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Foreward

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Foreword

The Rights of Ethnic Minorities: The Emerging Mosaic

*John B. Attanasio**

BELGRADE, Yugoslavia, Sept. 27 - The colonel suddenly wept. He was recounting the dilemma of a Serbian officer flying combat missions against Croatia. The pilot's Croatian wife had called him from Zagreb demanding that he take off his uniform and desert, or she would jump from their 14th-story apartment with their child.

The pilot then called his Serbian mother in Novi Sad, who told him that if he took off the uniform of the Yugoslav Army, he could never cross her threshold again.

He flew that night.¹

I. INTRODUCTION

Ethnic tensions pervade a planet populated by diverse people and cultures. Indeed, of late, we are witnessing a dangerous schizophrenia evolving: intensifying ethnic conflict fuels structural decentralization, while increased economic interdependence drives structural centralization.²

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1 Binder, *Ethnic Conflict in Yugoslavia Tearing Apart Its Army, Too*, N.Y. Times, Oct. 1, 1991, at A1, col 3. I do not mean to suggest that the conflict in Yugoslavia is strictly an ethnic one, but only that ethnicity is an important factor there.

2 See M. NAISBITT & P. ABURDENE, *MEGATRENDS 2,000* 19-53, 118-153 (1990); Addis, *Individualism, Communitarianism, and the Rights of Ethnic Minorities*, 66 NOTRE DAME L. REV.

This symposium gathers together some of the most distinguished scholars in law and other disciplines on the rights of ethnic minorities. From this and other scholarly efforts, some schematic of the distribution of rights and duties is beginning to take shape. In this short essay, I will not attempt to address what should be the rights of ethnic minorities. Instead, I will sketch what types or categories of rights positions are currently being discussed or will soon be discussed, as this critically important conversation unfolds.

II. SUBSTANTIVE CONTENT

A. *Substantive Content Versus Enforceability*

Lawyers frequently talk about rights as procedural or substantive. While this division becomes artificial if pressed too hard,³ it can also prove quite illuminating. For purposes of this short essay, I would like to invoke as a starting point a slightly different, and perhaps more viable, distinction. It seems to me that the two key variables in defining the rights of ethnic minorities are substantive content and procedural enforceability.

Of course, substantive content and procedural enforceability are shared characteristics of both substantive and procedural rights. For example, lawyers often refer to a right to trial by jury as procedural. Even when it is not enforceable, one could speculate about the substantive content of this procedural right—for example, in which cases it should pertain or what size jury should be required. One could just as plausibly speculate about the substantive content of a substantive right to foodstamps.⁴ Essentially, then, one can ponder the morality or justness of the substantive content of procedural and substantive rights regardless of their enforceability.

1219 (1991); Chen, *Self-Determination and World Public Order*, 66 NOTRE DAME L. REV. 1287 (1991). While political arrangements can strive narrowly to accommodate economic interdependencies, it can be difficult to segregate out the economic strand of political life.

³ Attanasio, *Foreword: A Duty-Oriented Procedure in a Rights Oriented Society*, 63 NOTRE DAME L. REV. 597, 602 (1988).

⁴ With both foodstamps and jury trial, one can also discuss procedural enforceability. With respect to a right to jury trial, one could discuss, for example, how to select a jury or what sanctions should exist for nonappearance of prospective jurors. With respect to a right to foodstamps, one could discuss what penalties should exist against governmental officials who intentionally fail to distribute foodstamps to people who are entitled to them by law.

For a right to be enforceable, a certain set of enforcement procedures must pertain. Not all procedures involve enforceability;⁵ however, the very nature of enforceability seems to entail certain procedures. In this light, the procedures needed to enforce both substantive and procedural rights might be viewed as a subset of procedural rights. For example, statutes, constitutions, and war figure prominently in my discussion of enforcement methods later in this essay.⁶ Each of these enforcement routes comprises a procedural mechanism. Indeed, one might usefully think about enforceability of procedural rights as two different types of procedures.

Thus, when I talk about the substantive content of rights, I am referring to the substantive content of both substantive and procedural rights. Similarly, when I talk about procedural enforceability, this can be discussed as a distinct characteristic of every substantive and procedural right.

One might challenge as superficial the entire enterprise of independently analyzing the substantive content and procedural enforceability of rights. In this connection, one might take the position that an essential characteristic of actual—as against make believe—rights is legal enforceability. Whether, however, one requires enforceability to have a right depends on one's jurisprudential conception of rights. A pure positivist might well require legal enforceability to have rights.⁷ Brought to its logical conclusions, this conception of rights is wholly relativistic; it is contingent on what rights a particular government might imagine appropriate, for whatever reasons—including pure whim.

A highly positivistic conception would not necessarily even require standards regarding what is a duly constituted government; pure power will suffice. Such a primitive, Hobbesian approach to rights does not demand any inquiry into any standards of morality or justice or "the good." The only necessary question is what a particular person or group—who might even have gained power

5 Examples of procedures that do not limit rather than advance enforceability are individual rights against self-incrimination or illegal search and seizure.

6 For a discussion of enforceability, see *infra* § III.

7 Of course, the notion of enforceability need not be confined to secular meanings: many religious traditions believe in punishment of earthly violation of moral duties stemming from human rights or dignity. Such eschatological questions largely range beyond the scope of this analysis. I will, however, at least list religion as one nongovernmental means of enforcing protections for ethnic minorities.

by mass murder—might arbitrarily feel about extending a particular right.

Rejecting this highly positivistic stance requires one to admit that inquiry into the substantive content of rights has value independent of their procedural enforceability. One, then, becomes interested in exploring principles or standards in morality, reason, justice, or natural law underlying the rights of ethnic minorities independent of the enforceability of these rights. In this context, discussing the substantive content of the rights of ethnic minorities grows independently valuable as it is no longer entirely predicated on enforceability.⁸

Thus, I will begin by exploring—along what might be conceptualized as a rough continuum—weaker and then stronger accounts of the substantive content of rights that might be afforded ethnic minorities. I will then examine enforceability along a separate, rough continuum which also goes from comparatively weak to comparatively strong positions. I will endeavor to combine these two continua in the last section. While the substantive content of rights may be important apart from their enforceability, combining these two continua allows us a glimpse of exactly what sorts of enforceable rights might be available to ethnic minorities. Combining or overlaying these continua creates a matrix which I hope will allow us to glimpse—if only in a rough and simplistic manner—the emerging mosaic of the rights of ethnic minorities.

