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Heuristic Considerations on the Typology of Groups and Minorities

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Heuristic Considerations on the Typology of Groups and Minorities

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Abstract

Minority rights play a significant role in development policy, especially within inhomogeneous societies. The justification of minority rights is linked to the justification of human rights. The study develops elements of a new typology of minorities against the background of the question of legal claims of minorities and groups. This typology can become part of a mechanism to decide which type of minority may make justified claims to special rights.

Kurzfassung

Minderheitenrechte spielen in der Entwicklungspolitik eine bedeutende Rolle, insbesondere in Bezug auf inhomogene Gesellschaften. Die Begründung von Minderheitenrechten steht in engem Zusammenhang mit der Begründung von Menschenrechten. Die Studie entwickelt vor dem Hintergrund der Frage nach den Rechtsansprüchen von Minderheiten bzw. Gruppen Elemente einer neuartigen Typologie von Minderheiten mit der entschieden werden kann, welche Typen von Minderheiten gerechtfertigte Ansprüche auf Sonderrechte erheben können.

1 Introduction

The expression "minority" is used in very different ways. In addition to the social and political science usage relating to social groups who are discriminated against, there are specialist legal and economic, scientific and mathematical usages of the expression "Minority".¹ For the following considerations on the typology² of minorities, it is primarily the social and political science dimensions that are relevant, i.e. the dimension in which minorities are social groups who place special demands on their surrounding society and legal system in relation to the implementation and protection of their inherent characteristics (e.g. laws and legal claims.)

A minority in this sense is not necessarily disadvantaged or discriminated against per se and especially not when their particular rights and legal claims are protected (such as is the case for example for the Sorbs or the Danish minority in Germany). It is precisely in those situations where the validity of the laws and legal claims are not protected, i.e. where the minorities and/or their members are subject to disadvantages or discriminations that it makes sense to look at the problem from a legal-philosophical point of view. The current political and academic discussion about minority rights is largely oriented towards this usage of the expression "minority" and uses a typological classification that generally differentiates five dimensions: Ethnic origin (race), nationality, language, religion and gender.³ Below we want to discuss the criteria for the typology of minorities and these expand the framework of the usual typologies. In this process it is important for the methodology that this is viewed functionally in relation to the rights and legal claims of minorities and their members.

¹ For example the economic-legal usage of "minority" in the sense of company law or stock corporation law etc.

² Concerning the term "typology", c.f. in particular the historical-systematic contribution "Type, Typology" by Hans-Ulrich Lessing in *A Historical Dictionary of Philosophy*, published by Joachim Ritter and Karlfried Gründer. Vol 10. Darmstadt 1998, 1587-1607. C.f. the Problem of Typology by Friedrich Heckmann: Towards the Development of a Typology of Minorities, in Fried, Ch. (ed.), *Minorities: Community and Identity*. Springer Verlag, Berlin-Heidelberg-New York-Tokyo 1983, p. 9-23; c.f. from the UN document E/CN.4/Sub.2/AC.5/1996/WP.2 Working paper on the classification of minorities and differentiation in minority rights, prepared by Mr. Asbjørn Eide.

³ For example the following term definitions express the implicitly used typologies in an exemplary way. "A minority is a population group, which differentiates itself from the majority through specific personal characteristics (race, language, religion, morals, social function, etc). The term is closely linked to the discrimination of such groups due to prejudices. The social status of the minority is determined by the values, norms and conflicts in the prevailing majority in society. The degree of discrimination is decisively determined by the degree of insecurity and aggressivity in the overall situation in the society". (Martina Boden: *Nationalitäten, Minderheiten und ethnische Konflikte in Europa*. [Nationalities, Minorities and Ethnic Conflicts in Europe.] Munich 1993, Page 18) and "The term minority [...] designates those human groups who find themselves "marginalised", in a position of numerical, political, social or economic and even cultural inferiority, apart from a few exceptions. The fact of being in a minority implies being legally or sociologically minor. It is both a quantitative and differential reality and a condition or dependency or is felt to be such. "(Pierre George, *Géopolitique des Minorités* [Geopolitics of Minorities], PUF, "Que sais-je ?", Paris, 1984, page 5). c.f. UN document E/CN.4/Sub.2/AC.5/1996/WP.2 Working paper on the classification of minorities and differentiation in minority rights, prepared by Mr. Asbjørn Eide

2 Group Rights and/or Minority Rights?

Before we look at the criteria for the typology of minorities from a legally-based objective a difficulty in the term usage must be pointed out which is not sufficiently appreciated in the current discussion on minority rights, namely the classification problem in the very term "minorities". In the international debate about minority rights, some authors when faced with this difficulty have transitioned into the usage of the term "group rights" instead of "minority rights".⁴ This makes particular sense because in the debates about minority rights there is not always a sufficiently precise differentiation between quantitative and qualitative minorities. Quantitative minorities in a society are minorities in number/size in relation to a (dominating) majority. Qualitative minorities are minorities who have one or several characteristics which differentiate them from a majority.⁵ It is therefore important to take note of this difference, in order to be able to distinguish between legitimate and non-legitimate legal claims of "minorities" in relation to the question of a legal-philosophical foundation of minority rights.

