

Natural Law,
Agents and Patients
and Minority Rights

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Introduction

The decision to split this study into four parts has a conceptual as well as a pragmatic motivation. First, the task of defining the fundamental concepts – natural law, civil society, democracy, human rights, artifacts, group rights, self-determination, peoples, national minorities, legitimacy, operationalization – is necessary for the understanding of the subsequent steps. Encountering these notions along the way, the reader will understand them in a sense that is compatible with the author's framework.

The second part of the paper aims at an inclusion of minorities and groups issues into the logic of more general concepts: patients and agents (moral agents and moral patients, respectively). The point this second section of the paper tries to make is that the diversity of the subjects of law (from individuals through peoples through the intermediary entities) can be covered by a general concept. The frame of this conceptualization is that of natural rights. In its classical understanding, the subject of natural rights is the individual human being. I will use an extended conception of natural law, the subject of which is more general than the individual – who is only a specific case – namely the *agent* (the moral agent).

The third part is dedicated to the system of rights: individual rights, individual rights exercised collectively, collective rights exercised individually, and collective rights. The premise of this chapter is that the ›ensemble‹ of rights is an issue in itself and not just a derivative domain of the subjects of these rights. The assertion of rights, together with the solution to the problems of hierarchy and compatibility are goals in themselves. The extension of the agents' rights that we aim to realize and to further has limits that are related to the assurance of a compatibility among agents, and between agents and costs.

The last parts of the study looks into the implication of this conception on some traditional questions of political science and in particular on the issue of national minorities. The fruitfulness of the agent-theory is tested in this fourth section.

1 Background Concepts

1.1 Natural Law

There are scholars who consider the idea of natural rights, that is *the idea of rights resulting from the dignity and value of each human person*, as implicit in the Judeo-Christian teaching.¹ Recent studies find as precursors of natural law the Christian jurisprudence of the late twelfth century, William of Ockham (around 1300), Jean Gerson (around 1400), Suarez and Grotius, or later, Thomas Hobbes.² But John Locke is generally considered to be the actual father of natural law theory.

Among modern natural law theories, one could identify those conceptions which postulate a list of basic needs and interests that every level order must take into account. I call this category ›the minimal anthropology‹ approach. Herbert L. A. Hart developed a concept of ›human existence‹ defined by limited altruism, limited strength of will, limited resources, and limited understanding.³ Ernst Joachim Lampe proposed a ›negative natural law‹ relating to this category of needs.⁴ John Rawls advocated, in his turn, the existence of a set of primary goods that all individuals want to own regardless of their specific goals and their particular lives.⁵

The natural law theory in this study attempts to integrate the broader concept of moral agency and has a pragmatic and relativistic nature. One would quote, for instance, John Finnis: ›A sound theory of natural law is one that explicitly, with full awareness of the methodical situation just described, undertakes a critique of practical viewpoints, in order to distinguish the practically unreasonable from the

1. Jacques Maritain, *The Rights of Man and Natural Law*, New York, 1943.

2. Brian Tierney, ›Religious Rights: A Historical Perspective‹, in John Witte, Jr. and Johan D. van der Vyder (eds.), *Religious Human Rights in Global Perspective*, Martinus Nijhoff, 1996, pp. 26-27.

3. Herbert L. A. Hart, *The Concept of Law*, Clarendon Press, 1961.

4. See Winfried Brugger, ›The Image of the Person in the Human Rights Concept‹, in *Human Rights Quarterly*, vol. 18, no. 3. August 1996, pp. 594-612.

5. John Rawls, *A Theory of Justice*, Harvard University Press, 1971.

practically reasonable, and thus to differentiate the really important from that which is unimportant or only by its opposition to an unreasonable exploitation of the really important. A theory of natural law claims to be able to identify conditions and principles of practical right-mindedness, or good and proper order among men and an individual conduct. Unless some such claim is justified, analytical jurisprudence in particular (at least the major part of it) and all the social sciences in general can have no critically justified criteria for the various concepts peculiar to particular people and/or to the particular theorists who concern themselves with those people.⁶ Roberto Unger endorses the same idea, noting that human beings are at the same time contextually-dependent and contextually-transcendent, meaning that humans will always ultimately settle down to live with some framework⁷ and no social framework (or finite sequence of them) will fully satisfy humans and they will always possess the power to step outside of their framework.⁸ Such positions respond to criticism against natural law worded by Bentham, Austin, Kelsen, Weber, Hart or Raz.

I would describe the approach apparent in this evolution of the Natural Law concept in the following terms: (1) deriving the legitimacy of a modern legal system as a whole from the formality and systematic nature of legal procedures is a contradiction in itself; (2) even if people reach a consensual agreement on a certain legal system they need to add to that agreement a ›right bridge‹, the agreement being merely an increased probability for the ›right‹.⁹ This bridge is the ›signature‹ of the ›minimal anthropology‹ which human rights presuppose.¹⁰

6. John Finnis, *Natural Law and Natural Rights*, Clarendon, 1980, p. 18.

7. Roberto Unger, *Social Theory: Its Situation and Its Tasks*, Cambridge University Press.

8. *Ibid.*

9. This is Habermas' approach in his *Discourse Ethics*, that Jean L. Cohen and Andrew Arato synthesize in the following way: ›The factual recognition of a norm by a community merely indicates that the norm could be valid. Its validity can be ascertained only if we make use of a 'bridge principle' that establishes a connection between the process of will formation and the criteria for judging the acceptability of a particular norm.‹ See Jean L. Cohen and Andrew Arato, *Civil Society and Political Theory*, MIT Press, 1994, p. 350.

10. The bridge presupposes a minimum set of empirical data – such as that supplied by ethnology.

1.2 Civil Society

As a first version of the concept of civil society one could refer to the Aristotle's *politike koinonia*, that is, political community, translated later by Latins as *societas civilis*. Aristotle's utopia was a public ethical-political community of free and equal citizens under a legally defined ruling system. The lack of any distinction between state and society, on the one hand, and the homogenous, unified character of the *politike koinonia*, on the other hand, explains why Aristotle's political community remains a proto-concept.

The first ›modern theory‹ of the civic society belongs to Hegel. He took over from the natural law tradition and from Kant the universalist definition of the individual as the bearer of rights and the agent of moral conscience. From the Enlightenment, he developed the distinction between state and civil society and, from Ferguson and the new discipline of political economy, the stress on civil society as the very source of material civilization.¹¹

Civil society is not only a subject for conceptual scrutiny. The modern society was forged by the great democratic movements of the eighteenth centuries that reached a type of duality between state and civil society which feeds the Western democracies of the twentieth century. Finally, the fight for the civil society was revived by the Eastern Europe opposition against totalitarian-communist states. Today, for the majority of scholars, civil society ›evokes the theme of liberalism. The term ›civil society‹ today calls to mind rights to privacy, property, publicity (free speech and association), and equality before law.‹¹² The actors who put the project of defense and/or democratization of civil society on their political agenda have in their view a normative model of a societal realm different from the state and the economy and having the following components: ›(1) Plurality: families, informal groups, and voluntary associations whose plurality and autonomy allows for a variety of forms of life; (2) Publicity: institutions of culture and communication; (3) Privacy: a domain of individual self-development and moral choice; and (4) Legality: structures of general laws and basic rights needed to plurality, privacy and publicity from at least the state, and, tendentially, the economy. Together, these structures

11. Cohen and Arato, *op. cit.*

12. *Ibid.*, p. 345.

secure the institutional existence of a modern differentiated civil society.¹³ However, there are scholars for whom the core of the civil society is made up of only the civic-political initiatives: ›Civil society is composed of those more or less spontaneously emergent associations, organizations, and movements that, attuned to how societal problems resonate in the private life spheres, distil and comprises a network of associations that institutionalizes problem-solving discourses on questions of general interest inside the framework of organized public spheres.‹¹⁴

This narrower approach is contradicted by the emergence of a world civil society ›made up of individuals and groups in voluntary associations without regard to their identities as citizens of any particular country, and outside the political and public dominion of the community of nations. The voluntary associations of the world civil society include religious organizations, private business organizations, the information and news media, educational and research organizations, and nongovernmental organizations. They exist in themselves and for themselves.‹¹⁵ Three connotations of ›civil society‹ have precedence within the context of this study:

- the set of all forms of organization between the state and the family (a structural point of view);¹⁶
- the product of the freedom of expression and association (regarding civil society as process);
- a way towards pluralism and autonomy (an axiological point of view).

13. Ibid., p. 346.

14. Jürgen Habermas, *Between Facts and Norms*, MIT Press, 1996, p. 347.

15. Gordon A. Christenson, ›World Civil Society and the International Rule of Law‹, in *Human Rights Quarterly*, vol. 19, no. 4, November 1997, p. 731. See also Dianne Otto, ›Nongovernmental Organizations in the United Nations System: The Emerging Role of International Civil Society‹, in *Human Rights Quarterly*, vol. 18, no. 1, February 1996.

16. One reason for working with such a general definition (rather than with ›civil society‹ defined in terms of civic-political initiatives) is conceptual beauty. The fact that prominent scholars (Habermas) exclude from the reconstructed civil society any private enterprise is a reason to operate with sub-categories within the category of civil society, not to restrict the concept. The emergence of a world civil society seems to draw heavily upon the spaces created by the free market of investments and exchange and the international human rights movements (see Christenson, *op. cit.*).

1.3 Democracy

The traditional concept of democracy focuses on majority rule and participation, as with respect to the standard definitions of a democratic government:

- a form of government in which the right to make political decisions is exercised directly by the whole body of citizens, acting under the procedures of majority rule (direct democracy);
- a form of government in which the citizens exercise the same right not in person, but through representatives chosen by and responsible to them (representative democracy);
- a form of government, usually a representative democracy, in which the powers of the majority are exercised within a framework of constitutional restraints designed to guarantee minorities the enjoyment of certain individual or collective rights, such as the freedom of speech and religion (constitutional democracy);
- any political and social system that tends to minimize social and economic differences, especially those arising from the unequal distribution of private property (social and economic democracy).¹⁷

To these definitions one has to add the fundamental commitment to political equality. But as it has already been shown, there is no way to deduce the single best system of representation from the principle of political equality.¹⁸

With respect to the moral-agent paradigm, the concept of democracy must be inquired on two issues:

- whether or not group rights are a point of departure from existing conceptions of representative democracy, undermining the liberal values of individual freedom, social justice and national unity around the political definition of the society;
- whether the structural definition of democracy finds a fruitful interpretation in the framework of ethical discourse.

17. *Encyclopaedia Britannica*, vol. III, 15th edn., p. 458.

18. See Ronald Dworkin, 'What Is Equality? Part III: The Place of Liberty', *Iowa Law Review*, 73/1; Robert Dahl, *Democracy and Its Critics*, Yale University Press, 1989; Charles Beitz, *Political Equality*, Princeton University Press, 1989.

The first question has already received positive answers from an important trend within liberal thought (e.g. Will Kymlicka).¹⁹ Accepting that group representation is indeed a radical departure from the classical paradigm, Kymlicka proves that:

- this has continuities with certain long-standing features of the electoral process;
- the general reason to support the territorially concentrated community of interest would apply with the same force to non-territorial communities of interest;
- the basic criteria apply to groups such as indigenous populations and national minorities: a) the members of the group are subject to systematic disadvantage in the political process; and b) the members of the group have a claim to self-government.²⁰

The connection between democracy and ethics is fundamental to liberal thought. To that I add the conjecture that any real democracy must necessarily find a liberal model.

1.4 Artifacts

Skepticism about our ability to capture the human beings within the frame of an objectivist description is the main insight of postmodern philosophy. Among the more analytical approaches belonging to the same category one could invoke Ernesto Laclau and Chantal Mouffe. In exploring how ›oppression‹ works in different anthropological contexts, they reject the anthropological definition of ›human nature‹ and of an unified subject with an essence knowable *a priori*. The assumption that the denial of this essence transforms every relation of subordination into a relation of oppression is regarded as misguided. Therefore, subordination can be *constructed* as oppression only in terms of a ›discursive

19. Will Kymlicka, *Liberalism, Community and Culture*, Oxford University Press, 1989; *Contemporary Political Philosophy: An Introduction*, Oxford University Press, 1990; *The Rights of Minority Cultures* (ed.), Oxford University Press, 1995; *Multicultural Citizenship*, Oxford University Press, 1995.

20. Kymlicka, *Multicultural Citizenship*, pp. 144-5.

formation« such as the ›rights inherent to all human beings«. Similarly, ›humanity« is ›an entity to be constructed«.21

In other words, ›human beings« (or humanity) is an artifact. This conception was largely argued in favor of by Benedict Anderson in his study on ›imagined communities«, but with regard to nations, which were described as something thought and conceived at a certain moment of modern history.²² The same was constantly repeated, as somehow already accepted, with reference to the idea of society in general: ›Modern social thought was born proclaiming that society is *made and imagined*, that is a human artifact rather than the aggression of an underlying natural order«²³ (emphasis added) states Roberto Ungar.

1.5 Human Rights

For those whose work is oriented towards activism, the concept of human rights means something like ›the prevention of the political murders, disappearances, torture, and unjust imprisonment«.24 The practical connotation of the human rights listed above is not at all marginal. On the contrary, famous thinkers consider it the very substance of human rights. For Richard Rorty, human rights need passion and courage, not reason and theory. The quest for secure philosophical foundations of human rights is philosophically doomed to fail and is practically useless.²⁵ The extreme position of this form of theoretical skepticism is the denial of human rights

21. Ernesto Laclau and Chantal Mouffe, *Hegemony and Socialist Strategy*, Winston Moore and Paul Compack trans., Verso, 1985.

22. Benedict Anderson, *Imagined Communities*, Verso, 1983, p. 14. This suggests that the emergence of the political rationality of the nation is also a form of narrative – textual strategy, metaphorical displacement and figurative stratagems. See Homi K. Bhabha, ›Introduction: Narrating the Nation«, in Homi K. Bhabha, ed., *Nation and Narration*, Routledge, 1994, p.2.

23. Ungar, *op. cit.*, p. 1.

24. This interpretation is restricted to what scholars call ›fundamental rights« or ›the first generation of rights«, i.e. civil and political rights. The second generation refers to social and economic rights. The third generation (of collective rights) has been codified during the last decades – the right to development, the protection of a healthy environment, the right to participate in the common heritage of humankind.

25. Richard Rorty, ›Human Rights, Rationality and Sentimentality«, in Stephen Shute and Susan Hurley, eds., *On Human Rights*, Oxford University Press, 1993.

as an ontological error. One of the most famous proponents of this opinion is Alasdair MacIntyre.²⁶

The classical theory of human rights states that they are ›natural rights‹. For John Locke, we have certain natural rights because we have been made by God for his sake, and not ours.²⁷ This theory has been a basic reference-point for two centuries (usually replacing God by God-substitutes such as Reason, Nature etc.), but it is generally repudiated by modern thought: ›Natural rights are supposed to be spectral attributes worn by primitive men like amulets, which they carry into civilization to ward off tyranny‹.²⁸ The notion that dignity is inherent in the human person, and expressed by human rights, is known as the essentialist conception of human rights.

