



Concept of Minority and Minority Rights in International Law: An Assessment

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ABSTRACT

In international law, the term “minority” remained a contested concept for a prolong period. Various authors and scholars have also defined the term in different ways depending on specific situations. The concept of minority and minority rights also remained neglected in the earlier phase of the United Nations. For many years, the UNs only focused on individual human rights, neglecting the minority protection system of its predecessor, the League of Nations. Lack of precise and accepted definition in international law led the UNs revert to its idea of only promoting individual human rights and took an interest in long ignored idea of group and minority rights. This paper attempts to define the concept of minority and minority rights in international law. It also focuses on origin of international protection of minority rights. The paper discusses the steps taken by the United Nations and other regional organizations in defining the concept in order to set universal standards for the protection and promotion of rights of minorities.

Keywords: Minority, Minority Rights, United Nations

Definition of Minority

The term “minority” since long remained a contested concept. Various authors and scholars have defined the term in different ways depending on specific situations. The concept of minority and minority rights also remained neglected in the United Nations for a long period of time. Lack of precise and accepted definition in international law led the United Nations (UN) revert to its idea of only promoting individual human rights and also took an interest in long ignored idea of group and minority rights, and then constituted a body to study that can give an advanced definition of minority. Until then, the most convincing definition before the UN was the one defined by the Permanent Court of International Justice (PCIJ), which had defined minority as ‘community’ or ‘nationality’ in its Advisory Opinion on the Greco-Bulgarian Community case in 1930 as:¹

By tradition... the “community” is a group of persons living in a given country or locality, having a race, religion, language and traditions of their own and united by this identity of race, religion, language and traditions in a sentiment of solidarity, with a view to preserving their traditions, maintaining their form of worship, ensuring the instruction and upbringing of their children in accordance with the spirit and traditions of their race and rendering mutual assistance to each other.

The formal attempt to define minorities began in 1971 when the United Nations Sub-Commission on the Prevention of Discrimination and Protection of Minorities appointed Francesco Capotorti, as a Special Rapporteur, to initiate a study on the implementation of the principles set out in Article 27 of the International Covenant on Civil and Political Rights (ICCPR) on the protection of interests of minorities with special reference to analyzing the concept of minority. He was tasked with the Study on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities which was finalized in 1979 and it also provided the definition of minority. Capotorti’s definition provided the most comprehensive criteria to identify the minority community and distinguish it from the majority community. Capotorti defined minorities as:²

A group numerically inferior to the rest of the population of a State in a non-dominant position, whose members being nationals of the State possess ethnic, religious or linguistic characteristics differing from those of the rest of the population and show, if only implicitly, a sense of solidarity, directed towards preserving their culture, traditions, religion or language.

¹ Iqbal A. Ansari, ed., *Readings on Minorities-Perspectives and Documents*, vol. 1 (New Delhi: Institute of Objective Studies, 1996), xv.

² Francesco Capotorti, *Study on the Rights of Persons Belonging to Ethnic, Religious and Linguistic Minorities* (New York: United Nations, 1979). See: E/CN.4/Sub.2/384/Rev.1, para. 568.

The United Nations and its bodies including the Human Rights Commission and the Sub-Commission remained engaged in providing a definition of minority for the purpose of formulating a declaration on the rights of minorities. During the course of preparation of the Draft Declaration on Minorities, the Sub-Commission considered a report prepared by J. Deschenes in 1985 wherein 'minority' was defined as:³

A group of citizens of a State, constituting a numerical minority and in a non-dominant position in that State, endowed with ethnic, religious or linguistic characteristics which differ from those of the majority of the population, having a sense of solidarity with one another, motivated, if only implicitly, by a collective will and whose aim is to achieve equality with the majority in fact and in law.

Deschenes, while defining 'minority' for the UN Sub-Commission, pointed towards three basic characteristics i.e. (1) numerical inferiority, (2) non-dominant status and (3) ethnic, religious and linguistic characteristics differing from those of the rest of the population. Deschenes did not feel that preservation of identity constituted an essential attribute of the minority situation. The core feature of minority status of a group therefore, is its vulnerability derived from inadequate access to power. Due to a lack of consensus among the member States over the definition, it was not officially adopted. The lack of unanimity over definition partly derives from differing minority situations, historically as well as contemporary, in different countries.

