

Neelan Tiruchelvam Commemoration Lecture Series - 1

Good Governance in Ethnically Heterogeneous Societies

Asbjørn Eide



International Centre for Ethnic studies

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International Centre for Ethnic Studies
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Good Governance in Ethnically Heterogeneous Societies

Neelan Tiruchelvam was one of the great constitutional lawyers who understood the need to adopt constitutions to diversity and pluralism. He pointed out time and again that the state should not be equated with the (ethnic) community. When the state purports to act on behalf of an imagined community, it serves in fact only a hegemonic group and marginalizes indigenous peoples, minorities and other non-dominant cultural groups in society. More importantly, he also pointed to ways in which this could be constructively handled, through a combination of integrating and separating measures that could be spelled out in a mature constitutional system. He played an active part in the international expert discourse on these matters, and contributed substantially to the work of the United Nations Working Group on Minorities, which I chair. The murder of Neelan was not only a terrible loss to the Tamils and to Sri Lanka but also to the international community in its effort to find more peaceful and constructive ways to handle heterogeneity in society.

Contemporary international human rights law sets requirements to institutions and processes of good governance, and to participation in and outcomes of the exercise of public power. How are these requirements to be applied in ethnically heterogeneous societies, where different ethnic groups coexist within the same state¹?

Most national societies are ethnically and culturally heterogeneous. Tragically, many governments and many hegemonic ethnic groups have denied or neglected the plurality of cultures within their borders. As a consequence many of them have become mired in conflicts which would have been avoided with a greater understanding of and respect for the composite nature of the society.

The following discussion proceeds in three parts: The first is a categorisation of past policies in heterogeneous societies, the second a review of the developments of international norms in this field, and finally some consequences are drawn for the assessment of good governance.

1. Categories of Past Policies in Heterogeneous Societies

Approaches to group relations within states have differed enormously in the past. Policies can be evaluated on the basis of their content and their intended effect, and are the result of competing influences by different groups and can therefore

¹ Under the heading 'ethnic' groups are included ethno-national and ethno-linguistic groups. In some cases their ethnicity originated through a common religion that is different from that of the other group(s) in society. The notion of 'racial' groups fall into a different category and has been the subject of so much semantic confusion that it is of very little use and will not be addressed here.

not be easily classified by simple criteria. What follows is a relatively high level of abstraction from practice observed in reality, based on two dimensions of classification. The main dimension here is line with homogenization at one end and separation at the other, with integration as an intermediate option. The second dimension is equalization versus ranking (differentiation in status). Combining these dimensions gives us six categories: Homogenization based on equalization versus homogenization combined with discrimination, and a similar twofold version each of integration and of separation. Having explored the policies of the state, a brief review will also be made of the claims or demands made by minorities.

Homogenization: Fusion, Assimilation and Exclusion.

Homogenization (making everybody alike, i.e. seeking to make everyone conform to one common culture, one language, one set of mores and behaviour) can be pursued in three different ways: Through fusion, through assimilation, and through exclusion. *Fusion* is a process where members of two or more cultures produce a new and different culture. It corresponds to the more popular notion of "melting pot" and occurs mainly in immigrant settler societies when the immigrants come from different nationalities and ethnic groups to a new future. If the territory to which they migrated was uninhabited, it would only be a question of the different cultures of the immigrants. If an indigenous people already lived in the territory, the question would be whether the members of that cultural group were equally influential in shaping the new culture. Real history shows that they were not. More generally, it is clear that the different cultures had different weights in shaping the new culture: In the United States, the dominant impact came from the British. Others influenced the culture to different degrees. In Latin America, the culture of the colonizing country dominated the evolution of a new culture; the indigenous were for a long time

discriminated or entirely excluded. So where those who were brought in as slaves.

Assimilation is understood as a process by which homogeneity is obtained on the basis of a dominant culture, to which other groups are expected to conform by shedding their own cultural characteristics. There is only a question of degree between fusion and assimilation. While being a dominating technique, it has at least the redeeming feature that it accepts new members. A fully inclusive, assimilationist approach would be anti-racist and non-discriminatory in all other fields than in culture. In practice, however, some parts of the population is hard to assimilate or is not wanted.

Exclusion: Homogenization could be achieved, however, by an entirely different and much more reprehensible process: Making the society homogenous by excluding those who are different, who belong to a different ethnic or religious group. The general term today for such policies is "ethnic cleansing", which is pursued in more or less brutal ways. One approach is to deny citizenship, at the time of independence or restored independence, to long-standing resident members of another ethnic group or make it difficult for them to obtain citizenship, combined with rules which prevent the denationalized residents from holding property and access to jobs in the public service;² a more brutal approach is to terrorize members of other ethnic groups

² Such policies can be observed in some countries after independence from colonial rule, and in more recent times in the countries which have become or regained independence following the dissolution of the USSR and Yugoslavia. In regard to the latter, the issue is discussed, e.g., in Müllerson, Rein: *The Continuity and Succession of States, with Reference to the Former USSR and Yugoslavia. The International and Comparative Law Quarterly*, vol.42 (1993) p.473-493.

in order to make them flee the territory;³ the third approach is largescale population transfers.⁴ The most extreme approach is that of genocide.⁵

Integration is understood as a process which differs from homogenization: While separate elements do combine into a political and economic unity, each group retains its identity to the extent that it does not threaten the over-arching unity. There can be degrees of integration, and there can be

³ This is the approach used, in particular, by Serbs in Bosnia-Herzegovina in order to force Muslims to leave those part of the territory which Bosnian Serbs want to attach to their 'Greater Serbia'. It has been used, though to a lesser extent, in several other recent ethnic conflicts.

