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# New minorities, old instruments? Diversity governance from the perspective of minority rights

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**Abstract**

In international law, minority rights instruments have been traditionally conceived for, and applied to, old minority groups with the exclusion of new minority groups originating from migration. Yet, minority groups, irrespective of their being old or new minorities, can be subsumed under a common definition and have some basic common claims. This allows devising a common but differentiated set of rights and obligations for old and new minority groups alike. This paper argues that the extension of the scope of application of legal instruments of minority protection, such as the Framework Convention for the Protection of National Minorities (FCNM), is conceptually meaningful and beneficial to the integration of new minorities stemming from migration.

**Keywords**: old minorities; new minorities; diversity; integration; minority protection

## Introduction: Old and new minorities: still a valid dichotomy?

The differences among minority groups, old and new alike, may be profound or difficult to discern. However, what distinguishes all minority groups is that they manifest, albeit implicitly, a desire to maintain an individual and collective sense of identity which differs from a dominant culture. Culture in this context is not synonymous with particular practices, customs or manners of dress. It is a sense of individual and communal self-identity that pervades multifarious aspects of life, including work and economic activity. It is the 'traditions of everyday life' (Wheatley, 2003: 508).

Moreover, the claims of old and new minorities are often perceived as a challenge and antagonistic to the traditional model of homogeneous 'nation-states' because both groups seek to increase opportunities within this model to express their identities and diversities at individual and group level. Along these lines, old and new minorities are often perceived as foreigners to the community of shared loyalty towards the state and shared rights guaranteed by that state. Accordingly, old and new minorities are seen as loyal to their kin-

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state or to the state whose citizens they are and to whose sovereign they belong, as long as they are not absorbed into the national body through assimilation or naturalization.

Despite these commonalities, legal instruments of minority protection, such as the Framework Convention for the Protection of National Minorities (FCNM), have been traditionally conceived for, and applied to, old minorities with the exclusion of new minorities originating from migration. This paper contends that the extension of these instruments of protection can serve as a powerful instrument to enhance the protection and inclusion of new minorities that, as far as Europe is concerned, has been and is still a difficult and problematic process. The conviction that minority groups, irrespective of their being old or new minorities, have some basic common claims, first and foremost diversity and identity claims, that can be subsumed under a common definition, does not mean that all minority groups have all the same rights and legitimate claims. Some have only minimum rights, while others have or should be granted more substantial rights; some can legitimately put forward certain claims—not enforceable rights—that need to be negotiated with the majority, while others should not . This paper argues that it is possible to devise a common but differentiated set of rights and obligations for old and new minority groups, a catalogue of rights that can be demanded by, and granted to, different minority groups. This implies that the scope of application of the legal international instruments pertaining to minority rights can be extended at the same time to old and new minority groups.

## Old and new minority rights: setting the grounds

The terms *historical, traditional, autochthonous minorities* – the '*old minorities'* – refer to communities whose members have a distinct language, culture or religion compared to the rest of the population. They have often become minorities as a result of a redrawing of international borders, with the consequence that their territory has moved from the sovereignty of one country to that of another; or they are ethnic groups that, for various reasons, have not achieved statehood of their own and instead form part of a larger country or several countries. Often, but not as a rule, they are also groups whose co-ethnics are numerically or politically dominant in another state that, for this reason, is constructed as their 'external national homeland' or kin-state.

*'New minorities'* are groups formed by individuals and families who have left their original homeland to emigrate to another country generally for economic and, sometimes, political reasons. New minorities thus consist of migrants and refugees and their descendants who are living, on a more than merely transitional basis, in another country than that of their origin.[1]

[1] According to Walzer, immigrants are considered to have made a choice to leave their own original culture, and know that the success of their decision will depend on integrating into the mainstream of their new society. In these cases ethnic diversity arises from the voluntary decisions of individuals or families to uproot themselves and join another society. On the contrary,

It has to be acknowledged that the term 'new minorities' is not without difficulties and criticism as it seems to imply that migrants and individuals with migration background are in a 'minority' position, that their status is 'minoritised'. On the contrary, the term underlines the diversity that these individuals and groups bring with them, that requires, if they wish so, protection and promotion. More precisely, the term refers to 'distinct' groups and by no means is intended to weaken the status of these groups; in contrast, it aims at offering additional legal tools to respond to their specific needs for protection. Besides, the term 'new minorities' is broader than the term 'migrants', as it encompasses not only the first generation of migrants but also their descendants, as well as second and third generations, individuals with a migration background often born in the country of immigration and who cannot objectively or subjectively be subsumed under the category of 'migrants'.

