

# Minority Rights: Development Needed

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## ABSTRACT

This paper trying to discuss in detail the concept of minorities and the problem of absence of an appropriate and largely accepted definition and how it is high time that these minorities needed to be protected by their respective nation states apart from that the development of these rights from the past centuries to the present position. Then in the next section the international legal protective instruments are studied. In the second last part of paper the rights from which minorities are deprived are discussed and in final section it has been concluded.

**KEYWORDS:** Promotion & protection of rights of minorities, Development of minorities, Need of minority rights, International instruments of minority protection

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## I. INTRODUCTION

The protection of minority is not a new concept in international law. The root cause of this problem is the discrimination, exclusion, denial and oppression. There is rarely any state which does not have minorities within its territory which, by their ethnic, racial, linguistic or religious differences, is segregated from the majority hence it's a problem of international context. Even in this modern era, cases of genocide of minorities are being reported.<sup>1</sup> Even though with the unavailability of inaccurate statistics, the United Nations (UN) reports estimates suggests that almost 10 to 20 percent of the world's population belongs to minority groups and communities. The members are often ill-treated which leads to injustice and unfair socio-economic segregation in the maximum cases. These minor groups are often excluded from power which leads to the denial of dignity, identities and cultures. The violence and deprivation which affects the group members disproportionately are symptomatic of unequal treatment and humiliation that human rights seeks to remedy. Despite of numerous conventions, guidelines of UN, still this discrimination with the minorities is not being tackled efficiently. Hence the rights of minorities must be protected and promoted globally.

## II. Who are minorities?

The present state of minorities right is under discussion that it must precede general understanding of term "minority" in

its full of intricacies and controversial in nature. No internationally well accepted definition is there till present day. States in order to deny the rights of minorities, often take advantage of the variation of definition of minority. Sohn asserts that a definition of the term minority is not a question of only theoretical and academic influence.<sup>2</sup> Akermark stated that the absence of appropriate definition gives nation states an excuse to deny the presence of the minorities within their lands.

The numbers of attempts have been made over the years on almost all international platforms to precisely define the quintessence of term minority. Firstly Permanent Court of International Justice (PCIJ) in its recommendatory opinion states that, "group of persons living in a given country or locality, having a race, religion, language and traditions in a sentiment of solidarity, with a view to preserving their traditions, maintaining their form of worship, securing the instructions and upbringing of their children in accordance with the spirit and traditions of their race and mutually assisting one another." The PCIJ definition employed two tests to determine minority status. First is the objective test, the existence of facts like race, religion, language and tradition. Second is the subjective test, "the sentiments of solidarity" and "the desire to preserve traditions".

<sup>1</sup> G. Alfredson, "Minority Rights and Peace" in Snezna Trifunovska (ed.), *Minorities in Europe 3* (TMC Asser, The Hague, 1999).

<sup>2</sup> L. Sohn, "The Rights of Minorities" in L. Henkin (ed.), *The International Bill of Rights 280* (Columbia University Press, New York, 1981).

Another definition of minority is proposed by Francesco Capotorti who has been considered as most prestigious study for the UN on the study of minority. He defined it as “a group which is numerically inferior to the rest of the population of a state and in a non-dominant position, whose members possess ethnic, religious or linguistic characteristics which differs from those of the rest of the population and who, if only implicitly, maintain a sense of solidarity, directed towards preserving their culture, religion or language.”<sup>3</sup>

In the year 1984, the Commission on Human Rights (CHR) directed the sub-commission to scrutinize the matter of defining ‘minority’ and this task was given to Jules Deschenes. In his opinion, minority is “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 another, motivated, if only implicitly, by a collective will to survive and whose aim is to achieve equality with the majority in fact and law.”<sup>4</sup>

While observing various definitions proposed by scholars and international organizations, we can certainly conclude that objective and subjective elements for an accepted definition have common components as of these proposed definitions. Apparently, there is a general agreement about the necessity of promotion of numerically inferior, politically non-dominant groups, which possess distinguished ethnic, religious or linguistic characteristics as compared to the rest of the population. These inferior groups themselves have the collective desire to secure their distinct identities.<sup>5</sup>