B. Potential Substantive and Procedural Rights

One could imagine a variety of substantive and procedural rights that might be afforded ethnic minorities. My description will proceed from weak to comparatively strong guarantees. Necessarily, considerable arbitrariness accompanies any attempt to order, along a continuum, various safeguards according to their fundamentality. Accordingly, one should not ascribe too much precision to the placement of a particular right, but take it as an approximate ranking used for purposes of illustration and convenience in which there is considerable room for disagreement. I do think,

8 For a useful explication of the separability in H.L.A. Hart's *The Concept of Law* of positive legal rules and their normative assessment from the point of view of an external observer, see Richards, *Taking "Taking Rights Seriously" Seriously: Reflections on Ronald Dworkin and the American Revival of Natural Law*, 52 N.Y.U. L. REV. 1265 (1977). Thus, even a strong defender of positivism like Hart recognizes the usefulness of examining the morality of rules independent of enforceability.

however, that there will be much less disagreement about the ordering of rights far apart on even this rough continuum. For example, most people would probably find a right against genocide more basic than a right to education. On the other hand, there would be greater dispute over the relative placement of a right to sustenance as against a right to vote.

To begin to describe the substantive content of the rights of ethnic minorities along a continuum, a minimalist position would seem to entail protection against genocide.⁹ One might consider this safeguard so basic that it is not worth mentioning; however, this savagery still occurs with disturbing frequency. Witness the recent plight of the Kurds in Iraq.¹⁰

Another quite basic right is the prohibition of apartheid.¹¹ The denotation of this word strictly involves separation and inequality between the races;¹² however, the connotations of the word often reach far beyond this behavior. The more virulent strains of apartheid that comprehend murder and other systemic group repression would seem to be surpassed only by genocide when one talks about basic human dignity. The broad-based reaction of the world community against the regime in South Africa confirms the widespread rejection of such conduct.¹³

Forbidding less systematic takings of life because of ethnicity would seem the next most basic level of protection. Of course, the taking of life comprehends a multitude of evils. One could imagine the state actively involved in murder by, for example, killing people because of their ethnicity.¹⁴ Alternatively, the state might condone or look the other way when private individuals kill members of a particular racial group.¹⁵

9 Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, 78 U.N.T.S. 277.

10 Johnson, *U.S. Asserts Iraq Used Poison Gas Against Kurds*, N.Y. Times, Sept. 9, 1988, at A1, col. 6. Another way to reduce or eradicate members of an ethnic minority involves compulsory sterilization.

11 *Universal Declaration of Human Rights*, G.A. Res. 217A, U.N. Doc. A/810, at 71 (1948).

12 THE OXFORD ENGLISH DICTIONARY, 542 (2d ed. 1989).

13 Shannon, *Resisting S. Africa's Pressures Costs 9 Nearby States Billions*, U.N. Study Says; *Africa: A U.N. Report Urges World Support for a Campaign to Bring Down the White Majority Government*, L.A. Times, Oct. 14, 1989, at A9, col. 2.

14 Some governments might execute more members of one particular ethnic group even after affording due process. The United States Supreme Court recently denied a challenge under the Equal Protection Clause based on the higher execution rates of black persons. See *McCleskey v. Kemp*, 481 U.S. 279, 292-93 (1987).

15 There is a separate question of whether the death penalty should exist at all.

Rather than actually kill members of a political or ethnic group, the state might torture them, or allow others to torture them. Again, the international community has condemned such practices.¹⁶ Like murder, domestic or international protection against torture is usually framed as an individual rather than a group right.¹⁷ Still, because these atrocities are often directed at members of a particular ethnic group, one might usefully conceptualize protection against them as a right of ethnic minorities.¹⁸

Closely related to torture is arbitrary and undue confinement.¹⁹ Under the best of conditions, imprisonment and other forms of confinement comprise tremendous deprivations. Particularly when confinement is done in some kind of systematic way based on ethnicity, it can offer ample opportunities for other human rights violations, such as murder or torture. Surely among the most horrific examples is the German death camps in World War II.

Protection against imprisonment can usefully be conceptualized as a cluster of rights. Even when imprisonment takes place under the best of conditions, it should only occur after due process of law has been afforded the accused. This should include a variety of protections such as an individual trial before a neutral adjudicator²⁰ and perhaps, if the accused desires, a jury of peers.²¹ Such protections should inhere not only under conditions of imprisonment, but also when the government wishes to execute someone or impose other penalties.²² Those who, after having been afforded due process, are convicted of what might legitimately be considered a crime should be incarcerated under decent conditions.²³

16 *Universal Declaration of Human Rights*, *supra* note 11, at art. 5.

17 *Id.* at arts. 3, 9, 10 & 11.

18 When such behaviors are systematically directed against a particular minority group, they overlap with virulent forms of apartheid.

19 *Universal Declaration of Human Rights*, *supra* note 11, at art. 9.

20 *Id.* at art. 10.

21 If granted, the jury should not be prejudiced against particular ethnic groups and afford equal opportunity for representation to all ethnic groups. See, e.g., *Batson v. Ky.*, 476 U.S. 79 (1986); *Casteneda v. Partida*, 430 U.S. 482 (1977).

22 Other safeguards that also should apply before governments can impose such penalties include protection against self-incrimination and the opportunity to confront witnesses. In adversarial systems, there might also be some right to free representation by counsel if one cannot afford a lawyer. See generally Israel, *Selective Incorporation Revisited*, 71 GEO. L.J. 253 (1982); see also *Universal Declaration of Human Rights*, *supra* note 11, art. 11.

23 See, e.g., *Wilson v. Seiter*, 111 S. Ct. 232 (1991).

Constraints on criminal punishment beg the larger question of equal justice before law. At minimum, courts should not discriminate against persons because they belong to a specific ethnic group.²⁴ Some ethnic minorities—particularly indigenous people who often have enjoyed sovereignty in the past—may desire a separate court system. As this position entails much stronger rights, I will set it to one side for now.

Ethnic minorities, like others in the society, should have rights to travel domestically and internationally.²⁵ Such rights serve as both a safety valve and sometimes a deterrent: if other rights are violated, members of the ethnic minority can at least escape to another part of the country, or to another country where legal protections are more substantial or ethnic hatred is less aggressive.²⁶ Moreover, once a right of travel is granted, it will impose certain constraints on the behavior of some governments who fear ethnic groups leaving.²⁷ Unfortunately, governments may sometimes actually want to give ethnic minorities incentives to leave. Particularly, in this eventuality, the right to travel is an important but thin sort of right: generally, ethnic minorities do not want to leave their homelands, but want to live in dignity and peace within their own countries. Moreover, for those who do want to leave, some other country must be willing to receive the ethnic minority in order to make the protection afforded by an international right to travel effective. Often, other countries are unwilling to receive refugees from other lands.²⁸

Religious persecution has often spurred ethnic minorities to flee to other countries. Freedom of religious belief and practice occupies a central place in the hearts and minds of the faithful.²⁹ This very centrality also has aroused some of the most horrific prejudice in history.³⁰

24 *Universal Declaration of Human Rights*, *supra* note 11, at art. 7.

