EVOLVING CONCEPTS OF PROTECTION OF MINORITIES

International and Constitutional Law*

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I. Introduction

Studying ethnic relations and protection of (ethnic) minorities I have learned that there are no simple and clear-cut answers. The discussion on the regulation and management of ethnic relations (including conflicts) and protection of minorities is by its nature complex and often contradictory. A general consensus in political and scholarly discussions on ethnicity, ethnic policy and protection of minorities seems to be impossible. This (by itself) is no problem in a pluralistic and democratic setting where all different views can be presented and heard thereby offering a necessary basis for a democratic decision-making process.

This paper presents my views on the regulation and management of ethnic relations and protection of (ethnic) minorities based on results of a six-year research. It reflects also my moral and political position that knowledge, awareness and acceptance of (cultural) diversity, understanding, toleration and cooperation should become the leading principles for the regulation and management of ethnic relations and protection of minorities. These principles constitute the basis of the proposed "positive concept of protection of minorities."

Evolution of concepts of protection of (ethnic) minorities has been a slow and often painful process conditioned by historical development and the current situation (in different historical epochs) in the world and within different countries. A general trend in this evolution has been the introduction of new rights and widening of existing rights of minorities, but it was often interrupted. Set-backs and regressions in this general trend characterized this evolution almost as much as positive developments.

The chosen topic defines also the structure of this paper. The framework is determined by the contemporary world, more precisely by facts, processes and factors that determine ethnic relations, protection of minorities and ethnic situation within different countries and within the international community. The framework is further determined by the used definitions of key phenomena. The presentation of historic

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development of protection of minorities within international and constitutional law shows main historic trends and the attitude of (nation)states. This is important for the exploration of different concepts of protection of minorities that have been developed, and for the prediction of the future development. Recent developments in Slovenia are chosen to illustrate these theoretical concepts.

I. Framework: the contemporary world

Taking into account the complexity and interdependence of the contemporary world there are several characteristics, factors and processes that condition ethnic relations and influence the protection of (ethnic) minorities. It is almost impossible to make an all-inclusive list, but the nature of this paper forces us to single out a few characteristics and factors that (in our view) impact on ethnic relations and protection of minorities the most.

I.1. Ethnic pluralism and myth of ethnic homogeneity

Migrations and communication with other groups played a crucial role in the history of humanity. When two (or more) previously isolated groups first met they discovered their world(s) and culture(s) were not the only ones. The concept of foreigners who did not belong to their specific group and culture was born. In addition to previously known (social) differentiations of people within a certain group a new division appeared: **WE/US** (members of our group) and **THEY/THEM** (members of other, foreign groups). A new type of a group identity[1] developed that led to formation of ethnic groups based especially on common language and culture. Ethnic identity was slowly becoming the strongest collective identity and different ethnic groups started to define their ethnic borders. Members of individual ethnic groups usually saw the "territory and population within their ethnic borders" as ethnically (and culturally) homogenous regardless of the actual situation. The concept of ethnic homogeneity was a powerful force that helped build common collective identity in the territory of a certain state; it has been an important element of political ideologies that unified and mobilized population of nation-states based on the notion that a certain state (country) belonged to its (ethno-)nation.[2] This concept of ethnic homogeneity was often

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[1] The yard-stick of this group identity became several and various - actually existing or perceived - differences among existing groups and their members. Foreigners and especially their culture(s) were often perceived as a potential danger to a specific identity of a certain specific group and therefore feared.

[2] A **nation** is "a stable, historically developed community of people with a territory, (specific) economic life, distinctive culture, and language in common". (Webster's New Universal Unabridged Dictionary. Deluxe Second Edition. Dorset & Baber, USA, 1983: p. 1196.) The existence of a specific "national identity" shall be added to a definition: the consciousness and will of an individual shall exist to be a member of a certain nation, and an individual shall be recognized by other members of such an ethnic community as its member. (E.g. SCHLESINGER, 1987) The formation of **modern nations** or **ethno-nations** was possible with the introduction of capitalism (capitalist mode of production) and is a historical product of a specific historical epoch of capitalism. The emergence of modern nations as specific ethnic communities was often conditioned on the existence of nation-states, and sometimes *vice versa*. (See e.g. GELLNER, 1983: 6-7, 53-58)

connected with nationalism and used by nationalist movements and politicians.[3] (E.g. GELLNER, 1983: 1; SMITH, 1991: 49-98) The **myth of (ethnic) homogeneity was born**: it was and often still is believed to be true. Constitutions and political systems of almost all modern nation-states have been built and are still based on this myth.[4]

I do not believe that absolute ethnic homogeneity has ever really existed in the modern history. At least a minimal level of ethnic plurality has existed as a result of a specific historic development of different regions[5] even in countries that have been traditionally perceived as ethnically homogenous nation-states.[6] **Ethnic and cultural pluralism is the reality of the contemporary world.** Furthermore, a general trend in the Twentieth Century is an increasing ethnic and cultural diversity. (E.g., AMBROSIUS, HUBBARD, 1989: 28-42, 84-86) Intensified communication, (economic) cooperation and interdependence in the world, developed transportation and increased mobility of population are some key factors further contributing to such a trend.

I.2. Nation-state

The concept of the nation-state has been shaped simultaneously with the process of formation of modern (ethno)nations in the very specific historical development in Europe from sixteenth and seventeenth century on.[7] It was in this context that the state

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[3] As the political ideology and principle, nationalism demands that members of a certain nation have "the political duty... to the polity which encompasses and represents... (this) nation." This political duty "overrides all other public obligations, and in extreme cases (such as wars) all other obligations of whatever kind." In this context, nationalism is the most demanding form of ethnic or group identification. (HOBSBAWM, 1990: 9) Nationalism, by definition, is exclusive and/or hegemonist, and is usually hostile to others. Being based on the idea of national unity, nationalism is **incompatible with pluralism and democracy**. Nationalism demands that every member of a nation fights for "national interests" and generally sees other interests - that may differ from "officially" proclaimed "national interests" - as undesirable; individuals, groups and political parties who advocate other interests are often called "national traitors" and nationalist movements try to eliminate them, if only they feel strong enough.

[4] Moreover, children in schools are still taught this myth and mass-media are presenting it to their audience in almost all countries in the world. Even in the cases, where ethnic plurality is recognized constitutionally and legally and this fact is accepted by the official politics and politicians they often see the existing ethnic plurality more a problem than a normal situation or even a comparative advantage.

[5] Factors of such specific historic developments were e.g., natural disasters including climate changes, diseases and famine, economic underdevelopment and hardship, faster economic development of certain regions, administrative changes in the territory and borders of nation-states, wars, etc.

[6] E.g., France was often cited as a typical example of the homogenous "(one)nation-state." In reality it was and still is an internally diverse multi-ethnic society. Ethnic plurality of its population (especially if immigrant population is included) is substantial and is further increasing. This was - even more - so in the period of the creation of French "nation-state" and nation (ethno-nation) in the 16th and 17th Century: regional and specific ethnic identities of the population of different regions were at that time much stronger than the newly invented French identity. (E.g. FOUGEYROLLAS, 1968)

[7] The main turning point in the process of formation of modern states from the perspective of the international community and relations was the (Peace) Treaty of Westphalia of 1648 which laid foundations of the status of states in the international community and principles of relations among them.

acquired its ethnic identity and content, and became the nation-state.[8] The state is understood as a specific mean or even the only mechanism that can realize certain national interests of nations as specific ethnic communities.[9] **The majority of modern states were established and are still perceived as nation-states of certain nations - we could say *"one-nation-states."*** (E.g., MACARTNEY, 1934: 192-211; SETON-WATSON, 1977) This concept could be explained by a simple equation: ***"State = nation = people"***. (HOBSBAWM, 1990: 23)

It is important to note that definitions of a (nation-)state in international law does not include its ethnic dimension and nature. (E.g. OPPENHEIM/LAUTERPACHT, 1948; STARKE, 1989) Article I of The Montevideo Convention on Rights and Duties of States (of 1933) provides the classic legal definition of states as persons of international law: *"The State as a person of international law should posses the following qualifications: a) permanent population; b) defined territory; c) government; and d) capacity to enter into relations with other states."*

Although the notion and concept of a *"one-nation-state"* could be considered unrealistic and even obscure in the plural ethnic reality of the modern world, nothing indicates the possible abolition of this concept in the near future. There has been a certain evolution in the concept and practice of existing nation-states especially with regard to protection of minorities and democratization, if we compared them to the classic model and historical practice. But the very notion that the nation-state should be primarily a tool to realize certain national interests of a dominant (ethno)nation, often at the expense of other distinct communities in a state hasn't been seriously challenged and/or substantially changed. (MANN, ed., 1990) Such a notion and the rather romantic understanding of the concept and principle of state sovereignty play an important role in politics as well - especially in the formulation of "national policies." (E.g. SETON-WATSON, 1977) The importance of ethnic factors and elements in politics should not be underestimated; among others, the afore mentioned practice could effect and even block processes of integration at the international level.

From the perspective of ethnic relations and conflicts, a modern nation-state could be observed as a generator of nationalism in some states. (GELLNER, 1983: 3-5; HOBSBAWM, 1990: 9-12) This has to do with the already mentioned fact that the ethnic composition of population is to a certain extent plural in all existing states, although they are mostly still perceived as *"one-nation-states"*. Such a concept of the *"one-nation-state"* state could generate conflicts between ethnic communities that dominate the state and ethnic groups that don't want to accept such domination.

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[8] The fact that the process of formation of modern nation-states in Europe went hand in hand with the process of formation of modern european nations has produced and still is reflected in a terminological problem in some languages. The same term **"nation"** is used to describe **a specific ethnic community** as was mentioned afore (Footnote 2) and **a state** as specific social organization and structure. In order to avoid misunderstandings in this article, the term "nation" is used only in the context of ethnic community.

[9] It is important to note that a state is not just a form of organization of a society, but as Max Weber pointed out, a state is (above all) an agency within society which possesses a monopoly over legitimate violence. (e.g. WEBER, 1922 and 1989) On the other hand, a modern state in European tradition of the twentieth century became also a service of its citizens that shall provide certain social infrastructure and assure realization of certain needs (e.g. education, social security, health care and service, etc.).

Distinct ethnic communities that are unhappy with arrangements within the existing states often seek a solution in the secession and creation of nation-states of their own.[10]

I.3. International community

States are the only (full) persons of international law and constituent parts of the international community. As mentioned states are usually still perceived as (ethnic) states of their respective nations based on the concept of *"(one-)nation-state"*. Today's International Community can, therefore, be defined as the **international community of (one)nation-states**. (E.g.: DEUTCH, 1970: 22-24; SMITH, 1986) Nation-states are the most important subjects and actors in international relations and processes. In this context states play a crucial role in the development of international law and its principles. They determine also the (historic) evolution of international protection of (ethnic) minorities.

Legal regulation of ethnic relations and protection of (ethnic) minorities and ethnic policy are considered internal affairs by all states. States are reluctant to accept any kind of limitations and/or standards that international community and law might impose on them in this context. They are often blocking proposed new developments in international protection of ethnic minorities. Nevertheless international law managed to develop certain recognized **minimal international standards for the protection of minorities** - at least traditional ethnic minorities.

States often ignore these international standards when it comes to their ethnic policy and legislation. Their constitutions and legislation, based on the classic model and concept of the *one-nation-state*, usually fail to recognize officially even the very existence of ethnic and cultural diversity. Only a few countries chose to introduce an adequate protection of (ethnic) minorities. States still tend to underestimate the importance of ethnic relations and tensions for the stability and development of modern societies. I would argue that constitutions, legislation and ethnic policies of many nation-states that had failed to recognize ethnic and cultural pluralism have contributed to the escalating ethnic conflicts that are tearing apart several nation-states and today's world.[11]

The international community, media and especially international public (opinion) could play an important role in promoting rights of minorities and new approaches in ethnic policy of states. There is a need to inform people about multi-ethnic and multi-cultural nature of modern societies: all advantages and possible problems of increasing ethnic diversity should be presented. It will take an enormous effort to overcome the uneasiness and fear of people regarding ethnic plurality. Media and international

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[10] This is conditioned by the fact that also minorities in the existing states perceive the "(one)nation-state" as the only proper tool to realize national interests of a dominant (ethno)nation - in this case their own interest. (e.g. KELLAS, 1991; STAVENHAGEN, 1990) It is frightening that, although they are deprived distinct communities in the existing states, their nationalist policy usually treats (possible) future ethnic minorities in their state as a problem and does not pay much attention to the future status and protection of these minorities.

[11] The list of countries that experienced violent ethnic conflict in the recent past includes among others: some parts of the former Yugoslav federation and Soviet Union, East Timor, Honduras, Iraq, India, Middle East (Israel, Lebanon), Nicaragua, Northern Ireland, Spain (the Basque country), Sri Lanka, Tibet, Turkey, etc.

public are especially important for the promotion of the concept and ideology of (equal) cooperation that seem to be the basis of good ethnic relations in an ethnically plural environment.

Reactions and protests of international public against violations of rights of ethnic minorities and immigrants can be a powerful factor in the process of formulation of ethnic policy of a state. Public pressure for the collective international humanitarian intervention in the case of gross and systematic violation of human rights might (at least in some cases) deter governments from such a practice.

I.4. Human rights

Human rights are nowadays usually described as the basis of modern democracy and the central issue (content) of democratic constitutions.[12] In this context modern constitutions proclaim basic principles of universality (universal nature) of human rights, and equality before law. Adequate realization and protection of human rights could be defined as the main constitutional goals in modern *democracies/poliarchies.* (DAHL, 1971)

There is a general agreement that protection of ethnic minorities is an important segment of human rights. We could observe the evolution of protection of minorities as a specific process within the historic development of human rights. Protection of ethnic minorities in the context of human rights is a central theme of this article.

I.5. Pluralism, democracy, and conflicts

Experts on democracy consider that **the existence of pluralism is a necessary precondition of democracy.**[13] They stress that limitations of pluralism based on the concept of enforced (social, political) monolithism and unity are incompatible with modern democracy. They underline that no majority shall have an unlimited power in a democratic system in order to preserve and protect democracy in a long term: Always there have to be democratic mechanisms and procedures to challenge an existing political majority. Modern constitutions acknowledged this problem and different limitations of a simple majority rule have been introduced in political systems to

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[12] Modern constitutional history can be observed as the process of growth and development of human rights in the last two centuries; among the most important dimensions of this process have been the inclusion of new categories of people (including certain communities and groups) as subjects of human rights, development and expansion of already existing ones, and the introduction of several new rights. (BLAUSTEIN, SIGLER, ed., 1988) Traditional personal, civil and political rights have been supplemented with the development of economic, social and cultural ones; collective human rights have been added to traditional individual ones (although some still reject the concept and even very existence of collective rights, e.g. MACHAN, 1989). The process of development of human rights is also a result of a constant interweaving of (internal) constitutional development in individual countries (states) with development in international law. (GIBSON, 1991; Human Rights in International Law: Basic texts, 1992; LUTZ, HANNUM, BURKE, eds., 1989)

[13] Pluralism is in this context often understood as political pluralism and reduced to the existence of several political parties that represent different political options. Nevertheless we should stress that pluralism in modern societies is a much broader phenomenon that exists in all spheres (economy, politics, culture, ethnic structure, etc.) of our life.

prevent abuse of democratic principles and institutions. (e.g., DAHL, 1989; SARTORI, 1987)

On the other hand the existence of pluralism in a certain society inevitably generates conflicts. If we took the example of political pluralism there are conflicts among different political programs and options. Conflicts are therefore normal phenomena in a democratic society. The main function of modern political systems should be to manage and resolve these conflicts in a democratic way. Democratic procedures and institutions should prevent their escalation into violent conflicts. Democratic political systems should provide (social) infrastructure and channels for the expression, coordination, harmonization and realization of different politically expressed and organized interests. I would describe **political systems as mechanisms for the management and resolution of all conflicts** deriving from the existence of different interests.

