Rights of Minorities in International Law

Abdulrahim P. Vijapur
Aligarh Muslim University, Aligarh

Objectives:

Any discourse on minority rights raises many intricate and complex issues: When most of the modern constitutions and international human rights treaties ensure that everyone is entitled to rights irrespective of one's colour, race, religion, sex, nationality, social or other status how can one advocate and justify the necessity of having a distinct framework of minority protection or collective rights? What is the importance of minority rights? Do minorities require special rights or appropriate measures of positive discrimination or affirmative action? Are such special measures philosophically justifiable? To what extent are minority rights recognized in international law? In what manner these rights are defined and interpreted? This module attempts to explore answers to some of these questions.

Importance of Minority Rights

Questions concerning the promotion and protection of human rights of all individuals – be they citizens, aliens, refugees, migrant workers, tribal or persons belonging to religious, cultural, ethnic and national minorities or indigenous groups – occupy high points in the agenda of contemporary national and international governance. International governmental organizations such as the United Nations, the Council of Europe, OAS, and African Union have evolved a comprehensive framework of human rights norms and standards. Since the end of Second World War, they have adopted numerous human rights documents, conventions, declarations and principles. These organizations, together with a large number of non-governmental organizations (both national and international) are monitoring the compliance of international human rights obligations and the rights of minorities by nation-states, especially of those who have ratified these human rights instruments. Thus, serious concern for human rights and minority rights has become a staple of their daily activities

Notwithstanding the internationalization of human rights, systematic and consistent violations of human rights and minority rights have become commonplace everywhere. In a significant study titled *An Agenda for Peace* (1992), Boutros Boutros-

Ghali, the former Secretary General of the United Nations, documents this grim reality: New racial tensions are rising and finding expression in violence (Para 12), while fierce new assertions of nationalism and sovereignty spring up, and the cohesion of states are threatened by brutal ethnic, religious, social, cultural and linguistic strife (Para 11). Democracy within nations requires respect for human rights and fundamental freedoms.... It requires, as well, deeper understanding and respect for the rights of minorities and respect for the needs of the more vulnerable groups of society, especially women and children (Para 81). Thus in these words, Boutros-Ghali referred to conflicts involving minorities. He could have continued by reflecting that the greatest threat to peace today, locally and regionally, arises from internal conflicts within States ranging from former Yugoslavia to Angola, while communal violence can erupt all too easily in established democracies ranging from India to the United Kingdom.

Today probably there is no country in the world, which does not have minorities of one or the other kind. In fact, there are some 3,000 ethnic or tribal groups in the world conscious of their respective identities and rights. Of the over 192 politically "sovereign" states now in existence, over 175 are multiethnic in composition. T.R. Gurr's Project 'Minorities at Risk' has recently presented data on 233 different "disadvantaged minorities". Even though the situation varies from continent to continent it is clear that these groups are to be found all over the world and in almost all countries, though in varying proportions.

One of the critical reasons for the past and on-going ethnic crises the world over is due partly to the fact that the ethnic groups are excluded from participating in power sharing and decision making process of their political system. Unless formal or informal arrangement of power sharing with all minorities is guaranteed besides according them legal protection or practicing tolerance towards them, peace is not possible in these multi-ethnic states. It is true that many of the inter-religious conflicts arise due to the claims of superiority or inferiority of religions or beliefs vigorously advocated by their adherents. In this context, it is well to recall the Rock Edicts of Asoka, which proclaimed in third century B.C. that "if you give other's beliefs no respect, you will damage the status of everybody's beliefs, including your own".

Following Asoka's traditions Mahatma Gandhi once said, "A civilization can be judged by the way it treats its minorities." The kind of treatment meted out to them is as good a test as any of country's tolerance and maturity. Good sense of history demonstrates that the ill treatment of minorities can be, and has been and still is, a cause of international friction and even war. The persecution of minorities by intolerant majorities is still a principal cause of international unrest in various parts of the world.