Modern thinkers have not given up the idea of developing a metaphysical and a moral basis for human rights. An example is the doctrine espoused by Alan Gewirth, remarkably synthesized by Michael Freeman: ›...human rights can be derived from the concept of morality itself. Morality entails action. Action entails necessary goods. Necessary goods entail claims of potential rights. Potential rights entail recognition of universal human moral rights‹.²⁹

A solution to the ›spectral conception of natural rights‹³⁰ is a constructive model. Ronald Dworkin suggested that we hold beliefs about justice because they seem right, not because we have deduced or inferred them from other beliefs. These intuitions about justice are not clues to the existence of independent principles, but rather stipulated features of a general theory to be constructed. In this sense, the principles of justice have no fixed, objective existence. We should simply be able to integrate the particular judgement on which we act into a coherent program of action. As a consequence, the best political program is that which defines the

26. ›The best reason for asserting... that there are no human rights is indeed precisely of the same type as the best reason which we possess for asserting that there are no unicorns: every attempt to give good reasons for believing that there are such rights has failed.‹ See MacIntyre, *After Virtue*, Duckworth, 1981, p. 69.

27. John Locke, *The Second Treatise on Government*, ed. by Thomas P. Peardon, The Liberal Press, 1952.

28. Ronald Dworkin, *Taking Rights Seriously*, Harvard University Press, 1972, p. 176.

29. Michael Freeman, ›The Philosophical Foundations of Human Rights‹, in *Human Rights Quarterly*, pp. 508-9.

30. *Ibid.*, p. 499.

protection of certain individual choices as fundamental and not subordinate to any goal, duty or combination of these.³¹

The position of this study is that at the basis of human rights there are two anthropological facts: one is ›natural‹ – the capacity of the human being to suffer;³² the other one is functional (or pragmatic, or instrumental, or utilitarian) – the objective effect of human rights principles, which protect human beings in their competition with the state. Since both suffering and protection are universal, human rights are universal. At the same time, these two resources are only the starting point, the Big-Bang of the human rights adventure in history.³³ In other words, I consider that a minimum philosophical anthropology is valid,³⁴ though I reject the possibility of a larger one. The ›universal human being‹ and, respectively, the ›basically communitarian behaviour‹ start as descriptions and end up as artifacts.

1.6 Group Rights

The actual international system of group rights is developed as:

- the international law of peoples' rights;
- the international law of indigenous populations;
- the international system of national or ethnic, religious and linguistic rights;
- the international law of women's rights.

Scholars use the term ›group rights‹ with reference to minority rights (such as communities defined by certain national, ethnic, religious, or linguistic characteristics), the rights of indigenous populations and women's rights. The international law describes the rights of peoples as collective rights; the same seems to be true with regard to the rights of indigenous populations;³⁵ while

31. Ibid., p. 499-500.

32. Dworkin refers to anthropological experience of vulnerability to violations of well-being and freedom.

33. ›Autonomous universal morality as well as the emergence of a formal, differentiated system of positive law must be seen as immense historical achievements.‹ Cohen and Arato, *op. cit.*, p. 352.

34. Alan Gewirth's axiom (all human beings are purposive agents and as such they require at least a minimal level of psychological well-being and freedom) covers the first part of the approach.

35. The Draft Declaration on the Right of Indigenous Peoples was completed in 1993 by the Working Group on Indigenous Populations. A working groups established at the level of the Commission on Human Rights,

minority and women's rights³⁶ are interpreted as individual rights of members belonging to these groups. This opportunistic approach obviously contradicts the logical requirement for a general concept of group rights. It is nevertheless supported due to political motivations.

The skeptical position towards group rights is voiced in different ways. One interesting objection was put forth by Nigel S. Rodley: ›... in the area of minorities, international law seems incapable of identifying the persons that would be the group rights holders. It appears that the world's governments – the legislators as well as the principal subjects of law – have resolutely refused to accept the notion of group rights for the minorities (recall that the rights in the UN Declaration on Minorities are reserved for ›persons belonging to minorities‹). Neither is it desirable that this be otherwise. ... Arguably, it could even be redundant to recognize minority rights, since these could well be accommodated by an enlightened interpretation of norms against discrimination which cover indirect discrimination and compensatory positive action, as well as the right to freedom of association and certain other substantive rights. Under normal principles of treaty interpretation, the provisions of a treaty are presumed not to be redundant.‹³⁷

composed of state representatives, further elaborated the draft Declaration. It proclaims the indigenous peoples' ›collective and individual right not to be subjected to ethnocide and cultural genocide...‹ See Elsa Stamatopoulou, ›Indigenous Peoples and the United Nations: Human Rights as a Developing Dynamic‹, in *Human Rights Quarterly*, vol. 16, no. 1, February 1994; Russell Lawrence Barsh, ›Indigenous Peoples and the UN Commission on Human Rights‹, *Human Rights Quarterly*, vol. 18, no. 4, 1996.

36. e.g. Convention on the Elimination of All Forms of Discrimination against Women, adopted December 18, 1979. See Joe Oloka-Onyango and Sylvia Temple, ›The Personal is Political, or Why Women's Rights are Indeed Human Rights: An African Perspective on International Feminism‹, in *Human Rights Quarterly*, vol. 17, no. 4, November 1995. The question is whether universal human rights are compatible with the struggle for the self-determination of women.

37. Nigel S. Rodley, ›Conceptual problems in the Protection of Minorities: International Legal Developments‹, *Human Rights Quarterly*, vol. 17, no. 1, 1995, pp. 64-5.

1.7 The Principle of Self-Determination

The ›principle of self-determination‹ of peoples is rightly considered to be a successor of the political principle of nationality. In fact, after World War I the principle was applied only to Eastern European nations which had until then been parts of the Ottoman or Austro-Hungarian empires. In the sixties, it determined the outcomes of the anti-colonial struggle in Africa and Asia. At the end of the 1980s there came the turn of the former Soviet region.³⁸

The concept of ›self-determination‹ refers broadly to two inter-connected aspects:

1. The *internal aspect* defines the right of all peoples to freely determine their political status and to pursue their economic, social and cultural developments.
2. The *external aspect* refers to the right of peoples to freely determine their place in the international community of states.

Within different contexts, a wider meaning of the right of peoples to self-determination is often used:

- the right of colonized peoples to independence and the formation of their own sovereign states;
- the right of oppressed nations to self-determination, including the right to secede;
- the right of peoples, nations, nationalities, national groups and minorities to freely pursue and develop their culture, traditions, religion and language;
- the freedom of all peoples from alien subjugation, domination and exploitation;
- the right of all peoples to determine democratically their own socio-economic and political system of governance and government.³⁹

Within the international community the principle of self-determination of peoples as expressed in the UN Charter, the two International Covenants on Human Rights and some resolutions of the United Nations is generally considered a legal principle.

38. Rein Müllerson, *International Law, Rights and Politics: Developments in Eastern European Countries and the CSI*, Routledge, 1994.

39. Issa G. Shivji, ›The Right of Peoples to Self-Determination‹: An African Perspective, in William Twining, ed., *Issues of Self-Determination*, Aberdeen University Press, 1991, p. 42.

Many declare it to be a *jus cogens* norm of international law.⁴⁰ What is much less clear is:

- the exact content of the principle;
- its relevance to other principles of international law with the same legal force.⁴¹

1.8 Peoples

Peoples are legal entities under international law holding the right of self-determination. There is no international document standardizing this concept. But there are some significant academic definitions:

- Friedlander's: ›A people consists of a community of individual bond together by mutual loyalties, an identifiable tradition, and a common cultural awareness, with historic ties to a given territory.‹⁴²
- In 1990, the UNESCO meeting of experts on the further study of the rights of peoples identified several criteria as being commonly taken into account when deciding that a group of individuals is a people: common historical tradition; racial or ethnic identity; cultural homogeneity; linguistic unity; religious or ideological affinity; territorial connection; a common economic life.⁴³

These definitions in mind, one can have no doubt that Tibetans, Kurds, Tatars, Navajos or Basques are ›a body of persons composing a community, tribe, race or nation‹, and yet they do not enjoy the right to self-determination. Conversely, no more than state citizenship can be accepted as a common characteristic of Swiss, Indians, Nigerians, Guatemalans and Americans, yet each of these groups is

40. Gabriel Andreescu, Renate Weber, ›Self-Determination and Secession‹, memorandum drawn up in consultation with the Rapporteur by the Centre for Human Rights, Bucharest, Political Affairs Committee, Parliamentary Assembly, 1996.

41. Rein Müllerson, *op. cit.*; Hurst Hannum, ›Rethinking Self-Determination‹, in *Virginia Journal of International Law*, Fall 1993.

42. Robert A. Friedlander, *Proposed criteria for Testing the Validity of Self-Determination as It Applies to Disaffected Minorities*, 25 *Chitty's L.J.*, 1997, pp. 335-6.

43. See *Self-Determination: Report on the Martin Ennals Memorial Symposium on Self-Determination*, Saskatoon, Canada, 1993, p. 3.

identified by the international community as a people.⁴⁴ The explanation resides in the tautological reasoning of the international community when employing the notion of people. Peoples are recognized as holders of the right to self-determination, but at the same time the right to self-determination is usually accepted for already self-determined communities.

1.9 National Minority

There is no internationally accepted legal definition of what a national minority is. There have been some proposals advanced within the United Nation and the Council of Europe, but so far none has been adopted. A widely quoted definition of minority is that suggested by Francesco Capotorti (Special Rapporteur of the UN Sub-Commission on Prevention of Discrimination and Protection of Minorities). In his view a minority is 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 – possess 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.‹ This definition was drawn up with particular reference to Article 27 of the International Covenant on Civil and Political Rights, but it also serves a more general purpose and has been widely cited in recent legal literature.⁴⁵

Other efforts to define a minority have been undertaken within the UN by Jules Deschênes, a Canadian member of the Sub-Commission, and within the Council of Europe by the Recommendation 1201 (1993). Deschênes' definition maintains the same characteristics as Capotorti's, but emphasizes the minority's collective will to survive while pointing out that the aim of the minority ›is to achieve equality with the majority in fact and law.‹ The definition laid down in the Recommendation 1201 adds another requirement which is the ›long-standing, firm and lasting ties with the State‹ maintained by the minority group.

44. Hurst Hannum, *Autonomy, Sovereignty and Self-Determination: The Accommodation of Conflicting Rights*, University of Pennsylvania Press, 1996.

45. Patrick Thornberry, *International Law and the Rights of Minorities*, Clarendon Press, 1992.

1.10 A Note on Methodology: Legitimacy

Legitimacy sometimes means foundation. There are many authors who contest the possibility of this understanding of foundationalism. One argument is that the foundationalist theories are constantly challenged without hope for a logical method able to resolve disputes conclusively. Another reason is that *›if a doctrine D is justified by a supposed foundation F, it is logically possible to call for a justification for F‹* and so on to an infinite regress.⁴⁶

The position of this study is that searching for the legitimacy of a particular doctrine by means of another theory (doctrine, set arguments or analogies) is a very useful and, for that matter, a very natural operation. Every new source of legitimacy highlights the explored doctrine. The fact that we face competitive foundation or demands that the foundational theories should have their own foundations is not an impediment. One important criterion for the selection of foundational theories is the *richness* of these theories. Especially in the field of normative discourse (to which human rights and minority rights belong) the process of legitimization is never without influence on the discourse itself. (In other terms, the meta-discourse determines in part the discourse.) The evolution of the normative discourse often results from its own inner dynamics, but the search for its foundation often has an essential impact upon its richness.

1.11 A Note on Methodology: Operationalization

The concept of operationalization was introduced by P.W. Bridgman in 1927 in relation to the nature of definitions that can provide an absolutely fixed meaning of physical measures. According to Bridgman, the meaning of a physical measure is fixed when the operations necessary for the measurement are fully indicated: in other words the concept is nothing other than the set of measurement-operations. Later on, operationalism received a more general and more refined form, stretching over a vaster theoretical domain which sees knowledge as a basic system of human

46. Michael Freeman, ›The Philosophical Foundations of Human Rights‹, *Human Rights Quarterly*, vol. 16, no. 3, August 1994, p. 495-6.

activity and the epistemic subject as the main source of knowledge. The central concept, therefore, is not that of reality, but that of an operation in a formal or empirical field.

Within the natural sciences, operationalism attributes the central place to formal and empirical operations. Within the social sciences, operationalism does not mean more than *the capacity to operate*. As a methodological option, operationalism requires that the conceptual developments reach concrete entailments and therefore be subjected to a pragmatic test. The theoretical assumption in this paper were developed while seeking for solutions to the some of the traditional problems of minority rights.

2 Behavior, Morality, Agents and Patients

2.1. Individuals and Morality; Moral Agents and Moral Patients

The classical theory of human rights is a conception of the moral nature of human beings. The followers of John Locke, whose idea was that we have certain natural rights because ›we have been made by God for his sake, and not ours‹,⁴⁷ substituted God by Reason, Nature etc., but kept this ontological dimension of the individual *outside the individuals*. There are many scholars who opened the door for a more explicit connection between morality and human rights.⁴⁸

I prefer to summarize here Alan Gewirth's conception because it synthesizes a trend in the field of individual human rights. For Gewirth, all moral precepts deal directly or indirectly with how people ought to act. Action provides the necessary content of all morality, being purposive and voluntary. Therefore, action becomes the basic means of attaining what the agent defines as the desirable good. In this context, voluntariness and freedom become the necessary framework of the moral agent's identity, because without this, the agent would not be able to reach the good.⁴⁹

This distinction between *moral agents* and *moral patients* – widely taken into consideration in this study – belongs to Tom Regan. Moral agents are, in Regan's understanding, the individuals holding a range of complex capacities, especially the ability to formulate impartial moral principles. On their basis they can make decisions, take action (or reject a particular course of action) if the morality they conceived so requires.⁵⁰ As moral agents, they are also responsible for their deeds. I shall simplify Regan's original phrase by saying that:

47. John Locke, *op. cit.*

48. Alan Gewirth, *Reason and Morality*, University of Chicago Press, 1978.

49. Michael Freeman, *op. cit.*, pp. 508-9.

50. Tom Regan, *The Case for Animal Rights*, Routledge, 1984, p. 161.

D1: ›A moral agent has the ability to achieve goals with respect to moral principles‹.

By contrast, Regan defines *moral patients* as lacking the ability to formulate moral principles on the basis of which to decide which of the various potential actions would be the right or appropriate one to carry out. Nor are they capable of grounding their decisions on these principles. The definition a moral patient definition is analogous to that of the moral agent:

D2: ›A moral patient is unable to achieve goals with respect to moral principles‹.

