voters support a party in numbers well in excess of the basic quota necessary to elect a candidate, those votes will be passed on and used (albeit through a formula that passes on all transferable votes at reduced value) to assist in the election of other representatives. The use of STV is seen as encouraging voters from both sides of a deeply divided society (where each side tends to be represented by both moderate and radical/intransigent parties) to give their second and subsequent preferences to moderate parties, even where they give their first preferences to the radicals. This it is hoped gives an artificial boost to parties prepared to compromise in power-sharing

[17] See, *Breaking the Mould: Electoral Reform in Bosnia and Herzegovina,* International Crisis Group Balkans Report No 56,4 March 1999, 15-20

arrangements.[18] So STV is seen, in a divided society, as a protection against the winner-take-all effects of FPTP. Admittedly, the magnification effects of FPTP had already been diminishing in Northern Ireland thanks to the growing fragmentation of the party system, and hence the more unpredictable consequences of simple pluralities in situations where each community was itself split. Changes in the relative population sizes of the two communities also happened to have this effect. Indeed, whether the use of STV has really worked to these conciliatory ends by boosting the moderates is debateable. It is certainly rational for voters to use their votes to support second-choice moderates since to plump for just one party, (the radical one), actually tends to diminish representation of one's community group, compared to voting for *both* the radicals and the moderates. But some voters do not appear to understand this. Moreover, Northern Ireland voters have in fact displayed a gradual shift in recent years *away* from moderate parties and towards radical ones. It is true that if this happens for exogenous reasons unrelated to electoral rules (for example a reaction to contingent events, shifting some voters' preferences into the radical party on each side), it does not prove that the conciliatory incentives of STV are not working. The electoral system may still assist towards the election of moderate parties much more than other forms of PR (for example any form of list PR), albeit in the context of a secular shift towards electoral polarisation. What it does show, however, is that electoral systems alone cannot fully counteract a process of radicalisation if the pressures working in its favour are sufficiently strong.

Finally, another mechanism, similar in effect to STV, should be mentioned. This is a variant of PR by which small parties are permitted to link their lists for seat-allocation procedures, even though running separate lists. This is known in some systems as *apparentement* or *stembusaccoord*[19] It has been widely practised, and is useful where more than one minority party is competing for the same segment of the electorate, and all risk failing to secure a seat because of a splitting of the vote. Variants on this under first-past the post arrangements, not involving explicit electoral design, and dependent on the political culture, would involve a national party declining to run in a particular seat or set of seats, and implicitly encouraging its supporters to support a minority party, in return for which, the minority party would operate a form of legislative coalition.

4. Party law and minority protection

The laws governing parties as organisations are much more varied than laws governing electoral systems. "Party law" can cover the definition of parties (which may in turn determine who has access to the ballot and to public subsidies), what parties can do, and how they are internally organized. In the interests of transparency, fairness, and national autonomy, it is today in advanced democracies widely thought desirable to have rules governing party funding. In the interests of democratic stability a few advanced democracies have rules governing political values and aims, but others see it as preferable to achieve this through legislation which is drawn more widely than political parties, and covers anti-discrimination measures in general, and protects against incitement to racism. Clearly, when a constitution identifies fundamental civil and social rights, it is seeking to achieve this purpose. But both the regulation of financial transparency, and that of values, can fail to achieve their intended purposes. Regulation of party funding is frequently circumvented, and the justiciability of rules on aims and values is notoriously difficult to enforce, certainly without strengthening the very prejudices which the law is seeking to overcome.

Not surprisingly, then, there is great variation between countries in the content of party law, from systems that say almost nothing about parties, to those that are highly prescriptive. Much of it has little to do with minorities, or at least without further specification it might be thought to be neutral this

---

[18] See Evans, G. and O'Leary, B. (2000). "Northern Irish Voters and the British-Irish Agreement: Foundations of a Stable Consociational Settlement?" *Political Quarterly* 71; O'Leary, Brendan. (1999). "The Implications for Political Accommodation in Northern Ireland of Reforming the Electoral System for the Westminster Parliament." *Representation* 35: 106-13, and O'Leary, Brendan and McGarry, J. (2006) 'Consociational Theory, Northern Ireland's Conflict and its Agreement: 1. What Consociationalists Can Learn from Northern Ireland', *Government & Opposition*: *An International Journal of Comparative Politics*, 41, 1: 43-63..