While Capotorti, in his definition, established one subjective and four objective criteria for determining the term. He pointed out that at the objective level a minority is not only numerically inferior to the rest the population of a State, it must also be in a non-dominant position. At the subjective level, minorities show a sense of solidarity towards preserving their culture, traditions, religion or language. It is this subjective dimension of minority, which distinguishes it from people willing to integrate.

The basic presupposition for a minority is that they are a group of people who are numerically inferior in respect to the rest of the population of a State which is a majority. Where there is no clear majority, 'the rest of the population' means aggregate population of all the groups in a State concerned. This point of view is criticized that the comparison is unnatural i.e. between a religiously homogenous group and the aggregate of all the rest. Numerical inferiority also includes that a minority must constitute a sufficient number for the State to recognize it as a distinct part of the society and to justify the state making an effort to protect and promote it. In 1953, the Sub-Commission on the Prevention of Discrimination and the Protection of Minorities provided that "minorities must include a sufficient number of persons to preserve by themselves their traditional characteristics."⁴ Sometimes, a question arises as to whether members of the majority community in a State can be considered minority if they are numerically inferior in a province or region. In *Ballantyne, Davidson and McIntyre vs. Canada*, the Human Rights Committee, by a majority opinion, decided that members of such a community cannot be considered as a minority for the purpose of Article 27 of the ICCPR.⁵

Non-dominant position is another factor for being a minority group which is also a political and social reality. Political dominance is understood based on proportion of political participation and social inclusion of a particular group. Minorities become vulnerable through their political under-representation and not so much by their numerical weakness. Although in democracies with majoritarian first-past-the-post system numbers of a particular group are directly related to their representation in elected bodies. Identifying the group as minority only on the basis of numerical weaknesses and not including political dominance sometimes proved wrong. In South Africa, during the apartheid regime, the Whites who were numerically inferior were politically dominant enjoying all the powers, thus, they didn't constitute a minority in need of special rights and protection. The Africans, though, were a numerical majority, were excluded from politics and thus, they were eligible for special protection. Thus, a politically non-dominant position is an important defining feature for a minority.⁶

The definitions of Capotorti and Deschenes maintain that minorities are citizens of the state where they reside, this excludes refugees, foreigners and migrants from the concept of minority. However, Capotorti, later himself abandoned the idea of requiring members of minority exclusively be nationals of the State. Furthermore, in its General Comment 23 on Article 27, (1994), the Human Rights Committee, referring to Article 27 of the ICCPR, observed that, "the individuals designed to be protected need not be citizens of the State party."⁷ In the Capotorti's definition, distinct religious, ethnic or linguistic characteristics are also an important necessity to demand the minority status. The 1992 United Nations Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities also added the term 'national' in distinct characteristics along with ethnicity, religion and language.

³ Abdulrahim P. Vijapur, "International Protection of Minority Rights," *International Studies* 43, no. 4 (2006): 370.

⁴ Borhan Uddin Khan and Muhammad Mahbubur Rahman, *Protection of Minorities: Regimes, Norms and Issues in South Asia* (Newcastle upon Tyne: Cambridge Scholar Publishing, 2012), 3.

⁵ Javaid Rehman, *The Weaknesses in the International Protection of Minority Rights* (The Hague: Kluwer Law International, 2000), intro.

⁶ Rehman, *The Weaknesses*, 30.

⁷ General Comment 23 on Article 27, (1994), *Human Rights Committee*.

Besides the above-discussed objective criteria, Capotorti's definition also includes an important subjective criteria of 'collective will' of the group to be recognized as minority. A minority group must have a sense of solidarity to preserve their own culture, traditions, religion or language. The subjective feature of collective will is not expressed, it emerges from the fact that a particular group has kept its distinctness over a period of time.⁸

International Protection of Minorities: Origin

Historically, the international concern for the protection of religious minorities had been noticed as early as the sixteenth and more particularly during the nineteenth centuries in the modern State system, effective implementation of this concern by means of an international guarantee had not been attempted until the Peace Settlements following the First World War. While, concerns for the protection of minorities predate the modern state system. It can be traced as far back as to the 'Constitution of Medina' drafted by Prophet Mohammed (PBUH) in the spirit of the Quranic laws of tolerance towards the people of other faiths, especially Jews and Christians. They were granted religious and cultural rights and were governed by their personal codes.⁹

In the evolution of international law, the treatment accorded to religious minorities in a number of States in Europe was the first to attract international attention. There were discernable international efforts in the direction of protecting religious minorities against persecution. During the seventeenth and eighteenth centuries, a number of treaties embodying clauses relating to religious minorities were concluded between various European countries.¹⁰