⁴ The negative consequences for the solution of ethnic conflicts of such transfers are discussed in Palley, Claire: *Population transfers*. In Gomien, Donna: *Broadening the Frontiers of Human Rights*. Oslo: Scandinavian University Press, 1993, pp. 219-257. Such transfers, their legality and consequences for human rights, have been the subject of a penetrating study for the Sub-Commission on Prevention of Discrimination and Protection of Minorities, by Professor Al-Khasawneh, Special Rapporteur on human rights and population transfer (E/CN.4/Sub.2/1997/23).

⁵ Genocide is defined in Article II of the Convention on the Prevention and Punishment of Genocide, adopted by the UN General Assembly on December 9, 1948, as 'any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such: (a) killing members of the group; (b) causing serious bodily or mental harm to members of the group; (c) deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part, (d) imposing measures intended to prevent births within the group, (e) forcibly transferring children of the group to another group'.

egalitarian integration or integration based on discrimination. Key indicators in practice of the difference between fusion or assimilation on the one hand and egalitarian integration on the other can be found in policies related to language and education. Policies of homogenization allows only one language for public use and for publicly funded education, and standardizes the content of education for purposes of socialization into a common cultural frame. Policies of egalitarian integration allows two or several languages or provides for publicly supported education in different languages where several linguistic groups co-exist, allowing for public use also of non-official languages. Homogenizing educational policies seek to socialize all members of society, through their education, into the common culture, transmitting a common set of values, a common conception of history and a common preferred future vision, while integrationist policies will give space for presentation of the different cultures and traditions in that society and the different conceptions of history, thus also allowing for some scope of differences in future visions.

Integration by Discrimination and Unequal Treatment.

Policies of majorities sometimes reflect patterns of discrimination: Unequal treatment, denial of access to certain jobs, to housing in certain areas, or other forms. It can include separation, in schools, in means of transport, and in other ways. The discrimination is not necessarily imposed by law. In many places it results from widespread practice by members of the majority when the state fails to protect against the discrimination.

Examples exist of a two-pronged approach where the policy towards some groups is characterized by fusion or assimilation on a basis of equality, but where members of some groups are integrated on a basis of inequality, being offered only the lower jobs, inferior education and subject to other negative measures. The purpose is not to exclude those

members altogether from some form of participation in the economic life of society, but to make use of them in an exploitative pattern. This has occurred mainly on racial lines, but the discrimination built into the caste system in the Indian subcontinent and with regard to the Burakumins in Japan appears not to be based on race.

Pluralist Accommodation. Policies of partial integration might be combined with some degree of separate functional autonomy, recognizing the separate existence of different groups on a non-territorial basis. Members of groups dispersed in society may want to be given separate treatment in some aspects of their life, while living with others on common territory. Considerable practice exists in different parts of the world.

After centuries of conflict, solutions have in modern time been found in most Western countries with regard to religion: The existence and separate management of religious places of worship (churches, mosques, synagogues and temples) and religious organizations are broadly accepted today. It still gives rise to considerable tension in some places, most pronounced with regard to the Muslim/ Christian interface in Africa (Sudan, northern Nigeria), in Asia (e.g. in Indonesia and the Phillipines) and in many parts of the former Soviet Union. The conflict in Bosnia and other parts of former Yugoslavia revolved around the tensions between the Serbs whose culture has been affected by the Orthodox religion; Croats, who generally are Catholics, and those of the Bosniacs who are Muslims. The conflicts between Nationalists and Loyalists in Northern Ireland generally coincide with the distinction between Protestants and Catholics. In Sri Lanka, most Sinhala are Buddhists and most Tamils are, even if it may well be that religion is more a pretext than a cause.

Another set of problems concern the use of language and the content of education. Languages serve instrumental

as well as primordial (identity-bearing) functions, and there are conflicts of interest as to what should prevail in these respects. Similarly, education serves the purpose of national socialization as well as identity preservation, which gives rise to considerable conflict.

Different approaches can be found in multicultural societies, including separate schools, or separate classes for some parts of the instruction. The concern with equality, in particular equal opportunities in the larger society, poses problems in the implementation even of well-intentioned pluralist policies. To find the appropriate balance between partial separateness and equality is a task of considerable complexity.

Pluralist group accommodation has in the past often been based on a ranking system: Dispossessed groups earlier deprived of large parts of their land or other resources are later left in a pattern of benign neglect to their own devices, being allowed to have a system of self-government but without making available the resources necessary to give substance to their self-government. Some arrangements for dispossessed indigenous groups might fall in this category.

Territorial separation can be a solution on an egalitarian basis, where dissimilar groups voluntarily choose to live territorially separate within the same sovereign state when the territorial separation is made in order better to preserve their own particular lifestyles and cultures, while also being partners of the larger entity on a basis of equality and non-discrimination. It is on an egalitarian basis provided (a) that it is indeed the voluntary choice by each group involved, (b) that there is no hierarchical ranking between the groups, (c) that they share common resources on a basis of equality and (d) wherever they interact, there are no privileges for members of one group and exclusion or restriction for members of other groups.