[19] Reynolds, A., Reilly, B., Ellis, A. and others (2005). *El;ectoral System Design: the New International IDEA Handbook.* Stockholm: International Institute for Democracy and Electoral Assistance, 90

regard. For example, some countries like Germany and Spain declare in their constitutions that parties are a fundamental building-block of democracy[20] and further declare that the internal organisation of political parties must conform to "democratic principles", but leave a very wide margin for interpretation as regards inclusiveness, proportionality, and minority protection, all of which might be thought to be part of "democratic principles". As to party finance laws, it might be argued as a general principle that since national parties are likely to have better access to private campaign finance, and to the media than minority parties, restrictions on the amount parties can spend may well assist in creating fair competition for minority parties. Public subsidies may help too, especially if justification can be found to give disproportionately large sums to aid minorities.

Some party law might be thought to work specifically *against* the interests of minorities, especially in countries where the conception of a party is national or nationalist in character, and where there is a presumption against certain types of interest becoming active in political life (regional, or religious groups, for example). Cases of this in the developing world are very common.[21] They are not unknown in Europe. Art. 9, 3, of the 2001 Russian Federation Party Law bans parties established "on the grounds of professional, racial, national or religious belonging" including parties seeking to protect racial, national or religious interests. However, while it is clear that provisions that force parties to be "national" in character can very easily be used, oppressively, against minorities, a related body of law is often intended to assist minorities, by forcing political parties to be *inclusive*: for example by making space within their governing bodies and on their candidate lists for representatives of minorities on pain of exclusion from the ballot without such representatives. Two such cases, if taken at face value, are Nigeria and Indonesia. In the former, party law requires parties competing in elections to have members on their executive council from two-thirds of the states in the federal system.[22] Similar provisions operated in secession-plagued post-Suharto Indonesia. Party law introduced in 2003 required parties to have a geographical spread of branch organisations, and parties achieving a low seat-share in one election were required to amalgamate with others at forthcoming elections. However, in some cases, requirements to have widespread party branches can work against national minorities that are regionally concentrated and can have the effect of limiting their possibility of forming parties. Such provisions, if introduced, could therefore have a negative impact on the effective participation of minorities in public affairs.

Other tools for engineering strong stable parties apply at the legislative level. They cover deterrents to prevent elected representatives from switching parties after an election.[23] This may be an especially important complement in contexts where there are also artificial incentives to ethnic groups to work in large coalitional parties in the first place. It can help counteract fissiparous pressures once representatives are elected. Rules governing the resources available to parliamentary groups, that offer incentives to amalgamation, may also work to make parties more solid and stable. But here too, it is difficult to say whether the effect of these measures is to capture and sterilise minorities, or to encourage them to stay in aggregative parties where ethic divisions are manageable, and can ultimately be overcome. Often the provisions are not drafted solely to deal with fractious minorities, but rather to deal with party indiscipline in general.

---

[20] Germany, (Basic Law art 21): "political parties participate in the formation of the political will of the people"; Spain, (Const. art 6) "Political parties express democratic pluralism, assist in the formation and manifestation of the popular will, and are a basic instrument for political participation".

[21] Saudi Arabia (Const. art 39): "information, publication and all other media…..shall contribute to the education of the nation and the bolstering of its unity". Algeria (Const. art 42): "…parties cannot be founded on a religious, racial, sexual, corporatist or regional basis. Nepal (Const. art 113, 3) "The Electoral Commission shall not register any…..party…..if the name, insignia, objectives, or flag is of such a nature that it is religious or communal or tends to fragment the country".

