

# Protection of Minorities



Protection of Minorities:  
Regimes, Norms and Issues in South Asia

By

Borhan Uddin Khan  
and Muhammad Mahbubur Rahman

**CAMBRIDGE  
SCHOLARS**

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P U B L I S H I N G

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## PREFACE

In this little volume an attempt has been made to give an account of international standards aimed at protection of minorities and relate the same to South Asian regimes. The arrangement of the text is quite simple. While the first chapter deals with the issue on identification of minorities as understood by international law, the three chapters that follow outline a brief history on development of international law towards a better protection of minorities (ch. 2), an introduction to contemporary international instruments and mechanisms on minorities (ch. 3), and the rights of minorities under international standards (Ch. 4). Concentrating on eight South Asian countries, Chapter 5 looks into the state of minorities and examines their protection under the domestic regimes. Finally Chapter 6 assesses the extent to which regional cooperation in South Asia has so far contributed to extending protection to South Asian minorities. The volume ends with an argument that SAARC (South Asian Association for Regional Cooperation) has potentials to play far greater role in this regard.

The study leading to the present volume was undertaken in the frame of the project *Europe-South Asia Exchange on Supranational (Regional) policies and Instruments for the Promotion of Human Rights and the Management of Minority Issues* (EURASIA-Net) funded by the Seventh Framework Programme of the European Commission (FP7). This manuscript could not have been completed without the help of those working with the project. We express our heartfelt thanks to Dr. Gunther Rautz and Ms. Alexandra Tomaselli (Institute of Minority Rights, European Academy of Bozen/Bolzano, Italy), Professor Rainer Hofman (Faculty of Law, Johann Wolfgang Goethe University in Frankfurt, Germany), Professor Javaid Rehman (School of Law, Brunel University, UK), Dr. Ranabir Samaddar (Mahanirban Calcutta Research Group, India), Professor Samir Kumar Das (Department of Political Science, University of Calcutta, India), Tapan Kumar Bose and Rita Manchanda (South Asia Forum for Human Rights) and Ms. Tanveer Jahan (Democratic Commission for Human Development, Pakistan). All of them generously offered their comments on a preliminary draft although they are in no way responsible for the ways in which we have addressed their views in the present volume.

The authors



## ABBREVIATIONS

ACHPR	African Charter on Human and Peoples' Rights
ACHR	American Convention on Human Rights
AI	Amnesty International
CEDAW	Convention on the Elimination of All Forms of Discrimination against Women
CERD	Convention on the Elimination of All Forms of Racial Discrimination
CHR	Commission on Human Rights
CHT	Chittagong Hill Tracts
CRC	Convention on the Rights of the Child
DC	Deputy Commissioner
DLR	Dhaka Law Reports
DROB	Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief
ECMI	European Centre for Minority Issues
ECOSOC	Economic and Social Council
FCNM	Framework Convention for the Protection of National Minorities
FSC	Federal Shariat Court
GA	General Assembly
HRC	Human Rights Council
HRCAC	Human Rights Council Advisory Committee
IAS	Indian Administrative Services
ICCPR	International Covenant on Civil and Political Rights
ICES	International Centre for Ethnic Studies
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICRC	International Committee of Red Cross
ICTR	International Criminal Tribunal for the Rwanda
IEMI	Independent Expert on Minority Issues
IFS	Indian Foreign Services
ILO	International Labour Organization
IPS	Indian Police Services
ISI	Inter-Services Intelligence