The Nineteenth century saw a shift in the developments relating to minority protection. The bilateral stance was remodeled and a number of multilateral treaties emerged. Similarly, a change was also evidenced in so far as the protection of ethnic and national minorities was concerned with the final act of the Congress of Vienna. This was the first international instrument to contain clauses for the protection of national as well as religious minorities.¹¹

The formation of the League of Nations after the First World War gave prominence to minority issues. The 'minority treaties' to protect minorities and their rights were adopted by the States, including, most importantly, the Polish Treaty between the Principal Allied and Associated Powers and Poland in 1919. The provisions of the Polish Treaty providing protections to peoples of all the nationalities in Poland became the basis for protection of national minorities after the War.¹²

After the failure of the League of Nations, the newly established United Nations in 1945 did not mention specifically the question of minorities. No attempt was made to define these groups in any special manner. The United Nations system of human rights focused on general human rights. Due to the belief that human rights for everyone could replace specific devices for the sole benefit of minorities, for many years after the Second World War, interest in minority protection was weak. It was only after the adoption of the International Covenant on Civil and Political Rights in 1966 which included a provision in Article 27 is specifically concerned with the protection of interests of minorities.¹³ It reads as:

In those States in which ethnic, religious and linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practice their own religion, or to use their own language.

Article 27 of the ICCPR is the only internationally recognized legally binding provision on the protection of the rights of persons belonging to minorities.

Human Rights and Minority Rights: Meaning and Nature

Human rights, in general sense means those rights, which are 'inherent' and 'inalienable' in the nature of human being and are necessary for the development of human personality, and without which nobody can live with dignity. These rights are applicable to all human beings irrespective of race, sex, color, language, religion or nationality. International documents enshrining human rights in the form of International Bill of Rights are the Universal Declaration of Human Rights 1948, the International Covenant on Civil and Political Rights 1966, the International Covenant on Economic,

⁸ "Commentary to the Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities" in *Readings on Minorities*, ed. Iqbal A. Ansari (New Delhi: Institute of Objective Studies, 2002), 3:251.

⁹ "Constitution of Medina,"

<https://static1.squarespace.com/static/5097fe39e4b0c49016e4c58b/t/5c8153eeec212d7117477f8f/1551979503244/Constitution-Medina.pdf>.

¹⁰ Rehman, *The Weaknesses*, 30.

¹¹ Jennifer Jackson Preece, "Minority rights in Europe: from Westphalia to Helsinki," *Review of International Studies* 23, no. 1 (January 1997): 75 – 92, <https://doi.org/10.1017/S0260210597000752>.

¹² Patrick Thornberry, *International Law and the Rights of Minorities* (Oxford: Clarendon Press, 1991).

¹³ Patrick Macklem, "Minority rights in international law," *International Journal of Constitutional Law* 6, no. 3-4, (July-October 2008): 531–552, <https://doi.org/10.1093/icon/mon019>.

Social and Cultural Rights 1966, and the Additional Protocols. These documents contain a comprehensive list of all the civil, political, social, economic and cultural rights. These rights are general human rights accessible to all with equality and non-discrimination.

The concepts of 'human rights' and 'minority rights' represent two different approaches in contemporary socio-political thought to describing the relationship of the individual or community with the State. The proponents of the human rights approach contend that general human rights treaties can be very helpful in protecting the minorities as they establish norms of individual human rights protection and include non-discrimination clauses. Some scholars rejected the idea of collective rights on the ground that it threatens the territorial integrity of States and also that minority rights would pose a threat to individual rights. Many scholars claim that collective rights have been recognized in both national and international law.¹⁴ The international law recognizes peoples' right to physical existence, self-determination and natural resources, and minorities' rights to physical existence and the preservation of a separate identity as collective rights. The terms 'minority rights' and 'human rights' are not contradictory but complementary to each other. Human rights is a concept with modern connotations, designed mainly to protect individuals against the State, while collective rights are linked to a traditional worldview and aimed at the protection of some specific and distinctive characteristics of traditional groups.¹⁵

Minority rights provide for affirmative action, which attempts to redress the past harmful or inhuman practices of discrimination and to correct socio-economic inequalities. In the words of Asbjørn Eide, the former Chairman of the Working Committee on Minorities, it is preference, by way of special measures, for certain groups or members of such groups for the purpose of securing adequate advancement of such groups or their individual members in order to ensure equal enjoyment of human rights and fundamental freedoms. Kymlicka, maintains that it is intended to remedy years of discrimination.¹⁶

