Minority Participation and New Constitutional Law

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1. Introduction

The last fifteen years have marked an unprecedented period of constitution-writing, concentrated in new States in Europe but including landmark constitutions in every world region. The goals of inter-community cooperation and an accommodation between the sometimes conflicting claims of different ethnic or religious groups have moreover formed a central part of the constitutional project in countries as diverse as South Africa, Fiji, Afghanistan and many States of the former Soviet bloc. Distilling the lessons learned from this experience is a major and complex task, but one which may prove invaluable for other States where a constitutional process is envisaged.

In Europe and Central Asia, where some 20 new States were born after the end of the Cold War, part of this task has already begun under the auspices of institutions of the Organization for Security and Cooperation in Europe (OSCE) and the Council of Europe (CoE). The Lund Recommendations on the Effective Participation of National Minorities in Public Life,1 promulgated by the OSCE High Commissioner on National Minorities, include specific recommendations on constitutional safeguards, but also cover a range of other measures some of which one would expect to see reflected, at least in broad terms, in national constitutional law, including representation in the legislature and other branches of government, territorial devolution of powers and other options for self-governance, and availability of judicial review and other remedies. In addition, the European Commission for Democracy through Law (Venice Commission), the CoE’s advisory body on constitutional matters, has published a wide range of studies detailing comparative constitutional practice in relevant fields, including \textit{inter alia} electoral law, ethno-political conflict settlement, and self-determination.2

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What these exercises have in common is an attempt to go beyond the international legal obligations binding on States and develop a series of standards to guide a State’s constitutional approach to the public participation of minorities, informed by an analysis of what has proved successful elsewhere (in the sense that it is perceived to have contributed to the establishment or maintenance of stable, multi-cultural democracy). In some instances, particularly those concerning human rights, this will simply involve the restatement of an obligation from the relevant treaty – guarantees of freedom of association or prohibitions on discrimination, for example – or a principle directly extrapolated from it. In other instances, the Recommendations take the form of a series of options, albeit underpinned by constitutional law principles, whose adoption will depend on the specific circumstances prevailing in the State in question. The section of the Lund Recommendations on participation in central governmental decision-making, for example, effectively presents a tool-kit of options under four categories, any, all or none of which may be appropriate in a given case. The rejection in these Recommendations or new standards of a one-model-fits-all approach and the recognition that the demographic and socio-political features and even the history of a given State will determine the appropriateness of constitutional arrangements for minority participation raise a number of questions about the general applicability of the standards. How do we know that a measure which has led to a successful outcome in one State will not have a negligible or even opposite effect in another? Is the area of minority participation one from which it is more difficult to extract general rules than other areas of constitutional law? Is there an inherent tension between advancing the aims of (majoritarian) democracy and controlling factionalism, on the one hand, and promoting minority self-governance or minority participation in central government, on the other? Does the successful legislative implementation of standards on minority participation depend on the promotion of diversity or multi-culturalism being an explicit aim of the legislator? The report of the Venice Commission on ‘Electoral Law and National Minorities’\(^3\) notably finds that “the main conclusion which may be drawn from the foregoing analysis is that there is no absolute rule in this field” and then goes on to conclude:

“To sum up, the participation of members of national minorities in public life through elected office results not so much from the application of rules peculiar to the minorities, as from the implementation of general rules of electoral law, adjusted, if need be, to increase the chances of success of the candidates from such minorities.”

Who decides whether there is indeed a need for such adjustments? Given that one of the principal functions of a constitution is to prevent executive or legislative oppression, can a legislature be relied upon to make the necessary adjustments when they are not specifically required by the constitution?

As the rate of State formation in Europe declines, constitutional law experts will likely shift their attention elsewhere. To what extent are European regional standards or recommendations on minority participation applicable in other world regions? Do they assume a common constitutional tradition which may not be shared in Africa,

\(^3\) Ibid.