Example "Gender": Women are in relation to social influence (quality) a minority, but in quantity they form a majority, namely 52% of the population. Therefore if one is speaking inaccurately about minority rights, then one inevitably implies for example that women in relation to the world society do not form a quantitative minority but a quantitative majority. This is how the gender problem in the qualitative minority of women occurred. Examples can also be found in the ethnic area such as in countries in which minorities hold power and where majorities become persecuted "minorities" such as the Hutus and Tutsis in Burundi and Rwanda or Sunnis and Shiites in Iraq. In such cases we do not want to confuse our every-day linguistic and intuitive ideas of minorities and their rights. Therefore it is helpful to talk of groups instead of minorities and of group rights instead of minority rights. The "classic" minorities (i.e. in the quantitative sense) are then a sub-form of groups. In the question of group rights, fewer quantitative group rights play a role than do the qualitative ones.

There is also a second aspect which concerns the orientation towards the term of group. Minority rights are equated by many with the rights of discriminated and/or persecuted groups and/or of family members of the groups. Minorities in the quantitative sense can however also describe privileged and powerful groups and their family members. Our investigation does not

⁴ cf. e.g. Julia Stapleton (Ed.), *Group Rights. Perspectives since 1900*. Bristol 1995. They thereby fall back on the more general group term as it had been developed in sociology in the 20th century. Important methodological aspects concerning groups, minorities and minority groups can be found in Hubert M. Blalock: *Toward a Theory of Minority-group*. New York 1967 and Erik Olin Wright: *Class Counts: Comparative Studies in Class Analysis*. Cambridge 1997.

deal with such rights which protect the privileges of the (power) minorities (e.g. *élites*) but with those which protect the elementary freedoms of the individual, therefore with basic rights and freedom rights.

An interesting example for the connection of minority rights and *élites* is the American constitution. The founding document included a specific protection for minorities. However, this did not really refer to socially-discriminated groups but to powerful *élites* such as large landowners, who forced the acceptance of minority protection into law out of fear of the strengthening democracy and the associated majority principle. As a socially-quantitative majority they wanted to maintain their political influence through the tool of minority protection.

⁵ C.f. also the approaches concerning the differentiation of quantitative and qualitative aspects of groups in Geiger, von Wiese, Hofstätter, Ellwood and others. Also see Wilhelm Bernsdorf: Article "Gruppe" [Group]. In the same. (publisher) *Wörterbuch der Soziologie* [Dictionary of Sociology] Frankfurt/M 1975, 313-326

3 Methodical Considerations and Definition of Terms

A legal/philosophical-based investigation on the establishment of group and/or minority rights cannot "simply" be based on the social empirics of the various "groups" in existence. These empirics are basically unrestricted and the term "group" and/or "minority" is used in different ways. Moreover, "social empirics" is a complex term for it is not "given" in a natural sense but is itself the result of a cognitive process and is therefore "made" in an epistemological and pragmatic sense.

We use "typology" here as defined by a group classification into types according to formal characteristics. ⁶A legal/philosophical investigation must start from a group typology which includes in principle all possible groups. Such a typological representation of groups should enable an identification of the general and specific features of each group type and also the recognition of the relationships of the types with each other and an organization structure. In addition, the typology presented here should be used as a basis for a representation of the legal claims, which are raised by the groups of a respective type and as a basis for the response to the questions of the legal/philosophical legitimacy of these claims and according to the validity of the over-positive rights of groups as they are dealt with in later parts of the study.

The typology presented here differs from the (usual) historical-sociological group typologies⁷ through the fact that it is looking to a legal/philosophical relevance of group identities. Sociological typologies are generally based on the sociologically describable empirical genesis of groups. We will consider genetic aspects only in as far as they are relevant for the question of the legal/philosophical foundation of group rights.

Therefore from a methodological point of view, a legal/philosophical investigation must be based on a typology which in principle includes the virtuality of groups, i.e. all of the possible groups. It must present all types of minorities in a systematic inter-relationship in order to help answer the question of the legitimacy of legal claims of individual groups or minorities on this idealized basis. This therefore requires a methodological framework which makes the criteria of

⁶ For the historical, systematic and disciplinary changing and different use of "typology" and "type", see for example, B. Strengé and H.U. Lessing, "Type; Typology". In a Historical Dictionary of Philosophy, published by J. Ritter and K. Gründer. Volume 10. Basel 1998, 1587-1607. See in particular also for the legal area L. Kuhlen, Typuskonzeptionen in der Rechtstheorie. [Type Conceptions in Legal Theory.] Munich 1977.