LTTE	Liberation Tigers of Tamil Eelam
MDGs	Millennium Development Goals
NGO	Non Government Organization
NWFP	North-West Frontier Province
PCIJ	Permanent Court of International Justice
PCJSS	Parbattya Chattagram Jana Samhati Samiti
PLD	Pakistan Legal Decisions
SAARC	South Asian Association for Regional Cooperation
SAFHR	South Asian Forum for Human Rights
SAFTA	South Asian Free Trade Area
SAIC	SAARC Agricultural Information Centre
SAPTA	SAARC Preferential Trading Arrangement
SC	Scheduled Castes
SCMR	Supreme Court Monthly Reporters
SCR	Supreme Court Reporters
SDC	SAARC Documentation Centre
SHRDC	SAARC Human Resources Development Centre
SMRC	SAARC Meteorological Research Centre
Sri LR	Sri Lanka Law Reports
ST	Scheduled Tribes
STC	SAARC Tuberculosis Centre
TULF	Tamil United Liberation Front
UDHR	Universal Declaration of Human Rights
UN	United Nations
UNDM	United Nations Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities
UNO	United Nations Organization
UNESCO	United Nations Educational, Social and Cultural Organization
UNTS	United Nations Treaty Series
UPDF	United Peoples Democratic Front
USSR	Union of Soviet Socialist Republics
WGM	Working Group on Minorities
WHO	World Health Organization
WP	Writ Petition

# CHAPTER ONE

## IDENTIFICATION OF MINORITIES

### 1.1 Definition of minorities

Despite many references to ‘minorities’ in international legal instruments, there is no universally agreed, legally binding definition of the term.<sup>1</sup> This is primarily because of a feeling that the concept of ‘minority’ is inherently vague and imprecise and that no proposed definition would ever be able to provide for the innumerable minority groups that could possibly exist.<sup>2</sup> Moreover, there are many states that prefer the definition to be too restrictive so that large trenches of their population do not fall within the definition. The diverse contexts of different groups claiming minority status also make it challenging to formulate a solution of universal application.<sup>3</sup> Consequently, international law has found it difficult to provide any firm guidelines in relation to defining the concept.<sup>4</sup> Furthermore, many states as well as potential minorities themselves obstruct the process of defining the scope of the term.<sup>5</sup> Nevertheless, the efforts made so far at various forums and by various international lawyers offer good insights as to the factors to be taken into consideration in developing a definition of the term ‘minority’.<sup>6</sup>

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1 Francesco Capotorti (1991) *Study on the Rights of Persons Belonging to Ethnic, Religious and Linguistic Minorities*. New York: United Nations. p. 5.

2 Javaid Rehman (2000) *The Weaknesses in the International Protection of Minority Rights*. The Hague: Kluwer Law International. p. 14.

3 See Philip Vuciri Ramaga (1992) ‘Relativity of the Minority Concept’, *Human Rights Quarterly*, Vol. 14, No.3. p. 112.

4 Javaid Rehman (2000) *The Weaknesses in the International Protection of Minority Rights*. The Hague: Kluwer Law International. p. 14.

5 Rhona K. M. Smith (2009) ‘The Fate of Minorities – Sixty Years On’, *Web Journal of Current Legal Issues*, Vol. 1. Available at: <http://webjcli.ncl.ac.uk/2009/issue1/smith1a.html> (last accessed on May 21, 2009).

6 See section 1.2 for details.

In legal literature and official documents, the most widely acknowledged definition is the one formulated by Capotorti.<sup>7</sup> For the purpose of his study on the Rights of Persons Belonging to Ethnic, Religious and Linguistic Minorities, the Special Rapporteur on Prevention of Discrimination and Protection of Minorities, Francesco Capotorti defined, with the application of Article 27 of ICCPR in mind, a minority group as -

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, maintain a sense of solidarity, directed towards preserving their culture, traditions, religion or language.<sup>8</sup>

In 1985, the Sub-Commission submitted to the Commission on Human Rights a text on the definition of 'minority' prepared by Jules Deschenes. The definition was, however, not accepted by the Commission. According to this definition, minority is

a group of citizens of a state, consisting of 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 not implicitly, by a collective will to survive and whose aim is to achieve equality with the majority in fact and in law.<sup>9</sup>

Although there is some measure of agreement regarding essential elements of the definitions proposed by Capotorti and Deschenes, some of the elements are criticized for being vague, misleading and inadequate for the diversified minority situations. Some countries considered the definitions as irrelevant, while others saw it as non-contributive to the debates concerning the definition of the term 'minority'.<sup>10</sup>

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7 Jelena Pejic (1997) 'Minority Rights in International Law'. *Human Rights Quarterly*, Vol. 19, No. 3, p. 671.