Minority Protection Since 1945

It is true that in the post-1945 international relations national states gave less importance to the minority rights issues, probably for the abuse of minorities system by Nazis, and decided to work for 'Human Rights' (the phrase was used for the first time in the UN Charter) *of all. At* the end of the First World War 'international protection of minorities' was in great fashion whereas in 1945 'human rights' was in fashion. Despite a general lack of interest on the part of majority of states on the issues of minority rights, an Indian member of the Sub-Commission on the Prevention of Discrimination and Protection of Minorities, (hereafter the Sub-Commission) Mr. Minoo Masani had submitted to the Sub-Commission, a draft resolution (E/CN.4/Sub. 2/108) in its 1950 session requiring the Secretary General to circulate to the Sub-Commission *a draft convention* or *a draft protocol* to be attached to the International Covenant on Human Rights *for the Protection of the Ethnic, Religious, and Linguistic traditions and characteristics of minorities.* Since several members of the Sub-Commission considered Mr. Masani's move as premature in view of the fact that the International Covenant on Human Rights was already under preparation which might insert a clause on the minorities. Mr. Masani withdrew his proposal (E/CN.4/641, para 31). It is unfortunate that even after 65 years of this development the international community has not yet shown its maturity in this regard. Although Article 27 of the International Covenant on Civil and Political Rights, 1966 (ICCPR) and similar provisions in other conventions are not sufficient, as they do not cover all types of minorities (such as national, cultural, or racial minorities), no effort has been made towards a comprehensive minority convention. Only individual scholars indulge in such an academic exercise.

The failure of the League made the United Nations wiser and pragmatic. The new organization adopted a novel approach. It talked about the human rights of *everyone.*

Through various Conventions and Covenants of human rights it has established a comprehensive system of mechanisms and procedures to promote and enforce the implementation of human rights norms as spelled out in those documents.

The UN Secretariat and several governments (*e.g.,* the erstwhile USSR and Yugoslavia) had tried to include in the Universal Declaration of Human Rights (UDHR), during it's drafting in the Commission on Human Rights (CHR), a provision for the protection of the rights of a "minority to use its own language and maintain schools and cultural institutions". Due to widespread opposition this provision was not approved in view of the inclusion of non-discrimination provisions. The Soviet Union reopened the matter on the floor of the Assembly (when UDHR came up for final approval) and suggested a supplementary Article dealing both with the right to self-determination and the linguistic and institutional rights of minorities. That effort also failed. However, the Assembly adopted a resolution [1217 C (III) of 10 December 1948, entitled 'Fate of Minorities'] stating that "the UN cannot remain indifferent to the fate of minorities", and said since the issue is complex and delicate, it urged the ECOSOC and the CHR to make a thorough study of the problem.

Article 27 of the ICCPR

The ICCPR (adopted in 1966 and entered into force in 1976) is the only international instrument legally binding on the states (ratifying it), which contains an Article on the rights of the persons belonging to ethnic, religious or linguistic minorities (Article 27). It states:

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

The drafting history of Article 27 reveals that the erstwhile Soviet Union attempted to limit the protection to national minorities only whereas, others favoured protection for other ethnic, religious and cultural groups. The first draft of the Article on minorities in the Covenant read as "Ethnic, religious and linguistic minorities shall not be denied the rights to enjoy their own culture, to profess and practise their own religion, or to use their own language". There was objection to the wordings of the draft Article. It was said that

minorities as such had no juridical personality in international law. It was suggested that instead one should speak of “persons belong to minorities”. These wordings were approved and on the suggestion from Chile, which like other Latin American countries, had fears that immigrants to these countries might form separate communities asking for minority rights, a new phrase was added to the beginning of the Article which read: “In those states in which ethnic, religious or linguistic minorities exist”.