In this context it might seem surprising that the fear of conflicts is one of the most powerful factors in the contemporary politics, but the universally accepted concept of the "(one)nation-state" provides a specific perspective. Based on this concept political systems are designed as homogenous, symmetrical, coherent, and hierarchical systems that should provide mechanisms and rules for a democratic decision-making process usually understood as the "system of simple majority rule".[14] In this context, conflicts and even the possibility of conflicts are seen as very dangerous destructive forces in a society that can destroy its political system.[15]

Especially politicians from dominant nations often prefer to perceive their countries as ethnically homogenous "(one)nation-states" of titular nations. From their perspective the very existence of ethnic pluralism in a certain society is a severe problem. They see ethnic pluralism as an obstacle in building a viable and effective "political majority". Namely, ethnic pluralism can contribute to the additional fragmentation of a certain electorate; ethnicity might be used as a powerful basis for political mobilization and it is often used in politics.[16] Furthermore, these politicians

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[14] In such a system all decisions would be made by a majority without taking into account interests of the opposition. The opposition would be made marginal and powerless regardless of its size, without any possibility to challenge the majority. It is often forgotten that certain limitations of a "simple majority rule" are necessary to prevent the abuse of "democratic institutions and procedures" for the introduction of dictatorship. These limitations should provide at least the basic protection of minorities and protect the opposition from the (sometimes even psychical) elimination by a majority that once won elections. (BOBBIO, 1989)

[15] All potentially positive and creative dimensions of conflicts have been neglected, and all negative and potentially destructive dimensions of social conflicts have been stressed. Social conflicts have been declared undesirable, dangerous and destructive, and we all were taught to fear them. Political systems have not developed adequate mechanisms for the management and resolution of potential social conflicts; nothing has been done to use the stimuli, and creative and constructive dimensions of social conflict in improving and developing of political systems and their segments. The ideological basis of most present democratic political systems has been the ideology of competition and individualism rather than the ideology of inclusion and cooperation. This is reflected in the existing socialization and education of people. Cooperation is being underestimated, although cooperation can often enable better results than individual competition; several problems cannot even be solved without cooperation. Nevertheless, political systems have not developed adequate procedures and instruments for the cooperation on specific projects and formation of temporary (non-party) "issue coalitions".

[16] Especially the role of nationalism should be stressed in this context. As mentioned, nationalism is incompatible with plural democrasy. It is not unusual that some politicians of the dominant ethnic group following their own

fear ethnic pluralism, because they see it as a source of possible ethnic conflicts in a certain society. (HOROWITZ, 1985; MONTEVILLE, ed., 1990) This fear has been further increased by recent disintegration of some states because of ethnic conflict.[17]

I.5.1. Constitutional democracy

All modern states declare themselves **constitutional democracies**. Democracy is in this context declared as both the principle and goal.[18] As the constitutional principle it determines the nature of a political system, designs its structure and democratic procedures, and provides guidelines for their functioning. In this context it is often described as majoritarian democracy, but modern democracy would be better defined as **limited majority rule**. The rule of (simple) majority is in democratic constitutions limited by democratic procedures, limited terms, human rights, rights and protection of minorities, and different systems of checks and balances, etc. (LIJPHART, 1984; SARTORI, 1986; VANHANEN, 1990) The constitutional goal deriving from this principle is to assure functioning of the democratic system and to protect the democratic nature of a certain political system and society. An important precondition in this context is the "institutionalization of democratic institutions and procedures" in the constitutional/legal system; it defines the framework of modern democracy, assures the stability of the political system and functioning of democratic institutions in a long term; (BARBER, 1984: 117-311)

The rule of law (Rechtstaat) is a central principle that assures coherence and functioning of constitutional/legal systems in the modern world. The internal coherence of the legal system is assured by its hierarchical structure based on the principle that lower legal norms should comply with higher ones, and that all legal norms should be in compliance with the constitution. The principle of the rule of law assumes also that the political system, all its institutions, legal persons and individuals follow and apply all relevant legal provisions. One of the main goals of modern constitutions is to assure the realization and functioning of constitutional/legal systems

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nationalist policy deny or want to abolish the very existence of ethnic pluralism in a certain society. At the same time, the existence and fear or hatred of "others" is used to mobilize followers and to enforce monolithism and ethnic union within their ethnic group; those individuals and associations within their own group who question or refuse to defend and promote "national interests" formulated by a nationalist movement or government are declared national traitors and risk expulsion. (e.g. GELLNER, 1983; HOBSBAWM, 1990; KELLAS, 1991; SETON-WATSON, 1977)

[17] The dismantling of the former Soviet Union and Yugoslavia, and the division of the former Czechoslovakia are these recent cases; the developments in the former Soviet Union and Yugoslavia have shown how violent a process of dismantling of a state could be.

[18] In this context, I underline that democracy became the prevailing political ideology that influenced constitutions in the last two centuries: even those constitutions and regimes, that were and/or are considered undemocratic by most scholars and the common public opinion, usually proclaimed themselves democratic ones. Societies and political systems are constantly changing, and there are no permanent and absolute yardsticks to measure democracy: What was considered to be democratic a few decades ago may be considered undemocratic by today's standards. On the other hand, in contemporary world even the most totalitarian and authoritarian regimes have adopted a few democratic provisions and features that a century or few decades ago seemed to be to radical and unrealistic in the most democratic countries of the time. (DAHL, 1989; LIJPHART, 1984; SARTORI, 1986; VANHANEN, 1990)

in practice. In this context, different mechanisms are being developed to prevent any violation of legal and constitutional provisions by states and their institutions. Every political system, its institutions, and every public and state agency are bound and limited in their functioning by the constitution and legal regulation. To prevent violations of legal provisions by individuals and legal persons different institutions, such as the judicial system, public prosecution and police (repressive mechanisms), have been developed. Modern constitutional/legal systems carefully and precisely regulate and limit competencies, procedures and functioning of these institutions to assure and protect rights of individuals, groups and legal persons. (KELSEN, 1945 and 1970).

Constitutional/legal systems usually define which important decisions have to be made or changed, only if a certain qualified majority exists in order to protect some basic interests of minorities and (political) opposition. Protection of minorities, their participation in decision-making, and the required level of consensus about some central issues could be considered important yard-sticks of the development of democracy in a certain modern society. (SARTORI, 1987: 24-25, 30-31) Regardless of that, it is often still believed that the protection of distinct communities, special (collective) rights of minorities, and some other limitations of a "simple majority rule" are unnecessary complications in everyday life and in the functioning of political systems.[19]

I.5.2. Modern constitutions

As mentioned practically all states in the contemporary world officially claim that they are **constitutional democracies**. (E.g., ELSTER, SLAGSTAD, eds.,1988; GREENBERG, KATZ, OLIVIERO, WHEATLEY, eds., 1993) Their constitutions define the structure and functioning of their political systems. Constitutions proclaim some basic legal and political principles that lay foundations and determine the nature of a certain society. Constitutions regulate relations between citizens and their states (governments); they determine and guarantee human rights and liberties, and should provide for their realization. (BETH, 1962: 2-20; BOBBIO, 1987: 138-156; KELSEN, 1945, and 1951: 272-276)

The constitution is a set of rules: It is a legal document, more precisely, the basic law (norm) on which the whole legal and political system of a certain state is built. Hierarchically, it is the highest norm in a legal pyramid. Usually, constitutions are written documents[20] adopted in a special procedure by parliaments (legislative bodies),

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[19] Such an opinion is usually advocated by nationalists, xenophobes and (neo)fascists, but with the growing economic and social problems in different countries it is becoming more and more appealing to the broader public. Foreigners and "others" are an easy target, a scape-goat that can be blamed for every problem; fear and hatred of foreigners and "all others" (different) is successfully used for the political mobilization of members of a certain ethnic group. (E.g. STROSS, 1992; VEEN, LEPSZY, MNICH, 1993)

[20] But not every state has its written constitution: such exceptions are United Kingdom (due to the specific historic development of British constitutionalism) and Israel (because of theological/religious and ideological reasons). Both states, though, have their hierarchically built legal system based on some basic constitutional norms that among others define their political system, democratic institutions and procedures of decision-making.

special constitutional conventions or by the popular vote in the constitutional referendum.[21]

Constitutions differ from country to country, and these differences are often substantial. Additionally, the nature, content and interpretation of a certain constitution are changing with time in the context of specific historic circumstances and development; these changes may be formal by adoption of amendments or a new constitution, but often they are just consequences of a new legal and/or political interpretation of the existing text in a new social and political situation. If the constitutions were initially mostly the act (law) of the state and government, they have been becoming more and more the act (law) of people focussed on human rights, liberties and democratic participation of people.

One should not forget that constitutions are always also political and ideological documents.[22] The act of adoption and proclamation of a new constitution is an important political event in the history of every country: it is the result of different political processes and usually of certain political compromises in a certain historical epoch. Every constitution expresses and promotes, at least to some extent, the prevailing ideology in a certain society at the time of its creation; it contains certain political views and ideals of its creators. There is a mutual influence because every constitution is conditioned by contemporary social and political processes and situations; however, after its adoption a constitution, in many ways, influences and conditions these processes.

I.6. Welfare state: state as a service of its citizens

A state as a service of its citizens is a relatively new concept and constitutional principle, based on democratic principles and ideology. Although this principle is universally accepted, there are several different interpretations of its content. The understanding of this principle in a certain country (state) conditions the formulation of specific goals. There is a general agreement in interpreting this principle that the people should freely elect their representatives, and thereby influence and control the political system. In the past, the state was used by the ruling elite as an instrument to

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In both states there were (and still are) numerous initiatives to prepare and adopt a new written constitution which so far have failed to assure sufficient political and public support.

[21] In the U. K. there are no special procedures provided for the adoption of a document of a constitutional nature: due to the nature of the British constitution the parliament can adopt such a document in a regular legislative procedure. On the other hand, the constitutional referendum as the final act of the adoption of a new constitution or constitutional amendments - which is in some countries obligatory (e.g. Switzerland) - is usually combined with the special constitutional procedure in the parliament or constitutional convention.

[22] These two dimensions of constitutions are usually not even mentioned in official documents, media and (official or recommended) textbooks used in schools to teach and indoctrinate pupils and students about the constitution and political system of a certain country.

control and subdue its people.[23] The development of democracy should have assured democratic control of the people over the state.[24] Constitutional/legal systems have provided numerous institutions and procedural rules that should assure the realization of legally recognized interests of the people - especially citizens of a certain state. A state is expected also to perform other functions for the benefit of its citizens. Traditionally, a state has provided defense of a country, maintenance of law and order, functioning of financial and economic system, and the basic infrastructure of economy and life (e.g. irrigation, roads, bridges, ports, etc.). In the process of development some new important functions of a state have been added regarding the basic infrastructure (e.g. railways, airports, other communication systems, energy supply, etc.), labor regulation and protection (labor law), education, health, medical and social care, housing, protection of environment, protection of ethnic minorities and realization of their rights, etc. Sometimes governments of modern states provide these functions directly, but often they are involved only indirectly by the adoption of necessary legislation (regulation) and assuring (additional) finances.[25] The objectives, nature and extent of these functions and activities of a state are very different from country to country and from field to field, but they always demand a certain level of involvement of a state in the redistribution of wealth to assure at least a minimal level of services for those who wouldn't be able to afford them otherwise. These functions and services of a state are usually referred to as a concept of the **welfare state** which differs substantially from country to country;[26] (E.g. GOULD, 1993; HANSEN, ed., 1993; KOLBERG, ed., 1992; MISHRA, 1990) Although there is no general consensus I would argue that the concept of welfare state should include also the obligation of states to guarantee the realization and protection of rights of ethnic minorities.

II. Ethnic minority: working definition

When we discuss protection of ethnic minorities we should underline that there is no generally accepted definition of the term "ethnic minority". Existing legal documents that regulate protection of ethnic minorities at the national level in individual countries or at the international level have also avoided this issue for a number of reasons. (E.g., BENOÎT-ROHMER, HARDEMAN, 1995: 25-29)

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[23] Most often, a state was perceived as an instrument of rule of a sovereign ruler, usually a hereditary monarch.

[24] If the people (voters) are not satisfied with the performance of elected representatives, at least they have the choice to elect other candidates and/or parties in the next elections.

[25] Several functions are being provided by different contractors that can be public and/or private companies and institutions. Legislation usually guarantees equal access to their services for every citizen, regulates their activities, and provides control over their operations. Although customers (tax-payers) are often required to pay a certain contribution, a state (government) provides at least some finances from the budget to assure stability, equal accessibility and certain standards (quality) in providing of these services.

[26] So far, development led to increasing (the extent of) the **welfare state**; different groups, associations, labor organizations, and political movements have participated in this process by demanding rights and improved working conditions, education, (some and later on universal) health care and social security, additional care for handicapped, etc. Although it was traditionally often rejected in the context of american individualism, demands for health care reform and some other proposals to introduce different elements of the welfare state (known mostly from Europe) are being expressed and supported also in the U.S.

Nevertheless there is a certain agreement that international law, constitutions and/or national legislation of individual states provide minimal standards and guarantee specific status, rights and protection only for (persons belonging to) **traditional ethnic or national minorities.**[27]

It is extremely difficult to build a necessary consensus about the politically sensitive and tricky issue of the acceptable definition of "ethnic minority". Nevertheless there were a few attempts to develop such a definition. Article 1 of the proposal for the Additional Protocol to the European Convention on Human Rights for the Protection of Human Rights and Fundamental Freedoms, concerning persons belonging to national minorities defines a **national minority** as *"a group of persons in a state who: **(a)** reside on the territory of that state and are citizens thereof; **(b)** maintain long-standing, firm and lasting ties with that state; **(c)** display distinctive ethnic, cultural, religious or linguistic characteristics; **(d)** are sufficiently representative, although smaller in number than the rest of the population of that state or of a region of that state; **(e)** are motivated by a concern to preserve together that which constitutes their common identity, including their culture, their traditions, their religion or their language".*[28] Although it is unlikely that this definition in the proposal of the additional protocol prepared by the Parliamentary Assembly of the Council of Europe will be accepted by the entire international community any time soon, it indicates certain newer trends in the theory of international law. The cited definition is obviously based on the often cited definition by Professor Francesco Capotorti who describes (ethnic) minority as a group:

"- ... numerically inferior to the rest of the population of a state;
- in a non-dominant position;
- whose members – being nationals of the state -- posses ethnic, religious or linguistic characteristics differing from those of the rest of the population; and
- show, if only implicitly, a sense of solidarity, directed towards preserving their culture, traditions, religion or language".[29] (CAPOTORTI, 1991: 96)

The above definitions are very useful. They include both objective and subjective (main) criteria, but they try to avoid theoretical and political issues that might cause disputes among states involved in the creation of international legal documents. For

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[27] In this context, a **traditional ethnic minority (typical national minority)** could be defined as **a part of the nation that as a specific (distinct) and formed ethnic community** (group) **lives in a territory outside the borders of its "mother" (one)nation-state.** Members of (persons belonging to) a certain ethnic minority are citizens of a state where they live. Such a situation is usually a consequence of a **specific historic** (especially political/administrative) **development** in a certain region. As an additional criterion, the **autochthonous settlement** of such an ethnic minority is often required. (See also, PETRIČ, 1977: 89-104)

[28] This text that still does not have any legal force is cited from the Article 1 of the proposal for the additional protocol to the Convention for the Protection of Human rights and Fundamental Freedoms, concerning persons belonging to national minorities, in Recommendation 1201 (1993) on an additional protocol on the rights of minorities to the European Convention on Human Rights, adopted on 1 February 1993. See also: "Report on an additional protocol on the rights of minorities to the European Convention on Human Rights", 1993: 4-5

[29] Professor Capotorti drafted this definition as the Special Rapporteur of the United Nations Sub-Commission on Prevention of Discrimination and Protection of Minorities in 1979. Subsequently, this or any other definition was not adopted by the Sub-Commission that finally decided that no definition of the term "minority" was necessary for the continuation if its work. (BENOÎT-ROHMER, HARDEMAN, 1995: 27)

the purpose of my research I developed more complex and detailed working definitions - fully aware of the fact that as such they could not be used in legal documents. Nevertheless they proved helpful in my research and to a certain extent also in political processes regarding protection of ethnic minorities in Slovenia.

Drawing on the above mentioned definitions I would suggest the following general definition of the ***"ethnic or national minority"***:

(a) An ethnic/national minority is a specific and formed - distinct - group of persons.

(b) It is (usually) numerically smaller than the rest of the population of a state,[30] and

(c) as a distinct community in a non-dominant position within a society.

(d) Persons belonging to this distinct community are citizens of the state on which territory they reside.[31]

(e) They posses ethnic, religious, cultural and/or linguistic characteristics differing from those of the rest of the population of the state.

(f) They developed a distinct (ethnic) identity and are motivated to preserve together their common identity, religion, culture, traditions and language.

(g) Such a community became an ethnic minority as a consequence of a specific historic (political and administrative) development in the territory/region of their traditional settlement.[32] (ŽAGAR, 1995: 334)

When we speak of ***"typical traditional ethnic/national minorities"*** I would add the following additional elements to the general working definition:

(h) An ethnic/national minority as a distinct community autochthonously lives in a certain territory of its traditional settlement.[33]

(i) An ethnic minority culturally and ethnically belongs to a ***"mother-nation"*** **that has a nation-state of its own.** A nation-state of a *mother-nation* is usually a neighboring country to the country of citizenship of persons belonging to an ethnic minority.[34]

(j) An ethnic/national minority has several (cultural, social, economic, political) links with a *mother-nation* and its nation-state. Protection of ethnic minorities and

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[30] In some cases we could speak of a certain distinct group as a "social minority" even if it represents a numerically superior group within a society when such a group is in a non-dominant position and/or oppressed. In such cases a numerically inferior group in power usually (mis)uses a nation-state and its mechanisms of repression to rule and suppress numerically superior groups. A situation in the South African Republic during the era of apartheid could be mentioned as a typical example.