But territorial sub-division are often pursued on a basis of ranking, or discrimination. The extreme version of dominant separation is that of *segregation*, the prime example being *apartheid*, which aims at keeping the ethnic groups territorially separate, unmixed, and ranked in a hierarchical position. This policy was used for purposes of extreme exploitation, by depriving the weaker groups of access to resources except on conditions set by the dominant group. Segregation is a flagrant violation of human rights.

The establishment of autonomies is one approach which might be egalitarian but in many cases is not: It could be preferential for the dominant group within the autonomous area, facilitating discrimination or even exclusion of members of ethnic groups. Consequently, there is a need to analyze policies by majorities within autonomies in the same way as we analyze policies by majorities within the state as a whole.

Territorial Dismemberment of a sovereign state, breaking it into two or more independent units, is rarely a good solution to the problems discussed here. On the contrary: It is likely to replicate the system of hegemonic repression of cultural and ethnic heterogeneity, the only change being that it will now be a former minority which becomes the violator. Secession is very often the expression of a failure by both parties to seek a constructive solution based on human rights.

2. Evolution of International Human Rights Norms

Three aspects of human rights of relevance for heterogeneous societies will be briefly outlined: The principle of equality and non-discrimination, the rights of persons belonging to minorities to express, preserve and develop their identity, and the rights of indigenous peoples to material and cultural autonomy.

2.1 Equality and Non-Discrimination is a major concern in human rights law, as spelled out in the International Covenant on Civil and Political Rights articles 2 and 26, the International Covenant on Economic, Social and Cultural Rights article 2, the European Convention on Human Rights and Fundamental Freedoms article 14, the Inter-American Convention article 1, the African Charter on Human and Peoples' Rights article 2.

Cultural co-existence, which is an unavoidable aspect of contemporary societies, can easily generate discriminations in the form of exclusions, restrictions or preference. The main thrust of modern human rights is to counteract such tendencies by emphasizing equality irrespective of race, colour, religion, national or social origin and other factors. It therefore seeks to outlaw all forms of discrimination, which is defined as distinctions, exclusions, restrictions or preferences on unwarranted grounds, such as race, national background, ethnicity, or gender.

The main instruments in international human rights law to counteract challenges to the equality of human beings from different racial or ethnic groups is the International Covenant on the Elimination of All Forms of Racial Discrimination (ICERD). It has the dual objective to eliminate racial discrimination in all its forms and to promote understanding among all racial and ethnic groups (article 2, para. 1) "Racial discrimination" in the convention includes also discrimination in the basis of national or ethnic origin. Ethnicity is defined primarily by culture; consequently, "racial discrimination" includes discrimination based on the cultural origin or identity of persons concerned.

The aim is not only to achieve equality *de jure*, but also *de facto*. ICERD furthermore requires that special but transitional measures shall be taken in regard to racial or

ethnic groups when this is required in order to guarantee to them full and equal enjoyment of human rights and fundamental freedoms. These measures shall be transitional, however, in the sense that they shall not entail the maintenance of unequal or separate rights for different racial or ethnic groups after the objectives for which they were taken have been achieved⁶.

ICERD is concerned with the achievement of equality irrespective of racial or ethnic origin; this equality is intended for individuals, not for groups. The special measures are therefore intended to be transitional, until there is no longer any inequality in the enjoyment of human rights for individuals, irrespective of the groups to which they belong. It is explicitly stated in article 2, paragraph 2, that this shall not lead to the maintenance of unequal or separate rights for the different groups. It might therefore appear to come into conflict with the desire by different ethnic groups to maintain their own separate identity. This dilemma can be resolved, however, by distinguishing between two concerns: On the one hand, the overriding importance of equality in the common domain⁷, and on the other hand the possibility of maintaining a degree of pluralism in other fields of human activity.

2.2 The Rights of Persons Belonging to Minorities: Preservation of Identity. In the first period after World War II the majority of UN members gave priority to the concern with equality and were reluctant to include minority rights under general international law. The Western states, then in

⁶ ICERD art. 2, para. 2, seen in the light of the definition of "racial discrimination" in art. 1.

⁷ The scope of the common domain is discussed under 'governance implications' below. It covers mainly material issues, as distinct from identity issues.

a majority position, argued that universal human rights should be enjoyed by all individuals whether they belonged to minorities or majorities. The principle of equality and non-discrimination was based on the assumption that all inhabitants of the territory, irrespective of their race, sex, language, national or ethnic origin, 'are endowed with reason and conscience and should act towards each other in a spirit of brotherhood' (Universal Declaration Article 1). It was broadly felt that there was very little need for special minority protection arrangements.

Over the years, however, a change of opinion has caused a gradual evolution in the normative system, arising from the demand by persons belonging to ethnic, religious or linguistic groups for protection of their group identity. The core elements of that identity is the right to organize themselves as a group, to use their own language, to be able to preserve, to reproduce and to develop their own culture, and therefore to control or have a significant impact on the content of the education of their new generations. A part of this concern is to be able effectively to influence political decisions affecting themselves.

The International Covenant Article 27 of the Covenant on Civil and Political Rights provides that 'In those states in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practice their own religion, or to use their own language'.