8 Francesco Capotorti (1991) *Study on the Rights of Persons Belonging to Ethnic, Religious and Linguistic Minorities*. New York : United Nations. p. 98.

9 Jules Deschenes (1985) 'Proposal concerning a definition of the term minority', UN Doc. E/CN.4/Sub.2/1985/31/Corr.1 (14 May 1985), para. 181.

10 Steven Wheatley (2005) *Democracy, Minorities and International Law*. London: Cambridge University Press. p. 20.

## **1.2 Identifying minorities: Factors and criteria of consideration**

What are the factors and/or criteria that are to be taken into consideration while identifying a group as a minority? Capotorti's definition speaks of several essential defining elements of a minority. So also is the definition of Deschenes. However, none of these elements - speaking of several objective and subjective factors and criteria - are agreed upon by international lawyers with the same spirit and essence. The following paragraphs elaborate these factors:

### **1.2.1 Numerical inferiority**

Almost every conceptualization of minority is made on the basis of a presupposition that a minority is numerically inferior.<sup>11</sup> This numerical inferiority is to be determined by reference to the size of 'the rest of the population of a state'. In a situation where there is no clear majority, the expression 'the rest of the people' is interpreted to refer to the aggregate of all groups of the population of the state concerned.<sup>12</sup> The criticism raised against this point of view is that 'the comparison is between a culturally homogenous group and an amorphous one (the aggregate of all the rest)'.<sup>13</sup> The definition of Capotorti only speaks about numerical inferiority of a minority group but it is silent about the numerical strength of the group. But, it is now well settled that a minority must constitute a sufficient number for the state to recognize it as a distinct part of the society and to make efforts to protect and promote it.<sup>14</sup> In 1953, the Sub-Commission on

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11 Some scholars contend that although the term 'inferior' is used to indicate the numerical minority position of a group, a neutral term with no undesirable connotations would have been more suitable. See generally, Kristin Henrard (2000) *Devising an Adequate System of Minority Protection: Individual Human Rights, Minority Rights and the Right to Self-Determination*. The Hague: Martinus Nijhoff Publishing. p. 33; G. Gilbert (1992) 'The Legal Protection Accorded to Minority Groups in Europe', *Netherlands Year Book of International Law*, Vol. 23, p.73

12 Malcom N. Shaw (1992) 'The Definition of Minorities in International Law'. In Yoram Dinstein and Mala Tabory (eds.) *The Protection of Minorities and Human Rights*. London: Martinus Nijhoff Publishers. p. 25.

13 Philip Vuciri Ramaga (1992) 'Relativity of the Minority Concept', *Human Rights Quarterly*, Vol. 14, No. 3, p. 117.

14 G. Gilbert (1992) 'The Legal Protection Accorded to Minority Groups in Europe', *Netherlands Year Book of International Law*, Vol. 23, pp.72-73.

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'.<sup>15</sup> However, sufficiency of the number of persons in a group is certainly a question of fact depending on the characteristics and the surrounding social circumstances of the group concerned.<sup>16</sup> 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*,<sup>17</sup> 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.

### 1.2.2 Non-dominant position

Minority is not just a numerical phenomenon; rather it is a political and sociological reality. From a political point of view, a minority situation is based on the degree of political participation and social inclusion rather than on number of members of a specific group. In fact, minorities are possibly undermined not so much by their weaknesses in number, but by their exclusion from power.<sup>18</sup> Exclusive concentration on numerical strength for identifying minority groups generalizes that a group inferior in number is also inferior as regards its political status. This assumption very often proves to be false. For example, during the former apartheid regime in South Africa, the numerically inferior white population did not constitute a minority in need of special protection as they enjoyed all the powers while the majority Black population were excluded from politics.<sup>19</sup> This is why, non-dominant position in the society, as essential defining feature of a minority, recognizes that not every statistical minority is also a political minority, in need of special protection.<sup>20</sup> In this regard, reference

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15 Malcom N. Shaw (1992) 'The Definition of Minorities in International Law'. In Yoram Dinstein and Mala Tabory (eds.) *The Protection of Minorities and Human Rights*. London: Martinus Nijhoff Publishers. p. 25.