[31] This is the main characteristic that differentiates between persons belonging to ethnic minorities and (im)migrants. Immigrants usually do not have citizenship of a country where they reside - usually with the legal status of resident aliens.

[32] There are also ethnic minorities whose members (persons belonging to these distinct communities) live dispersed on the whole territory or several regions of a state. Jewish communities in European and American cities could be mentioned as examples of such minorities.

[33] Autochthonous settlement does not indicate only a considerable duration of the settlement of a distinct ethnic community on a certain territory, but underlines also its active role and integration in the society (its contribution to culture, social and economic life, etc. of a certain territory/region).

[34] The terms ***"mother-nation"*** and ***"nation-state of the mother-nation"*** refer to nations (ethnic communities) and states with which certain ethnic minorities share a common origin or heritage, language, culture, historic development and/or ethnic identity.

cooperation between a minority and its mother-nation could become important issues in bilateral relations between a country of citizenship of persons belonging to a certain ethnic minority and a nation-state of their *mother-nation*.[35] (ŽAGAR, 1995: 334-335)

On the other hand, persons belonging to an ***"atypical traditional ethnic/national minority"*** also live autochthonously as a distinct community on a certain territory of their traditional settlement, but they do not have their *mother-nation* outside the borders of the country of their citizenship or, at least, their ***mother-nation*** **does not have a nation-state of its own.**[36]

Listing main criteria different definitions of traditional ethnic/national minorities usually underline the importance of autochthonous (traditional) settlement or (more precisely) the duration of the settlement of a distinct ethnic community on a certain territory. The problem is that a decision to declare a distinct community a traditional ethnic/national minority is always subjective and has several implications. As mentioned law provides special protection only for (persons belonging to) traditional ethnic minorities. This is why states often refuse to recognize such a status to different distinct communities. A decision to recognize a distinct ethnic community officially as a traditional ethnic minority is always a political decision.

Scholars are trying to find more objective criteria to determine when a certain distinct ethnic community becomes a traditional ethnic/national minority. In the case of the *World Directory of Minorities* (1990: xiv), for example, a decision was made to include all include minority groups who live permanently in a certain territory for at least two generations (40 to 50 years).[37]

V. Historic evolution of protection of ethnic minorities in international and constitutional law: a brief review

Ethnic minorities as we know them today are consequences of the formation (emergence), development and existence of modern nation-states and borders among

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[35] In this context I would like to stress that these (cultural, linguistic, educational, social, economic, etc.) links, contacts and cooperation of ethnic minorities with their mother-nations and nation-states of their mother-nations have to be peaceful and should not infringe the principles of territorial integrity and sovereignty of states.

[36] Some authors argue that atypical traditional ethnic minorities should be treated as equal constituent nations of states where they live regardless of their size in order to assure their equality. (Namely, nation-states as the only full persons of international law are the main advocate of specific ethnic interests of their respective nations within the international community.) This would, of course, require the (constitutional, political) transformation of several existing (one)nation-states where they live to multi-national-states. (BUČAR, 1994: 5)

[37] If we decided to take the duration of the settlement on a certain territory (e.g., 40-50 years) as a central criterion in the definition of ethnic minorities, we could encounter a certain problem in cases of old immigrant communities. In some cases we might find the second or third generation of immigrants who were born in the country of their permanent residence but are still citizens of the country of origin of their parents or predecessors. There could be different reasons why they do not have citizenship of the country of their permanent residence (e.g., laws on citizenship/nationality, tradition, ownership of property in the country of origin of their parents, etc.). (E.g., BOCKSTAEL, FEINSTEIN, 1991) In any case, immigrants who are not citizens of the country of their residence are excluded from political process (even if they are the third generation in a certain country), and they could not get the status and protection guaranteed for persons belonging to traditional ethnic/national minorities.

them.[38] Protection of minorities evolved simultaneously with the evolution of the international community and nation-states in a slow and often painful process. This historical process of the evolution of protection of ethnic minorities could be divided into **three main phases**:

(1) from the Peace Treaties of Westphalia of 1648 to WW I;
(2) from WW I to WW II; and
(3) after WW II.

V.1. From the peace treaties of westphalia to ww i

The Peace Treaties of Westphalia of 1648 are considered a historic turning-point in the formation of modern nation-states, and they also marked the beginning of the **first phase** of modern development of rights of religious and ethnic minorities. These treaties introduced the principle of freedom of conscience and religion and established the obligation of states to grant toleration and self-government to distinct religious communities.[39] (BARON, 1985: 3) Different international agreements and treaties signed in the Seventeenth and Eighteenth Century in Europe contained similar provisions on status and protection of religious minorities.[40]

The Congress of Vienna of 1815 rearranged the international community after the Napoleonic Wars. It brought a new development also regarding protection of minorities. In addition to religious minorities the final document for the first time mentioned an ethnic minority, the Poles who lived (as ethnic minorities) in three victorious empires after the division of Poland. The high contracting parties, Austria, Prussia and Russia agreed to grant certain ethnic rights to Poles who lived under their jurisdiction. The Poles, subjects of respective states, were promised new institutions necessary for the preservation of their culture and ethnicity in accordance with the political judgement of respective governments. (PETRIČ, 1977: 25) Although an ethnic minority was mentioned, the final document clearly did not establish any kind of its adequate protection. It failed to determine (at least) minimal binding standards and

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[38] Population in border-regions has been traditionally ethnically plural (mixed). It is impossible to design national borders that would not leave at least a minimal number of persons belonging to a certain nation outside the borders of their nation-state. On the other side, a certain number of persons who live on the territory of a certain state do not belong to the "titular" nation of this nation-state. In both cases, if they are citizens of the country where they reside permanently they should be given status and protection guaranteed for (persons belonging to) traditional ethnic minorities.

[39] These principles replaced the previously existing principle *"cuius regio, eius religio"* that determined the religion of the population on a certain territory by the religion of its ruler. The Peace Treaties of Westphalia ended the 30-year religious war and proclaimed the new principle of freedom of conscience and religion. These treaties reshaped the existing international community. States, the high contracting parties recognized the existence of religious minorities and stipulated to grant a certain level of (initially religious and later also local) self-government to Protestants in catholic states and to Catholics in protestant states. (BARON, 1985: 3) Certain international documents (treaties) that guaranteed religious freedom existed also before and had paved the way for the Peace Treaties of Westphalia. We could mention the Peace Treaty of Vienna of 1609 that guaranteed religious freedom to Protestants (protestant minority) in Transylvania. (PETRIČ, 1977: 24)

[40] We could mention The Oliva peace of 1660, the treaties of Nijmegn (1678), Rijswik (1697) and Vienna (1815). Important is also The Paris Peace of 1763 between France and United Kingdom on the protection of Catholics in Canada. (PETRIČ, 1977: 25)

adequate international safeguard mechanisms for protection of ethnic minorities. Additionally, the final document did not even mention all other ethnic communities - nations and minorities - who lived in the existing empires.[41] All these weaknesses led some authors to a conclusion that the Congress of Vienna actually ignored to address the problem of ethnic relations and protection of minorities. (PETRIČ, 1977: 25)

The evolution of protection of ethnic minorities slowly progressed in the Nineteenth Century. Historic developments in the Balkan peninsula were especially important for the evolution of protection of religious minorities. European powers forced Turkey to sign a number of international documents and agreements that dealt also with the protection of religious minorities in Turkey.[42] The treaties of Paris (1856) and Berlin (1878) demanded from Turkey to guarantee religious freedom and equality to its Christian subjects regardless of their religion or race. Different international documents guaranteed religious freedom and equality to minorities (in this case mostly Moslems) also in other newly established states in the Balkans. These documents did not regulate or even explicitly mention the problem of protection of ethnic minorities. (PETRIČ, 1977: 25-27)

WW I was a historic turning-point that ended the first phase of the historic evolution of protection of minorities. The progress was slow and often partial. The main characteristics of this phase were:

(i) Protection of minorities was limited only to religious minorities. It was especially concerned with religious freedom and equality. In some cases it included also certain level of religious and local self-government. It was only in one case that the protection of an ethnic minority was explicitly mentioned.

(ii) Protection of minorities was proclaimed by international agreements and documents, but there was no international mechanism that would have assured the realization of existing provisions. The realization of rights of minorities was usually left to individual sovereign states themselves.

(iii) Existing provisions on protection of minorities were very seldom realized in the practice.

(iv) There was no specific constitutional protection of ethnic minorities, except for a general proclamation of equality and in some cases, prohibition of discrimination on the ground of race or religion.

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[41] All existing European empires of the time were actually multi-ethnic empires but they usually failed to recognize this fact officially. Diverse ethnic communities who lived in these empires in the time of formation of modern european nations considered themselves "imprisoned" in the existing empires, and described these empires as "jails of nations". (E.g., PETRIČ, 1977: 25)

[42] European powers in this case forced Turkey into certain concessions regarding its subjects - citizens belonging to different Christian religions. This was the reflection of unequal position of different states (in this case Turkey and, later, newly established Balkan states) within the international community. European powers were not willing to give up on their sovereignty (as they considered their ethnic minorities their internal affairs), and accept an international regime that would guarantee generally binding minimal standards of protection of minorities.

V.2. From ww i to ww ii

WW I marked the beginning of **the second phase** in the evolution of protection of minorities that ended with WW II. The issues of the right of peoples to self-determination and protection of ethnic, linguistic and religious minorities were raised already during WW I. New principles started to emerge in this context that were further developed after WW I, especially within the League of Nations. In this context we should mention Peace Treaties after WW I that bound the states defeated in the war to respect certain rights of minorities.[43] Also new states that emerged in Europe after WW I as the consequence of the realization of the principle of self-determination of peoples, agreed to grant certain rights and special protection to ethnic, religious and linguistic minorities. The documents that guaranteed these rights of minorities were (unilateral) declarations of states and treaties within the League of Nations, or bilateral agreements between states. Provisions of these documents mostly followed the concept of protection of minorities developed by the mentioned Peace Treaties. (PETRIČ, 1977: 28-49)

Professor PETRIČ (1977: 37-38) lists the following nine (groups of) rights of minorities that had been guaranteed to persons belonging to ethnic minorities by the mentioned international documents in this phase:

(1) The right to the citizenship of the state where persons belonging to a certain ethnic minority live. In some cases when the administrative status of a certain territory was changed, the inhabitants were given the right to opt for a citizenship of their choice;

(2) the right to life, liberty of person, and freedom of religion;

(3) the right to equality before law, and equality in civil and political rights;

(4) the right to equal access to public services and offices, honors and functions, and equality at (professional) work;

(5) the right to establish, manage and maintain their religious and social associations and institutions, schools;

(6) the right to free use of their language;

(7) the right to use their language before courts;

(8) the right to education in their language in primary schools in the communities where a considerable proportion of persons belonging to a minority live. The official language of a state should also be taught compulsory;

(9) the right to adequate participation on public finances for educational, religious and similar purposes in the communities where a considerable proportion of persons belonging to a minority live.

In addition to general rights, the above list included some "special" rights of persons belonging to ethnic minorities (listed from 5 to 9). The realization of some of these rights (7-9) demanded an active obligation of states where minorities lived. (PETRIČ, 1977: 38)

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[43] See e.g. the treaties of: Saint-Germaine with Austria of 10 September 1919 (Art. 54-60); Neuilly with Bulgaria of 29 November 1919 (Art. 49-57); Trianon with Hungary of 4 June 1920 (Art. 54-60); Sevres with Turkey of 10 August 1920 (Art. 37-45).

On 22 October 1920, the Council of the League of Nations adopted the special report on **Protection of Linguistic, Racial or Religious Minorities**, known also as the Tittoni's Report. Based on this report a few resolutions of the Council on the "right to petition" were adopted that established a special procedure for petitions of linguistic, racial and religious minorities. These petitions enabled minorities to point out cases of violations of rights of minorities established by international law, and put pressure on the state that violated their rights. The right to petition was guaranteed to individuals belonging to these minorities, groups of persons belonging to these minorities, and to minorities as collective communities represented by their representatives. These petitions were reviewed by special "minority committees" of three members, appointed by the president of the Council. These committees usually tried to find a compromise solution in such cases in cooperation with respective states. Of some 500 petitions reviewed by special minority committees, 14 petitions were discussed also by the Council of the League of Nations. (PETRIČ, 1977: 43-44)

The second phase brought also new developments in the constitutional protection of minorities. In addition to general provisions on equality (before law), religious freedom, and prohibition of discrimination on the ground of race or religion, new constitutions included provisions that guaranteed certain special rights and protection for (persons belonging to) ethnic minorities. In this context we shall mention especially the Constitution of the Russian Socialist Federal Soviet Republic of 1918,[44] the German (Weimar) Constitution of 1919,[45] and the Constitution of the Esthonian Republic of 1920. The Esthnonian Constitution established the highest standards for protection of racial, ethnic and religious minorities. It guaranteed the right of

[44] Article 2 of the Constitution of the Russian Socialist Federal Soviet Republic of 1918 proclaimed that the Russian Soviet Republic was established on the basis of free union of free nations, as a federation of national Soviet Republics. Article 11 reads: "Soviets of regions with special usages and national characteristics of their own may unite in autonomous regional unions, governed (like all other regional unions which may be formed) by regional Congresses of Soviets and their executive organs." (BLAUSTEIN, SIGLER, ed. 1988: 341, 343)

[45] The "Weimar" Constitution of the German Reich of 1919 contains provisions relevant for the protection of minorities in the Part II "Fundamental Rights and Duties of Germans". Article 113 (Section I. The individual) reads: *"Sections of the population of the Reich speaking a foreign language may not be restricted, whether by way of legislation or administration, in their free racial development; this applies specially to the use of their mother tongue in education, as well as in questions of internal administrations and the administration of justice."* Section III of the Part II of the constitution regulated "Religion and Religious associations" (Art. 135-141). It guaranteed that all inhabitants of the Reich enjoyed "full liberty and conscience" (Art. 135). It also declared that there is no official state Church; the freedom of association and internal self-government was guaranteed to all religious bodies (Art. 137). *"Sundays and holidays recognized by the State shall remain under legal protection as days of rest and spiritual improvement"* (Art. 139) *"Religious bodies have the right of entry for religious purposes into the army, hospitals, prisons, or other public institutions, so far as is necessary for the conduct of public worship and religious ministrations, but any form of compulsion is forbidden"* (Art. 141) Article 149 of Section IV. "Education and Schools" regulated religious instruction:
"Religious instruction is a regular subject in schools, with the exception of undenomination (secular) schools. The giving of such instruction shall be regulated in accordance with legislation upon schools. Religious instruction shall be given in accord with the principles of the religious body concerned, without prejudice to the right of State supervision.
The giving of religious instruction and the undertaking of spiritual duties are subject to the declared assent of the teacher; participation in religious instruction and in religious rites and ceremonies is subject to the declared assent of the person responsible for the religious education of the child.
The theological Faculties in the Universities shall continue to be maintained." (BLAUSTEIN, SIGLER, ed. 1988: 376, 379-380, 381-382)

minorities to establish their autonomous institutions for the preservation and development of their culture and language. The constitution regulated the official use of their language in districts where the majority of the population was not Esthonian, and in dealings with central authorities.[46] Unfortunately this constitution had never been fully implemented and realized in its fifteen years of existence. Even formally it lasted only until 1935, when it was suspended by military dictatorship that also abolished all political parties. (BLAUSTEIN, SIGLER, ed. 1988: 337-398) In this context it has to be stressed that most modern constitutions in the 1990s still have not achieved standards of protection of minorities set by the Esthonian Constitution of 1920.

We could list the following main characteristics of the second phase of the historic evolution of protection of minorities:

(i) The concept of protection of minorities expanded and included also protection of racial, ethnic and linguistic minorities in addition to religious minorities. "Special" rights of persons belonging to ethnic, racial, linguistic and religious minorities were added to the general concept of human rights.

(ii) Protection of minorities was regulated by international agreements and documents, within and outside the League of Nations as the central institution at the level of international community. The Peace Treaties after WW I were central documents in this context that served as the basis for all other documents.

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[46] Chapter II. "Constitutional Rights of Esthonian Citizens" of the Constitution of the Esthonian Republic, adopted by the Constituent Assembly on the 15th June 1920, contained the following provisions important for the protection of minorities:

Article 6. *"All citizens of the Republic are equal before the law. Public privileges or prejudices derived from birth, religion, sex, social position, or nationality may not exist. In Esthonia there are no legal class divisions or titles."*

Article 11. *"In Esthonia there is a freedom of religion and conscience. No person may be obliged to preform any religious act, to be a member of any religious association, or to pay public taxes for the benefit of any such association.*

Every Esthonian citizen may freely practise the rites of his religion, provided they are not contrary to public order or morality.