[22] Nigeria (Const, art 223, 2b) " the members of the executive committee or other governing body of the political party shall be deemed to reflect the federal character of Nigeria if the members thereof belong to different States not being less in number than two-thirds of all the States of the Federation, and the Federal Capital Territory, Abuja".

[23] This applies inter alia in Belize, Namibia, Nepal, Nigeria, Seychelles, Sierra Leone, Singapore, and Zimbabwe see, Janda, K, *Political Parties and Democracy in Theoretical and Practical Perspectives*, *Adopting Party Law,* Washington, National Democratic Institute for International Affairs, 2005, p, 13.

Clearly, this points to the essentially-contested nature of measures intended to deal with minorities, and particularly ethnic minorities. The measures just discussed *can* be seen as measures to encourage inclusion, and hence a route to overcome ethnic divisions, but they may simply bring inside parties divisions already existing in the wider community, without doing anything to resolve or diminish those divisions. At best, the minority representatives may find themselves ignored inside the party, or inside party groups in elected assembles. At worst, they will be seen as a route to direct suppression of parties legitimately expressing minority interests. Moreover, if the requirements are forced on reluctant parties, the result may simply be cheating: the presentation of spurious candidates who are declared to represent the minority, but who do no such thing. Formalism or tokenism in this area is a serious danger, and once suspected by the minority in question, could be seriously self-defeating. Judicial remedies against this would be hard to enforce. Courts have great difficulty declaring after an election that a party that has won an election or a large share of seats should be deprived of its victory. Party law which in practice has this effect, rather than the effect of aiding the emergence of minority parties as such, may therefore be hard to justify.

5. Beyond electoral and party law: building consensus

How much national uniformity in economic and social rights, language, and culture is necessary for the proper functioning of the state is much debated. The answer is likely to vary a good deal across different societies. The need for uniformity will often work against the demands of minorities for autonomy, and hence against provisions promoting special representation in national institutions for those minorities. Positively valuing diversity and seeking to promote it requires a high level of national self-confidence. The more solid and confident a state is about its basic cohesion and territorial unity, the more likely it is that its dominant political elites will feel able to accept demands from minorities for institutions that promote minority representation in some explicit way.

The extent to which electoral law or party law can protect or promote the rights of minorities ultimately depends on this, because without a positive attitude towards minority representation, the formal reality of representation is quite likely to be undermined by a form of practical implementation which is grudging and divisive, when not positively destructive. In this paper we have so far assumed goodwill and fair-play among regulators, secondary rule-setters, and enforcers, once the basic properties of the electoral rules are agreed. This is a strong assumption. The collateral foundations need also to be robust. These include matters like fairness in registration, districting processes, language requirements, residency requirements, and possibly even citizenship requirements (in post-conflict societies, for example). For some types of minorities, the capacity even to begin to achieve representation might also require some positive paternalistic intervention to provide resources and party funding, and even help with education and literacy.

Many of these issues clearly depend on basic political good-will. It is relatively easy to set out hypothetical best practice for matters like registration and districting. It might start with a constitutionally-entrenched provision guaranteeing the independence of the agencies responsible for the exercise, but experience suggests that neutrality will not always be easily attainable, even with such guarantees in place. Some societies lack the concept of neutrality: they can at best conceive of collegiality, where institutions are given the appearance of neutrality or non-partisanship by giving everyone a representative presence. But this does not in itself guarantee neutrality. The same goes for other secondary conditions, including the clarity of ballot layout, the ease with which candidates can register, the absence of intimidation in registering to vote and in voting itself, and of course the fundamental issue of the counting of votes. Best-practice recommendations for all these issues have evolved over recent years, especially for post-conflict societies, and there is certainly no substitute for two quasi-constitutional conditions. The first is a clear entrenchment of the rules in normative sources that can only be changed with very broad agreement, under conditions of transparency and openness, and not just in advance of elections themselves. The second is a publicized commitment, in advance, on the part of each state, to international monitoring and a commitment to comply, in all but the most exceptional circumstances, with the conclusions of that monitoring.