### III. Need of Minority Rights

It is a well-known fact that generally in most multi-ethnic societies, the population in majority enjoys inherently dominant political, social and economic position in comparison to the population in minority. Minorities are not in decision making position and power centers endanger their distinct identity and their rights. Because of their inferior position, minorities are subjected to discrimination at different levels by both private and state dignitaries. The preservation of their distinct identity is in danger in the present times. According to Thornberry, in number of states, history, cultural values and traditions of these groups are subject to “distorted representations, producing low self-esteem in the minority groups and negative stereotypes in the wider community.”<sup>6</sup>

<sup>3</sup> Capotorti, Special Rapporteur, Sub-Commission on Prevention of Discrimination and Protection of Minorities, Study on the Rights of Persons belonging to Ethnic, Religious and Linguistic Minorities. UN Doc E/CN.4 Sub2/384/Rev 1 (1979)

<sup>4</sup> Jules Deschenes, proposal concerning a definition of the term ‘minority’, UN Doc. E/CN.4 Sub2/1985/31 (May 14, 1985).

<sup>5</sup> K. Henard, *Devising an Adequate System Of Minority Protection: Individual Human Rights, Minority Rights and the Rights to Self Determination 30-48* (Kluwer Law International, The Hague, 2000)

<sup>6</sup> Patrick Thornberry, “The UN Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities: Background, Analysis, Observations

According to Kymlicka, in multi-cultured societies, states have a choice of following either to integrate or accommodate the rights of minorities which are in question.<sup>7</sup> States are privileged to choose either encouraging the integration of minority groups into the mainstream community or allowing the distinctiveness to be preserved of minority groups through separate institutions.<sup>8</sup> It is well-known that the policy of accommodation will only help to safeguard the distinct identification of minority groups. On the contrary, the policy of assimilation will definitely destroy the distinct identity and culture of minorities, which will lead to the exclusion of the minorities from the mainstream communities. Pursuant to the policy of accommodation, the necessity of legal framework is always focused on protecting the distinguished identities of members of the minority groups. Their vulnerability is the root cause for the immediate need of some action to be taken to secure the rights of these groups, so that the fundamental rights can be equally assured and enjoyed by them as by the majorities. The time has come when both at international and national level it is widely accepted that there is need of special rights and their protection for the minority to save them from forceful assimilation, oppression, persecution and an affirmative action need to be taken in the favour of minorities to achieve substantial equal rights in the society.

In *Minority Schools in Albania* the PCIJ opinionated that the rights of minorities beyond non-discriminatory objectives rather they should target to preserve the characteristics which are differentiating the inferior group from majority.

### IV. DEVELOPMENT IN MINORITY RIGHTS

The protection of minorities can trace its deepest roots from 17<sup>th</sup> century. The earliest attempt was the Treaty of Westphalia, 1668 in which the state parties agreed to promote and respect the certain religious rights of minorities in their territories. Sigler argued that “the contemporary minority issues with which we have familiarity are largely rooted in the nineteenth century” since the nineteenth century was “concerned less with religious or racial groups than the linguistic and ethnic groups.”<sup>9</sup> In 1815, the congress of Vienna also dealt to some extent with the minority rights. The Berlin Treaty, 1876, in which traditional rights and liberties were acknowledged. Provisions to safeguard the Greek and Turkish minorities from discrimination were added in the Bulgarian Constitution in 1879.

After the end of the World War I, League of Nations adopted peace treaties in attempt to promote the rights of minorities at international level. At first it included those treaties which were imposed on the defeated states of World War I like

and an Update” in A. Phillips and A. Rosas (eds.) *Universal Minority Rights 49* (Minority Rights Groups and Abo Akademi University, London and Abo, 1995).

<sup>7</sup> Will Kymlicka, “The Internationalization of Minority Rights” *6 International Journal of Constitutional Law 1-32* (2008); Yousef T. Jabareen, “Toward Participatory Equality: Protecting Minority Rights Under International Law” *41 Israel Law Rev.* 640-41 (2008).

<sup>8</sup> *Ibid.*

<sup>9</sup> Jay A. Sigler. *Minority Rights. A Comparative Analysis.* Westport, Connecticut/London, England: Greenwood Press. 1983. 68.