The religious belief or political opinions of any citizen may not be pleaded in justification of any offence, or of the nonfulfillment of civic duties.

There is no state religion in Esthonia."

Article 20. *"Each Esthonian citizen is free to declare to what nationality he belongs. In cases where personal determination of nationality is impossible, the decision shall be taken in the manner prescribed by law."*

Article 21. *"Racial minorities in the country have right to establish autonomous institutions for the preservation and development of their national culture and to maintain special organizations for their welfare, so far as it is not incompatible with the interests of the state."*

Article 22. *"In districts where the majority of the population is not Esthonian, but belong to a racial minority, the language used in the administration of local self-governing authorities may be the language of that minority, but every citizen had the right to use the language of the state in dealings with such authorities. Local self-governing bodies which use the language of a racial minority must use the national language in their communication with governmental institutions, and with other local self-governing bodies which do not make use of the language of the same racial minority."*

Article 23. *"Citizens of German, Russian or Swedish nationality have the right to address the central administration of the State in their own language. The use of these languages in the Courts, and in dealings with the local administration of the State and of self-governing bodies, shall be the subject of detailed regulation by special laws."* (BLAUSTEIN, SIGLER, ed. 1988: 391-393)

When the Esthonian Constitution of 1920 spoke about racial minorities this term meant racial, ethnic, religious or linguistic minorities in accordance with the existing practice.

(iii) The second phase marked the beginning of modern constitutional protection of minorities, and set certain standards by adopting some solutions from the existing international documents and practice. Most constitutions, based on the concept of (one)nation-states, did not include provisions on protection of minorities.

(iv) There was no adequate and efficient mechanism at the international level or within individual states that would assure the realization of existing protection of minorities.

(v) There were several problems in the realization of "special" rights of persons belonging to minorities and protection of minorities provided by international law and a few constitutions.

V.3. After WW II

WW II marked the beginning of **the third phase** in the historic evolution of protection of ethnic minorities that brought intense and dynamic development of human rights, including "special" rights and protection of minorities. The horrors of WW II, and the need to replace the international system of the League of Nations that collapsed at the beginning of WW II intensified the concern with human rights when the system of the United Nations (UN) was being conceived and built. Human rights are remaining the central issue in the whole post-WW II period.

V.3.1. The UN

The UN played central role in the evolution of human rights and protection of minorities after WW II. The Charter of the UN calls for the promotion and encouragement of *"respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language or religion"* (Art. 1/3.), and declares that friendly relations among nations should be based *"on respect for the principle of equal rights and self-determination of peoples"* (Art. 1/2.), but does not mention protection of minorities directly. Nevertheless the above provisions set the direction of the future development. Also the Universal Declaration of Human Rights (GA Res. 217 A (III) of 10 December 1948), as the basis of the post-WW II system of human rights, failed to mention the protection of ethnic minorities explicitly.[47] But it provided for the infrastructure that enabled the future development of protection of minorities. It proclaimed the principle of equality and liberty, and forbade all forms and acts of discrimination.

The problematic of ethnic minorities and related issues have been discussed in different bodies and branches of the UN including General Assembly, especially when

[47] This was a reflection of a general trend that existed already during WW II that national minorities were not mentioned in international documents, including the Charter of the UN. At the same time there was a severe problem that manifested in the exodus of ethnic minorities, especially German minorities in different parts of Europe. This problem was ignored because it was thought that it would be extremely difficult to assure peaceful co-existence of these minorities with the rest of the population in several regions. The decisions of the Potsdam Conference actually confirmed the obligatory removal of German minorities from some European states. (PETRIČ, 1977: 52)

some concrete problems appeared (e.g., Palestine, former Italian colonies, Erithrea, South Tirol, etc.). In this context, the UN paid special attention to the prevention of different forms and practices of discrimination, and to the right of peoples to self-determination in the process of decolonization. This led to the adoption of numerous documents - resolutions, declarations, conventions.[48] (See e.g., *Human Rights: A Compilation of International Instruments*, 1994: 1-139)

Being aware of the importance of human rights for modern world, the Economic and Social Council (ECOSOC) at its first session established the Commission on Human Rights (ECOSOC Res. 5 (I) of 16 February 1946) that was required, among others, to prepare reports and suggestions on Human Rights, including protection of minorities. The Commission on Human Rights at its first session in 1947 established the UN Sub-Commission on Prevention of Discrimination and Protection of Minorities, that became a central body for the discussions on international protection of minorities. Its success in drafting documents and searching of general consensus was often rather limited,[49] but it constantly stressed the importance of protection of minorities and the need to establish adequate mechanisms for protection by international documents. The Sub-Commission initiated and prepared a number of studies on protection of minorities and on (prevention of) discrimination that played an important role in the development of international law and theory.

Among numerous UN documents and decisions on human rights, I would like to mention a few ones that deal with rights of minorities explicitly, and that I consider especially important in the context of the historic evolution of protection of ethnic minorities:

(a) The resolution **"The Fate of Minorities"** (GA Res. 217 C (III) of 10 December 1948) was adopted by the UN General Assembly on the initiative of a few member-states that were dissatisfied by the fact that the Universal Declaration of Human Rights had not included provisions on rights and protection of minorities. The resolution stressed that the UN could not ignore the problem of (special) rights and protection of minorities. It underlined the complexity and sensitivity of this issue that required that specific solutions be found for every specific case.

(b) The **International Covenant on Civil and Political Rights (ICCPR)** (GA Res. 2200 A (XXI) of 16 December 1966; entered into force on 23 March 1976) that together with the **Universal Declaration of Human Rights** and **International Covenant on Economic, Social and Cultural Rights** constitutes The International Bill of Human Rights. In addition to general provisions on human rights and their protection, the ICCPR establishes a special protection of minorities in Article 27:

"In those states in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language."

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[48] This issue can be observed also from the broader perspective in the context of the prevention of all different forms, acts and practices of discrimination that includes e.g., violations of rights of women, children, cases of slavery, servitude, forced labor and similar institutions and practices. (*Human Rights: A Compilation of International Instruments*, 1994: 145-242)

[49] As it was mentioned in the case of searching for an agreement on the definition of minorities.

The ICCPR defines rights of minorities only as individual rights, and does not establish an active obligation of states to assure the realization of these rights. Nevertheless, these rights of minorities defined by the ICCPR definitely became *"ius cogens"* in international law after the document entered into force.

(c) The Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities (GA Res. 47/135 of 18 December 1992) declares the obligation of states to *"protect the existence and the national or ethnic, cultural, religious and linguistic identity of minorities within their respective territories"* and to *"encourage conditions for the promotion of that identity"* by the adoption of appropriate legislative and other measures. (Art. 1) The declaration lists special rights of persons belonging to minorities in Article 2:

"1. Persons belonging to national or ethnic, cultural, religious and linguistic minorities (hereinafter referred to as persons belonging to minorities) have the right to enjoy their own culture, to profess and practise their own religion, and to use their own language, in private and in public, freely and without interference or any form of discrimination.

2. Persons belonging to minorities have the right to participate effectively in cultural, religious, social, economic and public life.

3. Persons belonging to minorities have the right to participate effectively in decisions on the national and, where appropriate, regional level concerning the minority to which they belong or the regions in which they live, in a manner not incompatible with national legislation.

4. Persons belonging to minorities have the right to establish and maintain their own associations.

5. Persons belonging to minorities have the right to establish and maintain, without any discrimination, free and peaceful contacts with other members of their group and with persons belonging to other minorities, as well as contacts across frontiers with citizens of other States to whom they are related by national or ethnic, religious or linguistic ties."

It is important that the dual, both individual and collective, nature of minority rights is recognized directly by this declaration: *"Persons belonging to minorities may exercise their rights, including those set forth with the present Declaration, individually as well as in community with other members of their group, without any discrimination"* (Art. 3.1.).

The declaration further elaborates obligations of states with regard to special rights and protection of minorities (Art. 4-8), and stresses the obligation of the UN bodies, agencies and other organizations of the UN to *"contribute to the full realization of the rights and principles set forth in the present Declaration, within their respective fields of competence"* (Art. 9).

UN declarations are not considered directly binding legal documents in international law, but they set forth legal principles that might become *"ius cogens"* through the practice of states and the international community. (E.g., STARKE, 1989) The Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities reflects the present situation and main trends of development of rights and protection of minorities. The lack of consensus and the reluctance of states to accept obligations regarding rights and protection of minorities played

important roles in drafting this document. Because of lack of consensus there is no definition of minority, but the declaration points out the dual - individual and collective nature of the rights of minorities. Although in many ways imperfect, this declaration represents a major development and establishes an international (legal) system for the protection of minorities.

(d) Representatives of 171 states adopted by consensus **The Vienna Declaration and Programme of Action of the World Conference on Human Rights** on 25 June 1993. Paragraph 19 of this document reaffirms *"the obligation of states to ensure that persons belonging to minorities may exercise fully and effectively all human rights an fundamental freedoms without any discrimination and in full equality before the law in accordance with the Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities."* (World Conference on Human Rights..., 1993: 34-35) This document confirmed the concept and principles set forth by the Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities, and indicated the direction further development of protection of minorities within the UN. This document could be considered also a confirmation of the existence of a new universal international legal system of protection of minorities.

Iv.3.2. The Council of Europe, Conference/Organization on Security and Cooperation in Europe, European Communities/Union, bilateral and multilateral treaties

The issues of special rights and protection of minorities are addressed also by different regional international organizations, bilateral and multilateral agreements. In this context, this article focusses on the situation and development in Europe.

The most important institution in this context is the **Council of Europe** with a broad range of activities in the field of human rights. Central documents are the European Convention on Human Rights of 4 November 1950[50] and the European Social Charter of 18 October 1961.[51] *"The two treaties establish lists of rights which must be guaranteed to everyone within the jurisdiction of the member States. They are accompanied by collective supervision and guarantee procedures at European level."* (*Human Rights: A continuing challenge for the Council of Europe*, 1995: 3) The two documents did not establish any special rights and protection of minorities, but they laid the foundations of the European system of Human Rights that is constantly developing.

As an international treaty, the European Convention on Human Rights has slowly evolved (by adoption of additional Protocols) since its entry into force. It has became probably the strongest and most effective human rights treaty there is. The convention

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[50] This convention was concluded in Rome by representatives of then 15 signatory governments, and entered into force in 1953. The official title of this document is: The Convention for the Protection of Human Rights and Fundamental Freedoms. (*Human Rights: A continuing challenge for the Council of Europe*, 1995: 5)

[51] The European Social Charter was signed in Turin (Italy) and came into force on 26 February 1965. This document "was conceived as the counterpart to the European Convention on Human Rights in the social field. It aims to guarantee effective exercise of nineteen fundamental social rights." (*Human Rights: A continuing challenge for the Council of Europe*, 1995: 20)

has been voluntarily accepted by all Council of Europe's member states that have also accepted the compulsory jurisdiction of the European Court of Human Rights (Art. 46) as well as the right of individual petition (Art. 25) (*Human Rights: A continuing challenge for the Council of Europe*, 1995: 5) From the perspective of protection of minorities we should mention Article 14 that prohibits any form discrimination in exercise of human rights and fundamental freedoms guaranteed by this treaty.

Several recommendations and decisions of the Parliamentary Assembly[52] and the Committee of Ministers, and also the declaration of the Heads of State and Government of the member States of the Council of Europe at the Vienna summit conference (8-9 October 1993) define the future direction of development of protection of minorities in Europe, and suggest different activities in this context. They set also basic standards of protection that have been followed in drafting international legal documents. The Committee of Ministers established in this context the Ad Hoc Committee for the Protection of National Minorities (CHAMIN) in November 1993. The CHAMIN, consisting of experts designated by each of the member states, drafted **the framework Convention for the Protection of National Minorities** that was adopted by the Committee of Ministers on 10 November 1994. The framework Convention was opened for signature on 1 February 1994 and will enter into force upon ratification by twelve member states. It will become the first legally binding multilateral document devoted to the protection of national minorities in general. (*Human Rights: A continuing challenge for the Council of Europe*, 1995: 46-47) The provisions of the framework Convention lay down principles in the following areas:

"- non discrimination;

- promotion of effective equality;

- promotion of the conditions regarding the preservation and development of the culture and preservation of religion, language and traditions;

- freedoms of assembly, association, expression, thought, conscience and religion;

- access to and use of media,

- linguistic freedom:

- use of the minority language in private and in public as well as its use before administrative authorities;

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[52]The Parliamentary Assembly adopted its first recommendation on the rights of minorities in October 1990 (Recommendation 1134 (1990)). Florence BENOÎT-ROHMER and Hilde HARDEMAN underline that it *"stressed that 'respect for the rights of minorities and persons belonging to them is an essential factor for peace, justice, stability and democracy' (Art. 4). The recommendation explicitly indicated that 'the special situation of a given minority might justify special measures in its favour', and that 'minorities should be allowed to have free and unimpeded peaceful contacts with citizens of other states with which they share a common origin or heritage, without, however, infringing the principle of the territorial integrity of States' (Art. 10). In addition, the recommendation stipulated that national minorities should have the right 'to be recognized as such by the States in which they live'; 'to maintain and develop their culture'; 'to maintain and develop their own educational, religious and cultural institutions'; and 'to participate fully in decision-making about matters which affect the preservation and development of their identity and the implementation of those decisions' (Art. 11). Accordingly, the Assembly called on the European states concerned 'to commit themselves to guarantee the protection as well as the possibility of the effective exercise of the rights of national minorities and persons belonging to them'; 'to make all the necessary legislative, administrative, judicial and other measures to create favourable conditions to enable minorities to express their identity, to develop their education, culture, language, traditions and customs'; and 'to abstain from pursuing policies aimed at forced assimilation of national minorities' (Art. 13)."* (BENOÎT-ROHMER, HARDEMAN, 1994: 11)

- use of one's own name;
- display of information of a private nature;
- topographical names in the minority language;
- education:
- learning of and instruction in the minority language;
- freedom to set up educational institutions;
- transfrontier contacts;
- international and transfrontier cooperation;
- participation in economic, cultural and social life;
- participation in public life;
- prohibition of forced assimilation." (*Human Rights: A continuing challenge for the Council of Europe*, 1995: 47)

The CHAMIN continues its work on the second part of its mandate, the drafting of an additional protocol to the European Convention on Human Rights containing individual rights in the cultural field. Its work should be completed by the end of 1995. (*Human Rights: A continuing challenge for the Council of Europe*, 1995: 48)

We should mention also the **European Charter for Regional or Minority Languages** adopted in June 1992 and opened for signature by member states on 5 November 1992 that will come into force upon the ratification by five member states. This Charter recognizes the right to use a regional or minority language in private and public life as an inalienable right. It stresses the importance of the principles of democracy and cultural diversity, and lays down objectives and principles to be respected by member states in the protection and promotion of regional or minority languages. In this context it proposes also concrete measures in the fields of: *"education, courts of law, administrative authorities and public services, the media, cultural facilities and economic and social life."* (*Human Rights: A continuing challenge for the Council of Europe*, 1995: 48)

All different activities of the Council of Europe concerning rights and protection of minorities take place at three complementary levels:

"- Establishment of machinery for the prevention and peaceful solution of minority problems (observation, consultation, conciliation, arbitration or any other appropriate steps);
- Devising confidence-building measures, aimed at improving mutual acquaintance and understanding with a view to peaceful coexistence; and
- Standard-setting." (BENOÎT-ROHMER, HARDEMAN, 1994: 12)

The Conference on Security and Cooperation in Europe (CSCE), as the broadest framework of cooperation in Europe that included also the USA and Canada, has paid special attention to rights and protection of national minorities since its creation in 1975. This issues became even more important after the collapse of the Communist regimes in Central and Eastern Europe. They remain in the focus of its attention also after its transformation into **the Organization on Security and Cooperation in Europe (OSCE)**.

Expressing the position of the CSCE on rights and protection of minorities **The Helsinki Final Act** of 1975 declares that:

"participating States on whose territory national minorities exist will respect the right of persons belonging to such minorities to equality before the law, will afford

them the full opportunity for the actual enjoyment of human rights and fundamental freedoms and will, in this manner, protect their legitimate interests in this sphere." (Helsinki Final Act, Principle VII of the "Declaration on Principles Guiding Relations between Participating States, para. 4)

This document was an important development in the concept of protection of minorities. The participating states stipulated that they would not only tolerate rights of minorities but would afford conditions for their full realization and actual enjoyment. This direction and concept, based on an active obligation of states to assure the enjoyment and realization of rights of minorities, have been followed also in all further documents of the CSCE/OSCE.