Even where the basic case for according special consideration to minority representation is accepted, it is complicated by the question of *which* minorities deserve protection when there are several potentially competing ones. The intentions of designs intended to assist minorities and bridge cleavages can easily be questioned, and it can take some time to overcome such concerns. This was seen in, for example, the years following the conclusion of the Macedonian Ohrid Framework Agreement, where a threshold of 20% of the population was set for the qualification for certain types of privilege for ethnic minorities relating to language status and the establishment of universities.[24] There is no simple solution to this, other than the setting of a threshold of minority size. But this in turn raises the issue of the territorial unit under consideration: what makes a larger "minority-protection zone" more or less legitimate than a smaller one, other than that more minorities might be protected in a larger special unit? And in so far as there is an arbitrary cut-off size, will not the smaller minorities feel a strong sense of grievance? Related to this is the issue of the permanence of arrangements. Minorities are not necessarily permanent. New minorities can emerge, as they have in western Europe through migration, that may have an equal right to representation. So procedures for review need to be built in to any electoral design.

These considerations remind us that minority representation can mean a lot or a little. The extent to which electoral or party law can protect or promote the rights of minorities depends on the intensity and structure of political cleavages, and the legitimacy of the representatives of the minorities which emerge. Symbolically, and psychologically, minority representation is generally better than no representation for minorities, but if it delivers no influence, because representatives are too few or too isolated, it does not promise much. It has to promote a dialogue between minorities and national leaders, and this requires institutions and guarantees that go well beyond voting procedures.

At the very least, it seems also necessary to have institutional devices to ensure that representatives in a legislature are present in, for example, legislative committees of special relevance to the minorities, and that they are consulted as a matter of course when minority interests are affected. This may be helpful in delivering an important antidote to the ever-present risk of perverse incentives. An electoral system which gives minorities marginal opportunities for representation that they might not otherwise have, can also give minority leaders an incentive to emphasise radical and chauvinistic demands to ensure that their supporters think primarily in terms of such demands.

There is no simple answer to the problem of perverse incentives, but the behaviour of national elites is one key to making majority-minority relations work cooperatively. It is important that national elites do not do things that vitiate the benefits of representation by provoking radical electoral appeals. So both majorities and minorities need incentives to act consensually. Here there are ramifications for electoral-system design. If, for example, constituencies are devised in such a way that minorities dominate in areas of high minority presence, it may also mean that majorities are more dominant in most other areas. Where majority-party electorates are relatively heterogeneous, this may mean that majority leaders are under less of an incentive to appeal for votes from minorities than they otherwise might be. These are limit-case observations, that depend very much on *context* (the nature of the party system; the importance of boundary issues) but all discussion of the impact of electoral and party law has to be context-sensitive in this way to be meaningful.

Naturally, much also depends on the structure of the minorities that a society contains, which takes us back to the typology set out at the start of the paper. It is often said that minority representation at the electoral level will be most successfully translated into real integration if it is accompanied by power-sharing arrangements, sometimes labelled *consociational* arrangements, in the wider institutional arena. Consociationalism involves not just proportionality in the electoral system, but access to executive power and resources, and a high degree of autonomy in using those resources, possibly even with vetoes over decisions that do not fall within the sphere of sub-community autonomy. This undoubtedly has value if it can be sustained, but it tends to apply to groups with a minimum degree of bargaining power at national level. That implies (returning to our initial typology) a society composed

[24] Ortakovski, Vladimir. *Minorities in Macedonia before and after 2001. Towards integration or disintegration?* Paper presented at the annual meeting of the International Studies Association, Hilton Hawaiian Village, Honolulu, Hawaii, Mar 05, 2005 <http://www.allacademic.com/meta/p70757_index.html>

of several large minorities and perhaps also a society divided between a permanent majority and a permanent minority, and probably will often exclude the case of a society with small minorities set in the context of a party system dominated by national parties. The exception may be when the party system is complex, and even minor parties can exercise leverage and veto-power in a legislature. But that circumstance is likely to be accompanied by high levels of overall coalition instability.