16 Philip Vuciri Ramaga (1993) 'The Group Concept in Minority Protection', *Human Rights Quarterly*, Vol. 15, No. 3, p. 577.

17 Communications 385/1985 and 359/1989.

18 Javaid Rehman (2000) *The Weaknesses in the International Protection of Minority Rights*. The Hague: Kluwer Law International. p. 16.

19 See Jennifer Jackson Preece (2005) *Minority Rights: Between Diversity and Community*. Cambridge: Polity Press. pp. 10-11

20 J. Robinson (1971) 'International Protection of Minorities: A Global View', *Israeli Yearbook on Human Rights*, Vol. 1, p. 61.



can be made to the definition of ‘minority’ offered by Professor Palley. According to her, minority means ‘any racial, tribal, linguistic, religious, caste or nationality groups within a nation state and which is not in control of the political machinery of the state’.<sup>21</sup>

### 1.2.3 Nationality

The definitions of minorities as offered by Capotorti and Deschenes rigidly maintain that minorities are citizens of the state they live in. Thus, they exclude refugees, foreigners and migrant workers who may arguably be regarded as minorities. However, in an article published in 1985, Capotorti himself dropped the requirement that members of a minority group be nationals of the state.<sup>22</sup> 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’.<sup>23</sup> Nevertheless, there remains a persistent confusion as to the national status of the claimant groups. Several of the recent minority rights instruments<sup>24</sup> make reference to the term ‘national’. This has provided some states with the opportunity to claim a limitation on the scope of minority status.<sup>25</sup>

### 1.2.4 Distinguishing ethnic, religious, or linguistic characteristics

Capotorti as well as Deschenes emphasizes distinguishing ethnic, religious, or linguistic characteristics of minorities. In fact, groups within a population may be considered minorities only when they differ from the rest of the population of the state in which they exist by reference to

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21 Claire Palley (1978) *Constitutional Law and Minorities*. London: Minority Rights Group. p. 3.

22 Francesco Capotorti (1985) ‘Minorities’. In Rudlof Bernhardt (ed.) *Encyclopedia of Public International Law*, Vol. 8. Amsterdam: North Holland Publishing. p. 385.

23 Human Rights Committee, General Comment 23, *The Rights of Minorities (Article 27)*, U.N. Doc.HRI/GEN/1/Rev.1 at 52, 1994, para. 5.1

24 These include the UN Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities (1992), and the Council of Europe’s Framework Convention for the Protection of National Minorities (1994).

25 Javaid Rehman (2000) *The Weaknesses in the International Protection of Minority Rights*. The Hague: Kluwer Law International. p. 17.

ethnicity, religion or language.<sup>26</sup> In this regard, the terms ‘religion’ and ‘language’ seem easy to understand and hardly leave any room for ambiguity. But how to define ‘ethnicity’? This term is currently used with a variety of different, but not necessarily complementary, meanings.<sup>27</sup> But there is no precise definition in international law and as such reliance has to be placed on secondary sources.<sup>28</sup> It has been since 1950 that the adjective ‘ethnic’ is used to refer to a particular category of minority groups.<sup>29</sup> Originally it was the adjective ‘racial’ that was used during the League of Nations period. The initial years of the UN also witnesses the same trend.<sup>30</sup> The UN Sub-Commission in 1950 replaced the term ‘racial’ with ‘ethnic’. This was because of non-scientific basis of racial categorization and for the term ‘racial’ being limited in scope referring only to hereditary physical features whereas the term ‘ethnic’ is more inclusive covering biological, cultural and historical characteristics.<sup>31</sup> Accordingly, ‘ethnic minority’, an expression preferred by contemporary international norms, addresses ‘racial minority’ as well. In the *Akayesu Case*, the ICTR offered a more restricted but precise definition stating that an ethnic group is generally defined as a group whose members share a common language or culture.<sup>32</sup> This definition may also be narrowed down and made more precise. Since, language is the essential distinguishing characteristic of linguistic minorities, culture in its broader sense may be, although not exclusively, considered as central to the definition of ‘ethnicity’. Based on the grammatical construction of Article 27 of the ICCPR, one can also infer that culture is indeed an attribute of ethnicity. This is simply by

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26 Manfred Nowak (1993) *UN Covenant on Civil and Political Rights: CCPR Commentary*. Strasbourg: Arlington. p. 491.