Moreover, as said earlier, the term 'new minorities' emphasizes the diversity of the individuals concerned, as well as their related individual and collective rights, whereas the term 'migrants' does not. In fact, most international instruments for the protection of migrants, such as the UN 1990 International Convention on the Protection of the Rights of All Migrants Workers and Members of Their Families, the CoE 1977 Convention on the Legal Status of Migrant Workers and the EU 2004 Directive on the status of third-country nationals who are long-term residents, contain only a vague reference to the protection and promotion of migrants' identities, or even a potential conflicting requirement of 'integration', whilst the notion of group rights is completely absent.[2]

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Walzer argues, old minorities are settled in their historic homelands. These groups find themselves in a minority position, not because they have uprooted themselves from their homeland, but because their homeland has been incorporated within the boundaries of a larger state. This incorporation is usually involuntary, resulting from conquest, or colonization, or the ceding of territory from one imperial power to another. Under these circumstances, it is argued, minorities are rarely satisfied with non-discrimination-individual rights model and eventual integration. What they desire, Walzer says, is 'national liberation' that is, some forms of collective self-government, in order to ensure the continued development of their distinct culture (Walzer, 1995: 139–154). This differentiation is however questionable mainly because it is debatable whether migrants have really made a voluntary 'choice' to migrate. This applies not only to refugees or those fleeing from wars or natural disasters, but also to the so-called 'labour migrants' who escape from economic distress.

[2] The UN Migrant Workers Convention is an exception in this regard but so far it has been ratified only by countries of *emigration*: Art. 31 provides: "States shall ensure respect for the cultural identity of migrant workers and members of their families and shall not prevent them from maintaining their cultural links with their State of origin (1). States Parties may take appropriate measures to assist and encourage efforts in this respect (2)." Article 12(f) of the ILO 1978 Convention No. 143 ´Concerning Migrations in Abusive Conditions and the Promotion of Opportunity and Treatment of Migrant Workers' only concedes that "Members States *should take all necessary steps to assist and encourage the efforts of migrant workers* to preserve their national and ethnic identity and their cultural ties with their country of origin, including the possibility for children to be given some knowledge of their mother tongue." (Emphasis added). Emphasis on the

As said earlier, current discussions on minority issues debate whether the scope of application of international treaties pertaining to minority rights that are usually applied to historical minorities (e.g. CoE 1995 Framework Convention for the Protection of National Minorities or the UN 1992 Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities) can be extended to new minority groups stemming from migration (Kymlicka, 2007; Medda-Windischer, 2009). The positions in this regard are extremely diversified. Some states, such as Germany and Estonia (FCNM, 1995; FCNM, 1997), have adopted rather narrow views firmly opposing the extension of minority provisions to new minorities; others, such as the United Kingdom and Finland (ACFC, 2001a; ACFC, 2004), have instead pragmatically applied some provisions to new groups; still others have not yet taken an official position. Most international bodies dealing with minorities have adopted an open approach, especially the Advisory Committee on the Framework Convention (ACFC, 2001:19-20; ACFC, 2002a:17-18; ACFC, 2002b:18), the European Commission for Democracy Through Law (CoE Venice Commission, 2007), the UN Human Rights Committee (UN, 1994: 5.1-5.2), the UN Working Group on Minorities (Eide, 2000), and the OSCE High Commissioner on National Minorities that has extended its mandate to new minority groups stemming from migration (OSCE, 2004; Ekéus, 2006; OSCE, 2012).