Thus, Article 27 speaks of rights of “persons” belonging to certain minorities, a deliberate decision, designed to avoid giving to the groups an international personality. Such international personality, it was feared, might have given a minority the capacity to vindicate its rights before the Human Rights Committee (created under ICCPR. The First Optional Protocol to the ICCPR gives the right to submit petitions/communications only to individuals. Groups and organizations cannot submit petitions as collective entities, but individual members may do so, alleging violations of their individual and collective rights. The political nature of the CHR prevented the Sub-Commission from actively pursuing the agenda of protection of minorities, as its members were, unlike those of the CHR, independent experts. (The original UN plan to have two Sub-Commissions, one on protection of minorities and the other on prevention of discrimination was shelved and only a single body was created. This indicates the unhappiness of governments about singling out minorities as a focus for action). As a result in 1954 it dropped the protection of minorities and concentrated on prevention of discrimination. After 13 years it decided in 1967 to undertake a thorough study of the rights of persons belonging to minorities in the light of Article 27 of the ICCPR. Another three years lapsed in securing approval of the ECOSOC and the CHR, and finally in 1971 Capotorti was appointed as a Special Rapporteur of the Sub-Commission to undertake this study, which was completed in 1977. Thus, such an approach of member states towards minority rights explains the slow progress in creating a Declaration or a Convention on the subject.

Since the entry into force of the ICCPR (as of 1 June 2015, 168 States had ratified it) and its first Optional Protocol (ratified by 115 States by 1 June 2015) in 1976, the Human Rights Committee has been receiving many complaints alleging the violations of human rights guaranteed under Article 27 of the Covenant. The case law of the Committee suggests that the Committee in many cases found states in breach of their

obligations towards minorities. The first important case concerning a member of a minority was No. 24/1977, *Sandra Lovelace v. Canada.* Ms. Sandra was born and registered as a Maliseet Indian, living in Canada. She married a non-Indian and so lost both her status as an Indian as well as the rights associated with this status. Her loss of Indian status was due to the Canadian Indian Act, 1970. After her divorce Sandra Lovelace wished to return and live on the reserve but because of her loss of legal status as an Indian she could not claim a legal right to reside on the reserve. According to the Indian Act there was no similar loss of status, for Indian men marrying non-Indian women. Lovelace alleged that the provisions of the Indian Act were inconsistent with Articles 2 (1) and (4) (regarding protection of the family and equality of the spouses), 26 (equality before the law and non-discrimination) and 27 of the ICCPR.

The Human Rights Committee asserted that "the significant matter ...is the loss of the cultural benefits of living in an Indian community, the emotional ties to home, family, friends and neighbours, and the loss of identity". Therefore, the Committee found that "although a number of provisions of the Covenant have been invoked by Sandra Lovelace, ...the one which is most directly applicable...is Article 27." The Committee concluded that Canada had violated Article 27 as restrictions on Sandra's right to residence on a reserve were not reasonable and objective and inconsistent with the other provisions of the Covenant. In an individual opinion, Bowziri, a Committee member, found that not Article 27, but also Articles 2 (1), 3, 23 (1 & 4) and 26 had been violated since the provisions of the Indian Act were discriminatory between men and women. It is gratifying to note that Canada informed the Committee in 1983 that the Indian Act has been amended following its decision in the *Lovelace case*.

Sometimes Article 27 rights are restricted or denied by making a declaration or reservation to it. Several petitions from French citizens of Breton ethnic groups were declared inadmissible in view of the declaration made by France at the time of its accession to ICCPR. The French declaration stated "in the light of Article 2 of the Constitution of the French Republic, Article 27 (of the Covenant) is not applicable so far as the Republic is concerned". Article 2 of the French Constitution provides: "France is Republic, indivisible, secular, democratic and social. It shall ensure the equality of all citizens before the law, without distinction of origin, race or religion. It shall respect all

beliefs". The rationale for the declaration was given in France's initial and second periodic reports to the Human Rights Committee (under Article 40 of the Covenant):

> Since the basic principles of public law prohibit distinctions between citizens on grounds of origin, race or religion, *France is a country in which there are no minorities,* and, as stated in the declaration made by France, Article 27 is not applicable as far as the Republic is concerned.

It is not clear what in Article 27 is offensive to the principle enshrined in Article 2 of the French Constitution. Such principle is not unique to the French legal system and can be found in many national constitutions. Yet only France has formulated such a declaration. Why? One explanation, according to Alfred do Zayas, is that France was unwilling to "assume any obligation to affirmative action, *i.e.,* to ensure equality in law and *in fact* by appropriate positive measures.