After a long struggle, an international document specifically devoted entirely to the rights of minorities could be possible only in 1992 with the adoption of General Assembly Resolution on December 18, 1992.¹⁷ The Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities enshrines a list of protections for minorities and lays down the norms for the protection of the rights of minorities to existence, to development and to distinct identity for which States are required to take special measures for effective equality and to create favorable conditions for the preservation of that distinct identity. The purposes of the Declaration, as set out in the General Assembly Resolution and Preamble of the Declaration, is to promote more effective implementation of human rights of persons belonging to minorities, and more generally, to contribute to the realization of the United Nations Charter and human rights instruments adopted at the universal or regional level. The Declaration builds on, but adds to, the rights contained in the International Bill of Human Rights and other human rights instruments by strengthening and clarifying those rights which make it possible for minorities to preserve and develop their group identity.¹⁸ The full implementation of the Declaration may lead to political and social stability of States in which minorities live and can contribute to the strengthening of friendship and cooperation among peoples and States.¹⁹

The rights of minorities include the existence and identity of persons of minority groups, and enjoyment or assertion of and participation in culture, religion, language, social affairs, economy, public life, national and sometimes regional decisions, associations and contact with other members of their group, inside and across frontiers. International standards of minority rights also provide special measures and affirmative action. These rights can be exercised individually and in community with other members of their group.²⁰

Conclusion

International norms on minority rights obligate States to protect the existence and the national or ethnic, cultural, religious and linguistic identity of minorities within their respective territories and encourage conditions for the promotion of that identity. In international law, minority protection is based on four requirements—protection of the existence, non-exclusion, non-discrimination and non-assimilation of the groups concerned. The protection of the existence of minorities includes their physical existence, their continued existence in the territories on which they live and their continued access to the material resources required to continue their existence on those territories. Protection of their existence goes beyond the duty not to destroy or deliberately weaken minority groups. It also requires respect for and protection of their religious and cultural heritage. Minorities shall also not be excluded from the national society and there should be non-discrimination as a general principle of human rights law, which provides that

¹⁴ Abdulrahim P. Vijapur, "International Protection of Minority Rights," *International Studies* (October 1, 2006), <https://doi.org/10.1177/002088170604300402>.

¹⁵ Vijapur, "International Protection of Minority Rights," 367-394.

¹⁶ Will Kymlicka, *Multicultural Citizenship: A Liberal Theory of Minority Rights* (Oxford: Clarendon Press, 2004), 3.

¹⁷ UN General Assembly, Resolution 47/135, Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities, A/RES/47/135 (Dec. 18, 1992), <https://www.ohchr.org/en/professionalinterest/pages/minorities.aspx>.

¹⁸ Iqbal A. Ansari, ed., *Readings on Minorities: Perspectives and Documents* (New Delhi: Institute of Objective Studies, 1996), 2:224.

¹⁹ "Commentary to the Declaration," in *Readings on Minorities*, 251.

²⁰ "Commentary to the Declaration," in *Readings on Minorities*, 251.

the exercise of their rights as persons belonging to minorities shall not justify any discrimination in any other field, and that no disadvantage shall result from the exercise or non-exercise of these rights. Non-assimilation requires to protect and promote the conditions for the group identity of minorities. Minority group identity entails not only tolerance but a positive attitude toward cultural pluralism on the part of the State and the larger society. Not only acceptance but also respect for the distinctive characteristics and contribution of minorities to the life of the national society as a whole are required.²¹

Protection of their identity means not only that the State should abstain from policies that have the purpose or effect of assimilating minorities into the dominant culture, but also that it should protect them against activities by third parties which have an assimilatory effect. States must adopt laws protecting against acts or incitement to acts that physically threaten the existence of groups or threaten their identity.

Minorities show a sense of solidarity towards preserving their cultures, traditions religion and languages. The basic tenet of the protection of minorities is that each minority has concurrently the right of full equality with the majority and to preservation of its separate identity. It is one of the unfortunate aspects of modern times that the rights of ethnic, religious or linguistic minorities to preserve their separate identity is persistently violated in many quarters of the world. The systematic and comprehensive deprivation of the rights endangers the dignified survival of the minority as a group.

²¹ Hamid Ansari, "India and the Contemporary International Norms on Group Rights," *Indian Foreign Affairs Journal* 2, no. 2 (April-June, 2007): 67-84, <https://www.jstor.org/stable/45340680>.