Regan suggested these notions in order to tackle a special situation, that of the rights of persons lacking discernment. But what is important with respect to Regan's definitions, is that it highlights a more complex relation between morality and human rights. The human rights of individuals depend – as the moral concept shows – on the individual's capacity to act with respect to moral principles. But someone who has no such ability is not entirely deprived of rights. Although he or she does not participate in elections, his or her life is still protected. This conception involves a strong connection of four terms: moral principles, action, human rights, and their legitimacy.

2.2 Agents and Patients

Not only individual beings but also groups are considered moral actors. The idea of regarding communities as moral agents and hence as holders of collective rights has many advocates. I name only few here. Peter French has developed the idea with regard to corporations.⁵¹ Duties, responsibilities for the group as such and for its members (moral duties) define their nature as moral entities. Some authors invoke Virginia Held,⁵² who regarded nations as having moral responsibilities, in relation

51. Peter French, ›The Corporation as a Moral Person‹, *16 American Philosophical Quarterly* 297, 1979; ›Crowds and Corporations‹, *19 American Philosophical Quarterly* 271, 1982; *Collective and Corporate Responsibility*, Columbia University Press, 1984.

52. Michael Hartney, ›Some Confusions Concerning Collective Rights‹, in Will Kymlicka, ed., *The Rights of Minority Cultures*, Oxford University Press, 1995.

with the collective existence and the status of each member of these communities.⁵³ Other scholars, such as Michael Walzer, lay stress on the moral right with reference to peoples and their behavior in the international arena: ›Every nation has a moral right to self-determination and, correspondingly, every nation state or its government is under the obligation to respect the integrity of other communities' internal affairs.‹⁵⁴ In an analysis of Walzer's conception, Juha Raikka also embraces the thesis of ›moral entities‹: ›Nation states are moral entities in which autonomous processes of social life take place and in which there exist a union of people and government, constituted by mutually accepted historical conventions, communal sentiment, loyalties, and resentment.‹⁵⁵

Walzer's position is worth bringing into the discussion here, as according to him individual rights are both analogous to nation states' rights and their basis. ›When we describe individual rights, we are assigning to individuals a certain authority to shape their own lives, and we are denying that officials are authorized to interfere‹ – ›the description of communal rights makes a similar assertion and a similar denial‹, for ›in the individual case, we fix a certain area for political choice.‹⁵⁶ The analogy between individual rights and group rights Walzer states so clearly, is implicit in the works of other scholars. We could easily prove this by highlighting their background reasoning. There are two basic logical schemes, reasonings R and R*.

The weaker one develops as follows – R:

- 1: Communities / individuals are good (i.e. have value);
- 2: Therefore they ought to be protected;
- 3: Therefore communities / individuals have rights (to existence, etc.).

53. Virginia Held, *Rights and Goods*, University of Chicago Press, 1984.

54. Michael Walzer, *Just and Unjust Wars*, Basic Books, 1977; Michael Walzer, ›The Moral Standing of States: a response to Four Critics‹, in Charles Beitz et al., *International Ethics*, Princeton University Press, 1985.

55. Juha Raikka, ›On National Self-Determination: Some Problems of Walzer's Definition of nation‹, in Twining, *op. cit.*, p. 20.

56. Walzer, *op. cit.*

The second is of the following type – R*:

- 1*. Communities / individuals can shape utility and common goals;
- 2*.Unity and common goals pre-suppose rights such as the right to non-interference;
- 3*.Therefore communities / individuals have rights (non-interference, self-determination, and so on).

R and R* are not logical inferences, but rather logical schemes. R was criticized by Michael Hartney with regard to communities.⁵⁷ It assumes a purely utilitarian approach to rights. R* presupposes the equality between conditions of action and rights. It is worth mentioning here another author who stresses the ability to decide and choose as an essential condition for the right-holder: H.J. McCloskey. He argued that the idea of a right held by someone starts to impose itself at the point when the notion of a (potential or actual) choice appears. When it becomes obvious that the possibility to make a rational choice – moral choices included – does exist; and even more when there is a language that can be used to express thought, decisions, wishes, choices, then we can go from the idea of duties towards living beings to the idea of individuals as (potential) holders of certain rights.⁵⁸

Both lines of reasoning highlight the need for an intermediary term: the requirement for protection, or general conditions to shape common goals, etc. What is significant above is the similarity of arguments between the theorists of human rights and the advocates for collective rights. Gewirth's central character is the person expressing his moral dimension by means of acts. Freedom and well-being are, as Alan Gewirth writes, the necessary good for all individual agents. But the same is true of collective agents. If agents must claim, against all other agents, the right of non-interference with their freedom and well-being,⁵⁹ then a group who enjoys unity and common goals (that is, non-interference) can be defined as a group in moral terms.

I suggest that Gewirth's conception elaborated in para.: 3.1 is in fact more convincing if it refers to groups. His argument, that rights are necessary rather than

57. Hartney, *op. cit.*, p. 203.

58. H.J. McCloskey, 'The Right to Life', in *Mind*, LXXXIV, no. 335, July 1975.

59. Michael Freeman, *op. cit.*, p. 506.

contingent because they are grounded in the general requirements of actions becomes more intuitive in the case of groups. The relation between unity and action is tighter when groups are taken into consideration.

The classical discourse on human rights is grounded in the idea of dignity. But how does dignity apply to groups? In fact, the concept of dignity is abstract and, according to Gewirth, contestable. The ultimate purpose of human rights is to enable individuals to be the masters of their lives; to be autonomous and act on their will; to sustain their purposes effectively; to be rational and to express their identity. This shift from dignity to autonomous will and action – that is, to *agent-status* – opens the scene for groups, which can be described, accordingly, as agents capable to define their own goals and act autonomously. If the objects of human rights are those goods required by the very possibility of successful action, then the same is true of groups. The conditions of actions are the same for both individual and groups.

Most authors agree that decisions, wishes and choices are fundamental for both individual and group identity, as well as for their rights. Less clear is how exactly we can connect decisions, wishes, choices and goals with morality. One has to consider Karl Baier's comments on the issue. Morality necessarily relates to moral principles (not just goals), Baier emphasizes. He explains, further on, that one cannot say one has adopted a moral standpoint as long as he/she is not prepared to regard moral rules as principles rather than as fortuitous rules. To put it differently, one cannot speak of morality as long as one does not act according to principles rather than in order to achieve a certain goal. Furthermore, one must act according to rules that apply to everybody, not just oneself or one's group.⁶⁰

Such arguments as well as other should make us more cautious when mixing action and morality. Therefore a general framework for the rights of individual and collective actors presupposes the separation of two levels: that of the actions directed towards goals; that of the actions founded on a moral standpoint. In the framework of the previous distinctions, the first level corresponds to that of agents and patients, the second to that of *moral agents* and *moral patients*. The meanings of these conceptions are obtained by removing the restriction ›with

60. Kurt Baier, *The Moral Point of View*, Cornell University Press, 1958, p. 210.

respect to moral principles« in D1 and D2:

D3: An agent has the ability to achieve goals.

D4: A patient is unable to achieve goals, but in different conditions it might be able to do that (i.e. the patient may become an agent).

If an agent acts with respect to moral principles, than that particular individual or group becomes a moral agent. Among the conditions through which a patient can become an agent, some turn the individual or group into a moral agent.

D3 and D4 apply not just to individuals but also to any acting entities. The definitions above contain a lot of important concepts: moral principles,⁶¹ purposes, choices, wishes, decisions, actions. All are synthesized by the expression ›the ability to achieve goals«. In what sense are these concepts the background of agents' and patients' rights?

2.3 Internal and External Recognition: Law, Legitimization, Ontology

A necessary condition for a patient to become an agent is the recognition of its agent status as such. It is worth noting that such a recognition may be *internal* as well as *external*. An act of recognition is internal when the agent becomes fully conscious of, and fully assumes his agent condition. When it is society that becomes conscious and acknowledges the agent status of an individual or group, we have a case of external recognition. The history of emancipation of different social groups deemed ›sub-human« (women, slaves, etc.) has been a process of internal as well as external recognition. The two actually influence each-other in a non-linear dynamics. Indeed, the type, manner and substance of an individual's desires, choices, and decisions depend on his agent status, on what kind of an agent one is. This is, of course, true with regard to groups as well.

External recognition is ultimately the product of regulations or norms, which is to say – in the context of modern societies – of laws. Culturally speaking, the law means the *freezing of an artifact*. But law-giving amount to more than that. It

61. In no way should one take ›moral principles« to mean, in this context, ›morals« – i.e., items in a catalogue of good manners.

has an ontic status. In determining (or strengthening, by means of validation) modes of action and identification, it creates entities. The ›person‹ which today looks like an obvious ontological reality was the result of a painstaking process of systematic construction, starting in the days of tribal culture and going on deep into modernity. Its force and its dignity, above those of any collective (e.g. national) conditionings or relativizations are a very recent result of this process. The same is true with regard to groups.

Once acknowledge and made into law, the newly, officially homologated entities become the framework in which new patient can awaken and become agents by acquiring internal and external recognition. This is the reason why, as a part of this process, law is endowed with ontological dignity. The recognition of a new agent in the national or international space – such as the indigenous peoples or the national minorities – is an important pillar for the legitimization of these agents. This point actually structures the discourse of this paper and making it explicit seems to me to be worthwhile. A certain evolution of the international legislative framework can be invoked as an ontological premise in order to support, in conformity with an ethical and/or pragmatic rationality, new states of fact. What we see as a state of law can turn out to be a state of fact is sufficient collective pressure is set into motion. The principles of natural and positive law support one another. Natural and positive law are not only discourse of legitimization and, respectively, assertion, but participants in an ontic process.

The model of purely logical, or purely ethical, or purely pragmatic judgements aimed at legitimating a certain society's reality is a costly simplification. We actually deal with a process of cross-legitimation: new steps in the field of law-making become the ground of new legitimizing arguments and vice-versa. Therefore the inclusion (as a premise, piece of evidence, or context) of a factual component into the discourse of ethics does not violate the coherence of the demonstration. A norm which has become a reality has an inherent force. The transformation of the ›person‹ into a subject of international law, for instance, had and still has a considerable influence on the debates concerning the citizen status in individual states. Yet another case: the recognition by the international community of the status of collective entity in the case of peoples. This is essential precedent of the efforts

targeted at the acknowledgement of collective entities (national minorities and indigenous peoples).

2.4 Peoples as Collective Entities: A Starting Model

Peoples are collective entities that enjoy as their main right the right to self-determination. The principle of self-determination of peoples was expressed in the UN Charter,⁶² the two International Covenants on Human Rights and some resolutions of the United Nations. Within the international community the self-determination of peoples is generally considered a legal principle. As pointed out before, some consider it to be a *jus cogens* norm of international law.⁶³

The enforceable character that the principle of self-determination acquired during the era of decolonization is rooted in Chapters XI (Art. 73) and XII (Art. 76) of the UN Charter on non-self-governing and trust territories. During the fifties, the UN issued two resolutions that support the right to self-determination of peoples under foreign domination: UNGA Res. 637A (VII), December 16, 1952, calling upon members of the UN to recognize and promote the realization of the right to self-determination; and UNGA Res. 1514 (XV), December 14, 1960, The Declaration on Granting Independence to Colonial Territories and Countries. The process of decolonization started in the fifties and was based on this set of UN documents.⁶⁴

What is also important to notice is the fact that the right to self-determination of peoples was progressively related to human rights principles. The International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights (1966) re-enforced the connection between the principle of self-determination and human rights. This trend was developed particularly within

62. Articles 1(2) and 55 of the UN Charter specifically refer to the ›self-determination of peoples‹.

63. The concept is treated as a ›principle‹ rather than as a ›right‹. See Morton Halperin and David J. Scheffer, with Patricia L. Small, *Self-Determination in the New Order*, Carnegie Endowment for International Peace, Washington, 1992, p. 20.

64. The Declaration of Principles of International Law Concerning Friendly Relations and Co-operation among States (1970) included new references to the right of self-determination which expanded its scope. At regional level, reiteration of the principle of self-determination was made through the African Charter on Human Rights and Peoples' Rights, the Helsinki Final Act (CSCE, 1975), the Copenhagen Document and the Charter of Paris (CSCE, 1990).

the framework of the Helsinki process. The Copenhagen Document (CSCE, 1990) underlines that the States ›will respect each other’s right freely to choose and develop, in accordance with international human rights standards their political, social, economic and cultural systems. In exercising this right, they will ensure that their laws, regulations, practices and policies conform with their obligations under international law and are brought into harmony with the provisions of the Declaration of Principles and other CSCE commitments.‹⁶⁵

Another advancement in the international commitment to the human rights dimension of the right to self-determination was the Third World Conference on Human Rights. The Vienna declaration on Human Rights (June 1993) has emphasized that the Conference considers the denial of a right to self-determination as a violation of human rights and underlined the importance of the effective realization of this right. As a consequence, one can state that the right to self-determination of peoples is conceived today as belonging to a system of rights with which it must be compatible.

The description of the collective right to self-determination offers an example of how a group exists as a collectivity/ as an agent, and therefore enjoys a collective right. Purposes, wishes, choices, decisions, and actions of this collective agent define the content of the right itself, that is, the internal and external aspects of the principle of self-determination. To determine the political status is to pursue the economic, social and cultural developments (the internal aspect) as much as to determine the place in the international community of states (the external aspect). Both refer to the ›ability of peoples to achieve goals.‹ There is no reason to think that a different approach is applicable to other collective entities. Therefore ›purposes, wishes, choices, decisions, and actions‹ does not generally represent the background of the rights of agents – see para. 3.2 – but the substance of the rights themselves. Recognizing an agent is implicitly an allocation of rights to that agent.

The case of peoples enables us to test conceptions introduced earlier. Are people ›agents‹ or are they ›moral agents‹? I have already quoted scholars such as

65. The Copenhagen Document states *expressis verbis*, for the first time in the context of an international document, the freedom of choice by peoples of their political, social, economic and cultural systems is not absolute and that peoples are free to establish their political, economic and social systems in so far as they guarantee respect for international standards of human rights.

Walzer and Raikka who insist on the moral character of peoples. But the right of peoples to self-determination does not refer to moral principles. The recognition of peoples and of their rights is not constrained by presuppositions as to those peoples' morality. In other words, the moral dimension of peoples is added to their ontological status. Peoples are moral agents in the sense of contingency, not in the sense of necessity.

When do we speak about peoples as patients? Reconsidering what was presented before, it is obvious that colonized peoples, claiming the formation of their own sovereign states, oppressed nations demanding the right to secede, other peoples under alien subjugation and exploitation belong to the category of patients. They lack the ability to achieve goals, but new conditions – decolonization, secession – could transform them into agents (peoples enjoying self-determination).