Although Article 27 is formulated in a negative way, it has been interpreted to oblige States not only to respect the rights of minorities to enjoy their culture, but to create the enabling conditions to make it possible. The Special Rapporteur on Prevention of Discrimination and Protection

of Minorities, Mr. Capotorti, in his 'Study on the Rights of Persons Belonging to Ethnic, Religious and Linguistic Minorities' stated that in order to give effect to the rights set forth in Article 27 of the Covenant, active and sustained measures are required from States. A purely passive attitude on their part would render those rights ineffective⁸.

This has been further elaborated in the Declaration on the Rights of Persons Belonging to National or Ethnic, Religious or Linguistic Minorities (hereinafter referred to as the 1992 Minority Declaration), adopted by the United Nations General Assembly in 1992⁹ which in its Article 1 calls on states to protect the existence and identity of minorities and to encourage conditions for the enjoyment of that identity. Article 1 further provides that the existence and the national or ethnic, cultural, religious and linguistic identity of minorities shall be protected by states within their territories, and that states shall encourage conditions for the promotion of that identity. It represents a clear trend in international law towards greater recognition of the multi-cultural composition of national societies in public life.

Under Article 4 of the Declaration, paragraph 2, states are called upon to take measures to create favourable conditions to enable persons belonging to minorities to express their characteristics and to develop their culture, language, religion, traditions and customs, except where specific practices are in violation of national law and contrary to international standards. States, therefore, are

⁸ F. Capotorti, Study on the Rights of Persons Belonging to Ethnic, Religious and Linguistic Minorities, UN doc. E/CN.4/Sub.2/384/Rev.1, para. 588. (Also published in, UN Study Series No. 5, 1991. Sales No. E.78.XIV.1).

⁹ General Assembly res.47/135, adopted 18 December 1992.

under an obligation to take positive measures of special protection for minorities, in order for them to develop their culture, language and religion.

The Organization for Security and Co-operation in Europe (until 1994: CSCE) has since 1990 taken a strong interest in the protection of minorities. Most important in this respect was the CSCE Copenhagen Meeting of the Conference on the Human Dimension, June 1990¹⁰. The Concluding Document of the Copenhagen meeting has elaborate provisions, many of which have inspired the United Nations Declaration on the Rights of Persons Belonging to National or Ethnic, Religious or Linguistic Minorities, adopted by the General Assembly in 1992.

In 1992, the Council adopted the European Charter on Regional and Minority Languages, calling for measures to facilitate the use of minority languages in regard to education, in the conduct of judicial proceedings, relations with public authorities, and access to the mass media, and the fostering of cultural, economic and social activities. It also aims at the facilitation, for these purposes, of transfrontier contacts and exchange. In 1994 the European Framework Convention on Minorities was adopted by the Council of Europe. It is the first multilateral "hard law" instrument devoted in its entirety to the protection of minorities, and it contains much more detailed provisions on such protection than any other international instrument.

The main thrust of the rights of persons belonging to minorities is to ensure the acceptance of the multicultural composition of heterogeneous societies, to promote pluralism in togetherness based on reciprocal respect but also on

¹⁰ The text can be found, i.a., in 'Human Rights in International Law: Basic texts', Council of Europe Press, 1992, p. 442-447

cooperation within an overarching civil society. A persons who objectively 'belongs' to a minority is free to use or not use the special rights of minorities. She or he is entitled to make her or his own choice of identity within the society at large.

2.3. The Rights of Indigenous Peoples: A Preference for Autonomy. The United Nations Sub-Commission on Promotion and Protection of Human Rights (previously called the Sub-Commission on Prevention of Discrimination and Protection of Minorities) has elaborated a draft declaration on the rights of indigenous populations, presently under debate in the UN Commission on Human Rights¹¹. The International Labour Organization adopted in 1989 ILO Convention (No. 169) concerning Indigenous and Tribal Peoples in Independent Countries¹². Article 4 of ILO Convention 169 states that measures shall be adopted for safeguarding the persons, institutions, property, labour, cultures and environment of the peoples concerned.

The World Bank has also adopted guidelines for the implementation of their projects that affect indigenous peoples. The World Bank's strategy for addressing issues pertaining to indigenous peoples requires informed participation of the indigenous peoples themselves¹³.

The specific rights of indigenous peoples contained in the ILO convention and the draft Declaration are significantly

¹¹ Draft Declaration on the Rights of Indigenous Peoples, U.N. doc. E/CN.4/Sub.2/1994/Add.1 (1993), hereafter referred to as 'Draft Declaration'.

¹² The text can be found in 'Human Rights: A Compilation of International Instruments' (Centre for Human Rights, Geneva, 1994) vol.2 p.475.

¹³ *The World Bank Operational Manual*, Operational Directive OD 4.20, Indigenous Peoples, September 1991.

different from those in the Minority Declaration. The difference can probably best be formulated as follows: Whereas the Minority Declaration and other instruments concerning persons belonging to minorities aim at ensuring a space for pluralism in togetherness, the instruments concerning indigenous peoples are intended to allow for a high degree of autonomous development.