⁷ As for example in the Minority Typologies of Friedrich Heckmann: Die Bundesrepublik. Ein Einwanderungsland? Zur Soziologie der Gastarbeiterbevölkerung als Einwandererminorität. [Is the Federal Republic of Germany a country of immigration? On the sociology of the guest worker population as an immigrant minority.] Stuttgart 1981, on minority typologies according to the sociologically describable socio-historical genesis (see in particular page 67)

the generation of groups and/or minority types available. Such a typological differentiation of groups must provide the following:

- Firstly, the identification of the general and specific features of each group type;
- Secondly, the recognition of the relationship of the types between each other and a possible organizational structure;
- Thirdly, the presentation of the legal claims which are raised by the groups of each type;
- Fourthly, a basis for the question of the legal/philosophical legitimacy of these claims and the validity of the over-positive rights of groups.

The types of groups developed below are idealized. In reality the types overlap each other.

From a sociological point of view, a group is a quantity of individuals who have a particular endogenous characteristic association and who develop through the presence of specific qualitative (social, cultural-religious, natural-biological, ethnic, national) characteristics.⁸ If groups assume a "special status" within a society or a societal system (e.g. EU), then we can talk of minority groups.⁹

A group can be viewed formally as a subset of a whole. This subset is either smaller than the complementary set in relation to the whole or is itself a subset of a subset. The individuals of these sets have characteristics. Subsets are created when some of the individuals have identical characteristics. A characteristic is therefore unsuited for the creation of subsets when either no individuals, or all of them, have it.

Two fundamental models are conceivable:

In Model I the whole is divided into two subsets of which either one is smaller than the other or they are both the same size. In the first case there is a minority subset. The quantity of individuals who do not fall into this group characteristic are called a majority subset.

In Model II the whole is divided up into several subsets. These are either all of different sizes or some are the same size or all are the same size. In this model, within a whole, there can be several minority subsets.

From a legal/philosophical point of view, a group is a (collective) legal subject. The group members are also (individual) legal subjects. Legal subjects have rights and can claim rights. Legal subjects imply autonomy and accountability.

⁸ C.f. for example Günter Hartfiel/Karl-Heinz Hillmann: Article "Gruppe" [Group]. In: Wörterbuch der Soziologie [Dictionary of Sociology], 3, revised and enhanced edition, Stuttgart 1982

⁹ C.f. A.M. Rose: Article: Minderheiten. [Minorities.] In: Wörterbuch der Soziologie. [Dictionary of Sociology], published by Wilhelm Bernsdorf. Vol. 2. Frankfurt/M 1975, 547-550

Which groups are relevant for the question of group rights? Avishai Margalit and Joseph Raz have tried to reason in view of the question of national self-determination that only specific groups can be subject to a right of self-determination.¹⁰ Such groups are identified according to Margalit/Raz through six characteristics "that in combination are relevant to a case for self-determination".¹¹ (In a later section of their essay the authors point out that the characteristics not only apply to national groups, but also to other groups such as ethnic, religious and social groups.¹²) These characteristics in detail are:

1. A common culture that embraces all the group members ("pervasive culture") with a common language, common tradition, common art, etc.¹³

2. The group members will be socialized and marked by the character of the fundamental life philosophy of the group ("will be marked by its character"). These character traits can be altered through a change in the sphere of influence of other groups (e.g. migration). To this extent such groups are relevant for Margalit/Raz for the problem of self-determination as their strength of influence on the group members is very strong ("profound and far-reaching"). It is obvious that the association of the "prosperity of the group" and the "well-being of individuals" plays an important role for the "tie" between the individuals and the group.¹⁴

3. The group members reciprocally recognize each other as group members.¹⁵

4. Group membership is important for the self-identification of a member.

5. Membership is a question of belonging and not of achievement or attainment ("belonging, not achievement"). The qualification for membership in a relevant group with self-determination rights results, according to Margalit/Raz from criteria which are "non-voluntary" - "one cannot choose to belong".¹⁶ This is in clear contradiction to the socialization possibility assumed in the second characteristic. If I as a member of a group know that I can also integrate myself into another group, then I can first of all decide whether I want another membership. Secondly, the integration is very much to be viewed as an achievement of the integration will of the individual. It can be easier for the individual to belong to a group when he makes the effort to learn and practice identifying images of the group and its members.