Other UN Instruments Concerning Minority Rights

Besides the ICCPR, following international instruments provide special measures or special rights for minorities. The Convention on the Prevention and Punishment of the Crime of Genocide, adopted (on December 9, 1948) one day prior to the proclamation of the UDHR is the first human rights instrument. It does not address minorities directly, but incorporates key concepts of minority rights such as the right to existence. The Convention criminalizes" acts committed with intent to destroy, in whole or in part, a national, ethnic, racial or religious group as such" (Article II). The greatest weakness of Genocide Convention is the absence of effective enforcement provisions. However, with the establishment of the first ever permanent International Criminal Court at The Hague upon 60 ratifications of the Rome Statute on International Criminal Court in July 2002 (as of 1 June 2015, 123 States had ratified it), this lacuna has been removed and genocide, war crimes and crimes against humanity will not go untried and unpunished.

While racial minorities benefit from Article 1 (4) of the International Convention on the Elimination of All Forms of Racial Discrimination (1965), the religious minorities benefit from the provisions of the UN Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief (1981). ILO convention No. 107 of 1957 and No. 169 of 1989 deal with the rights of indigenous population. Currently the UN is debating the draft Universal Declaration on the Rights of Indigenous Peoples. Children of minorities and indigenous populations are the subject of Article 30

of the Convention on the Rights of the Child (1989), which states that their children shall not be denied rights to enjoy their culture, to profess and practise their religion or to use their own language. The UNESCO Convention Against Discrimination in Education and the UNESCO Declaration on Race and Racial Prejudice also deal with minority rights.

Moreover, almost all international instruments on human rights indirectly promote minority rights through its provisions on equality and non-discriminations.

UN Declaration on the Rights of Persons Belonging to Minorities, 1992

After 14 years of hard work at the UN Commission on Human Rights and its Sub-Commission in drafting a Declaration on the rights of persons belonging to minorities, the UN General Assembly proclaimed the Declaration on Minority Rights on December 18, 1992.

The Preamble and nine Articles of the Declaration mostly restate the general contents of existing rights. Article 1 addresses the questions of existence and identity of persons of minority groups. Article 2 sets forth a series of rights and freedoms for persons belonging to minorities with regard to the enjoyment or assertion of and participation in culture, religion, language, social affairs, economy, public life, national and sometimes regional decisions, associations and contents with other members of their group inside and across frontiers. Article 3 repeats the language employed by Article 27 of the ICCPR concerning the exercise of these rights individually and "in community with other members of their group." Article 4 deals with special measures and Articles 5, 6 and 7 with national policies and programmes as well as cooperation and assistance among States.

It is quite possible that the greatest significance of the new Declaration will rest on the fact that it is the first international human rights instrument devoted solely to minority rights. It also states clearly in the Preamble and in Article 9, that organizations of the UN system have a role to play in "the full realization of the rights and principles set forth in the Declaration", and again in the Preamble it ties minority rights together with the "development of society as a whole and within a democratic framework based on the rule of law".

Article 8 concerns itself with the protection of minorities but with the interests of States, including their "sovereign equality, territorial integrity and political

independence." Furthermore, the text is littered with vague or negative phrases like "encourage conditions", "appropriate", "wherever possible", and "where required" and "in a manner not incompatible with national legislation". Questions relating to collective rights were left unresolved except for the phrase about enjoyment "in community with other members" of the group. Proposals to attach a serious monitoring mechanism to the Declaration have not yet been accepted. In this connection, it should be remembered that minority representatives did not have a role in the drafting process.

Affirmative Action

The doctrine of affirmative action attempts to redress the harmful or inhuman practices of past racial or social discrimination and to correct current socio-economic inequalities. The aim of affirmative action is always equality. In the words of Asbjorn Eide it is "preference, by way of special measures, for certain groups or members of such groups (typically defined by race, ethnic identity or sex) 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." Eide concludes by saying that since affirmative action can lead to group conflict such measures should not be continued beyond the time when equality has been achieved. Both philosophers and international lawyers defend it as a temporary measure. Will Kymlicka, a Canadian philosopher, maintain that it is generally defended as a temporary measure. It is intended to remedy years of discrimination. In fact, group-specific rights are needed to accommodate enduring cultural differences. Warwick Mckean has another argument. He maintains that positive discrimination measures are temporary and compensatory, while protective measures providing for "special rights for minority groups" (such as to maintain their own languages, cultures, and religious practices, and to establish schools, libraries, churches, and similar institutions), produce "an equilibrium" between different situations and "should be maintained as long as the groups concerned wish". Thus the protective measures have to be permanent, whereas compensatory measures like reservation of jobs, *etc.* (as it prevails in India) have to be temporary. Moreover, such measures have to be reasonable and objective in their purpose.