Whereas the Minority Declaration places considerable emphasis on effective participation in the larger society of which the minority is a part (Articles 2.2 and 2.3), the provisions regarding indigenous peoples seek to allocate authority to these peoples so that they can make their own decisions (e.g. ILO convention 169 Article 7 and 8, draft Declaration Articles 4, 23 and 31). The right to participation in the larger society is in the draft Declaration given a secondary significance and expressed as an optional right. They have the right to participate fully, *if they so choose*, through procedures determined by them, in devising legislative or administrative measures that may affect them (Draft Declaration Articles 19 and 20). The underlying assumption must be that participation in the larger society is not necessary when they have full authority of their own to make the relevant decisions.

Closely linked to this point is the difference concerning rights to land and natural resources. The Minority Declaration contains no such rights, whereas these are core elements in the ILO convention (Articles 13 to 19) and in the draft Declaration (Articles 25-30).

Other examples could be mentioned to explain the fundamental difference between the thrust of the rights of persons belonging to minorities and those of indigenous peoples. It is logically connected to the basic point that the minority instruments refer to rights of (individual) persons,

whereas those concerning the indigenous refer to rights of peoples.

3. Governance Implications

3.1 Society and Community in the Modern State. More than a century, Ferdinand Tönnies drew his famous distinction between 'Gemeinschaft' (community) and 'Gesellschaft' (society)¹⁴. His assumption was that there was an unavoidable, though often painful transition from the traditional community (Gemeinschaft) to the modern society (Gesellschaft) and that all separate communities within a state would be blended into one common society. Clearly he did not have in mind the kind of ethnic issues which we discuss today, but the debate about 'communitarianism' has re-emerged with considerable intensity. In the age of industrialization - in most of Europe mainly from the beginning of the 19th century until the middle of the 20th - there was a strong pressure towards nationalist assimilation. In the post-industrial world there is space for more flexibility. The evolution of the norms on minorities and indigenous peoples reviewed above would not have been possible had it not been for the fact that appropriate governance can accommodate diverse identities without destroying them. It is possible to combine a common domain (Gesellschaft) with several separate domains, allowing a space for ethnic communities (Gemeinschaften) to preserve and develop their culture in tune with the requirements of modern

¹⁴ Tönnies, F.: 'Community and society'. Originally published in 1887. English translation by C.P. Loomis, Harper and Row, New York 1963

society. The very violent ethnic conflicts observed today can in part be explained as explosive outbursts in response to past denial of recognition of the separate identities, though there are also other factors at work such as the insecurity arising from the disappearance of authoritarian government at a time of dislocations caused by unregulated globalization.

In the preamble to the U.N. Minority Declaration of 1992, the General Assembly considers that 'the promotion and protection of the rights of persons belonging to national or ethnic, religious and linguistic minorities contribute to the political and social stability of States in which they live'. This is probably true if the government and the various ethnic groups genuinely seek to find appropriate accommodations to the pluralist nature of society. Unfortunately, the conflict dynamics of some of these situations affected by play of conflict entrepreneurs make it very difficult to find a relaxed moment where the stakeholders can quietly explore the available options.

Much depend on the role of the international community. During the Cold War there was often a risk that local conflicts were exacerbated by competing external interests. Even if the Cold War is over, there are still some external competing interests which negatively affect the local conflict dynamics, as can be illustrated both in the case of Rwanda and in the various conflicts arising out of the dissolution of former Yugoslavia. There is, however, an increasing trend for the international community to find common approaches to local conflicts, a point which will be briefly discussed at the end.

The challenge for good governance in heterogeneous societies is to find a proper mix between a common domain and the acceptance of several separate, communitarian domains. There can even be several layers of public and separate domains, depending on circumstances and needs.

The possible and desirable separation between the common and the separate domains in specific societies depends on contextual factors, including the historical development of ethnic relations in the country concerned and on external conditions such as regional relations and the differential impact of the processes of globalisation¹⁵. The General Assembly had good reason to state, at the time when it adopted the Universal Declaration of Human Rights in 1948, that while the United Nations could not remain indifferent to the fate of minorities, it was 'difficult to adopt a uniform solution for this complex and delicate question, which has special aspects in each State in which it arises'¹⁶.

It is nevertheless possible to draw some inferences as guidelines for good governance. A combination of three elements is required: Ensuring equality in the common domain, facilitating pluralism in togetherness, and where appropriate establishing or maintaining cultural or territorial autonomy. The threefold dimensions - the common domain, pluralism in togetherness, and autonomist arrangements - have implications for the institutions, process and participation in good governance.

3.2 Governance in the Common Domain. In any nation-wide society encompassing the whole of the permanent population of a country a common domain must exist where everybody is free to interact. It would apply to all, including members of minorities and even persons of indigenous origins,

¹⁵ The culture of some of the groups allow their members more easily to be drawn into the global market economy than does the culture of other groups. This can exacerbate the pre-existing differences.

¹⁶ General Assembly resolution 217 C (III).

particularly those who have migrated out of the particular habitat of the indigenous population.

In the common domain, universal human rights require equality and non-discrimination should be the overriding principle. Governance should be color- and ethnically blind, except for the adoption and implementation of transitional measures of affirmative action are called for in order to create equality in fact. Such affirmative action measures must not lead to lasting differentiation.

What should be the scope of the common domain? Broadly speaking, it should cover nearly everything related to the common market, including access to jobs, goods and services, housing, communication, transport, and health services. The market can be sustained only through the existence of a civic culture which is over and above the separate ethnic cultures. The common domain is the space where everyone interacts, also across cultural borders.