2.5 The Agent Quadruple

Within the international arena, peoples manifest their will, choice and action in intimate correlation with their juridical-political forms of representation, which are the states. The counterpart of the peoples' right to self-determination is the sovereignty of the state made up by the people that enjoys self-determination. Let us consider the following scheme:

<i>entity</i>	<i>status</i>
people	self-determination of the people
state (legal-political representation of the people)	state sovereignty

Let us call this *the peoples' rights quadruple*. Within the scheme, the self-determination of a people is understood as defined in para. 3.3. The ›sovereignty of states‹ can be defined, in Jean Tusqoz's essential generalization as (D6) ›a set of competencies defined with respect to the international law.‹

One can devise a similar scheme for the human individuals as the *agents' rights quadruple*:

<i>entity</i>	<i>status</i>
human being	self-determination of the individual
person (legal-political representation)	individual sovereignty of the human being

The meaning of ›person‹ was investigated, among others, by Winifried Brugger.⁶⁶ She attaches self-determination (as the ›ability to have goals and to develop, pursue, and defend [one’s] own life plan‹), freedom of choice and ›personal responsibility‹⁶⁷ to persons, which is a matter of linguistic convention. For the sake of coherence, I prefer to speak about the ›self-determination of the human being‹ and about the ›sovereignty of the person‹ as a recognized actor in society.⁶⁸ The sovereignty of the person can therefore be defined as (D6) *a set of competencies defined in respect to law*.

Defining a person’s competencies in relation to law is a natural step. As embedded in a particular society, persons will be entitled with a comprehensive but contextually determined set of rights. For Brugger, persons enjoy meaningfulness (this is the basic anthropological intuition that the human development of individuals is grounded in culture), reciprocity (claiming rights and freedoms automatically implies granting them to others), liability (accountability for violating the rights of others), social responsibility, protection of life (including willingness to risk or sacrifice), lifestyle.⁶⁹

66. Winifried Brugger, ›The Image of the person in the Human Rights Concept‹, in *Human Rights Quarterly*, vol. 18, no. 3, August 1996, pp. 594-612.

67. Brugger, *op. cit.*, p. 602.

68. Positive human rights law refers to persons.

69. These items belong to all generations of rights. Brugger’s list is the result of an empirical analysis – the place of ›person‹ in German jurisprudence.

One can now expand the quadruple to moral agents in general:

<i>entity</i>	<i>status</i>
agent	self-determination of the agent
forms of agent representation	sovereignty of the agent

The *agents' rights quadruple* raises several issues. First, the notion of a right to self-determination enjoyed by agents is generally debatable. It has been often reaffirmed that in international law only peoples are entitled to self-determination. The reason for this is the fact that the external aspect of self-determination refers to the rights of peoples to freely determine their place in the international community of states. That includes the right to secession. The struggle between those who are advocating the right to self-determination of indigenous populations in the UN Declarations on Indigenous Peoples and those who are opposing this rights shows that even the smallest step in this direction is not an easy one.⁷⁰ Why do groups insist on their right to self-determination? Because the concept expresses the idea that groups are entitled to dignity – the capacity to decide on their fate.⁷¹ As the Grand Council of Crees of Quebec explained to the Commission on Human Rights (February, 1992): ›The right to self-determination is not absolute. It does not automatically include the right to secede from the Canadian federation. In each specific case, there may be various other international principles that must be taken into account. Although the world situation is changing, most jurists or publicists do not currently recognize an unlimited right to secede under international law in all case.‹⁷² Lloyd N. Cutler, Jimmy carter’s former counselor and member of the International Court of Justice expressed the idea of self-determination of ethnic groups as their right, within the framework of a sovereign state, to a larger degree of

70. The bostacles are detailed in Russel L. Barsh, ›Indigenous Peoples and the UN Commission on Human Rights: A Case of the Immutable Object and the Irresistible Force‹, *Human Rights Quarterly*, vol. 18, no. 4, November 1996, pp. 782-814.

71. As Rosary Higgings puts it, ›self-determination refers to the right of majority within the general accepted political unit to the exercise of power... there can be no such thing as self-determination for the Nagas.‹ Quoted in Alexis Heraclides, *The Self-determination of Minorities In International Politics*, Frank Cass, 1991, p. 24.

72. Quoted by Elsa Stamatopoulou, *op. cit.*, p. 79.

autonomy and identity, but not to their own state.⁷³ Other well-known authors support the principle of self-determination of groups as well (e.g. Ermacora, Dienstein).⁷⁴ Collective rights are considered a guarantee of the protection of persons belonging to groups. As Nathan Lerner puts it, ›individuals are discriminated against because of their membership in some specific groups and it is therefore necessary to ensure the rights of the group as such.‹⁷⁵ Adeno Addis notes that ›the only plausible way to understand the notion of ethnic rights is to conceive them as being the rights of a group.‹⁷⁶

I postulate as a fundamental right of agents the right to enjoy self-determination in a way that is not against the interests of other agents, defined as (D7) *a set of competencies of agents defined with respect to the rights of other agents*. The self-determination is always relative to other rights and therefore contextually-dependent.

Another particular problem of the agents' quadruple is the agents' form of representation. Let us note that the legal-political representation is significant but not compulsory. Albanians in Kosovo developed institutions which represent themselves in a very elaborate manner and play an essential role in the community's life. Yet, they do not serve as a form of legal representation. A people has a legal political representation: the state. Corporations, NGOs, etc. also have a juridical identity. What about other groups? There are organizations that speak on behalf of indigenous peoples, or ethnic minorities and have a juridical identity as well. But is this a legal-political representation of these groups? Generally speaking, it is not. The question must be addressed with respect to all sorts of groups. We shall explore this issue later, with reference to national minorities.

Before that, let me define the ›sovereignty of agents‹ as (D8) *a set of competencies with respect to (domestic or international) law*.⁷⁷

73. Lloyd N. Cutler, ›Foreword‹ to Halpering, Scheffer and Small, *op. cit.*, Carnegie Endowment for International peace, Washington, 1992, p. vi.

74. See I. Ermacora, ›The protection of Minorities before the United Nations‹, *182 Recueil* 261; Y. Dienstein, ›The Degree of Self-Rule of Minorities in Unitarian and Federal States‹, in *Peoples and Minorities in Interenational Law*, Martinus Nijhoff, 1993, pp. 221-239.

75. Natan Lerner, ›Group Rights and Discrimination‹, *International Law*, no. 16, 1991, p. 169.

76. Adeno Addis, ›Individualism, Communitarianism, and the Rights of Ethnic Minorities‹, *Notre-Dame Law Review*, no. 66, 1991, p. 1223.

77. Self-determination is relative to rights, while sovereignty is relative to laws.

2.6 Dynamic Glue

In order to nominate groups, reference was made before to nations, corporations, minorities. But there is no limit to the definition of groups. As Miroslav Kusy writes: ›People thus group themselves into the most varied communities or groups in the modern pluralistic society of today: those may be, for example, entrepreneurs or consumers, left-handed people, homosexuals, feminists, patriots, the handicapped or disabled ones, and the like. Consumers are defending their consumer-oriented interests in connection with commercial transactions and procedures, enforcing their collective consumer rights. The left-handed ones are fighting against the right-handed civilization, defending their collective rights of left-handedness by requesting the production of tools for the left-handed people, by the fact they have enforced the right to write with their left hand already when sitting at school desks.‹⁷⁸ But can one place peoples and left-handed people, indigenous people and patriots, respectively, under the same umbrella of moral agents, i.e. bearers of rights?

The answer is yes and no. Every set of people belonging to a voluntary association exhibits, by the very act of the association's emergence, wishes, choices, decisions, and actions. What about left-handed people? Of course, a group must exist, it must be real in a certain sense. In order to overcome the status of ›a set of people‹, a glue must provide this set of people with a certain unity. This glue is sometimes called common will, common interest, mutual recognition, common tradition. It must have some kind of expression. I call this ›dynamic glue‹ because entities change perpetually not only at the level of their reality, but also at the level of their potentiality. Furthermore – and in connection to the previous characteristic – the dynamic glue and its result (the group as a unified subject) are neither entirely objective, nor entirely imagined. What is objective with regard to such groups? Of course, some very limited natural data, such as left-handed organs, or languages, or ideologies. What, on the other hand, may be referred to as artificial or imagined? The unity, the recognition and the manifestations of groups depend essentially on our understanding of the identity of groups, more precisely on their own understanding

78. Miroslav Kusy, ›The Collective Rights of Minorities‹, in *Minorities in Politics*, Bratislava Symposium, II, 1991, pp. 120-33.

of this identity, of the importance we give to them and on their image of themselves. Therefore these groups are artifacts, imagined and constructed, like all our fundamental references (human being, nation, society, and so on). The notion of an artifact and the dynamic glue which gives unity to some very general anthropological data explains why we never deal with a finite object. The will and the energy involved in promoting a certain identity – be that people, minority or patriots – gives substance to the groups defined by this identity. Identity is a process.⁷⁹ Thus, the fact that today there is a huge difference in status between groups such as national minorities and indigenous populations, on the one hand, and groups such as patriots on the other, is not the expression of some ontological difference. This difference is not inscribed in stone. If one day humanity constructs the idea that ethnic-cultural features are marginal for the human being and that a brave new world would be the world of patriots, then the patriots' group will be the main moral agent of that time.⁸⁰

2.7 Social Movements: Entity and Process

The methodology of this study is to search for a general framework to accommodate different types of entities, from individuals to the international community. I have so far ignored the case of social movements on purpose. If the agents' rights quadruple works, then it must be tested with regard to different targets. Social movements are an especially attractive one.

The term ›social movement‹ has several connotations. Often, the it is used in connection with ideologies. Fascism, communism, liberalism presuppose mass

79. Luis Roniger and Mario Sznajder describe the collective identity of the re-democratized Uruguay: ›The shaping of collective identities always involves a process of struggle and elaboration, both social-political and discursive-symbolic. Such shaping concerns the never-ending process of defining the criteria of inclusion and exclusion, as well as determining the access to and allocation of resources, entitlements, and positions among different sectors, individuals and strata. However, it also involves the definition of concepts of authority, accountability and patterns of legitimization; in short, it involves the elaboration and implementation of visions institutionalized in the political order. Roniger and Snajder, ›The Legacy of Human Rights Violations and the Collective Identity of Rlbidocratized Uruguay‹, *Human Rights Quarterly*, vol. 19, no. 1, February 1997, p. 60.

80. In philosophical vein, one could say facts and ideas are equal ontological bricks at the basis of the world.

action. But this is a very limited sense of the concept. If one looks at classical studies on ideology, one finds that little attention is paid to collective action.⁸¹ Nevertheless, social movements do sometimes represent a coherent system of values shaped by will, decisions and actions. Movements avoid institutionalization but they are often represented and supported by concrete groups. Alberto Melucci is right to reject any ›metaphysical, essentialist idea of an actor endowed with its own spirit, with a soul that moves it and provides it with objectives,‹⁸² but the fact that social movements presuppose ›structures and interests which precede, delimit and condition politics‹ highlight other similarities with groups defined on a very different basis.⁸³

These similarities stem from an unavoidable polarity: that of entity *versus* process. So far, we have referred to agents (individuals, peoples, minorities, etc.) as entities. Entities are, again in Melucci's words, ›actors endowed with their own spirit, with souls that move them and provide them with objectives. ‹In fact, no individual or collective actor is completely and entity. They are objects which change in time – they have dynamics. At another level of analysis, they are processes. Entity-terms are only a manner of speaking, a matter of a specific type of discourse. Note, however, that in certain contexts – such as ours – the entity-approach prevails.

This is not the case with regard to social movements. Here dynamics takes precedence. Evolution, change, transformation are the main focus. One asks different questions about social movements than about agents. One uses other methods of study. Theories like, say, mobilization theory are theories of processes and have little to say about individuals or peoples. When they are worth looking into, that is because one studies individuals or peoples *as* processes. In other words, the entity-approach and the process-approach are two different ways of looking at the subjects of our analysis. In some cases and on certain levels the entity-approach prevails; in others, the process-approach turns out to be more

81. Among the five chapters of a study such as the *Naissance de l'Ideologie Fasciste* (Zeev Sternhell, Mario Sznajder, Maia Asheri, Gallimard, 1989), three are dedicated entirely to concepts, theories, magazines and journals. The fathers of the ideology are the main reference. The fascist movement is for the authors the historical evolution of ideas that grew into a social dynamic.

82. Alberto Melucci, ›Social Movements and the Democratization of Everyday Life‹, in John Keane, ed., *Civil Society and the State*, Verso, 1993, p. 247.

83. Melucci, *op. cit.*, p. 253.

fruitful. For political ethics peoples, minorities, and groups are firstly and mainly entities; social movements, however, are endowed with process-like features.

Our main focus here is, nevertheless, not an ontological one. We are interested in the consequences of the ›entity *versus* process‹ approach for our theory of rights. My conjecture is that when one claims *entity-status* one claims *rights*, and when one claims *process-status* one claims *conditions*. Individuals, minorities and peoples enjoy the right to identity and non-interference; social movements have freedom of thought and speech and freedom of association. (The latter do, of course, belong to the system of rights, but they are rights of individual actors involved in social movements and not rights of the movements themselves.) I insisted before that *conditions* are the main ingredient that turns patients into agents. This is another way to express the importance of social movements: the space in which there is a higher probability to make something potential into something real.

2.8 ›Agents‹, as the Subject of Conceptual Expansion

One question that has to be addressed here is the meaningfulness of replacing notions like ›group‹ or ›community‹ with ›agent‹/›patient‹ notions. This semantic move suggests re-thinking numerical entities and emphasizing their nature as active factors. But this cannot be the only justification. It is important to have a conceptual synthesis, able to face complex contexts. It is preferable to find a unique subject of natural rights, even if traditional natural rights theory – with its main referent, the individual human being – is conceptually rich enough to engulf groups. It is this role of a generalized subject of natural rights that the agent is meant to fulfill.

A similar transition is that from classical liberalism to the multicultural liberalism of Kymlicka, Raz, Taylor, Tamir and others. Kymlicka, for instance, defines liberty as the main value enjoyed by individuals. But by offering accommodation to collective entities (communities, groups) as well, the range of multicultural liberalism is enhanced. One can express this as a move from the individual-as-subject to the agent-as-subject. Similarly, a theory of democracy that reaches beyond the simple principle of majorities – which sees society as a plurality of

undifferentiated subjects – will not be able to limit itself to thinking in terms of persons, and will have to search for a more general actor.

Agents are the actual subjects and actors of international law. States are a derivative subject. Furthermore, they are not the only subjects. Documents such as the Convention on the Regional or Minority Languages introduce other non-conventional subjects. Regional or minority languages cannot, of course, be bearers of rights or juridical obligations. The objective of these conventions is the protection of these cultural entities and they are meaningful only in so far as they apply to communities that are willing to preserve this cultural heritage, i.e. to agents that have the protection of these languages on their agenda.