Austria, Hungary, Bulgaria and Turkey. Second group of treaties consist the states whose boundaries were altered under the self-determination principle. The another group of treaties dealt with special internationalized regimes established in Aland, Danzig, the Memel Territory and Upper Silesia related to their minorities. It also included unilateral declarations made by Albania, Iraq, Lithuania, Latvia and Estonia as a part of condition for their admission to be a part of the League of Nations.

Though with these peace treaties the League of Nations successfully founded rules legally binding obligations for the protection of minorities, enforced by the League Council and PCIJ adjudicated them but it was far being from perfect and enough. The scope of these peace treaties was limited and obligates only those states on which they were imposed. The system itself was discriminatory as the powerful states like Germany, Italy etc., which have admissible number of minorities within their territorial jurisdiction did not undertake any responsibility to grant those rights to their own minorities.

Later, UN succeeded the League of Nations as a new international organization after World War II. The United Nations, since its foundation took a considerable period of time to make any initiative with respect to protection of minorities. It preferred the development of universal Human Rights for all over the protection of minorities. In order to justify the above, it was contended that no specific measures required for minorities if, enforcement of human rights is supported with strong prohibition of any kind of discrimination.<sup>10</sup> Neither the Charter of UN nor the Universal Declaration of Human Rights (UDHR) contained any specific provisions for minority rights. The USSR and Denmark proposed that minority rights must be included in the UDHR. It was argued by the majority state parties that recognition of rights of minorities will promote separatism, fragmentation and adversely affect the national solidarity, hence proposal was rejected.<sup>11</sup>

The only exception was, the UN Convention on the Prevention and Punishment of the Crime Genocide, 1948, which guaranteed the right of physical existence to the groups against the destruction of any national, racial, religious groups. Afterwards the United Nations Commission of Human Rights (UNCHR) established a Sub-Commission on Prevention of Discrimination and Protection of Minorities. The sub-commission did not succeeded much until mid-1970s, then finally provision was inserted in the International Covenant on Civil and Political Rights (ICCPR) in the form of article 27 for the protection of minorities. Consequentially, in the year 1978 a special rapporteur studied this concept and this sub-commission recommended an adoption of the Declaration on the rights of minorities.

<sup>10</sup> L. Sohn, *Supra* note 9 at 271; David Wippman, "The Evolution and Implementation of Minority Rights" 66(2) *Fordham Law Rev.* 597-603 (1997).

<sup>11</sup> Hurst Hannum, *Autonomy, Sovereignty, and Self-Determination: The Accommodation of Conflicting Rights* 71 (University of Pennsylvania Press, Philadelphia, 1990).

The article 27 of ICCPR is the most prominent provision which advocates the protection of minorities. It has universalized the minority rights concept.<sup>12</sup>

In those states in which ethnic, religious or linguistic minorities exists, person 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.

With the end of cold war and highly visible violent ethnic conflicts in many states with potential of more violence made UN and other organizations to pay serious attention towards the fate of minorities. Later, a very strong initiative for the developing comprehensive minority rights regimes was clearly evident. Then the Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities 1992 (the 1992 Declaration) was adopted by UN general assembly. It can be said that the adoption of the above mentioned Declaration marked the beginning of new phase in the development of international norms on minority rights.

## V. PROTECTION UNDER INTERNATIONAL LAW

### Main sources of minority rights

- Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities {(This Declaration grants protection to existence of minorities without any hindrance created by majority, states are under obligation to procure these communities and let them enjoy all the freedom). Adopted by General Assembly resolution 47/135 of 18 December 1992}.
- International Covenant on Civil and Political Rights (Article 27 states that, "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 the group, to enjoy their own culture, to profess and practice their own religion, or to use their own language").
- International Covenant on Economic, Social and Cultural Rights (Article 2(2) provides that, " the states parties to the present Covenant undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status."
- International Convention on the Elimination of All Forms of Racial Discrimination (Article 1 defines discrimination, "any distinction, exclusion, restriction or preference based on race, colour, descent or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life".
- Convention on the Rights of the Child (Article 30 states that, "in those states in which ethnic, religious or linguistic minorities or persons of indigenous origin exist, a child belonging to such a minority or who is indigenous shall not be denied the right, in community

<sup>12</sup> Patrick Thornberry, "Is there a phoenix in the Ashes? – International Law and Minority Rights" 15 *Texas Int'l L. J.* 443 (1980).



with other members of his or her own group, to enjoy his or her own culture, to profess and practice his or her own religion, or to use his or her own language”.