25 *Id.* at art. 13.

26 *Id.* at art. 14. For many years, Jews and others have sought rights to travel out of the Soviet Union. See Wines, *The Trade Decision: Utility of Trade Restriction is Now Doubled*, N.Y. Times, Dec. 13, 1990, at A23, col. 3.

27 See generally, Clines, *Gorbachev Condemns Anti-Semitism, Past and Present*, N.Y. Times, Oct 6, 1991, at A6.

28 Witness the refugee problem in the world today. See, e.g., Kinzer, *Last Kurdish Camp is Shut in Turkey Near Iraqi Border*, N.Y. Times, Jun. 2, 1991, § 1, at 1, col. 3.

29 *Universal Declaration of Human Rights*, *supra* note 11, at art. 18. The United States guarantees religious freedom in part by fairly stringent separation between church and state. See U.S. CONST. amend. I.

30 Freedom of religion might also be viewed as one aspect of cultural autonomy,

Very important to securing some level of political power are the integrally related rights of freedom of speech, freedom of the press, freedom to associate in groups, and freedom to demonstrate.³¹ These rights at least afford the opportunity to bring to light atrocities, corruption, and inadequate living conditions.³² Even in nondemocratic societies, publicity can influence social change. Certainly in democratic societies, speech can influence the way in which people vote—even in nations where ethnic minorities cannot.

Another set of very basic rights clusters around notions of sustenance, including food, clothing, and shelter.³³ These rights are often referred to as positive rights.³⁴ Because they involve budgetary considerations, protecting such positive rights as sustenance can be tricky, particularly for a court.³⁵ Moreover, some commentators have been suspicious that protecting positive rights threatens negative rights.³⁶ Regardless of what governmental body provides them or how they are prioritized, some at least minimal protection for the necessities of life seems important.

Ethnic groups should have some right to locate together or apart from each other, depending on their preferences. This notion might loosely be called a right to space. Sometimes ethnic groups are repressed by forcing them to live in ghettos where

but its sacred importance to believers and the terrors that religious persecution have caused would seem to merit a more basic place in the order of protection.

31 *Universal Declaration of Human Rights*, *supra* note 11, at art 19. For a discussion of the integrally related nature of these various aspects of freedom of expression, see N. REDLICH, B. SCHWARTZ & J. ATTANASIO, *CONSTITUTIONAL LAW* xv-xvi (2nd ed. 1989).

32 For a recent summary of the various reasons to protect freedom of speech, see Greenawalt, *Free Speech Justifications*, 89 COLUM. L. REV. 119 (1989). This relies heavily on such earlier work as *Whitney v. Cal.*, 274 U.S. 357, 371 (1927) (Brandeis, J., concurring); T. EMERSON, *THE SYSTEM OF FREEDOM OF EXPRESSION* 1-4 (1970); A. MEIKLEJOHN, *FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT* (1948); Emerson, *Towards a General Theory of the First Amendment*, 72 YALE L.J. 877 (1963); Meiklejohn, *The First Amendment Is an Absolute*, 1961 SUP. CT. REV. 245.

33 *Universal Declaration of Human Rights*, *supra* note 11, at art. 25. Rights to necessities might even be considered more basic than, for example, freedom of speech, as one must be alive to speak. I once rehearsed this argument at a conference, and a German law professor wrote on a napkin: "To ask to eat, he must speak."

34 See I. BERLIN, *FOUR ESSAYS ON LIBERTY* (1969); Currie, *Positive and Negative Constitutional Rights*, 53 U. CHI. L. REV. 864 (1986).

35 See, e.g., J. GUTHRIE, *SCHOOL FINANCE POLICIES AND PRACTICES* (1980); Note, *Strategies for School Finance Policies in the Post-Rodriguez Era*, 21 NEW ENGLAND L. REV. 817 (1986). Moreover, strict adherents of laissez-faire capitalism would say that extending much in the way of such rights would so interfere with the normal workings of the market that it would make poor people worse off.

36 See, e.g., I. BERLIN, *supra* note 34.

they can be easily identified. Conversely, forcing members of an ethnic minority to live apart can deprive them of important support of economic and social groups. It can also hinder the preservation of language and culture.

Although one might also include it as one of the due process guarantees discussed earlier,³⁷ protection against illegal government search and seizure of person, home, automobile, and other property might also be conceptualized as part of the right of space. This protection creates a realm of privacy in which individuals can exist without government interference.³⁸ Civil and criminal proscriptions, such as trespass and battery, broaden this sphere of space to protect against interference by private individuals.

Private property is, of course, one means of safeguarding a right of space against government interference.³⁹ If a society postulates private, personal, or real property to advance freedom of space or to advance human dignity or societal productivity, then government should not be allowed to take it without just compensation.⁴⁰

Next in priority might be the right to participate in the political process.⁴¹ In democratic societies, this would at least involve the rights to vote and to be a candidate for office. In democratic and nondemocratic societies alike, it would also involve the ability to participate in bureaucracies which often monitor the distribution of key resources. This ability might also extend to other key political institutions such as political parties. Such egalitarian protection should also forbid discrimination which prohibits members of ethnic minorities from marrying members of other ethnic or racial groups.⁴²

37 See *supra* notes 20-23 and accompanying text.

38 *Universal Declaration of Human Rights*, *supra* note 11, at art. 12.

39 I call this a right to space rather than a right to private property for several reasons. First, while private property can be an important way of protecting an ethnic space, it is neither necessary nor sufficient. It is not necessary because the government can guarantee some freedom of space for ethnic minorities in, for example, a socialist system. Admittedly, this can be a dicey solution for the minority, as ethnic minorities in need of protection are almost by definition politically and economically weak. On the other hand, such minorities may also need economic assistance in market-oriented systems for similar reasons.

40 See, e.g., Michaelman, *Property, Utility, and Fairness: On the Ethical Foundations of Just Compensation Theory*, 80 HARV. L. REV. 1165 (1967).

41 *Universal Declaration of Human Rights*, *supra* note 11, at art. 21.