It is certainly not wise to build a philosophy of minority protection on the contingent circumstances of parliamentary arithmetic, Societies composed of minorities, or divided between a clear majority and a minority are not cases where the electoral system necessarily impacts on minority representation in a way that leads to definite conclusions about the best form of electoral system. They are often cases where wider power-sharing arrangements (whether constitutionally enshrined or not) impact on the generation of consensus, and help minorities. The case of a society divided between a national party system and fringe minorities is different. It is not that institutional provisions cannot help, but full-blown consociationalism itself is unlikely to be the solution. Instead, what is required is some combination of confidence-building measures at the centre, special electoral arrangements applying just to circumscribed territorial areas (extra representatives, differentiated electorates, and different electoral formulae). If possible, there should probably also be a degree of territorial devolution of power, even where this is not granted to the rest of the national territory. Such a package will have some of the properties of consociationalism, but needs to be tailored specifically to the local context.

6. Conclusions

From the existing academic and practitioner literature on the impact of electoral systems on minority protection, it emerges clearly that no specific recommendation can be made about electoral-system choice without close reference to the national and local context. The general conclusions about the relative merits of majority/plurality versus proportional systems which emerge from Part 2 of this report are fairly widely shared across that literature, both as regards the mechanical translation of minority votes into seat representation, and the behavioural incentives that they imply.

- We can say with some confidence that FPTP will help a minority party if it has no competitors for its "natural" minority vote, it is territorially concentrated, and it wins in the largest number of seats by the smallest possible margin. But plurality voting certainly increases the chance that a small party is excluded from power at national level. It may also reduce the incentive to a minority party to try to build a following beyond voters specifically attracted by the minority appeal, seeking votes on a broader basis.

- If there are no decisive advantages to a minority stemming from territorial concentration, then PR becomes a better prospect than FPTP, as long as the minority has good political cohesion and is not fragmented Given procedures for aggregating remainders, or large constituency size and low thresholds, PR maximizes the use of votes in both areas of strength and potentially of weakness,. It may also encourage minority parties to limit ethnic or other forms of extremism by providing stronger incentives to win votes from voters beyond the minority group itself. But a great deal of importance – more than is given in NGO reports (the Lund Recommendations; the OSCE Guidelines) that have hitherto discussed the issue - has to be attached to the *precise electoral formula*. The largest remainder formula, with a large quota, increases proportionality. The same system with a small quota, and the D'Hondt highest average formula, may reduce it.

- Mixed systems give greatest flexibility of all. They do not require the overall system to be designed with the needs of the smaller majorities in mind, and can combine the incentives to coalition inclusiveness of PR. They can also, by definition, allow specific provisions to be inserted for local circumstances, especially variations in seat size, locally-based formulae, and "minority-defined" second electorates.

- Giving voters an opportunity to chose between candidates through preference voting may in some circumstances encourage the representation of minorities through non-minority parties, and may encourage minority parties to include non-minority candidates on party candidate lists.

- But no electoral system can achieve its minority-protection purposes without regard to the conditions of wider political consensus or dissensus, including the willingness of electoral authorities, constitutional courts, and legislative leaders, to make the rules work effectively. So any set of recommendations needs ultimately to complement the formal/procedural recommendations on electoral and party law with recommendations about behavioural incentives for these groups .

Bibliography

Colomer, J. (2004). *Handbook of Electoral System Choice*. London: Palgrave

Diamond L.and Plattner, M. F. (eds) (1994) Nationalism, *Ethnic Conflict and Democracy*. Baltimore and London: Johns Hopkins University Press

Evans, G. and O'Leary, B. (2000). "Northern Irish Voters and the British-Irish Agreement: Foundations of a Stable Consociational Settlement?" *Political Quarterly* 71.