6. The relevant groups for national self-determination are not small face-to-face groups, but anonymous groups in which reciprocal recognition is defined over and above the possession of the general characteristics of the members (symbolic, objects, participation in group ceremonies, special etiquette, vocabulary, etc).¹⁷

¹⁰ A. Margalit/J. Raz, National Self-Determination. In Kymlicka, Will (Ed.), The Rights of Minority Cultures. Oxford 1995, 79-95

¹¹ C.f. *ibid.* 82

¹² C.f. *ibid.* 85

¹³ C.f. *ibid.* 82

¹⁴ C.f. *ibid.* 82

¹⁵ C.f. *ibid.* 83-84

¹⁶ C.f. *ibid.* 84-85

¹⁷ C.f. *ibid.* 85

According to Margalit/Raz the six aspects named are not mutually conditional but "they tend to go together".¹⁸ However, they do not make it clear how and which characteristics are to be combined in order to make an argument for the question of self-determination rights. In the following we will define group features more precisely.

¹⁸ C.f. *ibid.* 85

4 Criteria for the Typology of Groups and/or Minorities

In the section below, eight criteria will be developed and described which should enable us to make typological statements about groups and in particular about minority groups in relation to the legal/philosophical foundation dimension of minority rights.

4.1 Relevance Criterion: Relevant and Non-Relevant Groups

In a legal/philosophical foundation of group rights it must be clarified which types of groups are relevant from a legal/philosophical view point and which are not. The relevance criterion is the most fundamental criterion for the legal protection of minorities. This decides who if anyone can make a claim for a legal minority protection. It is therefore unavoidable because - for instance in cases of a quantitative minority - the simple quantitative relational feature of being a minority in relation to a majority, does not necessarily mean the validity of specific (over-positive) rights for such a group. Finally, it is not only decisive for the acceptance of minority rights by the majority of a society that restrictions¹⁹ created necessarily for non-members are generally and reasonably founded. The extension of minority rights to non-relevant groups would first of all lead to a legal/philosophical contradiction and secondly from a legal-practice point of view to an abuse of fundamental rights and thirdly from a socio-political point of view to the damaging of the achievement of minority rights for relevant groups.

If we move forward based on our experiences and intuitions then we could include the Sinti and the Roma as "real" minorities, but not EU-politicians and EU-European university professors although the latter from a numerical point of view in comparison to the Sinti and Roma represent a minority. This is to do with the fact that the term "minority" has more meaning in everyday language than just a quantitative relationship of a smaller subset to a larger whole. It already has an inherent judgmental meaning in everyday language. We would intuitively agree if someone were to say that politicians or university professors were not relevant as far as the problems of minorities were concerned. Why are politicians or university professors *prima facie* not groups in our view who are relevant for the problems of minority rights? The answer is that as politicians or university professors - at least in Western democratic states - they are not socially and culturally disadvantaged. To stay with the example, Sinti and Roma, were and are, subject to persecutions and discrimination due to ethnic/cultural characteristics and prejudices in several countries. (Of course cases could be made in which university professors could be

¹⁹ Minority rights are also closely linked with restrictions for non-members of minorities, such as for example the quotas for Afro-American students at US universities.

discriminated against if they for example were not allowed to marry because they were university professors. There have been such cases for instance in the systematic persecution and discrimination against intellectuals, teachers and professors under Pol Pot.)

Discrimination is a necessary feature in the differentiation of relevant and non-relevant groups, but it is still not sufficient. Not every discrimination against a group makes this group a relevant group. Decisive for the determination of a relevant group is that the members of the group (or the group as a group itself) is violated or restricted in the enjoyment of their basic rights and rights of freedom. However, it is also clear that the discrimination or violations of fundamental rights are not carried out by contingent individuals but that they are systematically carried out and repeatedly by a majority and by the institutional instruments available to them (e.g. legal system, state executive bodies, public opinion leaders). A basic rights violation alone does not exist when private individuals (such as for example the Klu-Klux-Klan) persecute minority groups or their members. This is a criminal offence as defined by the currently applicable criminal law. If however, state institutions do not punish these types of crimes *ex ante* (i.e. there is no preventative regulation in the legal system) and *ex post* there is no pursuance according to legitimate law, then a fundamental rights violation has occurred.

In the case of fundamental rights violations, again a differentiation must be made between fundamental rights violations which 1) have been caused to a member of a group as a mere individual, and which 2) have been caused to a member of a group due to its characteristics, or being a member of a group and 3) to the group as a group.

It is conceivable in the first case that the fundamental rights of a member of a group are violated, not due to his/her characteristics of being a member of the group and therefore possessing a relevant group characteristic, but due to another characteristic. His/her membership of a group therefore does not play any role in the fundamental rights discrimination. (It occurs for example due to power-political considerations or due to psychological reasons by the law infringer. The group member could for example only believe that he was restricted or violated in his fundamental rights because he is a member of the group. In reality, however, the fundamental rights are restricted or violated because they are in principle not granted. This could for instance be the case if organizational freedom is limited in one state and only those who want to organize themselves really experience this restriction. Other potential groups would only first experience this if they wanted to organize themselves. In such cases the wrong conclusion of a group wanting to organize itself could be drawn from the observation of the alleged lack of a negative action in other potential groups. If other potential groups were to want to organize themselves, then they would have to expect the same restrictions. This phenomenon exists for example in totalitarian systems when one part of the citizenship wants to organize itself and is confronted with restrictions of their basic rights. Others however, because they do not want to organize themselves, cannot determine and therefore deny the existence of fundamental rights restrictions in the area of organizational freedom. Such rights violations are difficult in practice to separate

from the second case. However, they must be differentiated analytically because they do not belong in the area of group rights but in the area of human and/or fundamental rights.