3 The Magnificent System of Rights

3.1 The Collective Rights of Agents

Did we lose the moral dimension of the agents on the way? Was self-determination denied to agents because of the fact that they lacked a moral status? Indeed, the self-determination of agents is rejected by international law and its supporters except in the case where these agents are peoples. The same is true of other collective rights. But those states that fight against collective rights do not invoke their immorality. They simply claim that collective rights are a danger to their stability.⁸⁴ Is this argument plausible? One of the most widely supported reasons for

84. Other states make efforts to force this notion into the consciousness of the international community: ›there are now hundreds of officials of foreign ministries, and at least as many committed experts, expecting promotions if they manage either to include the magic term ‘collective rights’ in some international document or manage to

the rejection of the collective rights of minorities is the example of Germany, which used national minorities to put pressure on other states and as a means to expansion.⁸⁵ This is to say that collective right of minorities are used against the right of self-determination of peoples. Recall the argument that collective right may infringe upon the right of the majority and even endanger the rights of national minorities.⁸⁶ *All these arguments suggest that the issue of the morality of agents is being replaced by the issue of complying with the rights of other agents.*

Political sensitivity to such arguments created an uncomfortable situation as well as conceptual disputes. The debates within the Council of Europe are extremely suggestive of the conflict between diverse options and interpretations within the Council with respect to the collective rights of national minorities. The Parliamentary Assembly insisted upon a standard evolution in the protection of national minorities, including references to collective rights. Giving up the idea of an Additional protocol to the European Convention for Human Rights and choosing the Framework Convention for the Protection of national Minorities, the Committee of Ministers pushed things backwards. But in the Framework Convention there appears and explicit acknowledgement of national minorities and not merely of rights of persons belonging to the national minorities. Here is a political compromise which is not at all conclusive for a theoretical research.

The Committee of Experts for the Protection of National Minorities (DH-MIN) of the Council of Europe has identified three types of rights with respect to national minorities: collective rights, individual rights of persons belonging to national minorities, and rights that have both an individual and a collective character. From the point of view of the Committee, collective rights are: the right of the minority to exist and to be acknowledged as a minority; the principle of protection of the

exclude it. Tibor Varady, ›Minorities, Majorities, Law and Ethnicity: Reflections on the Yugoslav Cases‹, *Human Rights Quarterly*, vol. 19, no. 1, February 1997, p. 29.

85. There is another point of debate: who is the subject of collective rights? A community has to have a form of political representation in order to be able to enter legal relations. But if we assert the collective right of a community why should the exercise of this right depend on a community's capacity to define its own form of representation?

86. See Gabriel Andreescu, Valentin Stan, Renate Weber, *The Concept of DAHR Regarding the Rights of National Minorities*, Human Rights Center, Bucharest, 1994.

identity of a minority and the idea of positive measures; the acknowledgement of a minority language; the right of writing in that minority language; the right to create institutions for education in the mother tongue; the right to have access to public media; the right to own means of communication; the right of political representation in the state organisms or at the local level. The drafters of the Framework Convention preferred to avoid discussing thoroughly other rights than those belonging to national minorities.⁸⁷

Anyone who has followed the debates within the expert committees related to international organisms or the positions of governmental analysts could notice that the notion of ›individual rights exercised in a community‹ was used as a way of rejecting the conception of collective rights. According to this view, those who claim collective rights have in view values that are perfectly translatable into individual rights of the members of a particular group.⁸⁸ The question of how to analyze the creation of institutions specific to minorities or the representation of ethnic groups in Parliament without thereby assuming the collectivity as the fundamental actor, was given the following answer: we drop collective rights and speak instead about the individual rights (›of persons belonging to national minorities‹) which are exercised in a community with others.

In this case a *beneficiary* of the right can be easily identified – the person that learns the native language, the person that watches TV programs in her own language, etc. But even when we are told that these rights are rights exercised in a community, nobody explains why the *collective* nature of the protection of a language or of the access to means of communication should be left out. Must individual and collective rights be regarded as opposites, as it has often been suggested? Tibor Varady sympathetically recalls an International PEN declaration which, contrary to the mind of a jurist, asserts that the ›*right of everyone to express him- or herself orally or in writing or to use [the language of*

87. In such a context it is no longer a paradox that a country like Romania, which acknowledges the existence of minorities, safeguards their access to the media, allows for the existence of ethnic parties and the representation of minorities in Parliament and schools in the native tongue, nevertheless considers the idea of collective rights to be an anti-national subversion.

88. For some useful remarks on this issue see Ronald Garret, ›Communitarity and Existence: The Rights of Groups‹, 56 *Southern California Law review*, 1983, pp. 1001-1045.

the group he belongs to] in all public and official documents is at the same time an individual and a collective right.⁸⁹

Some collective rights were listed earlier: the right to self-determination of peoples, the right to peace, the right to development, the right to a healthy environment. In all these cases we cannot identify the collective right as being just the expression of a parallel practice of the same individual right by several persons. This is the criterion through which we shall further define a collective right. On the other hand, the fact that rights are collective does not mean that they do not have a corresponding individual right or an individual beneficiary: the right of a healthy environment implies the possibility for a concrete individual to inhale clean air; the right to peace means that individuals should not suffer from the consequences of wars, etc.

Let us look first at the political-judicial level of states. One has to notice that a lot of groups have rights that cannot be interpreted otherwise than as collective rights. For example, the right of the party to participate in elections. The decision of the party to enter the competition, choosing the candidate lists, etc. are rights that involve the dynamics of a group as a whole. They do not involve individual decisions or individual votes, the simple aggregation of which does not generate the party's participation in elections. The right of a community to ensure writing in the language spoken in a certain locality can be captured by the same mechanism. The same is true of the right of an association to bring a case before a court of justice. The right is offered as such to associations and is ensured through a representation mechanism as a collective right.⁹⁰

As a background remark I should note one important achievement of the last decades: the field of collective behavior. It has been proven that in a majority of cases, in a more general sense than the political-judicial sense we have referred to, the behavior of the community cannot be reduced to the behavior of individuals

89. Tibor Varady, *op. cit.*, p. 35. PEN International is an international writers' organization founded in 1992 with the purpose of protecting writers from the pressures of censorship and the threat of governments. (The name is an acronym of ›poets, playwrights, editors, essays, and novelists‹).

90. See the emphasis placed on the collective dimension of the right to association by the Parliamentary Assembly of the Council of Europe in relation with the European Social Charter.

belonging to this community.⁹¹ Here we shall not explore this theme further, although it should be studied in the fields related to legal studies.

3.2 The Compatibility of Rights

Although the acknowledgement of collective rights is supported by a variety of insights, there are still delicate matters that have to be explored: Are minority rights human rights?⁹² Are these rights ›natural‹? Do they express the political will of only some persons, those who try to transform them into ›pure positive rights‹? etc.

Instead of focusing on the debate about the plausibility of a right of peoples, groups and individuals, we should rather center upon the discussion of rights as such. This can only give more substance to their reality. The relations between rights are crucial to the whole problem of rights. What types or relations are there between rights? The specialized literature supplies an ample debate on the hierarchy of rights. Important consequences of such a hierarchy are the limitation of state sovereignty or the legitimization of international intervention when rights are infringed upon. Some authors dispute the existence of a hierarchy of rights. Ronald Garet, an advocate of group rights, rejects this notion by stating that the individual, the group and society⁹³ have an equal ontic status. Thus, a hierarchy of rights would destroy the principle of underivability, according to which the subordination of a level to another would deny their intrinsic value. Other authors try to deduce theoretically interpretative principles which would permit the coexistence of different categories of rights. William Pentney, for instance, proposed the following principles: ›a certain community shouldn't be hindered to exist neither by the state, nor by the individual pretensions‹; and ›communality must respect the maximum of individual rights in accordance with the preservation of the group.‹⁹⁴

91. From the significant bibliography on this matter one should at least cite Geoffrey Brennan and Loren Lomasky, *Democracy and Decision. The Pure Theory of Electoral Preference*, Cambridge University Press, 1993.

92. A minimal answer can be found in Gabriel Andreescu, ›Minority Rights: Human Rights‹, in *Revista Romana de Drepturile Omului*, no. 3, Bucharest.

93. In Garet's terms, ›personhood, communality, sociality‹.

94. William Pentney, *The Aboriginal Rights provisions in the Constitutional Act*, Saskatoon, Native Law Center, Canada, 1987, p. 52-3.

I believe than an *a priori* discussion about the ontic status of rights should be left aside in favor of the concrete analysis of the relations between a specific types of rights. The relevant aspects can be clarified by means of analyzing the compatibility of different rights. Indeed, if we have a system of rights at the society-level (that is, the right of peoples of self-determination), the level of groups (minorities, small groups defining a common goal) and of individuals, these rights have to be compatible with one another. If they are not, they have to be made compatible. As long as different rights prove to be incompatible, different forms of pressure are exercised upon these rights.

Let us now consider the three levels: the society (people), the group and the individual. They introduce three relations of compatibility: between the rights of society and individuals rights; between the rights of society and group rights; between group rights and individual rights.

(a) The case of the relation between the right of society (the right of peoples to self-determination) and individual rights is the most elaborate. One of the main limitation of individual human rights resides in the protection of the state-collectivity. Therefore, the two International Covenants and the European Convention for Human Rights invoke the national security and public morals as a legitimate reason for restriction.

(b) Regarding the limitation of the rights of society by collective rights, this includes the development of the international system for the protection of minority rights, the rights of indigenous peoples and the right to association.

(c) What about the limitation of group rights (collective rights) by individual rights? The whole international system of human rights represents a codification of state sovereignty restriction.

Conversely, the limitation of the rights of groups by the self-determination of peoples can be recognized mostly in the constant references to the territorial integrity of the states, in the UN Charter, as well as in most of the documents referring to the protection of minorities. An example is Art. 21 of the Framework Convention for the protection of National Minorities: ›No disposition from the current Framework Convention will be interpreted as implicating a right to undertake any activity or act contrary to the fundamental principles of the international right,

especially to the sovereign equality, territorial integrity and political independence of states.

In Western democracies the dominance of individual rights over group rights is quasi-generally accepted. The documents mention the preeminence of human rights and the fundamental individual freedoms. The same Framework Convention notes, in Art. 22: »No disposition of the Framework Convention will be interpreted as to be limiting or causing damage to human rights or fundamental freedoms, which can be recognized in conformity with any Contracting Parties or any other convention of which the respective Contracting Party is a part.

There are, however, cases when individual rights are limited by group rights. The UN Human Rights Committee jurisprudence offers several examples. In *Lovelace v. Canada*, a Maliseet Indian woman, having lost her Indian status when she married a non-Indian (Section 12.1 of the Indian Act), sought to return to the Reserve after her divorce. The Maliseet Indians refused. The Committee found that »to deny Sandra Lovelace the right to reside on the Reserve is reasonable, or necessary to preserve the identity of the tribe.⁹⁵ The second case, *Kitok v. Sweden*, involved Ivan Kitok, a member of a Sami family engaged in reindeer husbandry. After having been away from the village for three years, his right to return was denied by the community (although he was permitted to engage in other activities with the group). The Committee treated the *de jure* exclusion as »a reasonable and objective justification, necessary for the continued viability and welfare of the minority as a whole.⁹⁶ At the same time, the Committee emphasized the responsibility of the state, in virtue of the 1971 Reindeer Husbandry Act, in spite of Sweden's argument that the conflict was one between minority and individual rights. Ad Nigel Rodley noted: »This case indicates that even where membership is determined by the group, state responsibility is sufficiently engaged by the mere existence of legislation assigning decision-making to the group.⁹⁷

However, it is important to notice Canada's own interpretation of the 12.1 (b) Section of the Indian Act: »It [Canada] nonetheless stressed the necessity of the Indian Act as an instrument designed to protect the Indian minority in accordance

95. Communication No. R. 6/24, *Report of the Human Rights Committee*, 1981, UN Doc. A/36/40, Annex XVIII, p. 17.

96. Communication No. 197/1985, *Report of the Human Rights Committee*, 1988, UN Doc. A/43/40, Annex VII, G.

97. Nigel S. Rodley, *op. cit.*, p. 69.

with Article 27 of the Covenant. A definition of the Indian was inevitable in view of the special privileged granted to the Indian communities, in particular their right to occupy reserve lands. Traditionally, patrilineal family relationships were taken into account for determining legal claims. Since, additionally, in the farming societies of the nineteenth century, reserve land was felt to be more threatened by non-Indian men than by non-Indian women, legal enactment as from 1869 provided that an Indian woman who married a non-Indian man would lose her status as an Indian. These reasons were still valid.⁹⁸

With regard to the rights at the same level (i.e., the rights of one people vs. the rights of other peoples; the rights of one groups vs. the rights of a another group, the rights on an individual vs. the rights of another), their perfect equality is the general principle.

3.3 The Synergy of Rights

The reciprocal limitation of rights is not the only conceivable form of relation between them. A relationship of reciprocal strengthening is also possible, and this point deserves special emphasis. While asking why the notion of collective rights seems to some inherently dangerous and oppressive, Darlene Johnston insisted that ›the individual and collective interests aren't inevitably antagonistic. The presumptive antithesis seems to have at its basis a particular and intolerant conception about the nature of group rights.⁹⁹ Michael McDonald interprets the idea of a positive correlation between the two types of rights in a different light: ›collective rights stand for the house in which individual rights must find their place.¹⁰⁰

The system of individual rights exercised in a community is a representative example of the strengthening function of rights. The rights of a person belonging to peoples or national minorities to use their native language, to create organizations,

98. Ibid., p. 5.

99. Darlene Johnston, ›Native Rights as Collective Rights: A Question of Group Self-Preservation«, in Kymlicka, ed., *The Rights of Minority Cultures*, Oxford University Press, 1995, p. 179.

to have access to means of communication support the preservation of the people's / minority's identity. This informs us about the people's / minority's collective right to identity. The individual rights thus exercised enter a collective logic that creates, develops, and protects the community and thereby refines and strengthens the community's rights as a whole. One can think of the example of churches, theatres, publishing houses and newspapers created by members of a particular community, on the basis of the enjoyment of the individual rights that they possess by virtue of their being members of a national minority. Such minority institutions reflect only in part the contribution of individual creators. They belong to the community, they give her substance, they speak about a collective identity and a right to collective identity, a right that has to be recognized and codified. Thus, individual rights do not replace, but rather strengthen collective rights in a bottom-up dynamic.

As noted above, there are rights that strengthen the community, that stimulate and protect its collective identity, in this sense underscoring a collective right. Let us now consider the reverse relationship – the strengthening of individual rights by collective rights.