Human rights require that everyone within the nation shall have the same rights to political representation, but in ethnically divided societies special requirements apply. While the political system should ensure a common domain, it should ideally not be controlled by a hegemonic, majority group but give incentives to peaceful group accommodation and ensure to each of the groups respect for their identity and their justified interests.

3.3 Governance and Pluralism in Togetherness: Ensuring Multiculturalism and Interculturalism. Under the Minority Declaration Article 1, States shall protect the existence and the national or ethnic, cultural, religious and linguistic identity of minorities within their respective territories and shall encourage conditions for the promotion of that identity, and shall adopt appropriate legislative and other measures to

achieve those ends. This requires institutional participation by the minorities.

The Declaration states in Article 2.3 that persons belonging to minorities have the right to participate effectively in decisions on the national, and where appropriate, regional level concerning the minority to which they belong or the regions in which they live. Effective participation may take various forms. In the 1991 CSCE Meeting of Experts on National Minorities in Geneva, states there assembled noted approaches used with positive results in some of the participating states, such as advisory and decision-making bodies in which minorities are represented, in particular with regard to education, culture and religion; elected bodies and assemblies of national minority affairs; local and autonomous administration, as well as autonomy on a territorial basis, including the existence of consultative, legislative and executive bodies chosen through free and periodic elections; self-administration by a national minority of aspects concerning its identity in situations where autonomy on a territorial basis does not apply; and decentralized or local forms of government¹⁷.

This should be treated only as list of possible options. The difficult question is to decide when a given recipe is likely to work well, and when it may be a road to disaster.

¹⁷ Report of the CSCE Meeting of Experts on National Minorities, Geneva, 19 July 1991, Part IV. Text in A. Bloed (Ed.), *The Conference on Security and Cooperation in Europe* (above, note 2), pp. 593-604. See also the second progress report of Special Rapporteur A. Eide on Possible Ways and Means of Facilitating the Peaceful and Constructive Solution of Problems Involving Minorities, UN Doc. E/CN.4/Sub.2/1992/37, paras 122-155.

In the Lund recommendations on effective participation, prepared under the auspices of the OSCE High Commissioner on National Minorities¹⁸, it has been pointed out that the electoral process is essential in facilitating the participation of minorities in the political sphere. The electoral system should facilitate minority representation and influence. Where minorities are concentrated territorially, single-member districts may provide sufficient minority representation. Proportional representation systems, where a political party's share in the national vote is reflected in its share of the legislative seats, may assist in the representation of minorities. Some forms of preference voting, where voters rank candidates in order of choice, may facilitate minority representation and promote inter-communal co-operation. Lower numerical thresholds for representation in the legislature may enhance the inclusion of national minorities in governance. The geographic boundaries of electoral districts should facilitate the equitable representation of national minorities.

Good governance in heterogeneous societies requires both multiculturalism and interculturalism. Multiculturalism as a policy accepts the different cultures represented by the different ethnic groups by allowing for the use of and education in different languages and for the manifestations of the different cultures. Interculturalism as a policy aims at

¹⁸ Lund recommendations on the Effective Participation of National Minorities in Public Life and Explanatory Note, published by the Foundation on Inter-Ethnic Relations, the Hague, June 1999. The recommendations can be found on the website of the OSCE High Commissioner for National Minorities: <http://www.osce.org/hcnm/documents/lund.htm>

the facilitation and encouragement of reciprocal respect between the members of the different groups and the establishment or maintenance of the common domain of equality and non-discrimination for all members of society.

For interculturalism to function, governance must encourage and support the development of a civic culture which transcends the different ethnic cultures. Governmental authorities as well as the minorities should pursue an inclusive, transparent, and accountable process of consultation in order to maintain a climate of confidence. The public media should also be encouraged to foster intercultural understanding and address the concerns of minorities.

The development of a civic culture in the sense of an abstract set of laws and morality, infused by human rights principles, does not exclude the maintenance within the separate domains of their own particular language of internal communication and their own traditions and mores. It can also allow for some recognition of folk law and legal pluralism, but these must be subordinated to civil law based on internationally recognized human rights.

Much depends on the scope of the common domain versus the communal or private domain. Three sets of questions have generated particularly strong debates: The question of education, the question of the use of language beyond the interaction of the group itself, and the question of gender relations within the family.

In some societies, the issue of the domain of religion is deeply contentious. In most Western states, centuries of conflict over religion in the public domain has brought it to be relegated to the private domain, even though there is a continued controversy over its role particularly in public education (which must be considered to belong to the public

domain). In many Islamic states, religion and religious laws still play a prominent role in the public domain, which can cause considerable difficulties both for non-Islamists and for modernizing Islamists.

3.4 Deeply Divided Societies and Extended Powersharing.

Heterogeneity of societies can take many forms and degrees. Distinguishing factors include, i.a., the following: The relative size of the groups (several large groups, or some large and some small), the length of time in which the groups have coexisted within that state, the degree of difference or similarity in their culture, and the spatial distribution: At one end are situations where each large group live in their own separate habitat compactly together, and thus territorially separate from the other group, and at the other end are situations where the groups live fully interspersed. In many cases there will be combinations of these forms.