42 See, e.g., *Id.* at art. 16; *Loving v. Virginia*, 388 U.S. 1 (1967).

Egalitarian protections should also proscribe discrimination in access to education and to employment in the private sector.⁴³ Anti-discrimination remedies could be based on a showing of past purposeful discrimination by the relevant governmental or nongovernmental agency or simply on a showing of disparate impact. The latter only requires statistically inferior representation of a particular minority group in the pertinent educational or employment opportunity.⁴⁴ Egalitarian protection could grow stronger by extending affirmative action to gain ethnic minorities access to education and employment opportunities. Again, these could be based on a historical purposeful discrimination by governmental or nongovernmental actors, or on discrimination in impact or effect.⁴⁵

Most of the rights of ethnic minorities discussed to this point are individual rather than group-oriented. Basic and evenly applied recipes of individual rights can defend ethnic minorities against atrocities like genocide or apartheid. Affirmative action programs, which afford members of minority groups preferences in such areas as education or employment, begin to shift the focus more toward group rights. This is particularly true of programs that focus only on a discriminatory impact requiring no history of intentional discrimination. Nevertheless, like virtually all of the rights discussed to this point, many affirmative action programs tend to focus on assimilating the minority group into the majority culture rather than empowering the ethnic group with a degree of economic or cultural autonomy.⁴⁶

Perhaps the most elemental form of cultural autonomy involves language rights. These can be weak or strong. Perhaps the thinnest kind of language right is the right to use one's own language whenever the other person communicating consents. Stronger than this is a government's recognition of multiple official languages. It might involve the government using these two or more languages in its communication. It might also entail requiring all governmental or other employees to speak all recognized languages, or establishing programs to teach minority languages in schools or other educational institutions.⁴⁷ Any of these strategies

43 *Universal Declaration of Human Rights*, *supra* note 11, arts. 23, 26.

44 *Compare* *Washington v. Davis*, 426 U.S. 229 (1976) *with* *Griggs v. Duke Power Co.*, 410 U.S. 424 (1971).

45 *See, e.g.*, *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267 (1986).

46 Some affirmative action programs directly empower members of minority groups. An example is a minority set-aside program that requires the hiring of a certain number of minority-owned businesses. *See infra* text accompanying note 50.

47 Actually, this might entail several strategies. The government might allow or be

could be pursued nationwide or within a particular geographic subdivision. Indeed, within a particular geographic subdivision, the minority language could be the only one required of, for example, government employees or of citizens. This regime begins to approach political autonomy which I will set to one side for the moment.⁴⁸

Education offers another cluster of potential cultural autonomy guarantees. Besides programs that teach the minority language in state schools, government could sponsor educational programs about religion, art, history, or other important elements of the culture of a particular ethnic group. Again, government sponsorship could be of varying degrees of intensity from financing museum exhibits to requiring that all students take courses in the culture of a particular minority group. Most importantly, government could sponsor schools oriented to the culture of a particular minority group. Beyond cultural autonomy is the equal dignity and respect characterized by systemic interaction, on an equal basis, between majority and minority cultures.⁴⁹

Beyond cultural autonomy lies advancing economic autonomy by, for example, fostering minority-owned businesses. Government could sponsor programs that allocate a certain amount of money to minority-owned businesses. It could give other advantages to minority businesses—for example, by requiring private firms to use them.⁵⁰

Finally, ethnic minorities might have rights to political autonomy. In nations that have legislatures, one could establish proportional representation systems which tend to favor ethnic minorities.⁵¹ Even in winner-take-all voting systems, government or courts could redraw district lines to give certain ethnic groups political majorities.⁵² This would afford minority groups with greater opportunities to secure representation.

forced to allow private or state schools that want to teach minority languages to do so. Government might also supplement the school's budget to encourage such programs, or it might require all students to learn one or all minority languages.

48 Witness the case of Quebec, in which French is spoken almost exclusively in parts of the province, and the province has been gaining more and more autonomy from Canada.

49 See generally Addis, *supra* note 2.

50 See, e.g., *Fullilove v. Klutznick*, 448 U.S. 448 (1980).

51 See generally E. LAKEMAN, *HOW DEMOCRACIES VOTE* (4th ed. 1974); Levmore, *Parliamentary Law, Majority Representation, and the Voting Paradox*, 75 VA. L. REV. 971 (1989).

52 See, e.g., *United States Jewish Organization v. Carey*, 430 U.S. 144 (1977).

Governmental bureaucracies could institute affirmative action programs to hire, train, or promote members of a certain ethnic minority. Government might also create certain agencies designed especially to serve the needs of a particular ethnic group or strive for representation of members of that minority group in court systems. The society might develop special courts which have jurisdiction over certain affairs of the particular minority group or over all of their affairs.

A greater degree of political autonomy would be afforded by federal structures that devolve power to a minority group to conduct its own affairs in a particular national region. In nations with heavy geographic concentrations of particular minority groups, the first step would be to draw district lines based on demographics. Then, one must determine how much authority to give the ethnic minority within the geographic region that it now controls. For example, with regard to regulation of business and commerce, there could be concurrent power with the national government, or exclusive power to regulate in certain aspects might lie with the national or district governments. The same could be true of the taxing power. For example, the taxing power might be completely shared or it could be divided so that the provincial government might have exclusive power to levy a sales tax and the national government might have exclusive authority to levy an income tax. Most dramatically, the provincial authority could have exclusive taxing power and agree, in advance or on an ad hoc basis, to give a certain amount or percentage each year to the central government. The spending power is related to the taxing power, but certainly the power of the central government to spend could be restricted so that it could not place certain conditions, or any conditions, on how the province uses the money. The power also could be restricted so that the central government can only give money to the provinces, who could then give it to local governments or private individuals.

An extremely sensitive issue is who protects the rights of ethnic minorities who are political minorities in the province.⁵³ At least three basic alternatives exist: the central government could protect them, the state government could protect them, or rela-

53 Indeed, the provincial minority might even be the dominant group in national politics. For example, the rights of Serbian nationals residing in Croatia has proven an important impasse over the independence of that republic from Yugoslavia. Sudetic, *Serbian Enclave Reluctant To Allow Visit By Outsiders*, N.Y. Times, Jul. 31, 1991, at A4.

tively autonomous localities could be designated within that particular province to protect them. By combining these three basic possibilities, authority over their particular area could be shared or divided in many ways.⁵⁴

The core authority of the central government would appear to be power over defense and foreign affairs. These move toward another watershed in political autonomy—external versus internal authority. Indeed, one might consider authority over defense and foreign affairs the bare minimum for sovereignty. Nevertheless, there are ways of circumscribing even this power. Most basically, the provincial government could insist on a sharp distinction between external defense and troops used to control the domestic population.⁵⁵ The provincial government could also attempt to assert that all persons drafted from the province must serve within the geographic boundaries of the province⁵⁶ and control all military operations on its soil or could forbid military operations on its soil. Most dramatically, the province might insist on more generally influencing overall military operations or eliminating a standing military force altogether.