The existence of the collective rights of peoples is unanimously accepted. The internal aspect of self-determination (the right of peoples to freely determine their political status and to follow their economic, social and cultural development) and the external one (the right of peoples to choose their place within the international community) represent two values that are enjoyed directly by the individuals that form the people. The two International Covenants adopted in 1966 firmly related the principles of self-determination to human rights.¹⁰¹ It could then be stated that, as Rein Müllerson puts it, the right to self-determination of peoples is not only one of the fundamental principles of international law governing the relations between states. It is at the same time a very important norm regarding human rights.¹⁰²

The first instrument to define the internal aspect of peoples' self-determination in ample terms is the Helsinki Final Act. Chapter VII of the document stipulates that ›in virtue of the equality principle of the peoples and the right to self-

100. Michael McDonald, ›Indian Status: Colonialism or Sexism?‹, *Canadian Community Law Journal*, no. 9, 1986, p. 48.

101. It is worth noting, nevertheless, that Articles 1(2) and 55 of the UN Charter, the fundamental document stating the peoples' right to self-determination, treat the concept as a principle rather than as a right.

102. Rein Müllerson, *op. cit.*

determination, all people have permanently the right to determine as they like and when they want, in full freedom, their internal and external political status, without any involvement from outside, and to carry out according to their will, their political, economic, social, and cultural development.¹⁰³ The principle of self-determination has been associated with human rights within the CSCE along these lines. The Copenhagen Document (CSCE, 1990) emphasizes that the states ›confirm that they will respect the right of each of them to choose and develop freely its political, social, economic and cultural system, according to the general accepted international norms for human rights. In practicing this right, they will see that the laws, regulations, practices and politics be in accordance with the obligations of the international law and harmonize with the stipulations of the Declaration regarding principles and other commitments of the CSCE.‹ (Art. 4)

In this sense, the Copenhagen document mentions *expressis verbis*, for the first time in an international document, that the freedom of peoples to choose their own political, social, economic and cultural destinies is not absolute. Peoples are free to do so only insofar as they guarantee the application of the international human rights standards. The Declaration of the Third World Conference on Human Rights (Vienna, June 1993) endorsed that interpretation when it advanced the view that the non-recognition of a right to self-determination is a violation of human rights, and that the international community has to give the deserved importance to the effective accomplishment of this right. This evolution is further significant in connection with the changes in Europe that led to the creation of new states, through the dissolution of the Soviet Union, of Czechoslovakia and of Yugoslavia. A document adopted by the European Council on December 16, 1991, ›Guidelines for the recognition of new states in Eastern Europe and in the Soviet Union‹, defined for the first time recognition and definition criteria for new states. Newly formed states striving to achieve international recognition must (1) be constituted on a democratic basis; (2) accept specific international obligations; (3) show respect for human rights and the rights of minorities; (4) accept the principle of self-determination as a basis of recognition.

103. Antonio Casesse interpreted this as referring to the right of every people to choose a social and political regime that would not suffer the oppression of an authoritarian government.

Today several authors insist on standards by means of which to evaluate the claims of new states, the creation of which is legitimated by the affirmation of the right of peoples to self-determination. A group working at the Carnegie Foundation suggested the following set of criteria: (a) constitutional democracy, meaning that a new government will not be recognized as long as it does not convincingly prove that it is devoted to the principles of democracy; (b) the right to differing political opinions, as a criterion that guarantees free and credible elections; (c) the protection of human and minority rights; and (d) the limitation of the power of police arbitration.

This evolution has convinced important authors that ›the application of self-determination principles of peoples that is, as we have seen, one of the most important norms of human rights, has not got a reason why to lead to the limitation of the recognized human rights – especially of minority rights. On the contrary, the affirmation of the principle in practice should have as a result a greater protection of the individual rights and liberties and also of the minorities.¹⁰⁴ In this sense the principle of self-determination has developed mainly into an instrument of democracy.¹⁰⁵ The self-determination of peoples has therefore ›ceased to be a principle of exclusion (secession) and has become one of inclusion: the right to participation. Today the right of self-determination legalizes the citizens from all states to participate freely, correctly and openly in the democratic process of the government, freely accepted by each state.¹⁰⁶ As a result, the peoples' collective right to self-determination finds its accomplishment in those civil and political rights which make possible for the individual to participate in the election of political representatives.

For those who consider the development of the system of rights and freedoms to be an objective as well as a means of the progress of civilization, the existence of mechanisms for reciprocal strengthening of rights at different levels constitutes, without doubt, a reason for optimism. The proof of objective interaction between collective and individual rights suggests that the view regarding them as altogether

104. Müllerson, *op. cit.*, p. 72.

105. *Ibid.*

106. Thomas Franck, ›The Emerging Right to Democratic Governance‹, 86 *American Journal of International Law*, 59, 1992.

separate (and possibly antinomic) systems is an extreme simplification; it emphasizes, simultaneously, the multidimensionality of human beings and the ontic dimension of community entities.

3.4 Collective Rights Exercised Individually

The exercise of the right of peoples to self-determination (a collective right) implies the existence of individual rights. We can therefore state that it is a collective right exercised individually. As discussed in the preceding paragraph, the right to self-determination has evolved into a principle according to which individuals should participate in the governing process. The collective right to self-determination is realized through the multitude of civil and political rights, which allow the individual to freely determine the political status of the country and of its economic, social and cultural development.

From the perspective of collective rights exercised individually we must further define the collective rights of groups. Let us look for a moment at the 1993 Draft Law of the Democratic Alliance of Hungarians in Romania (DAHR) concerning the rights of national minorities and autonomous communities. The drafters have laid out separate chapters on ›individual minority rights‹, ›the use of native language‹ (in education, culture, public administration, etc.) and ›community rights‹. The use of the mother tongue is a typical example of individual right exercised in a collectivity. This individual right can only be exercised in a group. However, learning the history of national minorities from textbooks edited or proposed by the minorities (or their representatives in the national education boards) points to a collective right: the right of the minority to internal self-determination.

As for community rights, the DAHR mentions (1) ›the preservation, protection, development and transmission of the minority identity‹ together with the recognition and protection of historical, territorial, local, cultural, religious and ethnic traditions; (2) the freedom of expression of the national minorities ›in their quality of juridical and political subjects‹; (3) the right to internal self-determination; (4) the right ›to display in their native tongue the names of towns, streets, etc.‹; (5) ›the right to practice free and unimpeded relations with the countries to which they are bound through ethnic, and linguistic affinities‹; (6) the right ›to ensure the realization and regular broadcast of minority shows on the public TV and radio stations‹; (7) the

right ›to benefit of funds from the national budget for the creation of own institutions sets‹; (8) the right ›to carry on manifestations and celebrations‹, etc.

Which of the above constitute individual rights exercised in a community, and which collective rights exercised individually? The protection of the minority identity defines a collective right. But it can be realized practically through rights such as the right to ›display names in the native tongue‹ or ›ensure regular broadcast of minority shows‹. It would not be adequate to say that these rights represent individual rights exercised within a community. It is not the individual who is legally empowered to ask for a TV station; it is not the individual who can demand *for his own benefit* that the names of streets and buildings be displayed in his or her mother tongue. (This is also why a substantial presence of members of a certain minority is required in order to motivate inscriptions in a minority language.) We could say that the right to inscriptions in one's own language or the right to have access to public broadcasting ensure the individual exercise of the collective right of preservation, protection, development and transmission of a minority's identity. Generally speaking, the rights of a group presuppose the establishment of specific procedures and the opportunity to make these rights and freedoms real. It is possible that the state itself will suggest the promotion of group rights by means that it itself administers. But one could also consider the view that the involvement of groups is indispensable for their own protection, and therefore that groups have a right to be involved whenever their fate is at stake. This is asserted at para.: 3, Art. 32 of the DAHR Draft Law. Just as the peoples' right to self-determination implies the assurance of certain specific individual (civil and political) rights, the self-determination of national minorities also presupposes the exercise of certain rights, such as the right of a member of the minority ›to be a member of organizations, associations, scientific, cultural, and religious institutions, and political parties‹ (Art. 18 of the DAHR Draft Law). In this case as well, the right to association is an individual right. But it must be underlined that it has an essential role in the individual enjoyment of a collective right. This example shows a very obvious positive relation of reciprocity between individual and group rights.

It seems interesting to dwell a little longer on the drafters' choice to classify the minority's right to have free and unimpeded relations with the countries with which they have special connections. The international documents regarding the

protection of national minorities mentioned earlier speak about the person's right to such relations.¹⁰⁷ Indeed, such relations can be established between national minorities and other states only if the minority functions as a community, if it creates forms of representation, or, in a word, enjoys a right to self-determination which is a pre-condition to the establishment of any legal relations. The relations between persons (members of minorities and members of other states) have a different character. In this case the need for collective identity protection is blurred by comparison with the individual right of the person belonging to a national minority to assert the ›national‹ dimension of his/her identity. This shows that speaking in terms of minority rights is not the same as speaking in terms of the rights of persons belonging to national minorities. The two are not inter-changeable.

As a consequence, the recognition of individually exercised collective rights represents a complementary act of recognition of individual rights practiced in common. Both types of rights have the same legitimacy, the same value, and must be seen as reciprocally strengthening individual and collective rights. There are many examples that can illuminate the richness of the relations between different types of rights. Countries such as Italy, Spain or Finland, to name just a few, have complex system of rights associated with national minorities and their members.

3.5 The Limits of the Expansion of the Minority Rights: Costs

The basic idea of this chapter is that all kinds of rights can support and enforce each other. The challenge for scholars and activists is to make rights at different levels compatible and to avoid contradiction. To look at rights in this way is to open the door to the project of the continuous expansion of rights. But there are limits to such a generous project. For one thing, one has to notice that rights also have costs.¹⁰⁸

I will deal here with the costs of minority rights exclusively. In the Choice Theory of Rights, costs refer to general constraints.¹⁰⁹ The basic limitation imposed

107.As a matter of facts, all documents emphasize that the right refers to relations with other persons, rather than with states or countries.

108.See, for instance, Hillel Steiner, *An Essay on Rights*, Blackwell, 1994, p. 55.

109.See H.L.A. Hart, ›Bentham on Legal Rights‹, in *Essays on Bentham*, Oxford University Press, 1982.

on rights is compatibility. But rights also have costs in the literal meaning of the term. My conjecture is that there are three basic levels of costs: the costs of civil and political rights; the costs of special measures (mostly aimed at minorities); and the costs of social and economic rights. The first level of costs is affordable and hence essentially a matter of political will. The cost of social and economic rights is substantial, on the other hand. Hence these rights are often considered a *desideratum*. Between these extreme level there is the level of special measures – the basic instrument of national minority rights.

This distinction has several consequences. First of all, different special measures have different costs. To have representatives in the national parliament, to enjoy the freedom related to internal self-determination, etc., all belong to a level of costs that is close to that of civil and political rights. *Numerus clausus* strategies typically have higher costs. The burden of special measures explains at least in part the complexity of the debate on minority rights.

How can one evaluate the costs of different sorts of rights? A decision as to the nature of civil and political rights depends on the parliament (or a similar authority). In principle, the implementation of such a decision does not impose high costs. Obviously, the institutions of a democratic society (lawyers, judges, etc.) need money. But there is no reason to consider the institutions of democracy to be more expensive than the institutions of oppression. The costs of maintaining social order are the costs of civil and political rights. In other words, civil and political rights do not require extra-costs.

What about the costs of minority rights? An indicator for the cost of minority rights is the price paid for special measures in different fields. Let us consider the case of education. What are the costs for a monolingual and a bilingual university, respectively? The supplementary cost of bilingualism at the University of Ottawa, for example, is about 10% of the provincial subsidy received by the university.¹¹⁰ So at least in some cases, the cost of minority rights is not high. Many societies can afford to pay such costs. Real limits exist only in conditions of scarcity. I believe that in most countries the obstacles to minority rights are a matter of will rather than a matter of price.

110. Jean-Michel Beillard, 'Bilingualism at the University of Ottawa', Roundtable in Snagov, Romania, February 6-8, 1998.

4 Natural Law, Groups and Artifacts

Is a conception based on the existence of agents (moral agents) consistent with the theory of natural law? How should natural law be understood in this context? Is it compatible with a generalization of the notion of agent (moral agent), ranging from the individual human being to groups, communities, other forms of human association? Natural law theory is based on a conception of the human being. Could a natural law *per se* exist without a human being *per se*?

As far as morality and moral principles are concerned, in our context they are considered primitive concepts. This approach is consistent with the relativistic and pragmatic character of natural law as we understand it. It makes no sense to concentrate now on the issue of morality, since the issue of morality is replaced by the issue of the compatibility of rights.

The fact that agents/moral agents are artifacts suggests that natural law and the theory of moral agents are not at all incompatible. If artifacts are ›made and imagined‹, then artifacts compel us to take a pragmatic approach. The same is valid in regard to a developed theory of natural law which undertakes a critique of practical viewpoints with respect to various contexts. The evolution of the theory of natural law requires an understanding of the evanescent character of its traditional subject – the individual human being. But a pragmatic version of the theory of natural law can expand its subject to a large range of artifacts, from individual human beings to agents/moral agents. I assume that (D7) the theory of natural law is the theory of moral agents, grounding the legality of modern political systems not in the systematic character of legal procedures but rather referring to a bridge that agents / moral agents presuppose.

This expanded natural law is called upon in order to empower the actors who put on their agendas the promotion – the construction, one is tempted to say – of agents/moral agents within the domestic and international arena. If one says ›natural law‹, one implies ›rights‹. In this sense, natural law theory is essentially a discourse about the rights of agents/moral agents.

One must realize what the stake of the legal, domestic and international recognition of the rights of moral agents is. When applied to artifacts, recognition means construction, a fact which explains only too well the reluctance of the domestic and international community to recognize indigenous population, minorities and so on. If the decision to recognize a group has a circumstantial character, then the arguments of natural law are deeply rooted in the practical struggle for the recognition of group rights.¹¹¹

On the other hand, it is normally assumed that our conception of rights and justice must overcome contingent details. In the case of D7, the legitimate bridge is, as Roberto Unger noted, contextually-dependent and contextually-transcendent. But this dependence does not mean that our conception of minorities should result from the opinion of, say, France, or the UN, or the OSCE on the matter. It means, on the contrary, that France has to take into consideration *our* understanding of minorities. Even if today this remains a desideratum, tomorrow another context may satisfy the criteria of rights and justice.