Such rights violations are in practice difficult to separate from the second case, since the motivation for a fundamental rights violation can be disguised. However, they must be differentiated analytically because they do not belong in the area of group rights but in the area of human rights as the freedom rights of reasonable individuals. (This highlights the difficult problem namely that all group rights are possibly derived from individual and/human rights). For our legal/philosophical question, the group type is relevant in which the discrimination in the area of fundamental rights occurs due to the fact of an individual being a member of a specific group.

Also relevant for our legal/philosophical question is the type of groups that are discriminated against in their collective rights (group rights). This could include the rights of the group (as a group) on the collective self-determination in the increased role of participation, integration, autonomy and sovereignty.

The relevance criterion in general also implies a conflict of interests between a normative mainstream in a society (which relates to a majority) and a violated but at the same time established legal claim (basic rights) of a minority or members of a minority. Therefore it is legally/philosophically indifferent whether such a conflict can be actively argued out or not (if for instance a disadvantaged minority has accepted its "lot" so to speak). For at the very moment when an established fundamental right claim has been violated, the principle of the law is also violated. Such a violation is also legally/philosophically reprehensible since in the violation of the principle of law the freedom and autonomy of the reasonable subject is also buried.

In connection with the considerations on the typology, there is no evidence that in collective rights it is a question of fundamental and freedom rights therefore of over-positive rights, which not only befall to members of groups but also to groups as groups. In the discussion on group rights, many authors reason that group rights and/or minority rights are to be viewed as is the case with human rights, as their own legal category.²⁰ Although a series of actual valid legal systems recognize special group and/or minority rights, the only thing that must be taken note of here is the underlying legal reason, and whether positive or over-positive legal validity is the legitimate basis. From a legal/philosophical point of view there is a whole series of arguments which are against the assumption that in the case of group and minority rights it is a question of over-positive collective legal claims i.e. independent from the empirical legal situation.²¹

²⁰ This is substantiated in other contributions on this volume

²¹ This applies to the authors such as Kymlicka, Walzer, Kukathas, van Dyke.

We can define a relevant-group for minority rights as a quantity of individuals who 1) at least have one common characteristic that differentiates them from a quantity of individuals forming the majority and who 2) have been prevented in the attainment of their over-positive legal rights through the institutions of the majority will - or parts of it- and who 3) due to their having this feature/these features and/or their belonging to this significant quantity of individuals have been violated in their basic rights.

4.2 Procedural Criterion: Voting Minorities

The discussion about groups and in particularly about minorities is at its core a discussion about rights. Rights in democratic societies are the expression of legitimate decision-making processes. Democratic decision-making processes lead to minorities and majorities. These voting minorities are the most unstable groups, since every new vote can lead to changing majorities.

Voting minorities are created through (rule-led) voting procedures. Some or all members of a whole group can participate in these votes. And either some or all can be affected by a vote. Voting minorities are a mixture of self-determined and heteronomous groups.²²

This type is self-determined in so far as the voting procedure is democratically regulated i.e. according to a will of a majority and the legal principle of legitimate procedures.²³ This type is heteronomous if these conditions are not fulfilled and the recognition of the will of the majority conflicts with ones own vote as an alien will and therefore nobody wants to belong to the voting minority.

Voting minorities are limited in time. They can lead to the original vote being revised and the possibility of a new vote as long as the vote is maintained and the majority relationships are not withdrawn.

4.3 Decision-Making Criterion: For Decision-Making Capable Groups

There can only be rights when there is free will. As legal subjects in the strictest sense, the only entities in question are those who have a will. In groups in which the individual wills of individuals are embraced, it must be clear what applies as an expression of the common will. A group can only be a legal subject if it is (in principle) capable of collective decision-making. The creation of collective rules, procedures and common bodies is part of the decision-making process.

²² The author has compiled the arguments elsewhere which are against the assumption of over-positive collective rights. An important argument is the false analogy of collective and personal identity and its meaning for the foundation of freedom rights and autonomy. C.f. here Hartmut Ihne, *Collective Identity and the Claim for Rights*. In Helmut Linneweber-Lammerskitten/Georg Mohr (publisher.): *Interpretation und Argument*. [Interpretation and Argument.] Würzburg 2002, 345-362

In contrast to natural persons as individual legal entities, a decision-making collective entity as a holder of collective rights can be described as an artificial person or a moral person. An artificial person can be established for a short period (e.g. association) or permanently (e.g. state). It is uncoupled from the individuals.