The broad state's margin of discretion as to the beneficiaries of minority protection depends largely on the fact that, on the whole, drafters of international instruments have been so far unsuccessful in efforts to define the term 'minorities'. Indeed, in international law there is no generally recognised legally binding definition of the term 'minority', not to mention ethnic, religious or linguistic minorities, despite several attempts in the past decades to elaborate such concepts (UN, 1985:85-86). A significant amount of energy and time has been spent over the past five decades by various international organisations in the quest for a generally acceptable definition of the term minority, mainly for codification purposes, yet no conclusive results can be reported. In the case of the UN Declaration on the Rights of Persons Belonging to National or Ethnic Religious and Linguistic Minorities as well as the CoE Framework Convention

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teaching of the migrant workers´ mother tongue for their children is also placed by the CoE Migrant Workers Convention (Art. 15) and by the UN Migrant Workers Convention (Art. 45). The aim of these provisions is however the return of these children to the country of origin of their parents. The recent EU Directive on the status of third-country national who are long-term residents (Art. 5(2) and Art. 15(3)) as well as the CoE Migrant Workers Convention (Art. 14) emphasise the integration conditions in the receiving countries including linguistic training on the language of the host country. Finally, the 1978 UNESCO Declaration on Race and Racial Prejudice proclaims the right to be different, and thus, in developing policies for the integration of migrants, host states should guarantee the preservation of migrants' cultural identity as a pledge of their right to be different, although subject to the legislation of the host countries (UNESCO Declaration on Race and Racial Prejudice, Art. 1, para 2). The UNESCO Declaration is however not a legally binding instrument.

for the Protection of National Minorities, drafters expressly avoided a definition of the term 'minorities', leaving this to the courts, parliaments, governments or other bodies involved in the interpretation of these instruments.

However, an approach that leaves the question of minority definition open to the state's margin of appreciation is not fully satisfactory because it can lead to inconsistent implementation among minority groups that find themselves in analogous situations of the same provisions by different states in breach of the principle of non-discrimination.[3]

Along the line of the most quoted definition of minorities (Capotorti, 1977: 568),[4] the following general definition of minorities can be formulated on the basis of a combination of objective and subjective elements (i.e. ethnic, cultural, religious and linguistic characteristics, residence or legal abode, numerical minority, non-dominant position and a sense of solidarity or will to survive): a minority is any group of persons, (i) *resident within a sovereign state on a temporary or permanent basis*, (ii) smaller in number than the rest of the population of that state or of a region of that state, (iii) whose members share common characteristics of an ethnic, cultural, religious or linguistic nature that distinguish them from the rest of the population and (iv) manifest, even only implicitly, the desire to be treated as a distinct group.

In this definition the element of *citizenship*, which is usually required by states in order to limit to certain groups the personal scope of application of most international instruments on minorities, is replaced by the element of *residence or legal abode*.[5] This general definition would be the basis for advocating the extension of the scope of application of international instruments pertaining to

[3] Any reliance in an international instrument on the notion of 'national minority', as in Article 21(1) (non-discrimination clause) of the Charter of Fundamental Rights of the European Union, should be based on a common legally binding definition of minorities and should not be subject to diverse interpretations in different Member States. Moreover, insofar as the notion of rights of minorities is relied upon in the future EU accession processes with respect for instance to Turkey – as it should, according to the criteria defined by the Copenhagen European Council of June 1993 – the understanding of the concept of minority should be clarified and agreed upon.

[4] In Capotorti's definition, only nationals/citizens of the state concerned are included (Capotorti, 1977: 568).

[5] This approach follows the concept of *civic citizenship* endorsed in various EU instruments from the Charter of Fundamental Rights of the Union to the Long-Term Residents Directive for Third Country Nationals (TCNs) aiming at putting member states nationals and long-term third-country residents on a similar legal footing. The civic citizenship would be acquired by third-country nationals after five years' residence in an EU country and would entail rights comparable to those of EU citizens, including the right to free movement and establishment throughout the European Union. The concept of civic citizenship is based on the idea of taking the residence requirement as a criterion to bring migrant and other minorities' rights and duties, as well as access to goods, services and means of civic participation, progressively into line with those of the nationals of the country in which they live, under conditions of equal opportunities and treatment. In this perspective, integration of migrants and members of minorities would be measured in terms of *citizenship rights* rather than nominal *citizenship status* (Bauböck, 1994: 3.1; Medda-Windischer and Kössler, 2014).

minorities, in particular the CoE Framework Convention for the Protection of National Minorities, in order to include new minority groups originating from migration. This extension would reverse the fact that, as seen earlier, most international instruments on migrants' rights contain only vague and weak references to the protection of migrants' identity and diversity. But the protection of the identity of minorities, and in particular of new minorities, is one of the bases of a veritable process of inclusion in which minority groups can develop a genuine sense of loyalty and common belonging with the rest of the population without being threatened to be forcibly assimilated in the mainstream society, which as a result can engender resistance and alienation.