54 The Constitution of India, for example, contains lists of exclusive Union and State areas of authority as well as a list setting forth where authority is concurrent. The Union List contains 97 items and gives the Center exclusive authority in areas such as defense, foreign affairs, currency and income taxation. The State List contains 66 items and encompasses public order and police, welfare, health, education, and land revenue. The Concurrent List contains 47 items in the areas of civil and criminal law and social and economic planning. When intergovernmental disputes arise, the Union executive authority typically controls R. HARGRAVE, JR., *INDIA: GOVERNMENT AND POLITICS IN A DEVELOPING NATION* 87-88 (3d ed. 1980). In addition, rights such as speech, assembly, and management of religious affairs are guaranteed by the Constitution. *INDIA CONST.*, arts. 19 & 26 (1949).

In Canada, the authority over many fields such as welfare, economic policy and transportation are not formally divided between the Parliament and the Provinces. The Provinces are often relied upon to implement Parliamentary acts and, where the Provinces do not agree with the policies put forth, direct negotiation occurs between the executives of the various Provinces. As the Provinces have no constitutionally protected representation at the central governmental level, this process of negotiation assures the Provinces have a say in the legislation which directly affects them. See Lanaerts, *Constitutionalism and the Many Faces of Federalism*, 38 *AM. J. COMP. L.* 205, 247 (1990); R. SIMEON, *FEDERAL-PROVINCIAL DIPLOMACY: THE MAKING OF RECENT POLICY IN CANADA* 5 (1972).

55 Under this logic, the federal government might be forced to withdraw military forces from areas not likely to be invaded, or to reduce the overall size of military forces. Sharing control over the military with the province might also affect national policies on weapons and troop training.

56 Provincial governments might even afford a public service option in lieu of military service.

On the diplomatic side, the province could demand to be a free trade zone of some sort, unencumbered by normal tariffs. It could have its own consular representatives for trade or tourism. It could participate in negotiations with other countries, or have representation in the United Nations.

At this point, the state or province starts to look a lot like a nation. All that is really left is secession and a formal declaration of independence. International law has been reluctant to grant a right to secede.⁵⁷ Secession is a complex and variegated process.⁵⁸ For example, one might require a supermajority of some kind for secession, or a particular waiting period. Secession might be made contingent on certain protections for ethnic minorities within the newly created unit. Perhaps, the penultimate right that an ethnic minority might have is literally to take over. One must be careful of the undemocratic implications of such moves. However, if the suppressed "ethnic minority" comprises a majority of the population ruled by a minority elite, then one could justify their taking over. One also could justify such a move by a number of minority ethnic groups that make up a majority. Again, rights of those who are ethnic minorities in this new political milieu would have to be protected. Moreover, the way in which such change could proceed would be a separate question.

III. ENFORCEABILITY

Questions of enforceability are essentially procedural. By classifying them as procedural, I do not want to subordinate them to questions involving the substantive content of the rights of ethnic minorities. Questions of procedure, including enforceability, have important value content separate from substantive questions. As the categorical imperative of Immanuel Kant says, one cannot treat people as means, but as ends.⁵⁹ In other words, enforcement procedures for whatever rights one grants ethnic minorities

57 Some commentators have been critical of granting a right of secession in international law. See, e.g., L. BUCHHET, *SECESSION* (1978); Sunstein, *Constitutionalism and Secession*, 56 U. CHI. L. REV. 633 (1991). But cf. L. KOHR, *THE BREAKDOWN OF NATIONS* (1957) (arguing that for efficiency of governance reasons, nation states tend to break down into smaller units).

58 For various kinds of national or quasi-national units into which newly formed states might be constituted, see H. HANNUM, *AUTONOMY, SOVEREIGNTY, AND SELF-DETERMINATION* 17-19 (1990).

59 See I. KANT, *THE METAPHYSICS OF ETHICS* 40 (trans. J. Semple 1869). For further discussion, see Attanasio, *The Principle of Aggregate Autonomy and the Calabresian Approach to Products Liability*, 74 VA. L. REV. 677 (1988).

ought not be formulated by an ends justifies the means philosophy. In protecting the rights of ethnic minorities, one ought not use enforcement procedures that ignore the essential dignity and respect of all human beings in that country.⁶⁰ For example, to stop a particular racist group from persecuting an ethnic minority, one ought not simply round up members and imprison them without affording them due process of law.⁶¹ Respecting such procedural boundaries may curb the rights of ethnic minorities by impairing certain substantive guarantees. Nevertheless, they preserve fundamental human dignity for the entire society which can be particularly important for members of politically disadvantaged ethnic minorities.⁶²

Enforceability concerns the question of how realistic are various rights of ethnic minorities. With many enforceability problems, one key variable is speed; quicker attempts for change in enforceability may lead to increased social tension and violence. On the other hand, ignoring problems or unduly delaying relief may also lead to violence. By way of introduction, I should also say that different rights afforded ethnic minorities can be afforded different levels of enforceability.

Perhaps, the weakest position in the enforcement continuum would make rights for ethnic minorities purely aspirational. They could be aspirational on the part of one or more minority groups. To realize these aspirations, minority groups could pursue such activities as political rallies. The group's aspirations could also be adopted in the platform of a political party.

These aspirations could be stated in constitutional or legislative documents or by executive, bureaucratic, or judicial proclamations. The aspirations could gain some official recognition by appearing as aspirations in the bureaucratic, executive, judicial, legislative, or constitutional documents of local, provincial, national, or international bodies. Governmental aspirations might have some timetable or programs attached by which to transform these aspirational rights into legally enforceable ones, or at least to consider them for legally enforceable status. Certain nongovernmental

60 See Attanasio, *supra* note 3.

61 See *Universal Declaration of Human Rights*, *supra* note 11, art. 9. Indeed, the members ought not be prosecuted for membership or political association, but instead for concrete illegal actions taken against the minority group. See, e.g., *United States v. Roebel*, 389 U.S. 258 (1967); *Keyishian v. Board of Regents*, 385 U.S. 589 (1967).

62 For further discussion of these issues, see *supra* notes 20-23.

groups might participate in the quest for governmental enforcement of ethnic rights. Examples might run the gamut from religious groups to neighborhood associations. Such groups might also serve as mediators and negotiators of various kinds in disputes between ethnic groups.⁶³

Aspirations might move people to action of various kinds directed towards realizing the aspirations. In terms of nonviolent action, ethnic groups could picket or call for economic boycotts until their rights are granted. The law will impact on the feasibility or the cost of taking such enforcement actions.⁶⁴

Rights could be legally enforceable domestically at the local, provincial, or national level. They could be promulgated by narrow or broad judicial precedents of a common law nature; or they could be codified in administrative regulations, executive orders, or statutes. These could be enforceable by an administrative body, a court, or executive action.