A group must be an artificial person in order to have any collective rights at all. A minority group of individuals with a common identity characteristic, who however were not in a position in principle to form a common will, could not claim any group rights in the sense of collective rights. However, the members of such a group could have the right to create decision-making entities (right to representation).

For groups which are artificial persons there must be a differentiation between those which are recognized by others and those which are not. The recognition of an artificial person can take place through a higher body, a body on the same level and/or through the members. In the case of an artificial person being a "state" the recognition must take place multilaterally in accordance with valid international law, i.e. (if available) on the internationally higher level (e.g. through the UN General Assembly), bilaterally i.e. between the states themselves and also internally through individuals. For short-term artificial persons such as in associations, the recognition also refers to different levels i.e. recognition through the legal system and through the recognition of the members. The recognition of the "bilateral" level is not relevant for the legal recognition as an association.

In the case of the artificial persons, all variants can be formed from the three levels as far as their recognition in principle is concerned. One must see however, that the establishment of group rights for minority groups has a close connection with the three levels. When for example a small part of a national minority demands the recognition as a state entity with all the associated legal state and territorial consequences, but the internal recognition, i.e. through the members is refused (the members do not want a state), then the question of group rights is different to if the members of a national minority want a state or a state entity in principle.

4.4 Voluntariness Criterion: Self-Determined and Heteronomous Groups

We obtain a further important typological differentiation when we look at the membership in a group, i.e. at the inter-relationships between individual to individual and between the individual and the group. The membership of an individual in a group can either be self-determined or heteronomous. A group membership is self-determined when it takes place voluntarily. This means that the individual decides himself to become a member and is not coerced into it.

Two things must be differentiated here:

²³ see IV. 4

1. The voluntary will to belong to a group
2. The will for a group to exist,

for there is a difference between whether an individual wants to be a member of a group and whether he wants a group to exist but does not necessarily want to be a member of it.

Heteronomy of a group membership can either mean that an external interest exists in the existence of the groups (e.g. the attempt to preserve ethnic origins in an antiquated solidarity, or to want traditions which possibly are not wanted by the members of the groups) or that a characteristic that cannot be changed is linked with the membership, (e.g. from birth in a biological “family” - sequence or having specific biological characteristics such as disabilities). Heteronomy of the membership can also take place internally, namely precisely when the members of the groups or - in the case of an artificial person - the group itself claims/coerces membership of the groups against the will of a person (e.g. in religious communities, who do not have any conversion clauses and impose so-called life-time memberships).

4.5 Exit Criterion: Leavable and Non-Leavable Groups

One specific feature in connection with the self-determination of group membership is the possibility of an exit criterion. This is not necessarily linked with the voluntary nature of membership, or even identical. Although in principle it applies that a voluntary membership also implies the exit possibility, it is however conceivable that it is possible to join a group, but then to be virtually prevented from ever leaving it again. The vice-versa position must also be differentiated from this namely the possibility of exit but the impossibility of re-admittance.

As far as the exit possibility in heteronomous groups is concerned, it must be seen that an exit from groups with necessary characteristics (e.g. non-biologically manipulatable characteristics, biological family, line of ancestors) is not possible. However, it can be possible to exit a group even when others want the group's existence to continue. For example someone who does not want to speak Romansh, even though he is a Romansh speaker, cannot be coerced to do it. Although he theoretically belongs to the group of Romansh speakers, he is, if he has made the decision, to never speak this language again, virtually no longer part of the Romansh-speaking group. A theoretical group membership of this type is not however relevant for the problem of minority rights.²⁴

4.6 Objective Criterion: Political and Non-Political Groups

A further type of groups stems from the objective of the respective groups. Groups can be differentiated into those who pursue equality, participation, self-administration and/or autonomy as objectives. Basically every self-determined group is political, as the political objective

²⁴ In accordance with for example Rousseau's concept of connections of *volonté generale* and *volonté de tous*

presupposes a common will. Non-political groups would be those who renounce every one of the four target claims.

A fundamental differentiation in setting political objectives is the type of institutionalization aimed at.

- The objective can be oriented towards the establishment of a political institution encompassing all areas of life (therefore a state facility). These political institutions could then be differentiated respectively according to form of government (according to a One-Some-All-Principle and the orientation around the Principle of Law). Differentiation can be made here between a strong and a weak objective. The strong objective wants its own state whereas the weak wants autonomy (e.g. administration sovereignty).

- The objective is not oriented towards the legal regulation of all the areas of life, but remains below the state level and wants the legally secured establishment of regulations (for instance through the creation of an association, introduction of quotas) in particular sectors by the state and society.