The minority question was one of the main items on the agenda at the Copenhagen Conference on the Human Dimension in June 1990. The position of the CSCE on this issue is elaborated in the Part IV of the **Copenhagen Document**. The minority question could be resolved only in a democratic way following the principles of tolerance, respect of human rights and fundamental freedoms, rule of the law and equality before the law. It stresses the role of the non-governmental organizations (NGO), especially the Human Rights Community, for the promotion of tolerance, cultural diversity and protection of minorities. The states confirm the importance of the respect of rights of persons belonging to national minorities in the context of Human rights for peace, justice, stability and democracy in the participating states. (Para. 30) The document declares the obligation of participating states to *"adopt, where necessary, special measures"* to assure the right of *"persons belonging to national minorities to exercise fully and effectively their human rights and fundamental freedoms without any discrimination and in full equality before the law"* (Para. 31). Persons belonging to national minorities have the right *"freely to express, preserve and develop their ethnic, cultural, linguistic or religious identity and to maintain and develop their culture in all aspects"*, without being afraid of forceful assimilation. In addition to this right they are granted a number of specific rights, which they could exercise both individually and in community. These special rights include the right: to use their mother tongue in private and public; to establish and maintain educational, cultural and religious institutions, organizations and associations; to profess and practice their religion; to establish and maintain internal and cross-frontier contacts; to disseminate, have access to and exchange information in their mother tongue in private and in public; to establish and maintain NGO, and to participate in international NGO and associations (Para. 32). States are required to create *"adequate opportunities"* for persons belonging to national minorities for instruction of, or in, their mother tongue. Their mother tongue should be used before public authorities *"whenever possible and necessary"* (Para. 34) They have the right to participate in public life, especially in issues important for the preservation and development of their identity. States *"note the efforts undertaken"* to create conditions for the development of ethnic, cultural, linguistic and religious identity of minorities *"by establishing, as one of the possible means to achieve these aims, appropriate local or autonomous administrations corresponding to the specific historical and territorial circumstances of such minorities and in accordance with the policies of the State concerned"* (Para. 35). States condemn totalitarism, racial and ethnic hatred, antisemitism, xenophobia and all forms of discrimination, in this context especially stressing the problems of

Roma/Gypsies. The document lists different ways and means to fight those problems that include: effective measures to prevent treats to or possible violence against individuals and groups based on national, racial, ethnic or religious discrimination and hatred, including antisemitism; effective measures to promote mutual understanding and tolerance, especially in the fields of education, culture and information; the right of individual to effective remedies; adoption and accessibility for individuals and states of international mechanisms and instruments to fight the problem of discrimination (Para. 40).

The political, rather than legal and binding, character of the Copenhagen Document of 1990 allowed the inclusion of this broad list of minority rights. The participating states in this context adopted solutions and commitments, that they would have never agreed to include in legally binding treaties and documents. The adoption of this document was the most important standard setting achievement within the CSCE. Discussions, especially at a CSCE Expert Meeting on National Minorities in 1991, and attempts to develop measures and mechanisms to improve the implementation of CSCE commitments concerning minorities have failed to produce adequate results. (See e.g., BENOÎT-ROHMER, HARDEMAN, 1994: 6)

Since 1990, the CSCE/OSCE has shifted its emphasis towards the field of conflict prevention and early warning. In this connection we should mention the further elaboration and development of the **Vienna Human Dimension Mechanism of 1989** at the Moscow Conference on the Human Dimension of September-October 1991 and the Helsinki Follow-up meeting of March-July 1992, and especially the creation of the post of a CSCE High Commissioner on national minorities at the Helsinki Summit in July 1992. (BENOÎT-ROHMER, HARDEMAN, 1994: 6-7)

The Vienna Human Dimension Mechanism se up a specific guaranteeing mechanism for the human dimension, that was intended to be applicable also to questions regarding national minorities. This mechanism involved four phases:

" *- A request for information addressed by a CSCE member state to another member state on questions relating to the human dimension;*

- Bilateral meetings between the states concerned, to discuss those problems and possible action to be taken;

- In event of a deadlock in the negotiations, the case could then be referred to the CSCE states; and lastly

- The follow-up to the case might give rise to discussion at meetings of the Conference on the Human Dimension." (BENOÎT-ROHMER, HARDEMAN, 1994: 7)

The Copenhagen Conference considered that the procedure needed to be speeded up. The Moscow Conference introduced *"the further possibility of requesting the state in question to agree to invite a mission of experts to address a particular, clearly defined question on its territory relating to the human dimension of the CSCE"*. If a state considers a problem in a certain state a serious treat to the fulfillment of the provisions of the CSCE human dimension, it *"may, with a support of at least nine other participating states, initiate a procedure whereby a group of rapporteurs is set up. In the event of refusal, the state may with the support of at least five other participating states, request the establishment of a mission of CSCE rapporteurs"*. The rapporteurs, chosen from a list of independent experts, formulate comments that may be discussed by the Committee of Senior Officials (CSO) which decides what further

action should be taken. These changes replaced the principle of consensus (previously existing in the Vienna Mechanism) that was blocking in some cases the resolution of crisis situation. (BENOÎT-ROHMER, HARDEMAN, 1994: 8)

The Helsinki Follow-up Meeting further improved the conflict-prevention and crisis-management mechanisms within CSCE. It strengthened the role of the Committee of Senior Officials (CSO), that might *"in the most serious cases decide on the need for concerted action by the CSCE. Fact-finding missions and missions of rapporteurs may also be set up at the request of the Committee of Senior Officials or the Consultative Committee of the Conflict Prevention Centre, to prevent or manage crisis situations."* (BENOÎT-ROHMER, HARDEMAN, 1994: 8-9)

In addition to these general mechanisms on human dimension, the **CSCE High Commissioner on National Minorities** is a specific early-warning instrument for the prevention of conflicts that involve national minorities at the earliest possible stage. An intention is to identify the underlying causes of tensions, and try to resolve them before they escalate. The CSCE High Commissioner should provide early warning, and *"activate mediation procedures when tensions involving national minorities seem to develop in such a way as to threaten peace and stability in the region"*. (BENOÎT-ROHMER, HARDEMAN, 1994: 9) The Decisions of the CSCE Helsinki Summit, however, prohibit the High Commissioner to involve with tensions that have violently escalated (Section II, Art. 5b). A mandate of the High Commissioner in a particular case is established by the CSO. (Section II, Art. 7) Such a decision of the CSO is adopted by consensus, which gives the CSCE/OSCE member states the possibility to block actions by the High Commissioner. This is especially important due to the fact that the High Commissioner's offices can be invoked not only by CSCE/OSCE member states but also by associations and NGOs representing the minorities concerned (Section II, Art. 26). The CSCE Office for Democratic Institutions and Human Rights provides the assistance to the High Commissioner in his/her work (Section I, Art. 23). The CSCE Office for Democratic Institutions and Human Rights is also in charge of managing the CSCE Human Dimension Mechanism. (See e.g., BENOÎT-ROHMER, HARDEMAN, 1994: 9)

Mr. Max van der Stoel, a human rights campaigner and former Dutch Foreign Minister, was appointed the first CSCE/OSCE High Commissioner on National Minorities on 15 December 1992, and the office was immediately activated. His efforts and involvement can be evaluated as a constructive contribution to a better mutual understanding. Being successful in reducing tensions by mediation and confidence-building activities, this office might evolve into an useful international mechanism for the prevention, management, reduction and resolution of ethnic tension and conflict. (BENOÎT-ROHMER, HARDEMAN, 1994: 9-10) Furthermore, the creation of the office of the CSCE/OSCE High Commissioner on National Minorities offered a common ground for cooperation in promoting human rights and protection of minorities in Europe. There has already been some cooperation with the Council of Europe in carrying out the functions of the CSCE/OSCE High Commissioner on National Minorities.

The role of **the European Communities/European Union (EC/EU)** in the field of rights and protection of ethnic minorities has increased after the collapse of the Communist regimes in Central and Eastern Europe. The role of the EU in this filed

seems likely to further increase considering the prospects of the expansion of the EU in the future.

The EC/EU has failed to create a binding legal instrument on the protection of rights of (ethnic) minorities so far, and it is unlikely that such a document will be adopted any time soon. The reluctance of some member states to adopt such a document and accept new obligations in this context does not seem to decrease.

Nevertheless, the issue of human rights has become increasingly important for the EC/EU since the adoption of a Declaration on Respect for the Fundamental Rights of Citizens of the European Communities in April 1977. Respect of human rights and, in this context rights of minorities, has become an important issue in relations of the EC/EU with third countries. Based on the criteria and recommendations in the Badinter report of the EC Expert Commission, conditions for the recognition of new democracies by the EC/EU include the respect and adequate protection of rights of ethnic and national groups and minorities in accordance with the commitments subscribed to in the framework of the CSCE/OSCE. After 1992 clauses of explicit suspension in the event in the event of the partner failing to uphold human rights and fundamental freedoms, including minority rights, are included in the association and cooperation agreements that the EC/EU concludes with the states of Central and Eastern Europe. (BENOÎT-ROHMER, HARDEMAN, 1994: 16-17)

The European Parliament adopted a number of resolutions concerning the protection of regional and minority languages and cultures in the EC/EU in the 1980s and 1990s, but no legally binding documents were adopted. The chairmen of the European Parliament Committee on Legal Affairs and Citizens' Rights, Graf Stauffenberg and Mr. Alber, drafted a proposal of an European "Charter of Rights of Ethnic Groups" in the beginning of the 1990s. The proposed charter includes both individual and collective minority rights, and calls for the introduction of the principle of reciprocity between member states in this field (Art. 27). The proposal calls upon the governments of the EC/EU member states to include at the next Intergovernmental Conference on the Amendment of Treaties (in 1996) in the Treaty on European Union the rights of ethnic groups and their members along the lines suggested by the draft charter. Provisions on the rights of minorities in the EU would thereby become a part of basic Community/Union Law. Taking into account the lack of support for the proposal (report on an European "Charter of Rights of Ethnic Groups") in the European Parliament Committee on Legal Affairs and Citizens' Rights and the reluctance of some EU member states regarding the rights and protection of minorities, the Committee decided to give priority to other matters. After *de facto* abandonment of the report before the European elections of 1994, procedures have to be started afresh under the new legislature. (BENOÎT-ROHMER, HARDEMAN, 1994: 17-18)

A draft Pact on Security and Stability in Europe, the so-called Balladur Plan of June 1993, was accepted by the European Council as a basis for possible "Joint Action" in the framework of the Common Foreign and Security Policy. According to the Balladur Plan a pan-European Conference on Peace and Stability in Europe with the participation of the EC/EU member states and countries of Northern, Central and Eastern Europe would be convened under aegis of the EU:

"This conference should result should result in the signature of a European Pact, consisting of a whole series of bilateral agreements between the countries concerned,

in which problems relating to borders and minorities would be solved on a case-by-case basis. The main objective of the pact would be 1) to reaffirm the principles concerning frontiers and minorities adopted earlier in the framework of other European organisations, in the first pace the CSCE, and implement these principles 'in the countries whose relations are not yet stabilised by membership in one of the main European political bodies'; and 2) to organise and coordinate the action of the existing institutions involved in order to assure the best possible guarantee for the observance and implementation of these principles (para. 2)." (BENOÎT-ROHMER, HARDEMAN, 1994: 19)

This plan has been later replaced by a more modest and pragmatic approach to a certain extent conditioned also by the new situation resulting from the enlargement of the EU in 1995.

There are also different **subregional initiatives** addressing specific problems regarding minority rights and protection of minorities in a certain region. In response to existing problems in the Baltic region, the Council of Baltic Sea States (CBSS) decided in March 1993 to establish the office of a CBSS Commissioner for Human Rights and Minority Questions. Within the framework of the Central European Initiative (CEI) there was an initiative to adopt a special Convention on National Minorities, but no final decision has been taken so far. (See e.g., BENOÎT-ROHMER, HARDEMAN, 1994: 21-22)

An important instrument for the regulation of rights and protection of minorities are **bilateral and multilateral agreements (individual international agreements)** concluded by states concerned, and **unilateral declarations** by individual states. Such agreements usually deal with a specific minority situation in a certain state or in two neighboring states, and clearly set out the respective obligations of each of the parties. Being better adapted to the specific historical, cultural, ethnic, economic and political context, they provide a highly comprehensive regime of protection for the minorities to which they refer. Among such agreements we could mention e.g.:

- the Gruber-Gasperi Agreement of 1946 (annexed to the Peace Treaty of 10 February 1947) between Austria and Italy that guarantees a range of minority rights and a broad autonomy to the German-speaking (Austrian) minority in South Tirol;
- The quadripartite memorandum of agreement, so-called London Memorandum, concerning the Territory of Trieste, signed by the governments of Italy, the United Kingdom, USA and Yugoslavia on 5 October 1954 that guaranteed the preservation of ethnic character and free cultural development to the "Yugoslav ethnic group" in the area under Italian administration and the "Italian ethnic group" in the area under Yugoslav administration. The London Memorandum was replaced by the Treaty of Osimo of 1976 between Italy and Yugoslavia, that was after its disintegration replaced by Slovenia and Croatia (as successor states). According to Article 8 of the Treaty of Osimo the equal level of protection of minorities should not decrease under the level guaranteed by the London Memorandum, and all already adopted protective measures should be maintained.
- agreement between the Federal Republic of Germany and Denmark of 1955 that protects their respective minorities in the provinces along their frontier, and guarantees them a number of minority rights. (Each government made an unilateral declaration to its parliament committing itself to respect the agreement.)

- a number of bilateral agreements concluded after the collapse of Communist regimes and disintegration of multiethnic states in Central and Eastern Europe, e.g., treaties on neighborhood relations that Germany concluded with Poland (in 1991), Hungary (in 1992) and with Czechoslovakia (in 1992); treaties between Hungary and Ukraine (of 1991), Hungary and Slovenia (1992), etc.

V.3.3. Constitutions

Constitutions seldom recognize the existence of ethnic pluralism very, but even when they do they tend to establish different legal regimes (arrangements) and status for different types of distinct ethnic communities. It is rather unusual that a state would be constitutionally defined as a multi-national state, and that different ethnic communities would be proclaimed as having an equal ethnic basis of this state;[53] in such a case, a constitution has to provide for mechanisms and rules that assure equal status and protection of such ethnic communities.[54]

Following developments in international law, some constitutions recognize the existence of ethnic minorities and provide certain special minority rights.[55] Special rights of ethnic minorities should assure the existence and development of ethnic minorities, their distinct language, culture and identity, establishment and functioning of their own associations and organizations, and their participation in the process of decision-making within the political system.[56] If we compared international law with constitutions and national legislation, concepts of protection of minorities in international documents are often more elaborated, and international standards of protection of minorities are higher than standards in constitutions and/or national legislation of most modern nation-states. (E.g. BARON, 1985; BROLMANN, LEFEBER, ZIECK, eds., 1992; THORNBERRY, 1990; WHITAKER, ed., 1984)

In accordance with international law, constitutions that include special provisions on minority rights, usually guarantee only specific status, rights and protection of **traditional ethnic or national minorities**.

The rights and protection of ethnic minorities are paid special attention in some new constitutions in the states of Central and Eastern Europe that were adopted after the collapse of the Communist regimes (e.g., Slovenia, Croatia, Macedonia, the Czech Republic, etc.).

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[53] As this is the case with e.g. the Constitution of the Swiss Confederation and Belgium, and constitutions of the former Yugoslav federation (e.g. The Constitution of the Socialist Federative Republic of Yugoslavia of 1974).

[54] This includes issues such as equality of languages, scripts, adequate representation in institutions of political systems which can assured by proportional representation and/or minimal quotas, etc.

[55] In the view of some critics, (special) rights of minorities should be abolished. They think that these special rights create unacceptable legal discrimination, and thereby constitute a violation of the principle of "absolute (formal) equality of everybody before law". (MACHAN, 1989)

[56] As mentioned, the Declaration on the Rights of Persons Belonging to National, Ethnic, Religious and Linguistic Minorities (A/RES/47/135) urges states to "protect the existence and national or ethnic, cultural and religious identity of minorities within their respective territories" and "encourage conditions for the promotion of that identity" by the adoption of "appropriate legislative and other measures". (Article 1)

V.3.4. General characteristics of the third phase

The third phase of the historic evolution of protection of minorities was the most dynamic so far. We could list the following main characteristics of this phase:

(i) The concept of human rights has further developed in this phase, which influenced also rights and protection of ethnic minorities. Some new special rights have emerged, and a dual, both individual and collective, nature of minority rights is slowly being recognized.

(ii) Rights and protection of minorities are regulated by a number of international documents, with the UN playing a central role in the development of the international law. The new concept of rights and protection of minorities has slowly been established by new international documents. Besides binding treaties and international agreements, there are also legally nonbinding documents (resolutions and declarations) that might become *ius cogens* based on the practice of the international community and states. So far, there is often just a political commitment of states to respect provisions of these documents.