A general common definition of minorities is based on the conviction that in spite of their differences, old and new minorities share some common characteristics and thus voice similar claims, namely the *right to existence*, the *right to equal treatment and non-discrimination*, the *right to identity and diversity*, and the *right to the effective participation in cultural, social and economic life and in public affairs.*[6] In addition to the common claims mentioned above, there is also a common rationale for protecting old and new minorities, namely that minority protection is necessary to maintain and promote peace and security, protect human rights and cultural diversity, and also ensure democratic participation and democratic pluralism (Åkermark Spiliopoulou, 2007/8).

While there are differences between old and new minority groups, these relate only to certain rights in the international catalogue. This is not a matter of interpretation. It is clearly expressed in the international instruments. For instance, the most relevant legal instrument of minority protection in Europe, the Framework Convention for the Protection of National Minorities, contains only three articles that condition their entitlements on 'traditional' ties, which, according to the Explanatory Report of the Framework Convention, are not necessarily only those of historical minorities. In this regard, the Explanatory Report states, rather ambiguously, that the term 'inhabited... traditionally' – referred to by Art. 10 (2), Art.11 (3), and Art. 14 (2) of the FCNM – "does not refer to historical minorities, but only to those *still* living in the same

[6] A vexing but still unresolved question is whether minority rights have an individual or collective dimension. For the former, the minority group itself is the beneficiary of the protection to be afforded, while for the latter, the beneficiary is individual members of the group. A third position uses the formula of individual rights 'collectively exercised' and represents a *via media* between the rights of individuals and full collective rights. In the current debate on the individual or collective dimension of minority rights, a pragmatic position holds that as human experience is such that human beings possess both individual and social dimensions, there is no dichotomy between individual or collective dimension and therefore no need to choose. As Marko puts it: "These two forms of rights not only can, but even must be used cumulatively when organising equality on the basis of difference." See. J. Marko "Equality and Difference: Political and Legal Aspects of Ethnic Group Relations" in F. Matscher (ed.), *Vienna International Encounter on Some Current Issues Regarding the Situation of National Minorities* (Kehl, Strasbourg, Arlington, N.P. Engel Verlag, 1997), at 87. Ultimately, the real issue is whether the groups that human beings form are free and whether members of those groups are able to live in dignity, including with regard to maintenance and development of their identity.

geographical area."[7] (FCNM, 1995a: 66). **The**se provisions pertain to the use of the minority language in public administration and on public signs and also in relation to education in the mother tongue; all other entitlements such as those to equality, non-assimilation, development of identity, tolerance, effective participation, bilateral and multilateral relations relate to all individuals and groups who may be in the position of a minority, thus old and new minorities alike, groups officially recognised as national minorities and those not recognised, individuals with or without the citizenship of the country in which they live.

Obviously, when reference is made to universal human rights or some basic norms of minority protection there is no need to distinguish between persons belonging to ethnic, religious or linguistic groups made up of recent immigrants, or those living in a given territory from time 'immemorial'. Other claims, such as the claim to use a minority language in relations with the authorities or the claim to street names in the minority language are more specific and need to be differentiated.

### A common but differentiated system of protection for old and new minorities

In order to define a common but differentiated system of protection for old and new minorities, it is crucial to differentiate between *justiciable rights* and *legitimate claims*. *Justiciable* or *enforceable rights* are rights expressly provided in legal norms or that can be deduced from legally binding judgments, such as those of the European Court of Human Rights (ECtHR or Strasbourg Court). The Strasbourg Court is particularly suitable for developing general principles and guidelines that are useful for solving the complex dilemmas of contemporary ethnically diverse societies because ECtHR judgments are legally binding, and thus their impact is more effective in comparison with the views of the UN Human Rights Committee or the opinions of the CoE Advisory Committee of the Framework Convention (ACFC). Moreover, the European Convention on Human Rights and its supervisory body, namely the European Court of Human Rights, have a more limited geographical dimension and a higher degree of homogeneity among its 47 contracting parties than, for instance, most UN instruments, in which searching for a consensus on sensitive issues such as morals or religion is evidently far more difficult.