4.7 Identity Criterion: Identity-Related and Non-Identity Related Groups

The identity criterion is the most frequently presented argument in discussions on minority rights for the justification of legal claims and rights of groups and for the granting of minority rights. The most common lines of arguments are as follows:

- a. As a group we have a right to our identity.
This identity is endangered/prevented by X.
As a group we have a right that X be prevented.
- b. Collective identity is a necessary characteristic of our group.
This identity is endangered/prevented by X.
Our group must prevent X.
As a group we have a right that X be prevented.

Groups can accordingly be differentiated by the extent to which they are identity-related. This means by the extent to which they have an affirmative self-identity of their common characteristics and possess a collective identity (whereby "possesses" in my opinion is to be equated with "claim", since a collective identity is possibly not an entity, but a result of an interpretation by the members). Non-identity related groups, such as consumers, are not relevant in relation to group rights. One could say, however, that consumers also claim their rights and consumer associations help them to secure them. However, the consumer group has neither its own self-identity nor collective rights. Consumer rights are not group rights but laws for consuming individuals.

As a differentiation, the identity-related groups are:

- those which possess a fleeting identity (for example people in a short-term, accidental emergency situation. After the termination of the emergency situation, the group identity generally evaporates) and

- those which possess a fixed identity, i.e. which grew up historically and which are based on norms recognized by the group members and which want a continued existence of the group, whereby the membership can only be claimed by a procedure recognized by the group (birth, initiation, legal act, etc).

These groups with fixed collective identities include national, ethnic, religious, cultural and (some) social minorities.

- National Minorities base their identity and their associated legal claims in relation to the majority or on other groups in their own self-image, of being their own nation. This means in principle already being a state entity with (full) sovereignty (e.g. Volksgeist [spirit of a nation] thoughts from the German Romantic period). This includes the existence of their own territory.

- Ethnic minorities in contrast, do not yet have per se the self-image of being a nation. They can, but this does not have to be the objective, demand state sovereignty (or partial sovereignty). Ethnic minorities can also be - under their own state - parts of existing states or societies.

- Religious, cultural and some social minorities on the other hand are not tied to state features. The strength of their self-image is based in common historically-developed world views considered as binding and/or in the existence of common rules of engagement.

But what is a "collective identity"? Formally, it is a specific characteristic of groups. Understood simply, groups are a collection of individuals in space and time. This collection of individuals can be accidental. This is why I call them contingent groups. There are no characteristics apart from the common space-time-location which binds the individuals together. A group can however also be participatory. By this I mean individuals whose constitutive elements for being a group, do not depend on a space-time-location but on the possession of specific features. A participatory group - and this also applies to contingent groups - does not necessarily have to have an awareness of these common features. I would like to describe groups who have an explicit awareness of this group existence as reflexive groups (e.g. associations, parties, states). The members of such groups do not only share specific characteristics with other members of the group, but they are also aware of this commonality and also want it.

Members of mere contingent or participatory groups have an external connection with each other. It is either a space-time-location which allows the collection of individuals to appear as a group or the possession of specific characteristics. Members of reflexive groups have an internal connection with each other. This means that the actual constitutive moment of such groups is an awareness of commonality. Let's look at Sartre's bus stop example²⁵ in which he describes the constitutional process for an inert group, in a modified form. Let us imagine that we as passers-by are watching individuals who are standing together on the pavement. It could be that these individuals at the precise moment when they are standing together have no relationship to each other at all, apart from the one moment whilst they are lingering in this spatial location. From the outside the impression is created that it could possibly be a group. If we were to ask and all the individuals were to inform us that they were passing by purely by chance then it would be a contingent group. If we were to ascertain in our enquiry that if amongst the individuals there were people waiting for a bus, then it would be a participatory group because a non-accidental feature links them together. Although these individuals (possibly) know about the common characteristic of waiting for a bus, it has not yet been said that this group actually wants to also become a group.

Only when this group of bus travelers develops a common awareness, on whose basis they want to obtain, deepen and even defend this specific group status, will the members therefore know that they are a group and that they also want it then we are dealing with a reflexive group. Only this situation of knowing about one's own groupness and the desire for this groupness, enables in some groups (or group members) normative claims to arise, which affect the area of freedom of other individuals. Therefore for example one group could claim the right that determines that in one specific bus or specific buses, only members of the group are allowed to travel or that only members of the group are allowed to travel by bus at all (or for example only white-skinned people). Others would be restricted or excluded. The argument put forward by the group is based on the attainment of a specific identity which would be endangered if one had to travel by bus together with non-members.