Legally enforceable rights for ethnic minorities could be constitutionalized. The stringency of such rights will hinge on such factors as who enforces the constitution and how easy it is to amend. By nature, minority rights are countermajoritarian; that is, they are designed to protect political minorities against political majorities.⁶⁵ Consequently, they are best protected in constitutions which cannot be amended by simple majority votes of a legislative body.

Constitutional protections are best enforced by institutions that are wedded to the constitution as a legal document rather than majority interests. Courts staffed by judges trained in the law are often dedicated to enforcing legal guarantees. In the case of minority rights, this is particularly true if judges are insulated from the will of the majority. They might be appointed by some combination of legislative or executive bodies rather than elected at large. For example, they might be appointed for life or for long terms, perhaps with no possibility for renewal.⁶⁶ Some nations

63 Some nongovernmental groups like churches and political parties can be powerful forces that can quell or increase ethnic disputes.

64 For example, the law might allow criminal prosecution or civil suits for interference with advantageous business relationships produced by picketing or economic boycotts. On the other hand, it might extend rights to engage in such political activities. See *N.A.A.C.P. v. Claiborne Hardware Co.*, 458 U.S. 886 (1982).

65 See J. ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* (1980); See also Attanasio, *Everyman's Constitutional Law: A Theory of the Power of Judicial Review*, 72 GEO. L.J. 1665, 1680 (1984).

66 In the United States, federal judges cannot have their salaries reduced during

like Germany and Hungary have specialized constitutional courts whose jurisdiction is limited to constitutional questions. In the United States, courts of general, original, and appellate jurisdiction adjudicate constitutional questions.

Beyond nonviolent and legal means of enforcement are extra-legal means of enforcement which often include destruction of property and physical violence. Often such means are resorted to when legal means are unavailable. Such extralegal enforcement methods include rioting and national or international terrorism. Ethnic rights could be legally enforceable internationally. In extreme cases, nations could impose economic or military sanctions on an ad hoc basis.⁶⁷ Sanctions by the United Nations Security Council will generally not pertain, as the ethnic conflicts discussed here are generally intranational.⁶⁸ More promising are regional courts, such as, the European Court of Human Rights.⁶⁹

The most extreme method of enforcement is war or systematic armed conflict. For the kinds of ethnic rights discussed in this symposium, this is likely to be civil war. International conflicts designed to enforce rights of ethnic minorities would run afoul of the principles against intervention and aggression.

IV. AN OVERVIEW OF THE RIGHTS OF ETHNIC MINORITIES

Not all rights need be enforced in the same way. One could overview the emerging mosaic of potential rights positions for ethnic minorities by combining the substantive content and enforceability continua to produce the following matrix.

Each square in the matrix contains two terms: (1) a procedural mechanism, listed at the top of the square; and (2) a substantive right, listed below the procedural mechanism. For example,

their terms and can only be removed by impeachment for lack of good behavior rather than for disagreement with a particular judicial decision. See U.S. CONST. art. III, § 1.

67 Military sanctions on behalf of ethnic minorities could be tricky in international law, as the United Nations Charter severely constrains the circumstances under which one nation-state can use military force against another. See, e.g., U.N. CHARTER ART. 39-54.

68 Only states can be parties before the International Court of Justice; consequently, the intranational nature of ethnic conflicts would pose jurisdictional problems. STATUTE OF THE INTERNATIONAL COURT OF JUSTICE, Jun. 26, 1945, art. 34, T.S. No. 993, 3 Bevans 1153, 1976 Y.B.U.N. 1052.

69 European Convention for the Protection of Human Rights and Fundamental Freedoms, 212 U.N.T.S. 222 (1950), (entered into force Sept. 3, 1953) at art. 19. For some of the efforts of the international community to define rights of ethnic minorities, see Eide, *Minority Situations: In Search of Peaceful and Constructive Solutions*, 66 NOTRE DAME L. REV. 1311 (1991).

the square in the upper left-hand corner of the first page of the matrix represents the procedural mechanism of International War as a method of enforcing the substantive right of the protection against Genocide. The horizontal axis corresponds to the substantive rights continuum, while the vertical axis corresponds to the procedural mechanisms continuum. Thus, substantive rights vary as one proceeds from square to square horizontally, and procedural mechanisms vary as one proceeds from square to square vertically. This charts some of the emerging rights positions:

Int'l War Genocide	Int'l. War Apartheid	Int'l. War Murder	Int'l. War Torture	<u>Int'l. War</u> Imprisonment w/o Due Process	<u>Int'l. War</u> Equality Under Law	<u>Int'l. War</u> Freedom of Expression & Religion
Civil War Genocide	Civil War Apartheid	Civil War Murder	Civil War Torture	<u>Civil War</u> Imprisonment w/o Due Process	<u>Civil War</u> Equality Under Law	<u>Civil War</u> Freedom of Expression & Religion
Int'l. Econ. Sanctions Genocide	Int'l. Econ. Sanctions Apartheid	Int'l. Econ. Sanctions Murder	Int'l Econ. Sanctions Torture	Int'l. Econ. Sanctions Imprisonment w/o Due Process	Int'l Econ. Sanctions Equality Under Law	Int'l. Econ. Sanctions Freedom of Expression & Religion
Terrorism Genocide	Terrorism Apartheid	Terrorism Murder	Terrorism Torture	Terrorism Imprisonment w/o Due Process	Terrorism Equality Under Law	Terrorism Freedom of Expression & Religion
Riot Genocide	Riot Apartheid	Riot Murder	Riot Torture	Riot Imprisonment w/o Due Process	Riot Equality Under Law	Riot Freedom of Expression & Religion
Judicially Enforceable Constitutl Provision Genocide	Judicially Enforceable Constitutl Provision Apartheid	Judicially Enforceable Constitutl Provision Murder	Judicially Enforceable Constitutl Provision Torture	<u>Judicially Enforceable Constitutl Provision</u> Imprisonment w/o Due Process	<u>Judicially Enforceable Constitutl Provision</u> Equality Under Law	<u>Judicially Enforceable Constitutl Provision</u> Freedom of Expression & Religion
Constitutl Provision Genocide	Constitutl Provision Apartheid	Constitutl Provision Murder	Constitutl Provision Torture	Constitutl Provision Imprisonment w/o Due Process	Constitutl Provision Equality Under Law	Constitutl Provision Freedom of Expression & Religion
Statute Genocide	Statute Apartheid	Statute Murder	Statute Torture	Statute Imprisonment w/o Due Process	Statute Equality Under Law	Statute Freedom of Expression & Religion
Executive Order Genocide	Executive Order Apartheid	Executive Order Murder	Executive Order Torture	Executive Order Imprisonment w/o Due Process	Executive Order Equality Under Law	Executive Order Freedom of Expression & Religion
Admin. Organ. Genocide	Admin. Organ. Apartheid	Admin. Organ. Murder	Admin. Organ. Torture	Admin. Organ. Imprisonment w/o Due Process	Admin. Organ. Equality Under Law	Admin. Organ. Freedom of Expression & Religion
Judicial Precedent Genocide	Judicial Precedent Apartheid	Judicial Precedent Murder	Judicial Precedent Torture	Judicial Precedent Imprisonment w/o Due Process	Judicial Precedent Equality Under Law	Judicial Precedent Freedom of Expression & Religion
Enforceable Province Genocide	Enforceable Province Apartheid	Enforceable Province Murder	Enforceable Province Torture	Enforceable Province Imprisonment w/o Due Process	Enforceable Province Equality Under Law	Enforceable Province Freedom of Expression & Religion
Picket & Boycott Genocide	Picket & Boycott Apartheid	Picket & Boycott Murder	Picket & Boycott Torture	Picket & Boycott Imprisonment w/o Due Process	Picket & Boycott Equality Under Law	Picket & Boycott Freedom of Expression & Religion
Aspiration Genocide	Aspiration Apartheid	Aspiration Murder	Aspiration Torture	Aspiration Imprisonment w/o Due Process	Aspiration Equality Under Law	Aspiration Freedom of Expression & Religion