(iii) The reluctance of governments of modern states that at least subconsciously still perceive their countries as ethnically homogenous "one-nation-states", has often slowed or even blocked further development of the protection and rights of minorities in international law. Due to the reluctance and opposition of some states, it is rather unlikely that already existing international standards of protection of minorities will be translated into national legislation of these states anytime soon.

(iv) Although there was a certain progress in the field of constitutional protection of minorities, most constitutions, still on the concept of (one)nation-states, did not include special provisions on rights and protection of minorities. Some newer constitutions did follow international standards of minority rights and protection of minorities, but standards of constitutional protection are still mostly lower than existing international standards. This gap is to a certain extent bridged by legislation in some countries, but unfortunately is this legislation often inadequate.

(iv) Different mechanisms at the international level (mostly within existing international global and regional organizations) or within individual states that should assure the realization of rights and protection of minorities are being established. Beside the protection of rights before the courts within the state, different international institutions and courts exist that can be addressed to in the case of violation of minority rights also by individuals and minority organizations/associations.

(v) There are still several problems in the realization of "special" rights of persons belonging to minorities and protection of minorities provided by international law and constitutions. This is sometimes conditioned also by the "ethnic policy" of states that fails to recognize the very existence of ethnic pluralism within their borders.

V. Theoretical concepts, models and trends of development

Regarding the nature and concepts of the rights and protection of ethnic minorities there are several theoretical and political disputes. As a consequence, it has not been

possible to formulate a generally accepted definition of an ethnic/national minority that is a central social phenomenon in this context.

Some disputes derive from different understanding of human rights and their nature in general, but several problems derive from a specific nature of minority rights. Namely, minority rights could be defined as specific/special rights of persons belonging to ethnic/national minorities in addition to traditional universal rights and fundamental freedoms.

The concept of **special rights of (ethnic) minorities** has often been disputed; some authors and politicians reject even the very existence of special minority rights. Critics insist on an absolute formal equality of everybody before law. In their view, special rights are an unacceptable legal discrimination and violation of the principle of equality of everybody before the law.[57] (MACHAN, 1989)

Among those authors who accept the existence of (special) rights of minorities, there are several differences regarding their understanding and the interpretation of the concept and nature of these rights. Nevertheless, international law, official documents of most states and the majority of scholars recognize their existence and importance. (CAPOTORTI, 1991; GYURCSÍK, 1993)

The aim of "special" minority rights is to assure equality of rights and opportunity for distinctive individuals and groups who are objectively in a less favorable position in a certain society and would not be able to realize their constitutional rights without these special rights. Although some authors deny the very existence of collective rights (e.g. MACHAN, 1989), I think that rights of minorities have a **dual nature** - they are at the same time both **collective** and **individual** rights.[58] If we analyze rights of ethnic minorities in their complexity, we can discover that as collective rights they belong to ethnic minorities as distinct communities, and as individual rights they belong to every member of a certain ethnic minority.[59] (VAN DYKE, 1985: 14-15, 44-45)

Nevertheless, rights of minorities are usually still perceived as individual rights of members of certain distinct ethnic communities, although the concept of collective rights has become more acceptable. In this context, constitutions and most international documents provide mostly for protection and rights of persons (individuals) belonging to ethnic minorities.[60] There are only a few international

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[57] They reject the concept of, so called, "positive discrimination" as a mean to achieve equality of socially deprived individuals and especially groups in a society (by the introduction of special rights), claiming that this is just a cover for inequality and legally introduced discrimination that destroys the basic principle of equality.

[58] Some authors use the phrase "rights of minorities" in the context of "equality of rights and opportunity for individuals belonging to minority groups", and the phrase "minority rights" to refer "to the rights of minority peoples (*as groups - M.Ž.*) who wish... to cultivate their own culture and control their schools, welfare agencies, and other communal institutions." (BARON, 1985: 3-4) In this study, I use both term as synonyms.

[59] E.g., the right to education in languages of minorities, about culture and history of these minorities is realized as a collective right of a certain minority by establishing of an adequate autonomous educational system and programs; as an individual right it is realized by giving the possibility to attend a bi-lingual school or educational program in the language of a certain minority to individual members of this minority.

[60] E.g. Declaration on the Rights of Persons Belonging to National, Ethnic, Religious and Linguistic Minorities (A/RES/47/135) adopted by the General Assembly of the United Nations on December 18th, 1992 defines rights of persons belonging to minorities mostly as individual rights, although it stresses that "(p)ersons belonging to minorities may exercise their rights, including those set forth with the present Declaration, individually as well as in community with other members of their group, without any discrimination." (Article 3/1.)

documents and constitutions that explicitly define rights of minorities also as collective rights of these distinct ethnic communities.[61]

V.1. Concepts of protection of ethnic minorities

Following Jellinek's classification of human rights,[62] one could describe the prevailing practice in the world as the "**negative concept of protection of minorities**". In this context, states usually do not interfere with the rights of ethnic minorities which are considered individual rights of members of a certain minority. The state reacts and protects them only when they are (directly) violated; an individual member of the ethnic minority and in some cases minority organizations (associations) can sue violators before the court and request that the state prevents further violations.[63]

On the other hand we know, that modern states influence directly or indirectly almost every aspect of our lives; they play a crucial role in the realization and protection of human rights in the contemporary world. The importance of modern states for the introduction, realization and protection of rights of ethnic minorities is even greater - taking into account specificity of these rights, and the objective situation of minorities in a certain (ethnically) plural society. This was the reason why the "**positive concept(s) of protection of ethnic minorities**" has been developed as a theoretical model. If the rights of "negative status" entitle their subjects only to the protection of the state in cases these rights are violated by the someone else, the rights of "positive status" entitle their subjects to demand certain action from the state to realize them. Taking into account this division, the "positive concept of protection of ethnic minorities and their members" means a special obligation of the state to act in

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[61] E.g. the Constitution of the Republic of Slovenia (of 1991) defines the rights of traditional ethnic minorities as collective and individual rights of autochthonous ethnic communities and their members. (E.g. Article 65) It is interesting to mention, that the Constitution of the Republic of Slovenia (of 1991) on the initiative of representatives of ethnic minorities in the Constitutional Commission replaced the term "ethnic/national minority" with the term "autochthonous ethnic communities" to avoid the possible negative connotations of the term "minority".

[62] Based on the status, Georg Jellinek classified human rights into four groups:
- **rights of negative status:** the state should not interfere unless they are violated (basic rights and liberties of an individual, e.g. personal rights, privacy, etc.);
- **rights of positive status:** an individual, usually the citizen has the right to demand a certain activity by the state (cultural, social and economic rights);
- **rights of active status:** political rights and liberties, that enable democratic participation of a citizen;
- **rights of passive status:** the state (society) can demand that an individual citizen preforms certain public functions (e.g. an obligation to preform an elected or public function). (JELLINEK, 1963: 86f)

An obligation of the state exists to prevent and punish the violation of a certain right, but in some cases state acts only on a request of an individual or a group whose rights were violated. Although some still claim that only an individual can be a subject of human rights so there can be no violation of collective rights, it has became broadly accepted that certain rights are in their nature (also) collective and that also these rights can be (and often are) violated.

[63] Constitutional/legal systems of some states might establish an obligation of the state to prevent violations of human rights as a general principle which applies also for rights of ethnic minorities; such provisions can be in some cases interpreted as the obligation of the state to undertake certain preventive activities before the actual violation takes place.

order to assure the realization of special rights of ethnic minorities and their members. The "positive concept" in the constitution and legislation:

(i) establishes minorities (as distinct communities) and their members (as individuals) as active and equal subjects in a plural society and its political system, and provides for their participation and decisive role in political decision-making;

(ii) requires active role of a state in protection and realization of (special) rights of minorities. The very fact that the state would not act would establish a violation of the constitution and law by the state and its moral and legal responsibility for consequences. (ŽAGAR, 1992a: 10-11)

Based on the "positive concept of protection of minorities" constitutional/legal systems should, among others, include the following obligations of a state: to prepare and adopt an appropriate legal regulation of rights of minorities that assures their realization and protection; to guarantee realization of these rights, prevent their violations and establish appropriate mechanisms for the prosecution of their possible violators;[64] to provide for necessary (pre)conditions and infrastructure for the realization of (special) rights of minorities and their members especially in the education, culture, publishing, etc.[65]

As mentioned, this concept has been developed mostly as a theoretical model; however, some of its elements have been fragmentally introduced in legal systems and in practice of some states.[66]

V.2. Ethnic policy of states

States always underline that ethnic policy and legislation, including the issues of ethnic relations and minority protection, belong to internal affairs of every individual states. Nevertheless, ethnic policy of modern states has several implications in dimensions. There are several internal and external factors that condition and shape the formulation of ethnic policy of a certain state.

Ethnic policy is in its internal dimension extremely important for democratic development of modern ethnically plural societies. Ethnic tolerance and high level of

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[64] An obligation of the state to actively prevent violations by its preventive activities shall be established in this case. In this context different additional mechanisms (such as special commissions and inspections, "ombudsman" offices, participation of minorities and special procedures of decision-making, etc.) shall be introduced in order to prevent violations of the special rights of minorities.

[65] In order to make the realization of some of special rights of minorities possible, a state should: provide funds to establish and develop special educational systems for the members of minorities and to assure their functioning; provide special regime of import taxes for books and other materials needed to preserve and develop national identity and culture of minorities and their members; assure additional funds for functioning of cultural and other ethnic institutions if a certain minority is not able to finance them itself, etc.

[66] Some elements of this concept have been introduced in legal systems and in political practice in Canada, Slovenia, and the former Yugoslavia. Some other states might sometimes use certain elements of a "positive concept" in their minority policy - mostly in the field of education of members of minorities (in their own language in order to preserve and develop their distinctive culture). This concept is advocated by members and representatives of ethnic minorities, some organizations (associations) of ethnic minorities, and some experts and scholars; but it is often not accepted well by (official representatives of) states and different politicians - especially members of nationalist political parties.

protection of ethnic minorities are elements of social stability and contribute to strengthening of social pluralism and democracy.

In its **external dimension** ethnic policy, first, influences bilateral relations with neighboring countries with regard to protection of traditional ethnic minorities and also immigrant communities; in this context states often use the principle of reciprocity. States use the issue of protection of ethnic minorities (and immigrants) in other countries to strengthen their position in negotiations, especially if there are historical, cultural, ethnic, linguistic and social connections and similarities involved.[67]

The external dimension of ethnic policy has also its global dimension which determines the position and treatment of a certain state in the international community. Ethnic policy and protection of minorities are still considered to be internal affairs of each states, other states and the international community might address these issues and request the implementation and/or fulfillment of certain minimal standards in the context of human rights.[68] These issues may become an important criterion for the international recognition of individual states, and an important item on the agenda in negotiations on succession of the former states.[69]

V.3. Political difficulties in the formulation of ethnic minority policy and legislation

When it comes to the formulation of ethnic minority policy and legislation, states encounter several political difficulties. It is necessary to address some politically sensitive issues that could often increase tensions in a certain country, and sometimes, because of the strengthening political polarization, also endanger political stability. These issues are, e.g.:

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[67] In this cases states of "mother-nations" of respective ethnic minorities feel their responsibility for the position and protection of these minorities.

[68] Severe violations of these rights and mistreating of ethnic minorities and immigrants have sometimes provoked critical reactions and condemnation of a certain state by different international fora and other states; there has often been some pressure by media and international public to react in such cases, but very seldom some concrete diplomatic and political actions of the international community have been taken. In a few cases, continuing and severe violations of rights of minorities provoked the international community to actually intervene in a certain state in order to prevent further violations. Such a collective international intervention coordinated by the UN took place regardless of the opposition of the government of the respective state (e.g. no-fly zone in Iraq); these actions were described as the **"(international) humanitarian intervention"** which is a rather new and contradictory concept in international law.

[69] The issue of the protection of ethnic minorities was stressed by the international community in the case of the Yugoslav crisis. The satisfactory level of the constitutional/legal protection of ethnic minorities was put up by the European Community (on the basis of the report of the international expert consultative commission led by Badinter) as one of the main preconditions to recognize officially the independence of newly established states - former Yugoslav republics. This position and criterion was supported officially also by the U.S. government, and was applied in the context of the formal international recognition of the independence of the former republics of the Soviet Union.

- **Multicultural approach or integrationalism**: *Key concepts in integrationalist approach "are equality and non-discrimination, with the implication that minority rights are seen as exclusively individual rights, and that special rights for members of minorities are easily regarded as discriminating for member of the majority. In the multicultural approach, emphasis is on positive measures, preserving group identity, and group participation in the country's life on all levels; in this approach, minority rights are considered to be necessarily group rights".* (BENOÎT-ROHMER, HARDEMAN, 1994: 33) The main characteristic of the multiculturalist approach is the recognition of dual, both individual and collective nature of minority rights.

- **The problem of official recognition** of ethnic pluralism and the existence of ethnic minorities by the state is usually very sensitive political problem that can contradict e.g., the officially declared concept of the one-nation-state. That is why several states, *inter alia* France, Greece, and Turkey, refuse to recognize the existence of ethnic minorities in their domestic legal order. By denying the existence of ethnic minorities, they also refuse to apply provisions and standards set down by the international law. Some states admit the existence of ethnic minorities implicitly. A number of states recognize the existence of ethnic minorities explicitly, and provide them certain legal minority protection. Also in these cases the issue of the official recognition and determination of legal status is extremely important for every minority group, because it defines the concept and nature of its minority protection.

- States often express their fear that numerous calls of ethnic minorities (and other distinct communities) for **territorial and functional autonomy** might conflict with **the principle of sovereignty of states**. On the other hand, minorities and their members stress the importance of autonomy of minorities for the preservation and development of their identity and culture. States and minorities often hold different views also of the autonomy of minorities in establishing and maintaining their contacts and cooperation *"across frontiers with citizens of other States to whom they are related by national or ethnic, religious or linguistic ties"* (Art. 2, Para. 5 of the Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities, 1992), and the possible negative effects of such a cooperation on sovereignty of the state of citizenship of members of minorities.

- **The principle of territorial integrity and the right to self-determination**: International law provides that *"all peoples have the right of self-determination"* by the virtue of which *"they freely determine their political status and freely pursue their economic, social and cultural development."* (Art.1, Para.1 of the International Covenant on Economic, Social and Cultural Rights, and of the International Covenant on Civil and Political Rights) We can distinguish an internal self-determination to freely chose a government and/or to increase autonomy within an existing nation-state from an external self-determination that leads to the creation of a new independent and sovereign state.[70] In the European tradition, we could define the right of peoples to self-determination as a collective right of nations. In principle it should be realized as

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[70] In this context, we should differentiate the following options: **(i) internal self-determination** by: **(a)** devolution and increasing autonomy of local government; **(b)** regional autonomy; **(c)** creating a federal state system; and **(ii) external self-determination** by: **(a)** secession (of a certain region or part of territory of a formerly existing state); **(b)** partition or division of a state; **(c)** by dismantling a state.

the right of the population living in a certain territory by the plebiscite (referendum); the participation in the plebiscite should be assured to everyone in the territory who has a right to vote. The decision shall be made by the majority of the total population in the territory and not only by the majority of members of a certain nation. When it comes to national (ethnic), linguistic or religious minorities they should be normally entitled only to an internal self-determination. Only in extreme cases when the very existence of a certain national minority is endangered it might be entitled to an external self-determination. (GYURCSÍK, 1993: 20-25)

V.4. Models of protection and participation of minorities in individual states[71]

As mentioned, minorities always request that their adequate participation is guaranteed in the political life and decision-making processes in order to ensure the preservation and development of their distinctive ethnic identity, culture, religion and/or language. In addition, minorities usually underline that an adequate participation could be assured only if a certain level of (territorial and/or functional) autonomy of minorities exists.

States respond to these requests in different ways by implementing chosen models of political system and participation of ethnic minorities in political process. There are several different concepts and models of political systems and of protection and participation of ethnic minorities - some of them are used in the practice while the others are mainly theoretical models. Regarding political participation of minorities, we can define (for the purpose of this study) the following groups of political systems and models of participation of minorities:

(i) No special mechanisms of participation of minorities exist within a political system: Political systems of a large majority of states can be listed in this group. We could differentiate two different types of states in this context:

- states whose constitutions do not contain any special rights of ethnic minorities;
- states whose constitutions list some special rights of minorities, but their constitutions and legal systems don't provide any mechanisms that would guarantee and/or carry out the protection of ethnic minorities and their participation in the decision-making processes in a political system.

If we focused on the participation of minorities as distinct communities in decision-making processes within a political system of such states, we find out that there aren't any special constitutional/legal provisions that would guarantee the presence of special representatives of minorities in the parliament and/or any other similar institution. A member of a certain minority could be elected only if he or she wins the general elections - as every other member of parliament (MP). However, this MP doesn't have a special status and competencies as a representative of a certain minority.