#### **Additional Sources of Minority Rights**

- Convention on the Prevention and Punishment of the Crime of Genocide.
- Rome Statute of the International Criminal Court (specific provisions related to Genocide and also crimes against humanity).

### **VI. RIGHTS OF MINORITIES**

#### **The Right to Physical Existence**

In the speculation of minority rights under international regime, the right of physical existence is considered as most prominent prerequisite<sup>13</sup>. It is *sine qua non* to all other human rights. According to Thornberry:

Survival is a perception which has a unique sense for collectivity such as a minority group.

Firstly, the right to existence of minorities was recognized in the Genocide convention which restricts the physical or biological extermination of ethnic, racial or religious group. Secondly, adoption of the declaration 1992, explicitly recognize the rights of minorities. Asbjorn Eide spotted the view of right to existence, for him the existence also includes the right to cultural, linguistic, economic and developmental existence<sup>14</sup>

The Genocide Convention speaks about physical and biological genocide only not about the cultural genocide. At the time of drafting of the convention, the issue of cultural genocide was proposed but got rejected being too vague to be accepted. William Schabas pointed out in the light of the *travaux preparatoires* of a genocide convention, that the cultural genocide cannot be punished if it is unrelated to physical or biological genocide.<sup>15</sup>

In *Prosecutor v. Radislav Krstic* the International Criminal Tribunal for the former Yugoslavia (ICTY) encountered the task of determining the legal status of cultural genocide. It was observed by the trial chamber that apart from the physical acts, “one may also conceive of destroying a group through purposeful eradication of its culture and identity resulting in the eventual extinction of the group as an entity distinct from the remainder of the community”<sup>16</sup>

#### **Right to enjoy one’s own culture**

Culture is a difficult concept and needs to be dealt with proper diligence. The UNESCO study by Michel Leiris defines it “as culture, then, comprehends all that is inherited or transmitted through society, it follows that its individual elements are proportionately diverse. They include not only sentiments, knowledge, beliefs and literature (and illiterate people are often have an immensely rich oral literature), but

the language or other systems system of symbol which are their vehicles”<sup>17</sup> The UNESCO Universal Declaration on cultural diversity on November 2, 2001, “the set of distinctive spiritual, material intellectual and emotional features of society or a social group, in addition to art and literature, lifestyles, values, traditions and beliefs.

The UN Committee on Economic, Social and Cultural Rights (CESCR), “encompasses, ways of life, language, non-verbal communication, religious beliefs, rites and rituals, natural and manmade, food, clothing through which individuals and communities express their humanity and the meaning they give to their existence, and build their world with the external forces affecting their lives”<sup>18</sup>

According to the Human Rights Committee (HRC) cultural rights may not be claimed legitimately in any manner where they are in conflict with other human rights recognized by the covenant. The cultural practices which are inconsistent with national law or international norms are also excluded. Article 5 of Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) states are under obligations to modify or restrict traditional or cultural practices derogatory to women. Similarly the educational rights must not deprive minorities from understanding the culture of the community as a whole. Exercise of any practice which is detrimental to the sovereignty and security of the state is also not permissible. Thus, these rights aim at protection of minority groups from their cultural assimilation into dominant culture and to preserve the culture identity of non-dominant communities.

#### **The Right to profess and practice religion**

Our history is full of illustrations of religious intolerance and persecution based on religion. The protection of religious beliefs preceded the protection of other rights.<sup>19</sup> This concept religious freedom was first addressed by the UDHR, its Article 18 provides that, “everyone shall have the right to freedom of thought, conscience and religion.” It also includes the freedom to alter the religious beliefs. Basically it protects the democratic principle that religious beliefs of every individual must be respected. In a study conducted by Arcot Krishanaswami it analyzed the major concept of religion and all the factors which are governed by these beliefs.

The ICCPR provides these rights without any distinction like race, colour, gender, political views, national or social background, descent, property. The committee of Human Rights while commenting emphasized on the right of freedom of expression, conscience is “far reaching and profound” it protects both the theistic or atheistic approaches. Article 20(2) obligates the state parties to restrict hatred or advocacy which distinguishes between the religions under their laws.