27 George Schopflin (2001) ‘Minorities and Democracy’. In Anna Maria Biro and Petra Kovacs (eds.) *Diversity in Action: Local Public Management of Multi-Ethnic Communities in Central and Eastern Europe*. Budapest: Open Society Institute. p. 10.

28 Javaid Rehman (2000) *The Weaknesses in the International Protection of Minority Rights*. The Hague: Kluwer Law International. p. 19.

29 See W. A. McKean (1983) *Equality and Discrimination under International Law*. Oxford: Clarendon Press. p. 144.

30 The GA Resolution 217C (III) of 1948, for example, made reference to ‘racial’ minorities and did not mention ‘ethnic’ to describe minority groups.

31 Malcom N. Shaw (1992) ‘The Definition of Minorities in International Law’. In Yoram Dinstein and Mala Tabory (eds.) *The Protection of Minorities and Human Rights*. London: Martinus Nijhoff Publishers. p. 17.

32 *The Prosecutor vs. Jean Paul Akayesu*, Case No. ICTR-96-4-T, para.512.

matching the reference to ‘ethnic, religious or linguistic’ in the initial part of the Article with that of ‘culture, religion or language’ in the last part.<sup>33</sup>

### 1.2.5 Collective will

Capotorti is of the view that a minority group should maintain a sense of solidarity that is directed towards preserving their culture, traditions, religion or language. This collective will, as an essential defining feature, is a subjective criterion. This subjective element, however, is not required to be expressed; rather it emerges from the fact that a given group has preserved its distinctive characteristics over a period of time.<sup>34</sup> The formulation of ‘collective will’ by Capotorti, however, only covers minority by will and excludes minority by force, *i.e.*, a minority that desires assimilation with the majority but is barred.<sup>35</sup> In this regard, the formulation of Deschenes appears broader to cover even the minorities by force since Deschenes narrowed down the collective will of the members of the group to achieving equality in fact and in law.

## 1.3 Implication of the absence of a precise definition of ‘minority’

The controversy on the definition of minorities over the years has prompted the scholars to question even the relevance of a precise definition. For the rights of minorities to be protected, is an agreement on who falls within the term ‘minority’ is essential? There are two schools of thought on this issue.

A group of scholars emphasize that the absence of a universally accepted definition is an impediment which appears insurmountable. According to them, a precise definition of the term ‘minority’ is imperative not only for practical reasons but also for theoretical clarity. According to Packer, the absence of a definition –

opens the door to possibly unfounded, unwarranted or ‘unjust’ invocations of the rights raises the prospect of social tension and conflict concerning

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33 Philip Vuciri Ramaga (1992) ‘The Bases of Minority Identity’, *Human Rights Quarterly*, Vol. 14, No. 3, p. 414.

34 Malcom N. Shaw (1992) ‘The Definition of Minorities in International Law’. In Yoram Dinstein and Mala Tabory (eds.) *The Protection of Minorities and Human Rights*. London: Martinus Nijhoff Publishers. p. 28.