These differences must have consequences for the approach to good governance. When there are several large groups in society, culturally quite different one from the other, effective political participation will require some special approaches. One approach is the so-called consociational democracy model. The notion was introduced by Arent Lijphart¹⁹ to describe power-sharing through a multiple balance of power among the segments of a plural society which allow for decision-making by the "grand coalition method." Consociational democracy is seen as an alternative to the majoritarian type of democracy, and more suitable for good government in plural societies deeply divided by significant ethnic, linguistic, religious or cultural differences, where the groups are large and clearly identifiable. Consociational democracy is built on the

¹⁹ Lijphart, Arent: Majority rule versus democracy in deeply divided societies, *Politicon* 4 (2), 1977.

principle of legislative accommodation, executive power-sharing and a certain degree of self-administration for each group, whether they live together or separately.

Consociational democracy can be useful, but has also its dangers, one of which is that it tends to freeze ethnic identities and lead to long-term polarization. It can also function as a starting point for eventual separation. To reduce these risks it should include electoral systems which create ongoing incentives for inter-ethnic co-operation, which over a longer period of time can accelerate the process of integration and expand the common domain in society.

Participation in executive government can include formal power sharing, informal power sharing by coalition groups, formal or informal recognition of minority language interests in the Cabinet, functional communalism in the Cabinet, formal advisory bodies, and assistance to organizations. Other mechanisms are also conceivable to ensure that minority interests are considered within relevant ministries, through, e.g., personnel addressing minority concerns or issuance of standing directives. Furthermore, special measures can be adopted for minority participation in the civil service as well as the provision of public services in the language of the national minority.

3.5 Good Governance Through Autonomy or Territorial Decentralization²⁰. Where large groups live in separate territories can territorial sub-division through federal systems or autonomies be the best solution²¹. Where autonomist approaches are required, particularly as required by the rights

²⁰ A thorough discussion of forms and content of autonomy arrangements is found in Suksi, Markko (ed.) *Autonomy: Applications and Implications*. Kluwer Law International, The Hague, London and Boston 1998.

of indigenous peoples, the common domain will be significantly narrowed and interculturalism will be less prominent. Certain aspects of the operation in the market will be modified. Individual property in land is restricted in favour of group control and regulation.

New models of federalism, autonomy and local government have been tried in recent years. They all have in common a degree of autonomy for a sub-unit within a sovereign state. 'Autonomy' is here understood to refer to the competence by sub-state units to make autonomous decisions. The two main ways to define sub-state units are the territorial versus the cultural mode. Both serve to set borders between the units; one is territorial, the other is cultural. The territorial sets borders on the ground; cultural borders are essentially set in the minds of people.

A degree of cultural autonomy²² can sometimes be the best response to the difficulties of governance in a heterogeneous society. Cultural autonomy is the right to self-rule, by a culturally defined group, in matters that affect the maintenance and reproduction of its culture. It differs from territorial autonomy in at least three ways: The management is allocated to a culturally rather than a territorially defined group; the scope of self-management is limited to cultural aspects; cultural authority can be exercised only over those individuals who 'belong' to that cultural group.

²¹ See also Horowitz, Donald L.: Democracy in divided societies. *Journal of Democracy* vol.4, No.4, 1993, p.36-38.

²² The notion and practice of cultural autonomy is examined in Asbjørn Eide: Cultural autonomy. in Markku Suksi (ed:) *Autonomy: Applications and Implications*. Kluwer Law International, The Hague, London and Boston 1998.

Non-territorial cultural autonomy would often be a better approach than territorial autonomy. Firstly, it serves better those minorities which are living dispersed throughout the country and would therefore not benefit from territorial autonomy; secondly, it can reconcile the need for the maintenance of inherited territorial borders within which several ethnic groups live together, while ensuring for each of them the possibility to maintain their own identity through self-management.

The issues most susceptible to regulation by these arrangements include education, culture, use of minority language, religion, and other matters crucial to the identity and way of life of national minorities. While taking into account the responsibility of the governmental authorities to set educational standards, minority institutions can determine curricula for teaching of their minority languages, cultures, or both²³.

Territorial decentralization can facilitate effective participation by ethnic groups which have difficulties in influencing decisions at the national level. In the process of decentralization, it would be wise to adopt measures to promote participation of national minorities similar as those discussed above. Decentralization can be territorial or non-territorial. Functions that are generally exercised by the central authorities include defense, foreign affairs, immigration and customs, macroeconomic policy, and monetary affairs, while other functions may be managed by minorities or territorial administrations or shared with the central authorities. Functions may be allocated asymmetrically to respond to different minority situations within the same State²⁴.

²³ Lund Recommendations (ibid) paragraphs 17 and 18.

²⁴ Lund Recommendations (ibid) paragraphs 19 and 20.

A federal system is constitutionally regulated and provides the same degree of autonomy to each of the units in the federation. A constitutionally regulated provincial autonomy provides a differentiated arrangement where some provinces have more autonomy than others, as in the case of Spain. It could also be arrangements where only one or two autonomies exist while the rest of the state is unitary, as is the case with Finland and the Aaland Islands. Administrative decentralization provides only for administrative, not legislative self-management. In terms of the formal rules and institutions, some of the following issues could be asked:

- (i) the nature of the transfer of power. Is it based on constitutionally entrenched or delegated power? In the former case it cannot be withdrawn except through constitutional change or through the qualified procedural requirements contained in the constitution; in the case of delegated power, the delegation can be withdrawn or modified by the delegating authority. When autonomy is based on international treaty obligations it cannot be withdrawn unless the treaty itself is changed or terminated.
- (ii) What institutions of authority have been established within the autonomous area? The self-government of a fully autonomous area should include legislative, executive, and judicial authorities. This appears to be rare, however. While legislative and executive power is often transferred, the judicial system is, within sovereign states, normally not transferred. While local courts are established, sometimes of a special nature appropriate to the particular cultural aspects of the territory concerned, they are normally subordinated to

a judicial hierarchy with the national Supreme Court at the top.