The another international instrument which secures the religious beliefs of minorities is UN Declaration on the

<sup>13</sup> Patrick Thornberry, *supra* note 3 at 57.

<sup>14</sup> Asbjorn Eide, Final text of the Commentary to the UN Declaration on the rights of Persons belonging to National or Ethnic, Religious and Linguistic Minorities, E/CN.4/Sub.2/AC.5/2001/2(2001), para 28.

<sup>15</sup> William A.Schabas, *Genocide in International Law* 187(Cambridge University Press, Cambridge, 2000).

<sup>16</sup> *Prosecutor v. Krstic*, case no. IT-98-33-T judgement (trial chamber).

<sup>17</sup> Michel Leiris, *Race and Culture* 20-21(UNESCO, Paris, 1951).

<sup>18</sup> Committee on Economic, Social, and Cultural Rights, General Comment No. 21: The Right of Everyone to Take Part in Cultural Life, art. 15, para. 1(a), E/C.12/GC/21 (Nov. 2009).

<sup>19</sup> N. Lerner, “The Nature and Minimum Standards of Freedom of Religion or Belief” *Brigham Young University Law Review* 908(2000).

Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief 1981. The Declaration is not binding, but many basic principles are founded on other international standard which includes ICCPR and they are binding in nature.

### The Rights to speak one's very own Language

In number of states the minority groups speak the different language from the majority and had to suffer many difficulties. The language plays very vital role in the identity of oneself. Language is the medium of self-expression hence it is one of the much needed right of minorities. The right to speak one's own language is probably most widely recognized right of minority in international law. The linguistic rights is not only limited to speak one's language on daily basis but it also includes the right to education being offered in the same medium, judicial proceeding, media and in public and administrative services also.

Article 27 of ICCPR is of immense importance in securing the linguistic rights of minorities. It provides that the state must not restrict their affairs because they belong to a linguistic minority. For example, these non-dominant communities are allowed to maintain their institutions imparting knowledge in their own languages, states are not under any obligation to financially assist these kinds of institutions. Protection of linguistic rights can be claimed where public authorities prohibit mass media or publications in minority language because it violates freedom of expression.

The UN Human Rights Committee asserts that, "positive measures should be taken by states to protect the identity of minority and the rights of its members to enjoy and develop their culture and language... in community with other members of the group"<sup>20</sup>

More regulations on these rights are incorporated in the 1992 Declaration. The Article 4 obligates the state parties to provide convenient stipulations to make individuals associated to these minorities able not only to exhibit but also to uplift their culture, customs, traditions, language and religion. This Article makes the state responsible to create adequate opportunities for the persons associating to these minor groups to learn their native language and have instructions in the same.

## VII. CONCLUSION

Undoubtedly, various international legal provisions are there, which have found the basis for the promotion of minority rights. However, their efficiency in securing these rights is in doubt yet. In the absence of an accurate definition, we must investigate the similarities between the different people so that they all can be protected. It is not crucial and also impossible for all the states to be ethically, religiously and linguistically homogenous. It is also well understood that mere observance of equal rights and prohibition of discrimination may not be sufficient for securing the minorities and to address their issues. Hence, a consensus has been arrived at both national and international levels that these minor groups are in need of special rights and protection thereof. States are suggested to take prominent initiatives to conserve the distinct identity of

minorities. Moreover, it is also one of the necessary conditions for greater political and social stability and peace within their territories and across the borders as well.

Another aspect of international law is that it is a weak law therefore, lacks strict binding force behind all these international instruments. The provisions of these conventions are hugely vague in language, leaving much on state parties to interpret it with a considerable amount of discretion. Need of the time is to assure that the political and legal commitments accepted by states in respect to their minorities are well-implemented and effectively monitored and are in good faith.

These rights of professing one's own religion and speaking own language, following one's own traditions is the most basic or fundamental right one can exercise and nobody deserves ill treatment or any kind of violence just because they share different norms and values. Every single being on this planet should be free to enjoy their culture, ethics and not be under any threat of dominant group.

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<sup>20</sup> Human Rights Committee, general comment 23Apr.8,1994,para 6.2.