The latter term, *legitimate claims,* refers to claims that acquire strength from specific contextual factors. The classification of a claim as legitimate is based on factors that cannot be reduced to the old /new minority dichotomy. Instead, it is based on contextual factors such as a lengthy presence in a given territory, the type of settlement (compact, scattered or dispersed), past forms of discrimination, colonial legacy, contributions to the history or economy of the greater national society, and so on.

[7] Emphasis added.

When no principles or guidelines can be inferred from the jurisprudence of the Strasbourg Court, then reference is made to the so-called principle of reasonable accommodation, which was developed in American and Canadian legal practice to come to terms with accommodation or adjustment requests (Bouchard and Taylor, 2008: 19 and 162-5; Bosset and Foblets, 2009: 50). In this regard, reasonable accommodation is the legal route applied in the field of harmonization practices, the objective of which is to find a solution that satisfies both parties, and it corresponds to concerted adjustment. Canadian courts, in particular, have developed a concept of 'reasonable accommodation' whereby accommodation or adjustment requests may be rejected if they lead to what in legal terms is called 'undue hardship', e.g., an unreasonable cost, a disruption of the organization's or the establishment's operations, the infringement of other people's rights or the undermining of security or public order. Such a request is deemed to be reasonable when it does not lead to undue hardships (Bosset and Foblets, 2009). The content of the undue hardship constraint is open-ended and can change depending on the context: it will vary depending on the public or private nature of the institution, the applicant (a client, a user or an employee), whether the clientele is captive and vulnerable, the human and financial resources available, and so on (Bouchard and Taylor, 2008: 162-5). Similarly, the ECtHR has developed a concept of 'undue burden', which is when an impossible or disproportionate burden is imposed on the authorities (ECtHR 1979).

Against this background, the table below (Old/New Minorities: A Common But Differentiated System of Protection) identifies and differentiates a set of *justiciable rights* and *legitimate claims* that can be demanded by old minorities, by new minority groups stemming from migration or by both groups.

This legal framework is composed of rights and freedoms but also of a variety of limits and restrictions. These limitations, along with a thorough understanding of the context and other circumstances, will be applied, constituting a valuable interpretative tool and, therefore, a valid reference for minority protection. Indeed, they provide, together with proactive, positive principles, the basis for a process of a permanent dialogue between majority and minority groups, and a guarantee for the minority that the majority will not undermine important minority demands, as well as a guarantee for mainstream society that minority claims will not exceed certain limits of general interest, in particular those referring to state unity and security by making unreasonable or illegitimate claims. Within this legal framework, it is possible to negotiate minority claims in a continuous dialogue with the majority under the supervision of international bodies, such as the Strasbourg Court, acting as neutral and objective arbiters.

To clarify how a common but differentiated set of rights is developed, examples can be taken from so-called 'symbolic ethnocultural disputes', which, in contrast to 'claims of assistance rights', are disputes regarding aspects pertaining to the identity of a minority group that do not directly affect the

ability of said group to enjoy or live according to its culture. These aspects range from how the state names groups or places to what historical figures are honoured by having public buildings named after them or statues of them erected to special constitutional recognition of founding peoples or official languages. These disputes are about claims to recognition: recognition as a (or the) founding people of the polity, or recognition as a group that has made important contributions to the state in which they are living.