Gallaher, M. and Mitchell, P. (eds.) (2005). *The Politics of Electoral Systems*. Oxford, Oxford University Press

Horowitz, D.L. (1985) *Ethnic Groups in Conflict.* Berkeley: University of California Press

Horowitz, D.L. (1999) 'Making Moderation Pay: the Comparative Politics of Ethnic Conflict Management' in J.V. Montville (ed), *Conflict and Peacemaking in Multiethnic Societies* New York: Lexington Books, 451-76.

Ishiyama, J.T. (1994) 'Electoral Rules and Party Nomination Strategies in Ethnically Cleaved Societies: the Estonian Transitional Election of 1990', *Communist and Post-Communist Studies* 27:177-192.

Ishiyama, J.T. (2000), 'Institutions and Ethno-Political Conflict in Post-Communist Politics', *Nationalism and Ethnic Politics* 6,

Janda, K, (2005) *Political Parties and Democracy in Theoretical and Practical Perspectives, Adopting Party Law.* Washington: National Democratic Institute for International Affairs

Katz, R. (2005). "Why Are There So many (or So Few) Electoral Reforms?, in Gallaher, M. and Mitchell, P. (eds.) (2005). *The Politics of Electoral Systems*. Oxford, Oxford University Press, 56-76.

Laakso, M. and Taagepera, R. (1979) '"Effective" Number of Parties: A Measure with Application to West Europe', *Comparative Political Studies*, 12/1: 3-27

Lijphart, A. (1994). *Electoral Systems and Party Systems: A Study of Twenty-seven Democracies, 1945-1990*. Oxford: Oxford University Press

Lijphart, A. (1999) 'The Power-Sharing Approach' in J.V. Montville (ed), Conflict and Peacemaking in Multiethnic Societies, New York: Lexington Books, 491-509.

Norris, P., (2004). *Electoral Engineering: Electoral Rules and Political behaviour*. Cambridge, Cambridge University Press

O'Leary, Brendan. (1999). "The Implications for Political Accommodation in Northern Ireland of Reforming the Electoral System for the Westminster Parliament." *Representation* 35: 106-13.

O'Leary, Brendan and McGarry, J. (2006) 'Consociational Theory, Northern Ireland's Conflict and its Agreement: 1. What Consociationalists Can Learn from Northern Ireland', *Government & Opposition*: *An International Journal of Comparative Politics*, 41, 1: 43-63.

Rae, D. W. (1971) *The Political Consequences of Electoral Laws*, 2nd edn. Newe Haven, CT: Yale University Press.

Reilly, B. (2001) *Democracy in Divided Societies: Electoral Engineering for Conflict Management,* Cambridge: Cambridge University Press

Reynolds, A., Reilly, B., Ellis, A. and others (2005). *El;ectoral System Design: the New International IDEA Handbook.* Stockholm: International Institute for Democracy and Electoral Assistance.

Reynolds, A. and Reilly, B. (1999) *Electoral Systems and Conflict in Divided Societies*. Washington DC: National Research Council

Sartori, G. (1994) *Comparative Constitutional Engineering: An Inquiry Into Structures, Incentives and Outcomes*. London: Macmillan

Shugart, M. (2005) "Comparative Electoral Systems Research: The Maturation of a Field and New Challenges Ahead", in Gallaher, M. and Mitchell, P. (eds.) (2005). *The Politics of Electoral Systems*. Oxford, Oxford University Press, 25-55.

Shugart, M.S. and Wattenberg, M.P. (eds.) (2001). *Mixed-Member Electoral Systems: The Best of Both Worlds?*. Oxford: Oxford University Press.

Sisk, T.D. (1996). *Power Sharing and International Mediation in Ethnic Conflicts*. Washington DC: United States Institute of Peace Press

Taagepera, R. (1996) 'STV in Transitional Estonia', *Representation* 34

Taylor, C. (1992). *Multiculturalism and the Politics of Recognition*. Princeton NJ: Princeton University Press.

Walzer, M. (1997). *On Toleration*. New Haven: Yale University Press.