¹¹¹. As Rorty puts it, human rights need passion and courage rather than reason and theory. See Rorty, *op. cit.*

5 Agents and Democracy

The rights of groups are manifestations of political nature, that is, they are deeply involved in the balance of power. They refer to guarantees of the possibility of mediating interests in order to produce decisions. In standard democracies a set of rules defines the means by which collective will prevails over the wills of each separate group, even in the case of more ›sophisticated‹ societies that have discovered the value of difference, affirmative action, etc. But if democracies rely on a majority then it is a legitimate question to ask how does democracy succeed, since ›democracy in complex societies requires conditions which enable individuals and social groups to affirm themselves and to be recognized for what they are or wish to be.‹¹¹²

There are authors, such as Will Kymlicka, David Miller, Joseph Raz, Yael Tamir, Charles Taylor, etc., who, working from within the liberal framework, discussed how democracy can be made to work in multicultural societies. But I suggest here another perspective. This perspective states that political life is regulated by laws handling the rights of agents. This conception results from the idea that legal validity (the law being the political expression of the will to power) is valid as natural law validity. Only so can formal democracy become a real (i.e. moral) democracy. This is so because the democratic discourse is (and must be) a copy of the legitimated legal discourse. Real (moral) democracy describes what is just in a world constituted by agents (moral agents). In this world ›just‹ means ›compatible‹. If we admit as a matter of principle that we are dealing with agents, and therefore with the field of natural law, then democracy could shift from mirroring political relationships to reflecting the need for balance between different agents.¹¹³ As a consequence the evolution of democracy is the result of the agents' pressure when they struggle for

112. Alberto Melucci, *op. cit.*, p. 258.

113. This statement echoes G. Binder's principle: ›democracy depends upon group autonomy, while the autonomy rights of groups depend upon their democracy. See G. Binder, ›The Primacy of Group Freedom‹, in Anthony D'Amato, *op. cit.*, p. 268.

the improvement of the compatibility between agents and for the moral legitimacy of laws.¹¹⁴ The specific features of democratic rules, i.e. the logic of the mechanism by which laws are adopted, is only the by-product of the agents' dynamics. It is worth looking closely to the democratic principles within the international community. Do relations among states reflect relations among societies? According to Horowitz, ›by moving the question of policy to a philosophical and ethical agenda, we hold out the distinct capacity to move beyond polarity.‹¹¹⁵ I assume that the realm beyond polarity is mainly the realm of the large numbers of actors in the international arena, now much more than the traditional nation-states. These actors prove to be more and more like agents than legal-political forms of representation, thereby increasing the chance for a more democratic international community.

114. Here the accent falls on reconstruction a theme common on the postmodernist side. See, for instance, Peter Murphy, ›Postmodern Perspectives and Justice‹, in Dennis Patterson, ed., *Postmodernism and Law*, Yale University Press, 1994.

115. Irving Louis Horowitz, ›Moral Theory and Political Science: A New Look at the Gap Between Foreign and Domestic Affairs‹, *Ethics and International Affairs*, vol. 6, 1992, p. 93.

6 Agents and Civil Society

Civil society conceived as the totality of forms of organization between the state and the family is perhaps the widest structural understanding of this notion.¹¹⁶ This definition does not capture the emergence of a ›world civil society‹. As noted before, NGOs, religions, businesses, transnational communication systems, etc. are no longer contained within the territorial boundaries of sovereign states. Gordon Christenson noted that ›world civil society ... rather contains a global sense that a diverse and pluralistic burgeoning of world life is becoming freer from dominance either by sovereign states or system of sovereign states.‹¹¹⁷ There are reasons to believe that any structural definition of civil society or any inventory of its components will fail to describe the actual extent of civil society. Where can we draw the limits?

There is no difficulty in understanding world civil society as the product of the freedom of expression and association, or as a way toward pluralism and autonomy, in the same way in which the ›domestic‹ civil society is understood. Both perspectives (civil society as process; and civil society as axiology) emphasize wishes, choices, decisions (see section 1.2). We recognize here the dynamic glue that gives identity to different groups united by different purposes. All this suggests that in a simplified sense civil society can be understood as *the set of all agents*.

The concept of civil society is usually associated with the notion of pluralism. There is an illustrative story about this relation in James Turner Johnson's ›Does Democracy 'Travel'?‹.¹¹⁸ Johnson discusses the different ways in which Americans and their Polish counterparts understand the idea of pluralism. Johnson opts for the definition in an American dictionary, which defines pluralism in terms of diversity

116. See Gabriel Andreescu, ›Le developement de la societe civique en Roumanie‹, *La Nouvelle Alternative*, no. 6/1991.

117. Gordon A. Christenson, *op. cit.*, p. 737.

118. James Turner Johnson, ›Does Democracy 'Travel'? Some Thoughts on Democracy and Its Cultural Context‹, *Ethics and International Affairs*, Vol. 6, 1992, pp. 41-57.

and protection: »a state of society in which members of diverse ethnic, racial, religious or social groups maintain an autonomous participation in and development of their traditional culture and special interest within the confines of a common civilization.«¹¹⁹ For Polish scholars, the pluralist society refers essentially to political and social differences producing atomization, a climate in which social groupings (farmers, factory staff, trade unions, political parties or loosely organized groups) compete with one another to pressure the state hoping that it will once more become a Great Distributor, rather than work together. »This sort of pluralism«, writes Johnson, »does not tend towards the establishment of civil society; rather it undermines that necessary first step toward democracy.«¹²⁰

The fact that Americans tend to see in the American and Polish approaches respectively some competing conceptions is too hasty an interpretation. Let us look at some basic anthropological facts to which any general description of the rich variety of societies needs to refer. My minimal anthropology is three-dimensional: it refers to *charity, freedom, and interest*. These three dimension are, of course, hardly independent.¹²¹ The Polish approach is only one way of balancing these three dimensions. Simplifying, charity is probably more prominent in the shaping of civil society in Great Britain; and in the US groups of interest are a very potent force behind the American civil society. The drive for freedom is almost certainly the most potent drive in Eastern Europe.

This way of looking at things pays attention to the distinction between functional entities and civil society and to the distinction between public law and private law. In the realm of public order functional entities and public institutions »guarantee contracts between private individuals, [keep] the peace both internally and externally, [impart] a degree of collective management to the overall social development of the society.«¹²²

World civil society is possible because international agents are increasingly present in the modern international community. One of the most outstanding examples of international moral agents are religions. Most of the world's religions claim

119. Ibid., p. 49.

120. Ibid., p. 50.

121. In order to be charitable one has to have a certain degree of freedom and even a measure of interest.

universality. They succeeded in creating international solidarities and, thereby, international identities – the best and oldest model remains the Catholic Church itself. (Which also suggests that the world civil society is an entirely new phenomenon.)

Who are today's patients that will be tomorrow's moral agents? The fact that citizens have a legal opportunity to participate in international organizations and the continuous development of communications will expand considerably the number of international NGOs. Human rights, ecological, and women's communities have reached out beyond intra-national solidarity. A clearly-defined set of goals and procedures pave the way towards the recognition of a common identity of the world civil society.

7 The Theory of Agents and Conflict Management

If agents are the nourishing reality of the global society, and if they develop themselves by means of a continuous process of legitimization, then the main concern is the compatibility that enables them to enjoy their identities together. Modern world rule implies diversity, development and peaceful changes. Here is an explanation of the marked shift in scholars' focus from descriptive-structural social sciences to conflict management sciences. Conflict management is not some sort of marginal wisdom about diminishing the number and the intensity of conflicts, but the core of the re-interpretation of the global society. If the world of agents (the global civil society) is a world ›in the shaping‹, then improving this world is more

122. Justin Rosenberg, *The Empire of Civil Society: A Critique of the Realist Theory of International Relations*, Verso,

important and more complex than describing it. Conflict management is the science about how the actions of agents can be made compatible.¹²³ On the other hand, the compatibility among agents is just one particular side of the relation among them. This is the reason why the theory of conflict management will never obtain the status of a globalizing science.

8 Do Nations and Nationalities Have a Place Within the International Community?

Traditionally, ›nation‹ refers to the totality of those who share a common ethno-cultural heritage. The concept has lost many of its connotations in the modern world, when the ›civic nation‹ was prioritized. ›The people‹ as a group are now understood primarily as a group of different people who enjoy self-determination and establish their own state. This change turned out to be crucial to the shape of the new world order. Mankind replaced national identity from the ground up and made it possible to interpret the world's map in terms of human rights. The well-motivated skepticism with regard to the old principle of nations or the classical *Volk* transformed these ideas into painful memories.

There are a lot of reasons to salute this change. The terrible conflict in Yugoslavia was nurtured by the mad advocacy of the ethno-cultural understanding

1994, p. 125.

123. Among the classical theories in conflict management: Lijphart's institutional techniques for dealing with ethnic conflict (Arend Lijphart, *Democracy in Plural Societies*, Yale University Press, 1977); Esman's study of the authoritative allocation of scarce resources among communal actors (Milton J. Esman, *Ethnic Politics*, Cornell University Press, 1994, etc.)

of nations.¹²⁴ An interesting detail is the distinction between ›nations‹ and ›nationalities‹ in Yugoslavian law. The federal Constitution of 1974 distinguished between ›nations‹ (*narod*) such as the Serbs, Croats, Slovenes, Montenegrins, Macedonians, and Moslems and ›nationalities‹ (*narodnosti*), such as the other Slavic and non-Slavic groups that had a state outside Yugoslavia – Albanians, Hungarians, Slovaks, Romanians, Italians.¹²⁵

In the 1990s the linguistic distinction still played an important role in the Yugoslav conflict. One of the arguments that Serbia opposed to Croatia's attempt to turn Yugoslavia into a confederation was the fact that the Serbs in Croatia will remain a ›mere‹ nationality. Serbia insisted on a hierarchy of group rights, nations being entitled to higher status than nationalities. Meanwhile, Croatia argued that if nationalities are opposed to nations, then they have the right to self-determination (*narod* means both nation and people). Varady believes that when the distinction between nations and nationalities was first codified it had no particular relevance in practical terms. Its significance was *merely* symbolic. But in fact the case of Yugoslavia forcefully points to the notion that symbolic acts (distinctions) are not devoid of political relevance. Symbols are bricks at the basis of artifacts such as nations, nationalities, minorities and so on. They link together desires, goals, acts, will. The distinction between nation and nationality had a very meaningful part to play in the post-civil-war map. It also gave substance to the notion of the nation as the mother-group of nationalities.

On the other hand, it is completely opportunistic to deny entirely the political reality of the former connotations of ›nation‹ and consider it only a discursive stratagem expressing a nostalgic yearning. When the German Constitution grants everybody proving their German origins the German citizenship, an ethno-cultural will is obviously at work. When the Hungarian Constitution states ›the responsibility of the Hungarian government for the Hungarians outside Hungary‹ or when prime-minister Victor Orban states that the borders of the Hungarian nation are broader than those of Hungary, an ethno-cultural will is again expressed. There are scholars

124. Misha Glenny, *The Fall of Yugoslavia*, Penguin Books, 1993; Bogdan Denich, *Ethnic Nationalism: The Tragic Death of Yugoslavia*, University of Minnesota Press, 1995; Paul Mojzes, *Yugoslavian Inferno: Ethnoreligious Warfare in the Balkans*, Continuum, 1995.

125. See Tibor Varady, *op. cit.*, pp. 10-12.

who speak about the myth of ethno-cultural neutrality in the liberal states. In a forthcoming paper (›Western Political Theory and Ethnic Relations in Eastern Europe‹) Will Kymlicka considers the example of the US, the typically neutral state: ›Firstly, it is a legal requirement for children to learn the English language in schools. Secondly, it is a legal requirement for immigrants... to learn the English language to acquire the American citizenship. Thirdly, it is a de facto requirement for employment in or for government that the applicant speak English. Fourthly, decisions about the boundaries of state governments, and the timing of their admission into the federation were deliberately made to ensure that anglophones would be a majority within each of the fifty states of the American federation.‹

One of the important questions that at the background of this paper is whether concepts work in a positive way. Do ›rights of nations‹ enrich the general system of rights? The most convincing example that I could offer was their role in shaping international law in the case of individual and especially collective rights. The autonomies in Aland Islands and South Tyrol,¹²⁶ the special status of Danes in Germany, the improvement of the Hungarians' standing in Romania, the evolution of the Russians' status in the Baltic countries are the result of an international concern of the Swedish, the Austrians, the Danes, the Hungarians and the Russians as ethno-cultural entities.

One is entitled to ask if the regional processes of integration are not influenced by the fact that almost every nation in Europe is scattered in smaller or larger communities in different countries. The interest for integration can be related to the interest for better communication between people of the same genealogy, i.e. between members of the nation in the traditional sense of the word. Another face of the same process is the development of the EU's relations with other countries. In April 1998 Austria firmly insisted that Hungary introduce visas for Romanian citizens in order to curb immigration. Hungary resisted the pressure doubtlessly thinking of the great number of Hungarians in Romania.

126. In 1960 and 1961 Austria was again involved in the affairs of South Tyrol. It submitted the dispute to the UN General Assembly which ›urged the two parties to resume negotiations with a view to finding a solution for all differences relating to the implementation of the Paris Agreement of September 5, 1946.‹ (UN General Assembly Resolution 1497, XV, 31 October 1960; UN General Assembly Resolution 1661, XVI, 28 November 1961).

Cases such as that of Yugoslavia warn us of the dangers inherent in the promotion of an ethno-cultural conception of the nation. If one advocates nation-rights one has to prove that positive entailments are not followed by negative consequences. In other words, can the ›nation‹ become a bearer of specific collective rights in ways that will not weaken the general system of rights? Is there any sign that international law can tolerate such an approach? In my opinion, whenever international documents refer to the right of persons belonging to national minorities to have relations with persons of other nationality (those with whom they share common ethno-cultural features), the right of the mother-state is taken into consideration. This is obviously the case with the right of states to monitor how other states respect minority rights, as in the monitoring mechanism established by the Council of Europe with respect to the Framework Convention for the protection of National Minorities. When one makes reference to a state-competence one has to add a people-competence that expresses the ethno-cultural will of the mother-state, related to the ethno-cultural will of the minority. While there is no formal nation-right, in practice an informal right is timidly emerging. Nations' rights seem to be accepted in specific cases in a very non-obvious way. Can one conceive of a proper collective right of the nation?

To be realistic, one has to think of a nation as a moral agent with no unique legal-political representation. If persons with a specific ethno-cultural identity or their representatives (those of a minority in a state, for instance) or the majority of a different state, or international organizations will sue for violation of the rights to their identity one could speak of a formal nation right with a well-defined place in the international law. Such a machinery is in fact not absurd. If one day the Council of Europe will accept a protocol on minority rights (it was almost ready to do it in 1993) then such a mechanism involving individuals and organizations might reach the complexity of a collective right exercised individually. This would forge a stronger agent – the nation in an ethno-cultural sense – the evolution of which in the international affairs is unpredictable.