This approach is confirmed, as noted earlier, by the UN Declaration on Minority Rights in Articles 4 and 8. Among the international treaties, the International Convention

on the Elimination of All Forms of Racial Discrimination (CERD) and the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) provide for "special measures". The former in Article 1 (4) permits such measures in order to ensure the equal enjoyment of human rights and freedoms "provided, however, that such measures do not, as a consequence, lead to the maintenance of separate rights for different racial groups and that they shall not be continued after the objective, for which they were taken (*i.e.,* equality) have been achieved". The same spirit is reflected in Article 2(2) of the CERD. Similarly, Article 4 of CEDAW aims at *de facto equality.* Also here the measures should be discontinued "when the objectives of equality of opportunity and treatment have been achieved".

General Comment 18 of the Human Rights Committee on Article 26 of the ICCPR (concerning equality before law and equal protection of law), which is an interpretation of the Article, supports affirmative action and states "the enjoyment of rights and freedoms on an equal footing does not mean identical treatment in every instance" (Para. 8) Moreover, the Committee further adds:

> …that the principle of equality sometimes requires States Parties to take affirmative action in order to diminish or eliminate conditions which cause or help to perpetuate discrimination prohibited by the Covenant. For example, in a State where the general conditions of a certain part of the population prevent or impair their enjoyment of human rights, the State should take specific action to correct those conditions. Such action may involve granting for a time to the part of the population concerned certain preferential treatment in specific matters as compared with the rest of the population. However, as long as such action is needed to correct discrimination in fact, it is a case of legitimate differentiation under the Covenant. (Para 10)

The same approach has been reiterated by the Human Rights Committee in its General Comment No. 23 (50) regarding Article 27 of the ICCPR.

The Committee notes that:

> Positive measures of protection are...required not only against the acts of the State Party itself, whether through its legislative, judicial or administrative authorities, but also against the acts or other persons within the State Party. ...Positive measures by States may also be necessary to protect the identity of a minority and the rights of its members to enjoy and develop their culture and language and to practise their religion, in community with the other members of the group. In this connection, it has to be observed that such positive measures must respect the provisions of Article 2, paragraph 1, and Article 26 of the Covenant, both as regards the treatment accorded different minorities and the treatment accorded the persons belonging to them....

> However, so long as those measures are aimed at correcting conditions, which prevent or impair the enjoyment of the rights guaranteed under Article 27, they may constitute a legitimate differentiation under the Covenant, provided that they are based on reasonable and objective criteria.

Thus the preceding analysis suggests that the affirmative action policies towards the minorities do not constitute discrimination and are temporary measures to achieve the objective of full enjoyment of their rights.

Concluding Observations

After the Second World War, with the inception of the United Nations, any independent and serious concern for the rights of minorities was more or less absorbed into the wider aspiration of protection of individual human rights. Though the issue of minority rights is important for the stability and prosperity of multireligious/multicultural modern nation-state system, it remained peripheral to international human rights law. Unlike the League of Nations, which had a limited, yet discernable, vision on the protection of minorities both an inability and an unwillingness to consider the position of minorities characterized the approach of the United Nations.

However, since the 1990s the question of international protection of minority rights is making a serious comeback on the agenda of international law and relations. The adoption of the UN Declaration on the Rights of (persons belonging to) minorities in 1992 is a pioneering development. The drafting and subsequent entering into force of the Framework Convention on National Minorities by the Council of Europe and the establishment of the OSCE High Commissioner on National Minorities are other promising developments in this regard. Moreover, the development of jurisprudence on Article 27 of the ICCPR by the Human Rights Committee will emerge as the most valuable tool in advancing the cause of minority protection.

Notwithstanding these positive signposts, it must, however, be admitted that both the substance of minority rights and the problems associated with their effective implementation are weak in international law.

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