Int'l. War Sustenance	Int'l. War Privacy of Space	Int'l. War <u>Participation in Political Process</u>	Int'l. War <u>Non-Discrim., e.g., Educ. & Employment</u>	Int'l. War Taking of Property	Int'l. War <u>Affirmative Action in Educ. & Employment</u>	Int'l. War Language Rights
Civil War Sustenance	Civil War Privacy of Space	Civil War <u>Participation in Political Process</u>	Civil War <u>Non-Discrim., e.g., Educ. & Employment</u>	Civil War Taking of Property	Civil War <u>Affirmative Action in Educ. & Employment</u>	Civil War Language Rights
Int'l. Econ. Sanctions Sustenance	Int'l. Econ. Sanctions Privacy of Space	Int'l. Econ. <u>Sanctions Participation in Political Process</u>	Int'l. Econ. <u>Sanctions Non-Discrim., e.g., Educ. & Employment</u>	Int'l. Econ. Sanctions Taking of Property	Int'l. Econ. <u>Sanctions Affirmative Action in Educ. & Employment</u>	Int'l. Econ. Sanctions Language Rights
Terrorism Sustenance	Terrorism Privacy of Space	Terrorism <u>Participation in Political Process</u>	Terrorism <u>Non-Discrim., e.g., Educ. & Employment</u>	Terrorism Taking of Property	Terrorism <u>Affirmative Action in Educ. & Employment</u>	Terrorism Language Rights
Riot Sustenance	Riot Privacy of Space	Riot <u>Participation in Political Process</u>	Riot <u>Non-Discrim., e.g., Educ. & Employment</u>	Riot Taking of Property	Riot <u>Affirmative Action in Educ. & Employment</u>	Riot Language Rights
Judicially Enforceable Constitut'l Provision Sustenance	Judicially Enforceable Constitut'l Provision Privacy of Space	Judicially Enforceable Constitut'l Provision Partic. in Polit. Process	Judicially Enforceable Constitut'l Provision Non-Discrim., e.g., Educ. & Employment	Judicially Enforceable Constitut'l Provision Taking of Property	Judicially Enforceable Constitut'l Provision Affirm. Action in Educ. & Employment	Judicially Enforceable Constitut'l Provision Language Rights
Constitut'l Provision Sustenance	Constitut'l Provision Privacy of Space	Constitut'l Provision Partic. in Polit. Process	Constitut'l Provision Non-Discrim., e.g., Educ. & Employment	Constitut'l Provision Taking of Property	Constitut'l Provision Affirm. Action in Educ. & Employment	Constitut'l Provision Language Rights
Statute Sustenance	Statute Privacy of Space	Statute <u>Participation in Political Process</u>	Statute <u>Non-Discrim., e.g., Educ. & Employment</u>	Statute Taking of Property	Statute <u>Affirmative Action in Educ. & Employment</u>	Statute Language Rights
Executive Order Sustenance	Executive Order Privacy of Space	Executive Order <u>Participation in Political Process</u>	Executive Order <u>Non-Discrim., e.g., Educ. & Employment</u>	Executive Order Taking of Property	Executive Order <u>Affirmative Action in Educ. & Employment</u>	Executive Order Language Rights
Admin. Organ. Sustenance	Admin. Organ. Privacy of Space	Admin. Organ. <u>Participation in Political Process</u>	Admin. Organ. <u>Non-discrim., e.g., Educ. & Employment</u>	Admin. Organ. Taking of Property	Admin. Organ. <u>Affirmative Action in Educ. & Employment</u>	Admin. Organ. Language Rights
Judicial Precedent Sustenance	Judicial Precedent Privacy of Space	Judicial Precedent <u>Participation in Political Process</u>	Judicial Precedent <u>Non-Discrim., e.g., Educ. & Employment</u>	Judicial Precedent Taking of Property	Judicial Precedent <u>Affirmative Action in Educ. & Employment</u>	Judicial Precedent Language Rights
Enforceable Province Sustenance	Enforceable Province Privacy of Space	Enforceable Province <u>Participation in Political Process</u>	Enforceable Province <u>Non-Discrim., e.g., Educ. & Employment</u>	Enforceable Province Taking of Property	Enforceable Province <u>Affirmative Action in Educ. & Employment</u>	Enforceable Province Language Rights
Picket & Boycott Sustenance	Picket & Boycott Privacy of Space	Picket & Boycott <u>Participation in Political Process</u>	Picket & Boycott <u>Non-Discrim., e.g., Educ. & Employment</u>	Picket & Boycott Taking of Property	Picket & Boycott <u>Affirmative Action in Educ. & Employment</u>	Picket & Boycott Language Rights
Aspiration Sustenance	Aspiration Privacy of Space	Aspiration <u>Participation in Political Process</u>	Aspiration <u>Non-Discrim., e.g., Educ. & Employment</u>	Aspiration Taking of Property	Aspiration <u>Affirmative Action in Educ. & Employment</u>	Aspiration Language Rights