(ii) Special protection and representatives of minorities in the parliament exist, but there are no special mechanisms to assure the influence of these minorities on decision-making: In these cases constitutions do not guarantee only rights of persons belonging to minorities and sometimes collective rights of ethnic minorities, but assure

[71] More about different models see e.g. PALLEY, 1982/1978: 11-19; ŽAGAR, 1994 & 1990: 180-397.

also a special system of representation in the parliament or similar legislative body. On the other hand, there are no special constitutional/legal mechanisms that would enable the MPs or specific bodies representing minorities to effectively influence adopting of decisions and realize specific interests of minorities.

The existing electoral law could offer different solutions, systems and models that should assure the guaranteed representation of minorities in the legislative body.[72] Such possibilities are e.g.:

- to shape some electoral districts (units) so that members of a certain ethnic minority represent a majority of voters in these districts;[73]
- to establish special (functional) electoral systems for the members of a certain minority, regardless where they live and possibly regardless their number. In this cases, Mps, who are representing a certain minority, are elected only by members of this minority;[74]
- to introduce a territorial - regional or federal - division of a state which respects ethnic structure of a population (electorate), where every territorial unit has a certain number of MPs (possibly in a special chamber of territorial units). A special requirement could be that the ethnic structure of the "delegation" (MPs) of a certain federal/regional unit reflects ethnic structure of its population. Territorial units, where members of minorities live, could have a special autonomous status that provides the better realization of special rights of minorities. Additional provision could assure the minimal representation of minorities and distinct communities in legislative bodies;[75] etc.

The consequence of the introduction of any of the mentioned solutions is an (relative) over-representation of minorities or smaller units in the parliament. In view of many scholars taking into account actual situation of minorities in plural societies, such an over-representation is necessary in order to assure their adequate

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[72] For more detailed information about different electoral systems and their effects see, e.g., in Manfred J. HOLLER (ed.), 1987: 283-404, and especially chapters by: Geoffrey ROBERTS, " 'Representation of the People': Aspects of the Relationship between Electoral and Party systems in the Federal Republic of Germany and the United Kingdom, pp. 283-301; Tatu VANHANEN, "What Kind of Electoral Systems for Plural Societies? India as an Example", pp. 303-315; Lawrence LEDUC, "Performance of the Electoral System in Recent Canadian and British Elections: Advancing the Case for Electoral Reform", pp. 341-358; Kenneth KOFORD, Linda HECKERT, "Determinations of the Number of Legislative Parties: Evidence from Postwar France", pp. 371-380.

[73] The electoral law could provide also an additional mechanism to provide the representation of minorities if this model is introduced: namely, the law could require a certain obligatory percentage of candidates - among all candidates who are running the elections - be members of a certain minority.

[74] Such a model, that was introduced e.g., at the first multi-party general election in Slovenia in 1990, guaranteed that only members of minorities themselves (regardless where they live) elected their MPs. Polling stations for these MPs are usually located in the region where a certain minority traditionally lives. An additional protection of the interests of minorities, if such a model is introduced, could be a guarantee that a certain number of representatives is elected regardless the number of voters who are members of a certain minority. Such solutions would be in accordance with **the basic principle that the rights of minorities and their members should be guaranteed regardless their number**.

[75] This model could be combined with the former two: namely, electoral units in a certain territorial unit of a state cold be shaped in a way that in some of them voters, who are members of a certain minority, represent a majority of voters; if such a solution would not guarantee an appropriate representation of minorities a special (functional) electoral system for the representatives of minorities could be introduced.

representation in the parliament, although it may represent certain deviation from a proportional electoral system in states where it is introduced. (LIJPHART, 1977: pp. 38-41)

(iii) Besides special protection and adequate representation of minorities, the constitutional/legal system guarantees special mechanisms and procedures that could assure the influence of these minorities on decision-making and realization of their specific interests: According to existing constitutional/legal regulation, such special mechanisms and procedures could be applied by MPs representing minorities or different minority institutions/bodies who are legally authorized to use these special procedures and mechanisms in decision-making.

Among different procedures and mechanisms that could assure adequate influence of minorities on decision-making, I would mention the following:

(a) MPs, who are representing minorities, could ask to postpone debate and decision-making in the matters that are important for the realization of special constitutional rights of minorities; such a postponement (a kind of conditional or procedural veto) should enable additional time to debate these matters and to find the best solutions;

(b) MPs, who are representing minorities, are legally authorized so they could ask (in accordance with legal provisions) for the use special procedures in the parliament or approval in a referendum to decide on matters that are relevant for the realization of special constitutional rights of minorities. In some cases, a special (e.g. two-third or three-quarter qualified) majority may be required in the parliament to adopt a decision. In some, the most important matters (even) a decision by a consensus may be foreseen by the constitution or/and an approval in a referendum may be required by the constitution (e.g., in Switzerland).[76] Special procedures that require a special (qualified) majority or a consensus could be described as a kind of a minority veto, that assures that decisions especially important for rights of minorities could not be taken without an approval of representatives of minorities; (LIJPHART, 1984: pp. 29-30, 35-36, 189-191)

(c) a (theoretical) model of asymmetrical decision-making offers a mechanism that enables distinct communities to adopt only those decisions that do not contradict their special interests. The decisions that would not be accepted by a certain distinct community, should not be obligatory for this community. Nevertheless, such decisions and documents that would be adopted in the parliament, would be obligatory for everybody else. The constitution has to list all cases and matters when the asymmetrical model of decision-making could be used. The constitution and legislation shall exactly define the procedure for the application of this model, and how a certain issue should be regulated in accordance with specific interests of the distinct communities that chose to use the asymmetrical model. (ŽAGAR, 1990: pp. 337-397)

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[76] Such special procedures and adoption of decisions by special majorities are especially important in the process of constitution-making. The fact, that the constitution could be changed only in a special procedure and by a special majority, shall guarantee the stability and existence of constitutional rights of minorities and their position in the society. In some cases a public initiative of citizens to put forward proposals for legislation or to require an approval of a law or decision by a parliament in a referendum (such as in Switzerland) may be very important.

V.5. Trends of development

If we analyzed a list of principles and minority rights that are set down by international documents, such as the framework Convention for the Protection of National Minorities (See e.g, *Human Rights: A continuing challenge for the Council of Europe*, 1995: 47), and compared it with documents from previous phases of historic development of minority rights and protection, we could easily establish a general historical trend. Although there were some set-backs and even reverse trends, the evolution was characterized by gradual expansion of existing rights and introduction of new minority rights. Rights of minorities became an important segment of human rights.

Nevertheless, states are reluctant in introducing or increasing (special) rights even for traditional ethnic (national), religious, cultural and linguistic minorities. (BARON, 1985; BROLMANN, LEFEBER, ZIECK, eds., 1992; GALÁNTAI, 1992; THORNBERRY, 1990; WHITAKER, ed., 1984) States advocate their position claiming that the introduction of new special rights of minorities would be (very) costly, and would cause delays and additional complications in the functioning of their political systems.

International law established some general principles and standards of Human rights and rights of minorities that are considered one of the important criteria of modern democracy. Nevertheless, minority policy and protection of ethnic minorities have been generally considered internal affairs of every individual state; states have traditionally rejected any interference in these issues from abroad. They often didn't feel obliged to adopt and assure rights and standards developed by international law. It was and still is most of all the political decision of individual states whether to accept and realize these rights and standards or not. Although there was a recognition that the obligation of states to protect ethnic minorities was established by the international law, there was hardly anything done against countries that violated it.

It is a very new development that the international community actually reacts at least in some cases: the UN introduced "non-fly zones" in Iraq and Bosnia-Hercegovina to protect ethnic minorities and prevent genocide; protection of ethnic minorities was listed by the European Community as one of conditions for the official international recognition of the new states emerging from the dismantling Yugoslavia, etc. But still it seems that the International Community and its main powers react only occasionally when it seems convenient; limited practical results of such attempts and general lack of determination to execute proclaimed principles and policies put their credibility at stake. (KOCH, 1993:3-5)

We could expect that further development of protection and rights of ethnic minorities will be slow both at national and international level; it will take some time and efforts of minorities before several states will be willing to accept and translate already existing international standards of protection of ethnic minorities into their national law and ethnic policy. At the same time we could hope that at least some rights that international law and national legislation provide for traditional ethnic

(national) minorities will be granted to **other distinct communities** and minorities.[77] (ŽAGAR, 1990: 292-294)

VI. Rights of immigrants and immigrant communities[78]

Demographic situation and ethnic structure of population in a certain territory are changing in time. Mobility of population and migrations are important factors of these changes - both in emigrant and immigrant societies. Modern technologies and better mobility of people have resulted in increased migrations and ethnic diversity.[79] New immigrants and their communities are changing traditional ethnic structure; these processes are intense especially in more developed regions and countries. New distinct communities are being created. Old and new communities meet and influence each other; new dynamics are transforming the nature and culture of such an environment. Although these new communities in many ways resemble traditional ethnic minorities, states differ them and treat them differently; they define individual members of immigrant communities officially as **immigrants** or **migrant workers** which determines their legal status.

If at least a few constitutions and legal systems provide different arrangements and mechanisms of protection and participation of traditional ethnic minorities (e.g. PALLEY, 1982: 6-19; ŽAGAR, 1992 & 1992a), there is practically no protection for (new) immigrants and immigrant communities. These immigrants came to countries of their current residence relatively recently, although in some case two, three or more generations ago; they are usually not citizens of a country of their current residence, and therefore do not have rights based on citizenship of this country.[80] As individuals immigrants without a citizenship have a legal status of aliens or resident aliens, and they enjoy basic human rights that belong to any person regardless of citizenship; as distinct communities their existence is legally not recognized at all. There are a few developments in different international documents (e.g. EC/EU, ILO) and law that are establishing at least some basic protection and social security of migrant workers. Although there is a belief that a protection similar to that of traditional ethnic/national minorities should be provided for immigrants and immigrant communities as new ethnic minorities, it is very unlikely that such a development is possible soon due to

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[77] E.g., new standards of **protection of migrant workers** and immigrant communities are being developed (at international level especially within European Community/Union). Some questions in this context include problems of integration in immigrant community, citizenship and political participation of migrants at least at local level, special collective rights of migrant communities as groups to enable them preserve their culture and identity, etc. (See e.g. Community and Ethnic Relations in Europe..., 1991)

[78] A part of this text was published in: ŽAGAR, 1995a: 245.

[79] These migrations are mostly conditioned by economic and/or political factors. From individual perspective, people usually decide to emigrate, because they hope they can live better in a new immigrant society. In addition, there are several refugees driven from their homes by natural disasters and wars.

[80] This means that they do not have rights of citizens and especially political rights; thereby, they are basically excluded from political life. They can get these rights only if they become citizens of a country of their residence, which in some cases is extremely difficult.

objections of most nation-states.[81] A problem in this context is also they usually live scattered in the territory of the state of immigration; additionally, in larger economic centers there are often members of several diverse immigrant communities with their specific (sometimes conflicting) cultures, needs and interests.

If an immigrant became a citizen of a state of immigration (where he/she resides) by naturalization, he/she as an individual acquires usually all rights that the constitution and legislation of a certain state provide and guarantee to its citizens. As mentioned, states do not recognize officially the existence of distinct immigrant communities and do not provide any special mechanisms of protection of these communities and their members; the fact that an individual becomes a citizen changes nothing in this context. Nevertheless, immigrants with citizenship have all political rights; they can participate in the political process, and try to influence decisions important for the preservation and development of the distinct identity, culture and life of their immigrant communities.[82]

VII. The case of Slovenia[83]

The Constitution of the Republic of Slovenia was adopted by its parliament in December 1991.[84] This happened after the independence of the republic had already been achieved in the practice, a few days before the already announced official international recognition of independence and sovereignty of Slovenia by the EC took place.[85] The adoption of the constitution followed the process of its drafting that took

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[81] See e.g: Community and Ethnic Relations in Europe: Final Report of the Community Relations Project of the Council of Europe, Council of Europe / Conseil de l'Europe, MG-CR(91) 1 final E, January 1993.

[82] In case of some international integrations, there are some attempts to create a special legal regime for citizens of members states who live in other member states; in this context, they should have the right to participate in local elections and in elections of their local/regional representatives at the level of the international integration (e.g. European Union). (E.g. MEEHAN, 1993)

[83] The following text is mostly taken from: ŽAGAR, 1995a: 246-249.

[84] The Constitution of the Republic of Slovenia of December 23, 1991, Official Gazette of the Republic of Slovenia, No. 33/1991. The official english translation: Constitution of the Republic of Slovenia, Časopisni zavod Uradni list Republike Slovenije, Ljubljana 1992.

[85] The adoption of the Basic Constitutional Charter and proclamation of independence and sovereignty of Slovenia (Official Gazette of the Republic of Slovenia, No. 33/1991. The official english translation: Constitution of the Republic of Slovenia, Časopisni zavod Uradni list Republike Slovenije, Ljubljana 1992.) on June 25th, 1991 triggered the intervention of the federal army (Yugoslav People's Army) in Slovenia. This was the beginning of the "Ten Days War" in which the federal army failed to take over international border crossings (that were after 1974 controlled by a republic police) due to the successful resistance of Slovenia. This war was followed by the Brioni Agreement (signed on July 7th, 1991) that provided for a six-month period in which the future arrangements in the former Yugoslavia were to be negotiated. Based on the decision of the Presidency of the SFRY the last federal soldier left Slovenia on October 26th, 1991. On January 15th, 1992 the EC countries officially recognized the independence and sovereignty of Slovenia after the six-month period expired and no viable solution was achieved by negotiations.

more than two years,[86] in which all the important issues - including protection of ethnic minorities in Slovenia - were discussed.[87]

Based on principles proclaimed by the Declaration on Intents of the Assembly of the Republic of Slovenia and the Basic Constitutional Charter on the Independence and Sovereignty of the Republic of Slovenia, the consensus was reached that the level of the protection of ethnic minorities should not have decreased in comparison with the level of protection of ethnic minorities guaranteed by the amended Constitution of the Republic of Slovenia of 1974. In this context, the "**positive concept of protection of ethnic minorities**" was enacted by the Constitution of the Republic of Slovenia of 1991 to a large extent.[88] The Constitution recognizes also dual nature of (special) rights of ethnic minorities. They are defined as collective and individual rights of *"autochthonous ethnic communities and their members."* As collective rights they belong to ethnic minorities as distinct communities; as individual rights they belong to every member of a certain ethnic minority. Concerning their nature, some of the rights are realized mostly as collective rights while others are realized mostly as individual rights.

The Constitution of the Republic of Slovenia of 1991 followed the mentioned common practice and provided only for protection of autochthonous traditional national minorities. Taking into account the initiatives of the representatives of ethnic minorities in the Constitutional Commission, the constitution with the term ***"ethnic community"*** to avoid the possible negative connotations of the use of the term "minority".[89] (ŽAGAR, 1992a: 8)

There are several provisions of the Constitution of the Republic of Slovenia of 1991 that are important for the protection of ethnic minorities. Article 5 provides the constitutional framework of the "positive concept" of the protection of minorities by

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[86] In a way, this process started in 1989 with the activities on amending of the Constitution of the (Socialist) Republic of Slovenia of 1974 in 1989-1991.

[87] Different concepts of the protection of ethnic minorities were presented and advocated in the Constitutional Commission of the assembly/parliament in the process of drafting. Some members claimed that every kind of special protection of ethnic minorities is incompatible with the main basic principle (of liberal democracy) of equality before law, others suggested to implement an absolute reciprocity taking into consideration the position and rights of Slovene minorities in the neighboring countries, while some advocated that (at least) all existing rights of ethnic minorities, their protection and special position should have been guaranteed constitutionally.

[88] The "positive concept" was developed as a theoretical concept based on the classification of human rights into rights of "positive" and "negative status." The rights of "negative status" entitle their subjects to the protection of the state in cases these rights are violated by the someone else. The rights of "positive status" entitle their subjects to demand certain action from the state to realize them. Taking into account this division, the "positive concept of protection of ethnic minorities and their members" means a special obligation of the state to act in order to assure the realization of special rights of ethnic minorities and their members. The "positive concept" in the constitution and legislation: **(i)** establishes minorities (as distinct communities) and their members (as individuals) as active and equal subjects in a plural society and its political system, and provides for their participation and decisive role in political decision-making; **(ii)** requires active role of a state in protection and realization of (special) rights of minorities. The very fact that the state would not act would establish a violation of the constitution and law by the state and its moral and legal responsibility for consequences. (ŽAGAR, 1992a: 10-11)

[89] The term "minority" in everyday's language often refers not only to the quantitative but also to qualitative characteristics of a certain phenomenon. The term "ethnic community" in the constitution is politically more neutral, and in a way underlines active and equal social role and position of these communities. For the same reason, the former Yugoslav and Slovene constitutions (of 1974) and official political practice used the term "nationalities" to replace the term "ethnic minorities."

declaring the active role of the Slovene state in the protection and realization of rights of Italian and Hungarian autochthonous ethnic communities in Slovenia. This article defines also the active role of Slovenia in attending to the welfare of Slovene autochthonous minorities (in the neighboring countries), emigrants and migrant workers, and in promoting their contacts with homeland. Slovene (Slovenian) is declared the official language, but Article 11 enacts that also Italian and Hungarian shall be official languages in those areas where Italian and Hungarian ethnic communities reside.