35 For a brief account of minorities by will and minorities by force, see section 1.5.

the legitimacy of claimants and the full contents of their rights. It also poses a difficulty in assessing compliance by states.<sup>36</sup>

He also opines that the fear of states that minority rights are precursor to disintegration of the state - to separatist claims threatening the territorial integrity of the state - is prompted by the lack of clarity in international standards on the basic concepts on which they are premised.<sup>37</sup> Similarly Shaw contended that 'a precise definition may serve to minimize controversies by drawing the bounds in a clear fashion, thus fitting the relevant rights to undeniable claimants'.<sup>38</sup>

On the other hand, a group of scholars emphasize that the existence of a minority is a question of fact and not of definition. Capotorti maintains that 'application of the principles set forth in Article 27 of the Covenant cannot, therefore, be made contingent upon a 'universal' definition of the term 'minority', and it would be clouding the issue to claims the contrary'.<sup>39</sup> The Working Group established to draft the Declaration stated that 'the Declaration could function perfectly well without precisely defining the term as it was clear . . . to which group the term referred to in concrete cases'.<sup>40</sup> Thornberry maintains that the lack of a universal definition does not prevent a description of what is and has been understood by the term.<sup>41</sup> With a similar tone, Hannum opines that the absence of a widely accepted definition of 'minority' does not bar from using a common sense conception of the term.<sup>42</sup> According to Alfredsson

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36 John Packer (1996) 'On the Content of Minority Rights'. In Juha Raikka (ed.) *Do We Need Minority Rights*. The Hague: Martinus Nijhoff Publishers. p. 121.

37 John Packer (1996) 'On the Content of Minority Rights'. In Juha Raikka (ed.) *Do We Need Minority Rights*. The Hague: Martinus Nijhoff Publishers. p. 121.

38 Malcom N. Shaw (1992) 'The Definition of Minorities in International Law'. In Yoram Dinstein and Mala Tabory (eds.) *The Protection of Minorities and Human Rights*. London: Martinus Nijhoff Publishers. pp. 1-2.

39 Francesco Capotorti (1991) *Study on the Rights of Persons Belonging to Ethnic, Religious and Linguistic Minorities*. New York : United Nations. p. 564.

40 UN Doc. E/CN.4/1991/53, para.9.

41 Patrick Thornberry (1991) *International Law and the Rights of Minorities*. Oxford: Oxford University Press. p. 164.

42 Hurst Hannum (1991) 'Contemporary Developments in the International Protection of the Rights of Minorities', *Notre Dame Law Review*, Vol. 66, No. 5, p. 1431.

and Zayas, 'a precise definition is not necessary' simply because 'the answer is known in 90% of the cases'.<sup>43</sup>

## 1.4 Self-identification dilemma

Often it is argued that the identification of minorities is a matter of self-identification. This argument appears attractive in the sense that it does not recognize the competence of a state to identify its own minorities. But the problem arises when a minority group refuses to be identified as minority and claims the status of 'peoples'. Such refusal in most of the cases is primarily due to the intention of availing the right to self-determination, a right conferred on people but not on minorities.<sup>44</sup> However, this type of position of a group cannot be said to be well-founded on the principles of international law. Although the notion of 'peoples' has not yet been formally defined in international law,<sup>45</sup> the terms 'peoples' and 'minorities' are not always mutually exclusive and accordingly if a given minority has

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43 Gudmundur Alfredsson and Alfred de Zayas (1993) 'Minority Rights Protection by the United Nations', *Human Rights Quarterly*, Vol. 14, No. 1-2, p. 3.

44 On the right to self-determination, see G. Welhengama (2000) *Minorities' Claims: From Autonomy to Secession*. Aldershot: Ashgate Publishers; Alexis Heraclides (1991) *Self-Determination of Minorities in International Politics*. Oregon: Frank Cass; Jerom Wilson (1996) 'Ethnic Groups and the Right to Self-Determination', *Connecticut Journal of International Law*, Vol. 11, No. 3, pp.442-456; Ghanea Nazila and Xanthanki Alexandra (eds.) (2005) *Minorities, Peoples and Self-Determination*. Leiden: Martinus Nijhoff Publishers; Karen Knop (2002) *Diversity and Self-Determination in International Law*. Cambridge: Cambridge University Press; Hurst Hannum, (1996) *Autonomy, Sovereignty and Self-Determination: The Accommodation of Conflicting Rights*. Philadelphia: University of Philadelphia Press; A. Cassese (1995) *Self-Determination of Peoples: A Legal Reappraisal*. Cambridge: Cambridge University Press; Julie Dahlitz (ed.) (2003) *Secession and International Law*. The Hague: TMC Asser Press; Jan Klabbers (2006) 'The Right to be Taken Seriously: Self-Determination in International Law', *Human Rights Quarterly*, Vol. 28, No. 1, pp. 186-206; Martti Koskeniemi (1994) 'National Self-Determination Today: Problem of Legal Theory and Practice', *International and Comparative Law Quarterly*, Vol. 43, No. 2, p. 249; Avishai Margalit and Joseph Raz (1990) 'National Self-Determination', *Journal of Philosophy*, Vol. 87, No. 9, pp. 439-461; Christain Tomschat (ed.) (1993) *Modern Law of Self-Determination*. Dordrecht: Martinus Nijhoff Publishers.