Int'l. War Separate Education System	Int'l. War Cultural Pluralism	Int'l. War Economic Empowerment	Int'l. War Political Representation	Int'l. War Federalism	Int'l. War Secession	Int'l. War Revolution
Civil War Separate Education System	Civil War Cultural Pluralism	Civil War Economic Empowerment	Civil War Political Representation	Civil War Federalism	Civil War Secession	Civil War Revolution
Int'l. Econ. Sanctions Separate Education System	Int'l. Econ. Sanctions Cultural Pluralism	Int'l. Econ. Sanctions Economic Empowerment	Int'l. Econ. Sanctions Political Representation	Int'l. Econ. Sanctions Federalism	Int'l. Econ. Sanctions Secession	Int'l. Econ. Sanctions Revolution
Terrorism Separate Education System	Terrorism Cultural Pluralism	Terrorism Economic Empowerment	Terrorism Political Representation	Terrorism Federalism	Terrorism Secession	Terrorism Revolution
Riot Separate Education System	Riot Cultural Pluralism	Riot Economic Empowerment	Riot Political Representation	Riot Federalism	Riot Secession	Riot Revolution
Judicially Enforceable Constitut'l Provision Separate Education System	Judicially Enforceable Constitut'l Provision Cultural Pluralism	Judicially Enforceable Constitut'l Provision Economic Empowerment	Judicially Enforceable Constitut'l Provision Political Representation	Judicially Enforceable Constitut'l Provision Federalism	Judicially Enforceable Constitut'l Provision Secession	Judicially Enforceable Constitut'l Provision Revolution
Constitut'l Provision Separate Education System	Constitut'l Provision Cultural Pluralism	Constitut'l Provision Economic Empowerment	Constitut'l Provision Political Representation	Constitut'l Provision Federalism	Constitut'l Provision Secession	Constitut'l Provision Revolution
Statute Separate Education System	Statute Cultural Pluralism	Statute Economic Empowerment	Statute Political Representation	Statute Federalism	Statute Secession	Statute Revolution
Executive Order Separate Education System	Executive Order Cultural Pluralism	Executive Order Economic Empowerment	Executive Order Political Representation	Executive Order Federalism	Executive Order Secession	Executive Order Revolution
Admin. Organ. Separate Education System	Admin. Organ. Cultural Pluralism	Admin. Organ. Economic Empowerment	Admin. Organ. Political Representation	Admin. Organ. Federalism	Admin. Organ. Secession	Admin. Organ. Revolution
Judicial Precedent Separate Education System	Judicial Precedent Cultural Pluralism	Judicial Precedent Economic Empowerment	Judicial Precedent Political Representation	Judicial Precedent Federalism	Judicial Precedent Secession	Judicial Precedent Revolution
Enforceable Province Separate Education System	Enforceable Province Cultural Pluralism	Enforceable Province Economic Empowerment	Enforceable Province Political Representation	Enforceable Province Federalism	Enforceable Province Secession	Enforceable Province Revolution
Picket & Boycott Separate Education System	Picket & Boycott Cultural Pluralism	Picket & Boycott Economic Empowerment	Picket & Boycott Political Representation	Picket & Boycott Federalism	Picket & Boycott Secession	Picket & Boycott Revolution
Aspiration Separate Education System	Aspiration Cultural Pluralism	Aspiration Economic Empowerment	Aspiration Political Representation	Aspiration Federalism	Aspiration Secession	Aspiration*

The matrix is a descriptive tool that delineates some of the potential rights positions. It simply sets the context for analysis; it does not begin to provide reasons for preferring certain squares in the matrix, or even describe what the content of squares is in any detail. Many of the symposium papers are concerned with analyzing some of the rights positions that I have sketched in greater depth.

Lung-chu Chen talks about the various meanings of the term "self-determination" which played such a powerful role in the post-war decolonization movement. He says that self-determination must be applied in ways that minimize unauthorized coercion and violence and maximize basic human dignity.

Henry Steiner analyzes the development of international law norms that grant group autonomy rights to minorities through power-sharing schemes, minority political control of territory, and laws distinctive to minorities. He discusses the bases in international law for autonomy rights and the potential tension between these rights and more traditional human rights.

Hurst Hannum describes the halting pace of recognition of the rights of ethnic minorities in international law. He says that the slowness of the law to respond to these concerns has fanned the flames of nationalism, violence, secession, and terrorism.

Asbjørn Eide maintains that ethnic minority issues involve immigrant groups, indigenous peoples, and ethnic groups which were formerly enslaved. He examines ethnic minority problems around the world and proposes some guiding principles to deal with these problems.

Adeno Addis proposes a broad-ranging conversation between ethnic minorities and members of a political majority which he calls cultural pluralism. Specifically, he recommends that these groups share each other's narratives and question each other's perspectives on equal terms.

Sharon O'Brien describes the various inconsistent approaches that the United States government has taken in defining its legal relationship with Indians. She recommends that the United States seek consistency by more closely following international standards.

In discussing the rights of ethnic minorities in China, Arthur Rosett describes various measures that afford certain advantages to those claiming to be members of minority groups. These policies have resulted in additional people claiming minority status, and

have thereby impaired the government's goal of assimilating minority groups.

Igor Grazin examines one of the strongest claims made by ethnic minorities—secession and subsequent recognition by the international community. His article analyzes these issues against the specific backdrop of the Baltic states.

Jean Bethke Elshtain provides a historical tour of the concept of sovereignty, including the distinction between internal and external sovereignty. She particularly critiques absolutist versions of sovereignty which associate violence with power.

V. CONCLUSION: TOLERATION

Although many of the papers discuss them, I have ignored criteria that a society might invoke to select particular combinations of substantive and procedural rights. For example, a nation might afford greater rights to an indigenous peoples than to other ethnic minorities.⁷⁰ It might decide to allocate more or less rights based on the sheer number of ethnic minority groups in the country. Any number of other criteria might be used, as many of the principal papers discuss.

I would just like to put in a brief plug for one guiding light, toleration. For the past few years many prominent authors have advocated toleration.⁷¹ Of course, toleration cannot be pursued to such a degree that it enervates or undercuts all other values.⁷² Nevertheless, the violence to ethnic minorities and the violent threats to world public order that ethnic clashes have provoked dictate that toleration should pervade any discussion of the rights of ethnic minorities.

70 For a recent discussion of the rights of indigenous peoples, see Williams, Jr., *Encounters on the Frontiers of International Human Rights Law: Redefining the Terms of Indigenous People's Survival in the World*, 1990 DUKE L.J. 660.

71 See John Rawls, *The Idea of an Overlapping Consensus*, 7 OXFORD J. LEG. STUD. 1 (1987); see also L. BOLLINGER, *THE TOLERANT SOCIETY: FREEDOM OF SPEECH AND EXTREMIST SPEECH IN AMERICA* (1986).

72 See generally, Attanasio, *The Impoverished States of Law and Moral Philosophy*, 64 NOTRE DAME L. REV. 773 (1981).