- (iii) What is the scope of authority transferred within each of the branches of self-government? This varies greatly within different autonomies. The scope is not always fixed once and for all, but based on a formula of gradual increase in the transfer of power. This is used, i.a., in the case of Greenland, or the autonomies in Spain. When there is a reasonable level of confidence among the parties, this appears to be the best solution: There is a need for capacity-building within the autonomous area; the local authorities must be certain to have the resources required in order to exercise the authority intended, and the local population may need to develop their experience in making claims on and holding their own authorities accountable. It may be more difficult to opt for such a solution if the parties are deeply antagonistic to each other, particularly when emerging out of a violent armed conflict. In such cases, the would-be autonomous area may want to have agreement on a full package before they end hostilities.
- (iv) Do all nationals (citizens of the country as a whole) enjoy equal human rights in all parts of the country, or do the inhabitants of the region have privileges within the autonomous region, while having equal rights in society at large? Human rights, such as the right to freedom of movement and residence contained in the Universal Declaration Article 13, can be negatively affected by certain autonomy arrangements which establish privileges for members of the autonomous group.

Territorial sub-division may be organized in ways that make it possible for a compactly settled minority to have greater influence over political, cultural and economic decisions affecting its members. However, it should not serve to give ethnic groups the sense that the local government is exclusively their government. The sub-division should only serve to bring the institutions of power and the service of state closer to them and give them greater influence over it.

Decentralization of power from the center and the extension of authority to smaller territorial units can lead to a more homogenous ethnic composition. Very rarely, however, will even the smaller unit be entirely "pure" in the ethnic sense. The local majority will have to share power with members of other groups living in the same territorial unit. Groups that are minorities in the nation at large can be majoritarian in the region, but they will have to be as pluralistic within the region as the majority has to be in the country at large, if minority rights are to be respected.

By sharing democratic power, the local majority may become more sensitive to the interests of other groups living in the same territorial unit. There will be also at that level an ethnic, cultural and possibly also linguistic mosaic which must be respected. Local, regional, and autonomous authorities must respect and ensure the human rights of all persons, including the rights of any minorities within their jurisdiction. Decentralization must therefore be coupled with genuine pluralistic democratic governance in each territorial unit and with the same respect for human rights and minority rights as on the national level. Were this to be safeguarded, the prospects for decentralization are much better, and could help also to ease the burden of overgrown central governments without causing fear for groups which are in a minority position within the smaller units.

The benefits of decentralization can be several. It reduces government overload, it facilitates pluralism within the country as a whole by diffusing centers of power, it broadens the allocation of prestigious political and administrative functions, and it facilitates the organization of mother-tongue education, to mention only a few. In the transition from authoritarian to democratic rule in Germany and Italy since 1945 and Spain after the death of Franco in 1975, democratization proceeded together with a peaceful process of decentralization from the extremely centralist governance of Franco, Mussolini and Hitler. The transition from authoritarian rule in former USSR and in former Yugoslavia has also resulted in extensive decentralization, but in the case of Yugoslavia and in part of former USSR has it been much more violent and problematic.

Important is it that the decentralization is a product of negotiation and consent. When it is brought about by violence, it is likely to cause suffering which far overshadows the intended benefits. A violent quest for secession almost invariably leads to ethnic cleansing, which are gross crimes against humanity. The actors of such practices may risk being prosecuted before the International Criminal Court in the future. On the other hand, some governments have in the past resorted to large-scale enforced population transfers in order to change the democratic structure of a given territory. Such acts also clearly constitute gross violations of international law.

4. Concluding Remarks

As Neelan Tiruchelvam repeatedly pointed out, one should never equate the state with a community. The state should be

the common home for all parts of its resident population under conditions of equality, with preservation of separate group identities for those who want it under conditions making it possible to develop those identities. Inside that home there should be many rooms, with space for different communities to develop their culture and traditions. Decentralisation, be it by federalism or in other ways, would in many cases provide those different rooms within the common home. It would make it possible to reflect in a constructive way the multicultural composition of society. There should be parity of esteem, where the relations are marked not only by reciprocal tolerance, but with appreciation of the diversity as a source of richness.

And yet we should insist that it should be a common home with equality of treatment in the common domain. Neither majorities nor minorities should be entitled to assert their identity in ways that deny the possibility for others to do the same, or which lead to discrimination of others in the common domain. A primary role of any state is to facilitate the equitable sharing of the economic wealth and social benefits of the nation as a whole. Priority in minority protection should be given to members of groups which are truly vulnerable, subject to discrimination and marginalisation by the majority.

Asbjørn Eide is Senior Fellow and former Director, Norwegian Institute of Human Rights. He is member of the United Nations Sub-Commission on the Promotion and Protection of Human Rights and the Chairman of its Working Group on Minorities.

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