Do such identity-supported legal claims have a legal/philosophical foundation? I am of the view that they do not have a foundation under the sole argumentative appeal to an idea of a collective identity. This is connected with the fact that the legal-based enforcement of personal identity from a theoretical treaty viewpoint for a legal system (and in particular its function for the protection of freedom rights) cannot simply be transferred to groups. This is connected with

²⁵ It could be argued here that someone who speaks a language, therefore will always belong to the group of speakers of this language per se or "for ever" and that it is not his will to leave this group because he speaks the language. This would be a very abstract view of the problem of groups. On the one hand it could be argued to the contrary, that epistemologically it would never be proven whether after his decision never to speak the language again, he would still be able to speak it at all. Perhaps he really does forget it for instance after his decision due to an accident. There would be no possibility of finding out if he could not speak the language and/or if he did not reveal his language competence. On the other hand, such a heteronomy argument underestimates the fundamental meaning of the voluntary criterion. This means therefore that the members of a group belong to the group from their own free will. Heteronomous groups are not relevant for the protection of minority rights as long as a qualified majority of the heteronomous group does not also want the externally assigned features.

the essence of collective identity itself. A weak identity is lacking the characteristics of personal identity which are essential for its legal foundation.²⁶ To this end here is a series of new approaches which contest that collective identity can be formed in the same way as personal identity.²⁷

4.8 Territorial Criterion: Territorial and Non-Territorial Groups

As already intimated above the question of the territorial relationship plays an important role when dealing with the question of the legal-theoretical foundation of group rights. To this extent there must be a typological differentiation of groups which have territorial claims and/or live in a specific territory and those who have neither territorial claims nor live in a specific region. Territorial legal claims are closely linked to a political objective and affect groups with both a strong and a weak objective.

²⁶ cf Jean-Paul Sartre: *The Critique of Dialectical Reason*. Reinbek 1978, 276.

²⁷ Unfortunately the positions stated in the following cannot be discussed here in more detail. Refer however to Hartmut Ihne in the stated location. And recently also in particular to Jan Assmann, *Das kulturelle Gedächtnis* [The Cultural Memory], 2nd Edition 1997 / Jürgen Straub, *Personale und kollektive Identität. Zur Analyse eines theoretischen Begriffs* [Personal and Collective Identity. On the Analysis of a Theoretical Concept]: In: *Identitäten – Erinnerung, Geschichte, Identität. [Identities – Remembrance, History, Identity.]*, published by Aleida Assmann and Heidrun Friese. Frankfurt/M 1998 Pages. 73 – 104 / Reinhard Kreckel, *Social Integration and National Identity*. In: *Berliner Journal für Soziologie* [Berlin Sociological Journal] 4, 1994. 13-20 / Lutz Niethammer, *Konjunkturen und Konkurrenzen kollektiver Identität. Ideologie, Infrastruktur und Gedächtnis in der Zeitgeschichte. [Booms and Rivalries of Collective Identity. Ideology, Infrastructure and Memory in Contemporary History.]* In: *Prokla. Zeitschrift für kritische Sozialwissenschaft* [Journal for Critical Social Sciences] 24, 1994, 378 – 399.

5 Conclusion

The preceding considerations are summarized below in a diagram. It will become apparent that by using the criteria discussed, different group types are created. Groups are differentiated and are determined due to the logical association with the problem, their genesis, their manner of self-organization, their relationship of group member to group, their objective, their relationships with themselves and their spatial conditions. It is a question of ideal-typical descriptions which enable them to become mixed. As a rule several of the criteria apply to an actual minority. Using the criteria it can be determined whether a group to which a certain criterion can or cannot be assigned, is in principle eligible for minority rights according to the criteria. Here the criteria of relevance, voluntariness and identity are of specific importance as they are necessary for the existence of a legal/philosophically relevant minority problem. Without their applicability it would not make any sense to talk about a real minority rights problem.

Table 1: Criteria and Types

Criteria	Type	Type	Comments
Relevance Criterion:	Relevant Group (+) Common Characteristic Discrimination	Non-Relevant Group (-) Common Characteristic No Discrimination	Logical association with the minority problem
Procedural Criterion:	Voting Minority (+ -) Self-determined Heteronomous	Non-voting minority (+ -) Self-determined (-) Heteronomous (+ -)	Genesis
Decision-Making Criterion:	Capable of decision-making (+) Short-term Permanent	Group not capable of decision-making (-)	Self-Organization
Voluntary Criterion:	Membership (+) Self-determined Heteronomous	No membership Self-determined (-) Heteronomous(+)	Individual/Group Relationship
Exit Criterion:	Leavable Group (+ -)	Non-Leavable Group (+ -)	Individual/Group Relationship
Objective Criterion:	Political Group (+) All areas of life Particular areas of life	No political group (-)	Objective
Identity Criterion:	Identity-related group I. Fleeting Identity (-) Fixed Identity (+) National minority Ethnic minority Religious, cultural, social minority II. Contingent group (-) Participative Group (+ -) Reflexive Group (+)	Non-Identity-related Group (-)	Self-Image/Self-Relation
Territorial Criterion:	Territorial Group (+)	Non-territorial Group (+ -)	Spatial Condition Objective:

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