9 National Minorities as Moral Agents

9.1 National Minorities and Moral Will

As mentioned above, certain groups raise the issue of the necessity to pass from the condition of patients to that of agents. The limits of these groups' ability to express their own options in relation to moral principles that carry group specificity depend essentially on external, rather than internal, conditionings. That is true of national minorities, indigenous populations, and other groups with a well-defined identity. The contextual details are always so fine that we cannot witness as such the process by means of which a group changes its status and becomes an agent. A possible illustration is the case of the Moldavian Csangos, a Catholic population speaking an old Hungarian dialect, who preserve ancient habits but live surrounded by Romanian Orthodox population. After several decades of forced assimilation (starting in the second part of the '50s), they have now reached a new stage in the definition of their identity. The democratic system after 1990 witnessed the emergence of new community leaders – formal and informal, NGO members – and of the debate over Csango identity. They are not recognized as a national minority although 2,165 persons have declared themselves of Csango nationality in an 1992 census, a figure higher than that of other acknowledged minorities (e.g. the Armenians). Investigations indicated that the census was vitiated by the older policy of forced assimilation. Several estimates suggest a figure of a few tens of thousands of Csangos.¹²⁷ Some Csangos consider themselves Hungarians, some other Romanians. The organization that represents the Hungarians in Romania (DAHR) treats them as Hungarians for obvious political reasons. Some Csango leaders managed to determine a certain mobilization among the minority, but their options are not yet clear-cut. Csangos may accept the views of the DAHR and thereby obtain some rights that they had been asking for (studying in Hungarian, church service in

¹²⁷.See *Human Rights Developments in Romania: 1997 Report*.

the mother tongue). However, the long-term result would be the dissolution of this special community in the larger Hungarian pool. Another option would be to assume a distinct identity. Since it is probable that a few tens of thousands might acknowledge their specific descent (which they were afraid to do for so long), there is a strong possibility that they might be acknowledged as a (rather large) national minority. This would assure a membership in the National Minorities Council and annual subventions from the state that will help them preserve their traditions that have already withstood in part the leveling powers of modernity. This second scenario would bring about a new agent – a new minority. At the moment that this paper was written the process is unfolding. There is no clear-cut tendency yet.

Provided our approach to minorities rights (understood as collective irreducible entities) is partially accepted even at the level of the international law, then we must look to the next issue: are these entities moral agents?

The main ingredients of the ›moral agent‹ are, as noted, the will, the common work for the common good, etc. Remember that the term ›moral‹, in ›moral agent‹, does not have the meaning of an item in the catalogue of the good behaviors. Of course, this results in serious quandaries. As Will Kymlicka notes, ›in many parts of the world, groups are motivated by hatred and intolerance, not justice, and have no interest in treating others with goodwill. Under these circumstances, the potential for ethnic and national groups to abuse their rights and power is very high‹ and he gives as examples the recent cases of Yugoslavia and Rwanda.¹²⁸

The moral status of national minorities does not derive merely from the fact that, by comparison with other groups and with the society at large, minorities have their own moral projects along different other ones. Rather, to an important (even crucial) extent, it comes from the fact that groups are by definition the milieu where moral consciousness manifests itself. I believe this argument was aptly argument expressed by Guyora Binder. She worth quoting in full: ›[I]t is a mistake to suppose that people either choose or pursue their vision of the good autonomously. They do not so much choose ends as choose cultural identities through which they can participate in collective decision and action. Thus, they forgo the autonomy celebrated by philosophers in order to gain access to one another's powers and judgement. They do this because the pursuit of genuinely private ends would be

emotionally meaningless and politically ineffectual. Rather than reduce morality to justice, we should view morality as a form of politics in which each person's ability to identify and pursue goals depends on the cooperation of others. From this view it follows that only when we act together can we be the self-determining moral agents philosophers describe.¹²⁹

It would therefore be a mistake to approach the issue of the morality of agents from the perspective of an individualist ethics. The main characteristic of agents such as national minorities is the affirmation of their identity in the context of other identities. But just like groups are the space where moral consciousness manifests itself, so the wider framework of peoples and the international community is the space that bestows meaning upon that ›form of politics‹ which is the morality of national minorities as agents. Their ethics cannot be dealt with individually, as a problem that applies uniformly to individuals. A complex interaction between individuals and communities is outlined. Every community ring (family, institution, national minority, state society, global community) has its own logics that is irreducible to that of ›inferior‹ rings.

9.2 The Self-Determination of Minorities

The self-determination of minorities refers to the set of competencies of the national minorities defined with respect to other moral agents. This application of the definition in D5 is important because of the relativistic nuances of the self-determination of minorities. Why should the self-determination of people have a general expression but the self-determination of national minorities should not?

Personal autonomy seems to be the closest analogy to self-determination understood internally (defined in para.:1.1.7 as ›the right freely to determine the political status and to pursue the economic, social and cultural developments‹). But even in the case of the most elaborated personal autonomy known – Estonia, 1925 – only the institutions directly connected with cultural-educational activities are entitled to be fully on their own. The Statute on Cultural Self-Determination of the

128. Will Kymlicka, *Multicultural Citizenship*, Oxford, Clarendon Press, 1995, p. 193.

129. Guyora Binder, *op. cit.*, p. 267.

National Minorities (1925) authorized all national minorities with at least three hundred members to establish associations of public law. These associations organized, administered and supervised public and private schools and institutions related to culture.¹³⁰ Other economic and social institutions presuppose, obviously, the interest of the majority and, as a consequence, its rights and its participation to decisions.

Any model for the protection of minorities will include certain norms which allow a certain degree of self-determination. The right to have minority associations, to run newspapers and broadcasting institutions, to develop ties with persons with whom they share common features, to build schools and churches and to manage them, are all part of the legislation pertaining to self-determination. But what about the right to ask and receive support from the state in order to create minority institutions? There are rules which transform the theoretical principle of self-determination into the practical principle of self-determination. What about the principle of non-discrimination? This is the case which properly refers to ›rights of the persons belonging to national minorities‹ and not to ›rights of the minorities‹ as such. The norms already codified within the UN, OSCE and the Council of Europe, as well as by other models of autonomy, include non-discrimination rules and self-determination rules. The heated debate between those who struggle for applying international standards describing special measures and those who look for domestic models of autonomy by means of which minorities are granted rights lacks substance. What is important is to have *appropriate* rules of self-determination and non-discrimination guarantees.

A significant example of this debate is the confrontation between different wings of the Democratic Alliance of Hungarians in Romania, the leading organization which represents the Hungarian minority in the country. In 1993, the DAHR sent to the Romanian Parliament a draft law on minority rights and autonomous communities which codified a complex system of minority institutions under the public law, personal and territorial autonomies. This draft law has never been introduced on the agenda of the Romanian Parliament; instead it has become the flag of a strong wing within the DAHR, which considered the specific means of the draft law as ineluctable guarantees for the protection of the Hungarian minority.

130. Ruth Lapidoth, *Autonomy. Flexible Solutions to Ethnic Conflicts*, United States Institute of Peace Press, 1996.

Because the 1996 elections were won by a democratic coalition ready to integrate the DAHR into the government, a proposal was handed to the Hungarian leadership to accept special measures covering the concrete rights that Hungarians demanded instead of the autonomy system, partially non-constitutional. The moderate wing succeeded to convince the DAHR to accept the deal. When a system of special measures was adopted by the Romanian government in May and June 1997 by means of two emergency orders, there was no complaint about the failure of these measures to accomplish what the former autonomy-system was designed to accomplish.

From this perspective one has to note the wording of the Article 27 of the International Covenant on Civic and Political Rights, which tackles the rights of the persons with an ethnic, racial, linguistic and religious identity: »In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not deny the right, in community with the other members of their group, to enjoy their own culture, to profess and practice their own religion, or to use their own language«. Art. 27 repudiates any constraints imposed on the means by which persons of ethnic, racial, linguistic and religious identity enjoy their rights, opening room for the actual constraints on self-determination: the appropriate character of the rights and the respect for the rights of other individuals and group rights, people rights included.

9.3 The Representation of National Minorities

The issue of representation is fundamental in that it is usually referred to in order to underscore the distinction between individuals and peoples as moral agents, on the one hand, and minorities as moral agents on the other. In the Moral Agents Quadruple individuals and peoples have a univocal representation. This is not the case of national minorities in the actual environment. Of course, one can find contexts which offer univocal representation, as in the case of personal autonomy. After World War I Estonia permitted its national minorities to be organized as entities of public law. These groups established autonomous institutions in order to

preserve and protect their cultural heritage.¹³¹ To enable self-rule institutions to carry out their specific functions, they were granted the power to make regulations that were binding for the members of those communities and to impose taxes. The Estonian case is not unique.¹³² On the other hand, it is hardly common, especially after World War II.¹³³

Generally, minorities are not subject to public law and do not have a representative body.¹³⁴ Minorities offer an open space for individuals and NGOs to represent their interests and values. There are cases when a certain organization gets most of its support from a national minority due to purely circumstantial reasons.¹³⁵ But these are exceptions. Which are the consequences of the fact that, generally, minorities do not have their unique representative body?

We should look once again at the case peoples as moral agents. Peoples are also an open space for competing individuals and groups aiming to represent the peoples' values. This is an ontological dimension of any group – be that a corporation or an organization. Each needs a mechanism by means of which persons are made subject to rules of ›unification‹ in order to impose a political-juridical representation. The group thereby becomes a unified subject, with its own specific goals and means to its ends. Peoples in particular developed a unique system – in democracies, the multi-party system – in order to reach a global and unique representation. This unique representation gives people the possibility to participate in the shaping of their environment, which is the global community. Peoples are moral agents shaped by history and, as such, they are contingent entities. One can easily imagine that the actual global society is a cluster of groups,

131. Ibid.

132. The Jews have been sometimes permitted by European rulers to administer their ›internal affairs.‹ The same was true for non-Muslim communities within the Ottoman Empire.

133. In 1991 the new independent state Latvia enacted a law aiming at granting national minorities a certain degree of personal autonomy (›Law on the Unrestricted Development and the Right to Cultural Autonomy of Latvia's nationalities and Ethnic Groups‹ – an English version is available).

134. There are scholars who express high appreciation for personal autonomy (e.g. Lapidoth, *op. cit.*). The main critique with regard to this form of autonomy is the dependence of the members of national minorities on their representative body.

135. Such is the case of the Hungarians in Romania. In the 1990, 1992 and 1996 elections, the Democratic Alliance of the Hungarians in Romania won the minority's votes (about 7%). This is not the case in Slovakia, where at least three parties dispute among them the will of the Hungarian minority.

reaching unified subjects at most at the level of what we today call minorities. (To the actual global community belong not only people gifted with states, but also tribes living in places where there is no real state authority.) Could such a global community exist? Doubtlessly. The real problem of any global society is how to comfort all individuals and different species of groups. In our terms, how to comfort all moral agents.

The upshot of the preceding analysis of peoples is this: the fact that national minorities lack an unique (judicial-political) representation is a contingent fact. Sometimes they enjoy such forms of representation, but generally they do not.

9.4 Minorities – From Moral Agents to Moral Patients

As I have mentioned before, certain groups raise the problem of the necessity to pass from the condition of moral patient to that of moral agent. When these groups are limited in their capacity to express their own options in relation to the moral principles that carry the group's specificity, they come to depend upon external conditions.¹³⁶ The theory of moral agents can produce some useful observations on the minority problems.

As can be expected, many definitions have been given to the notion of ›national minority‹.¹³⁷ As a matter of fact, the very question of whether there should be a clear-cut definition of ›national minority‹ in official documents that are juridically and politically binding for states has been amply debated. Many states argued against such a formula. Recently, however, the Council of Europe supported, up to a point at least, the idea of a definition of the national minority. This definition was featured in the Recommendation 1201. The Hungarian law of national minorities, adopted in 1993, also uses such a definition. (It introduces a perishable conceptual criterion – the age of the group that gets a minority status, which should be 100 years at the date the law is adopted.)

¹³⁶The study of the rights of indigenous populations is rich with insights (see e.g. ›Indigenous Peoples and the UN Commission on Human Rights. Case of the Immovable Object and Irresistible Force,‹ *Human Rights Quarterly*, vol. 18, no. 4, 1996).

¹³⁷See Girasoli, *op. cit.*

The paradigm of moral agents, however, regards minorities as artifacts. We should therefore avoid freezing the notion of a ›national minority‹ by means of a definition with legal value. The way we think about minorities, their range and their substance, evolves and adapts not only function of concrete circumstances, but also in virtue of the evolution of our conceptual frameworks. As some point or another a frozen legal definition might prove an impediment.

9.5 Historical Minorities and Immigrants

Among minority rights experts there are some who consider that the principles of national minority protection, as they appear within the main documents adopted by the UN, the OSCE, and the EU must also apply to the immigrant communities established at a certain moment in the West. Arguments on both sides seem to revolve around questions of emphasis and nuance. What does the relation between immigrant communities and historical communities which firmly qualify as national minorities look like, according to the moral agents paradigm?

When we defined moral agents, we said that they act in virtue of their capacity to choose and their capacity to make reference to moral principles – without making any allegation about what constitutes a moral principle. For this reason, the name of the moral agent is never a label, a simple nominal selection of the subject. It is very important to distinguish between the object of a protection system or policy (refugees, left-handed persons, victims of a natural disaster, etc.) and ›living‹ groups that act through their own will. It is true that, in time, any community may evolve and become a moral agent, if external conditions allow it. The group of left-handed persons may be one day become a real group, a group that is ›alive‹, a group with specific projects and ends. But in the current circumstances we suppose that it is possible to distinguish between the kinds of groups mentioned above.

The immigrants seem rather to belong to the category of groups that are the subject of a defined set of protection measures. They can be regarded as the subject of an integration or even assimilation policy (which they generally wish), or that of humanitarian aid. The difference between them and the historical communities emerges, from the perspective of the theory of moral agents, as sufficiently clear-

cut. The attempt to create artificial identities (such as education policies in countries like Sweden concerning the native-tongue of some immigrant groups) are a way to do good by force. They are most probably widely exaggerated.¹³⁸

10 Conclusions

The discourse on group rights is committed to explore, protect and strengthen individual and collective identities. One must see group rights as a component of the larger system of rights. All kinds of rights: pure individual rights, individual rights exercised in community with others, collective rights exercised individually, pure collective rights, etc. These kinds of rights can reinforce each other. The central issue is to make individuals and groups compatible and thereby avoid contradiction. Shaping group rights does of course involve ontological arguments and contingent arguments. But in this context ontology refers to the domain bridging individuals and groups rather than to an atemporal human nature.

The core of the battle for those who place the improvement of group rights on their agenda is the acknowledgement of groups as moral agents. Their arguments do not so much belong to the arena of ontology, but to the logic of the system of actual and possible individual and group rights.

¹³⁸A Draft Law regarding the rights of national minorities, elaborated by the Center of Human Rights in Bucharest in 1994 has been criticized by Pieter van Dijk because of its traditionalist perspective on this matter – the reduction of national minorities that enjoy a special protection to historical minorities. See Pieter van Dijk, 'The evaluation of different law projects regarding national minorities from the point of view of the conformity to the international standards', in *Legislation in Transition*, Center of Human Rights, Bucharest, 1995.

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