The main general and special provisions regarding protection and special rights of ethnic minorities are located in Part II. of the Constitution entitled "Human Rights and Fundamental Freedoms". Besides general provisions on equality before law (Article 14), profession of national allegiance (Article 61), the right to use one's own language and script in official dealings and proceedings (Article 62), the Constitution prohibits and incriminates *"all incitement to ethnic, racial, religious or other discrimination, as well as the inflaming of ethnic, racial, religious or other hatred or intolerance"* (Article 63).

Article 64 regulates special rights of autochthonous Italian and Hungarian ethnic communities in Slovenia explicitly stating that they belong to ethnic communities (as collective subjects) and their members (as individuals). They shall have right to use their language and national symbols, to foster economic, cultural, scientific and research activities, their mass media and publishing, and to establish organizations in order to preserve their national identity. Regarding their educational rights, they are entitled to education and schooling in their own languages which includes planing and developing their own curriculae. Statutes shall determine where and how special rights of minorities shall be realized and guaranteed, and also areas in which bilingual education shall be compulsory. The two communities have enjoy the right to foster their contact with their wider ethnic communities and with Italy or Hungary respectively. The Slovene state has the duty to financially and morally support and encourage the implementation of these special rights.

Political participation of both communities at local and national level is guaranteed by the Constitution. In this context, the constitution provides a ***minority veto*** as an additional mechanism of the protection of minorities in the process of decision-making within political system. (LIJPHART, 1984: 29-30, 35-36, 198-191) Article 64 further states that Italian and Hungarian ethnic communities are guaranteed the right *"to establish autonomous organizations in order to give effect to their rights"*. At the request of the autochthonous ethnic communities, these organizations may be authorized by the state to carry out specific functions within the jurisdiction of the state; in such cases the state should provide necessary means and resources.

The Constitution enacts also that all special rights of autochthonous Italian and Hungarian community are guaranteed regardless of the number of members of these two minorities.

Article 65 of the Constitution of the Republic of Slovenia of 1991 states that *"the status and special rights of Gypsy communities in Slovenia shall be such as are*

determined by statute."[90] Roma/Gypsies are considered autochthonous ethnic communities (minorities) in Slovenia, although they have no mother state to exercise special connections with it. The specific way of regulation of the status and special status of Roma/Gypsy communities in the Constitution is conditioned by their specific situation and status.[91] The special statute shall establish an adequate protection and status of Roma/Gypsies and their communities in Slovenia; it has to be drafted and adopted with a direct participation of their representatives to assure regulation that will correspond to their actual situation, interests, needs and wishes.

Article 80 in the Section A. "The National Assembly" of Part IV. "The Administration of the State" guarantees that autochthonous Italian and Hungarian communities shall always be represented directly by one deputy each in the National Assembly - a House of Representatives in the republic parliament. This provision actually establishes direct representation and political participation of these minorities in the legislative process at the national level.

VII.1. Immigrants and immigrant communities

Members of other former "Yugoslav nations and nationalities" mostly came to Slovenia as economic immigrants from less developed parts of the former Yugoslavia after World War II, and represent some 10% of population of Slovenia. Some of them were to stay temporarily to economically support their families still living in the republic of their origin, but most of them settled in Slovenia where they also brought or founded their families. Most of them who had a permanent residency in Slovenia applied for Slovene citizenship (by naturalization) and were given it in a special procedure on the basis of Article 40 of the Law on Citizenship.[92]

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[90] The Roma - Gypsy communities live autochthonously in different parts of Slovenia (most of them in the Prekmurje and in the Dolenjska region). Some of them still live traditionally as travelers and traveling craftsmen (especially in the Dolenjska region and some families also in other parts of Slovenia); some of them have changed their style of living and live in the permanent settlements (mostly in Prekmurje). Their economic and social situation is often very difficult, and there are many social problems (unemployment, breaking of the law, etc.). There are some problems especially with the travelling families and their integration in a certain local community, where Roma (because of their specific way of living) are seen as unwanted invaders who disturb the normal life of the local community. It was an important development when the rights of Roma were included for the first time in the Slovene constitution by Amendment LXVII (67) in 1989, and the Constitution of the Republic of Slovenia of 1991 basically adopted the same text.

[91] Roma/Gypsy communities are relatively small and very dispersed in the territory of Slovenia; their way of life and settlement makes their situation very different from other autochthonous ethnic minorities. There is a little or almost no sense of common identity among the members of their communities and not much has been done to develop and promote their specific culture; the level of the education among the members of Roma ethnic communities is low, and yet in the last twenty years there have been some attempts to include their language and culture in the educational programs in primary schools in the local communities where they live. Many problems concerning the education of Roma children were connected with the fact that they didn't speak Slovene language, and that they were not traditionally socialized in a way that would be compatible with the one in schools. There are hardly any forms of cultural, social and political integration of this community, and also some of the existing (mostly cultural) associations find it difficult to cooperate; etc. (E.g., *Romi na Slovenskem*, 1991)

[92] The Law on the Citizenship of the Republic of Slovenia (Official Gazette of the Republic of Slovenia, No. 1/1991) was adopted in the same session of the republic assembly (on 25 June 1991) when also The basic constitutional charter on the independence and sovereignty of the Republic of Slovenia was adopted. According

As Slovene citizens they enjoy all constitutionally provided human rights and freedoms, among them political rights with the right to assembly and association[93] which enables them to establish organizations and cultural in order to prevent, foster and develop their ethnic culture. They also enjoy the right to use their language and script, express and develop their specific ethnic culture; they may freely express their ethnic identity (but should not be forced to do so), and this should not be any factor of their discrimination.[94]

On the other hand, the Constitution of the Republic of Slovenia of 1991 did not establish any special individual or collective rights of immigrants and their communities. Special rights and protection are guaranteed only to autochthonous typical ethnic minorities. This is in accordance with general practice in the world. The status and position of immigrants in Slovenia is actually better than it is in other countries taking into account that most of them became citizens of Slovenia.

Citizens of the former Yugoslavia and other foreigners who live in Slovenia and are not Slovene citizens, because they did not apply for citizenship or did not fulfill required conditions for naturalization, are in their legal status aliens. If they acquire a permission for permanent residency they may become resident aliens in accordance with law. They enjoy all the rights that the Constitution and legislation provide for foreigners - including the right to cultural association as one of their individual rights.

VII.2. Characteristics of the case of Slovenia

If we compared the (special) rights and protection of ethnic minorities and immigrants in the Constitution of the Republic of Slovenia of 1991 with international standards and other constitutions, we may conclude that it follows the highest existing standards and even exceeds them with regard to special rights and protection of autochthonous ethnic minorities.

Nevertheless, there may be a few issues and problems that should be addressed in this context.

Constitutional standards need to be translated into laws to be fully applicable, which will take some time. Taking into account economic and social problems in Slovenia and the rise of xenophobia in the world, social conditions may not be the most favorable to actually realize and maybe develop existing level of protection. Some problems in relations with neighboring countries may also have a negative effect, as they strengthen those who advocate the principle of reciprocity in protection of

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to Article 39 of this law, everybody who had citizenship of the Republic of Slovenia and SFRY at the time of independence of Slovenia became citizen of the Republic of Slovenia. Article 40 provided for a special procedure for the acquisition of Slovene citizenship (actually, by naturalization) for every citizen of the former Yugoslavia who had a permanent residence and actually lived in the territory of the Republic of Slovenia on 23 December 1990, the day of the Plebiscite, and who applied for the Slovene citizenship within six months after the adoption of this law. More than 170,000 Yugoslav citizens without Slovene republic citizenship applied for and were granted Slovene citizenship in accordance with Article 40. Within six months their applications could have been refused only if their applications were incomplete or if they had participated actively in the aggression against Slovenia (as members of the Yugoslav federal army in the - so called - "Ten Days War").

[93] See: Article 42 of the Constitution of the Republic of Slovenia of 1991.

[94] See Articles 14, 61 and 62 of the Constitution of the Republic of Slovenia of 1991.

minorities - which would in the case of Slovenia mean lower standards of protection of minorities in Slovenia.

In addition to the already mentioned problems of Roma, the factors mentioned in these general remarks will influence also the work on the special statute on the status and special rights of Roma/Gypsy communities in Slovenia.

In the context of protection of autochthonous ethnic minorities in Slovenia, we shall add that there are also some other very small autochthonous minorities in Slovenia, e.g. some autochthonous Croats and Serbs, Germans, Austrians, Jews, Vallach, etc. Although the number of members of these communities is very small (all together a few hundreds) and partly because of that, there will be a need to assure their existence, preservation and development of their culture.

With regard to the problem of immigrants who became Slovene citizens, one could expect that there will be some demands to introduce some special collective rights to preserve and promote their specific cultures and assure their direct political participation. Taking into account general social conditions in Slovenia it is not very likely that such requests will be accepted.

There is no doubt that immigrants and distinct immigrant communities in many ways resemble traditional ethnic minorities (that often emerged as a consequence of migrations themselves). But observing from the global perspective it is not likely that similar level of protection will be developed for immigrants. The existing international standards and level of their protection are rather low, and states are rather reluctant to implement even these standards. (E.g. COSTA-LASCOUX, 1990) It is rather unlikely that even some existing standards and solutions in the protection of traditional ethnic minorities will be applied to protect immigrants and their communities; taking into account some recent developments, practice of states, and growing xenophobia in several countries one might fear that the situation and protection of immigrants in these countries might even worsen.

VIII. Conslusion

The protection of minority rights and good ethnic relations are generally accepted as an important element and prerequisite of modern democracy. On the other hand, the existing model and concept of the "(one)nation-state" seems to ignore such a conclusion; there has been no or very little change in the concept of political system of nation-states that is still based on abstract theoretical models built on the presumption of the symmetrical, ethnically homogenous and harmonious society.

In the context of growing ethnic diversity in most environments, there is obviously a need for a new model of the state, ethnically speaking as neutral a "body politic" as possible. Such a state should recognize and promote the existence of ethnic and cultural pluralism. Its political system should be built on the principles of inclusion, tolerance, cooperation, and recognition of ethnic, cultural and social plurality and diversity of its population. A political system should recognize the possibility of different conflicts, and provide channels for expression, coordination and realization of different specific interests. This political system should provide mechanisms for the protection and participation of distinct communities; it should develop also different

institutions, mechanisms and procedures for the prevention and management of possible conflicts (including ethnic conflicts), and offer different peaceful and democratic means and ways for resolution of existing conflicts.

To assure functioning of such a system people have to be informed about the multi-ethnic and multi-cultural structure and nature of their society. They have to know as much of different cultures as possible, and especially they should be taught to acknowledge and respect differences. It is important to create channels and ways of communication and cooperation among different distinct communities that will take into account cultural differences and a specific nature of every individual culture. This includes the creation of informal mechanisms for the management and resolution of conflicts.

I would argue that the ideology of such a system should be human rights, cooperation and democracy, but it has to take into account also different content and nature of these concepts in different cultures present in a certain society; it has to find the common and universal elements of these cultures, and build on consensus and compromise to prevent even the feeling and fear of inequality and domination.

As mentioned, international law plays an important role in the historical evolution of rights and protection of ethnic minorities. Several recent developments and increased standards of protection of minorities have yet to be translated from international law into national legislation of states. Due to the reluctance of some important states, it is likely that the pressure of the international community to introduce the highest existing international standards of protection of minorities in national legislation will be used rather seldom and selectively.

In the context of attention paid to human rights and protection of minorities at the level of the international community and regardless of passivity and opposition of some states, *"a rather comprehensive set of instruments to protect minority rights seems to have been constructed or, at least, seems to be under construction by the international community"* which includes *"the developments in the thinking about the legitimacy of intervention by the international community in the case of gross and systematic violation of human rights"* (KOCH, 1993: 3). These developments will influence constitutions and national legislation of states at least in a long run, and hopefully contribute to better situation of ethnic minorities in the future.

It may be expected, that the *"intervention by the international community in the case of gross and systematic violation of human rights"* will be at least in some cases used also in the future. The decision to apply the collective "humanitarian" intervention should be in every case made by the UN in accordance with the Charter; such a solution *"must be applied equally and respect the principle of proportionality"*. There might be a possibility that *"an obligation of international community to intervene when human rights are grossly and systematically violated"* could be developed in international law. (KOCH, 1993: 3, 4)

With regard to the protection of immigrants and distinct immigrant communities that in many ways resemble traditional ethnic minorities, the situation seems to be less optimistic. The existing international standards and level of their protection are rather low, and states are rather reluctant to implement even these standards. (E.g. COSTA-LASCOUX, 1990) It is rather unlikely that some standards and solutions in the protection of traditional ethnic minorities will be applied to protect immigrants and

their communities; taking into account some recent developments, practice of states, and growing xenophobia in several countries one might fear that the situation and protection of immigrants in these countries might even worsen.

The international community, media and especially international public can play an important role in promoting rights of minorities and new approaches in ethnic policy of states. There is a need to inform people about multi-ethnic and multi-cultural nature of modern societies; to overcome the fear of ethnic plurality all advantages and possible problems of increasing ethnic diversity should be presented. Media and international public are especially important factors of the promotion of the concept and ideology of cooperation that seem to be the basis of good ethnic relations in ethnically plural environment.

Reactions and protests of international public against violations of rights of ethnic minorities and immigrants can be a powerful factor in the process of formulation of ethnic policy of a state. Public pressure for the collective international humanitarian intervention in the case of gross and systematic violation of human rights might at least in some cases deter a government from such a practice.

The immediate strategy could be to put the pressure on governments to implement at least mechanisms and standards for the protection of ethnic minorities and regulation of ethnic relations that already exist in the international law and national legislation of different states. Governments should be pressed to sign and ratify international documents that regulate the protection of ethnic minorities and immigrants, to translate them into national legislation, and to increase national standards of their protection at least to the level of international standards. There is a need to change also the education and political socialization of citizens to at least recognize the existence of ethnic and cultural pluralism in a certain state; it is in this context that the importance of good ethnic relations and cooperation need to be promoted.

I believe that the present situation and developments in the world urgently requires development of alternative concepts that will be able to manage ethnically plural reality and assure some social stability necessary for the future democratic development. That is, why I offer a few elements of such an alternative concept in this conclusion.

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Povzetek

Evolucija koncepta zaščite manjšin: Mednarodno (javno) in ustavno pravo

Ta članek je rezultat večletnega raziskovanja pravnega urejanja medetičnih odnosov in v tem okviru zlasti še mednarodnopravnega in ustavnopravnega varstva etničnih manjšin. Podrobneje predstavlja družbeni in zgodovinski okvir, v katerem so nastajale in se uveljavljajo zaščita (etnične) manjšin in njihove posebne pravice, kot specifičen segment celote temeljnih človekovih pravic in svoboščin. V tem kontekstu analizira naravo, vsebino in vlogo države (zlasti nacionalne države kot njene specifične oblike) in mednarodne skupnosti ter njuno prepletanje in soodvisnost. Posebno pozornost namenja odnosu med narodom in (nacionalno) državo ter zgodovinskemu nastanku in opredelitvi etničnih manjšin.

Ob ugotovitvi, da splošno sprejete definicije etnične manjšine ne najdemo, članek ponuja kompleksno delovno definicijo etničnih manjšin in tradicionalnih narodnih manjšin. Članek deli zgodovinski razvoj pravic etničnih manjšin v tri ključne faze ter predstavlja bistvene značilnosti koncepta opredeljevanja in uresničevanja (posebnih) pravic manjšin oziroma njihovega varstva v posameznih obdobjih. Pri tem analizira in ocenjuje tako mednarodnopravno ureditev te problematike kot tudi njeno ustavnopravno ureditev, največ pozornosti pa namenja sedanjemu obdobju. Omenjene tri ključne zgodovinske faze razvoja (koncepta) manjšinskih pravic so:

(i) od Westfalskih mirovnih pogodb (1648) do konca prve svetovne vojne in mirovnih pogodb po njej;

(ii) od prve svetovne vojne do konca druge svetovne vojne;

(iii) obdobje po drugi svetovni vojni.

V nadaljevanju članek obravnava še problematiko urejanja medetničnih odnosov in varstva manjšin v Sloveniji, pri čemer podrobneje predstavlja uveljavljeni t.i. "pozitivni" koncept zaščite manjšin ter ustavnopravno varstvo avtohtonih narodnih manjšin.