**Table 3.1**. Old/New Minorities: A Common but Differentiated System of Minority Protection

| | **OLD MINORITIES** | | **NEW MINORITIES** | |
|---|---|---|---|---|
| **Type of Claim** | **Justiciable right** | **Legitimate claim** | **Justiciable right** | **Legitimate claim** |
| **Education** | | | | |
| Publicly funded education in minority language/religion | no (unless provided for other groups) | yes (states may legitimately require respect for certain principles/values in the curricula) | no (unless provided for other groups) | yes (states may legitimately require respect for certain principles/values in the curricula) |
| Use of minority language in public education | no (unless initially provided and then abrogated) (ECtHR, 2001) | yes (empirical evidence in different forms/contexts : South Tyrol, Catalonia, Québec, etc.) More emphasis on the knowledge of a minority language | no (EC Directive 77/486/EEC of 25 July 1977 places an obligation on member states only to *encourage* the teaching of the mother tongue to children of migrant workers | yes (empirical evidence mainly as extracurricular classes)<br><br>More emphasis on the knowledge of the official language |
| **Language** | | | | |
| Use of minority language in elected bodies | no | yes (but knowledge of the official language may be required) | no | no (not reasonable/feasible) |
| Use of minority language with the public administration | no | yes | no | no (not reasonable/feasible) |
| Use of minority language in judicial proceedings | yes (but no if there is evidence of sufficient knowledge of the official language) (ECtHR, 1989) | yes (even in case of knowledge of the official language) | no (but yes if there is evidence of insufficient knowledge of the official language) | no (not reasonable/feasible) |

**Table 3.1**. Continued…

| | **OLD MINORITIES** | | **NEW MINORITIES** | |
|---|---|---|---|---|
| **Type of Claim** | **Justiciable right** | **Legitimate claim** | **Justiciable right** | **Legitimate claim** |
| **Political Participation** | | | | |
| Electoral rights (passive/active rights) | yes/no (on the basis of citizenship, otherwise no) | yes | yes/no (in case of individuals without citizenship of their country of residence) | yes (at least at local level) |
| Participation in decision-making (e.g., reserved seats/quota/advisory bodies) | no (but no interference from the Strasbourg Court if forms of participation - exemptions from threshold/quota - are recognized) (ECommHR, 1997) | yes (empirical evidence/precedents at local and national level) | no (but no interference from the Strasbourg Court if forms of participation - exemptions from threshold/quota - are recognized) (ECommHR, 1997) | yes (at least at local level) |
| **Autonomy (local/territorial/regional)** | no | yes (empirical evidence; South Tyrol, Catalonia, etc.) | no | no (no empirical evidence or decisions of the Strasbourg Court in this sense) (ECtHR, 2006) |

The demand that a minority language be made one of a state's official languages (or that the notion of an official language be abandoned altogether) is a symbolic one, albeit one that might have an important impact on a whole range of claims related to assistance language rights. In such cases, groups with long-lasting, traditional ties to a given territory, groups that settled on a territory before the 'social contract' or the constitutive national agreement was reached among national groups, or groups that have made special contributions to the state where they are living or with which the state has a legacy of past discrimination, colonization, or slavery (for instance, African-Americans in the United States, Jews in Germany) may all formulate claims that, although not enforceable rights, acquire legitimacy and have more weight in negotiations with majority groups as a result of the above considerations.

In case of uncertainty about how to differentiate the set of rights for old and new minorities, a general principle can be formulated: if it is true that the majority--minority relationship is intrinsically asymmetrical due to the fact that members of minorities, old and new, are under more pressure than members of the majority to adapt to the majority society (for instance, in terms of language knowledge or recognition of qualifications), then, in the case of old

minorities (unlike in the case of new minorities) this process is more demanding on the part of the majority. In other words, in this case the relationship is more symmetrical than asymmetrical. The majority-minority relationship as described above can be illustrated with scales, where the burden for the majority is indicated as more demanding in the majority/old minorities relationship than in the majority/new minorities relationship.

A claim to use a minority language in the context of education can serve to illustrate this principle: despite the fact that both old and new minorities have an obligation to learn the official language of the majority, members of the majority living in areas inhabited by old minorities, can sometimes be obliged to learn the minority language. For instance, in South Tyrol, the members of the Italian-speaking group living in the region have to learn the minority language, German, at school and must provide evidence of knowledge of the minority language if they want to obtain a post in the Province's public administration. The same obligation cannot be found, at least as far as Europe is concerned, in areas inhabited even largely by new minorities.

**Figure 3.1:** Majority--Minority Relationship: An Asymmetrical Balance


Therefore, while managing the diversity of minorities is intrinsically asymmetrical due to the fact that members of both old and new minorities are under more pressure than members of the majority to 'adapt' to the majority society, in the case of old minorities this asymmetry is more accentuated and demanding on the side of the majority. In the case of new minorities this asymmetry is more acute on their side (see Figure 3.1).

## Conclusions: beyond the old/new minority dichotomy

The conviction that minority groups, regardless of being old or new, have some basic common claims, that they can be subsumed under a common definition, and that the rationale for protecting them is fundamentally the same, does not mean that all minority groups have all the same rights and legitimate claims. Some have only minimum rights, while others have, or should be granted, more substantial rights; some can legitimately put forward certain claims − not enforceable rights − that have to be negotiated with the majority,

while others cannot. For instance, the members of any minority have the right to use their own language, in private and in public, with anyone who is prepared to communicate with them in that language, but not all minorities, or not all their members, have a legitimate claim to receive state-funded education in their own language, or to use their own language in communicating with public officials.

In this context, the difference is not (only) based on the fact that a given group belongs to the category of an old or new minority. Other factors are relevant and apply without distinction to old and new minorities alike, such as socio-economic, political and historical factors, the legacy of past colonization or forms of discrimination. Likewise relevant is whether members of a minority live compactly together in a part of a state territory, are dispersed or live in scattered clusters, as well as the fact that members of a community with distinctive characteristics have long been established on the territory, while others have only recently arrived. Minority groups, both old and new, are not monolithic but composed of groups very different from one another. The catalogue of minority rights has so far been implemented in relation to historical minorities without differentiating among various minority groups but rather by taking into account other more pragmatic factors, such as those mentioned above. The same approach should be applied when extending minority protection to new minority groups stemming from migration.

This is also the article-by-article approach favoured by the Advisory Committee of the Framework Convention and by Asbjørn Eide (former chairperson-rapporteur of the UN Working Group on Minorities), who summarized this point by saying: "The scope of rights is contextual" (Eide, 1993: 27; Eide, 2000: 36-44). This inclusive approach based on a common and broad definition of minorities would be the starting point for appropriate qualifications in regard to which specific right should be granted to which specific group and under which conditions they should apply.

Many actors, especially government representatives, worry that by extending the definition and protection of minority rights to migrants, the latter will claim rights and powers similar to those granted to traditional minorities, thereby threatening unity and diluting the protection intended for old minority groups. However, if it is true that in Western countries some immigrant groups demand certain group rights, it would be incorrect to interpret immigrant demands for recognition of their identities as the expression of a desire, for instance, for self-government (Kymlicka and Opalski, 2001: 31-6). Migrants are generally aware that if they want to access the opportunities made available by their host countries, then they must do so within the economic and political institutions of those countries. For example, it is still the case that immigrants must learn the official language to gain citizenship, to get government employment or to gain professional accreditation. Active civic participation and effective integration among immigrants are essential to the economic prospects of most

migrants, and indeed to their general ability to participate in the social and political life of the host country (EU, 2005).

Obviously, this leaves open the possibility that some leaders of ethnic groups hope that integration policies will provide a channel for obtaining a separatist policy. But, so far, there is no evidence from any of the major Western immigration countries that immigrants are seeking to adopt, and succeeding in doing so, a pro-sovereignty political agenda (Kymlicka, 1997: 52-6). Indeed, when attempts have been made, these have been rejected by national and international courts (ECtHR, 2006).[8]

Clearly, it has to be recognized that any decision to bring minorities of immigrant origin within the scope of application of international and/or national instruments pertaining to minorities is bound to be political. But if a country is serious about integrating immigrants, then it should not oppose the extension of the scope of application of minority provisions to new minorities. As discussed above, this would not entail the extension of the full range of minority protection to all minority groups without distinction. Moreover, it might be an appropriate political gesture that underlines the importance of the country's integration policy and sends out a powerful message that populations of immigrant origin are now clearly seen to be an integral, though distinct, part of the nation.

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[8] The case of *Kalifatstaat v. Germany* (ECtHR, 2006) concerned the banning of an association whose aim was to create an Islamic state founded on sharia law in Germany. The European Court of Human Rights ruled that the ban had pursued a number of legitimate aims under the European Convention on Human Rights (such as Article 11 on the right to freedom of assembly and association), in particular the interests of national security and public safety, the prevention of disorder and/or the prevention of crime, as well as the protection of the rights and freedoms of others.

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