45 See John B. Henriksen (2006) 'Oil and Gas Operation in Indigenous People's Lands and Territories in the Arctic: A Human Rights perspective', *Journal of Indigenous Peoples Rights*, Vol. 4, p. 26.

a right to be called ‘people’, it is certainly entitled to the right of self-determination.<sup>46</sup> If we look at the jurisprudence of the Human Rights Committee, it appears that ‘the existence of an ethnic, religious or linguistic minority in a given state party does not depend upon a decision by that state party but requires to be established by objective criteria’.<sup>47</sup> Herein, the terms ‘objective criteria’ leave no scope for criteria set by a group to refuse minority status. Accordingly, a group, if qualifies to be a minority group according to the established criteria, cannot be kept outside the purview of minority protection even if that group refuses to be identified as a minority. Another problem of self-identification arises when a group claims minority status based on sex, economic status or political identity and thereby identifies itself as sexual minority, economic minority or political minority. The basis of such identification is quite foreign to minority rights jurisprudence. Hence the protection of minority rights cannot *per se* be applicable for such groups. On the whole, it can be concluded that once we treat ‘minority’ as a category defined by the observed rather than by the observers, we are faced with a methodological problem.<sup>48</sup>

## 1.5 Minorities by will and minorities by force

‘Minorities by will’ and ‘minorities by force’ are terms engineered by Laponce.<sup>49</sup> According to him, a minority group that desires assimilation with the majority but is barred is a minority by force and, on the other hand, a minority that refuses such assimilation is a minority by will.<sup>50</sup> A minority by will consists of a group of persons, predominantly of common descent, who think of themselves as possessing a distinct cultural identity (which includes religion and language differences) and who evidence a

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46 See Francesco Capotorti (1990) ‘Are Minorities Entitled to Collective International Rights?’. In M. Tabory (ed.) *Israeli Yearbook of Human Rights*, Vol. 20, pp. 355-356.

47 Human Rights Committee, General Comment 23, *The Rights of Minorities* (Article 27), U.N. Doc.HRI/GEN/1/Rev.1 at 52, 1994, para.5.2.

48 Myron Weiner (1989) *The Indian Paradox: Essays in Indian Politics*. New Delhi: Sage Publications. p. 43.

49 See J. A. Laponce (1960) *The Protection of Minorities*. Berkeley: University of California Press. pp. 12-13.

50 J. A. Laponce (1960) *The Protection of Minorities*. Berkeley: University of California Press. p. 12.

desire to transmit this to succeeding generations.<sup>51</sup> This group is defined by J. Packer as a 'positive/organic (or voluntary) association'.<sup>52</sup> On the other hand, a minority by force is created by outside designation, invariably for negative purposes.<sup>53</sup> This group is defined by J. Packer as a 'negative association',<sup>54</sup> and by Wiessner as a 'non-organic (or involuntary) association'.<sup>55</sup> While minorities by will are defined by their real differences to the majority population/culture, minorities by force are defined by their imagined differences to the majority population/culture. The Ahmadiyas of Pakistan, who claim to be Muslims but the existing laws criminalize their identification as Muslims, can be regarded as an example of minority by force.<sup>56</sup>

## 1.6 National minorities

The term 'national minority'<sup>57</sup> appears to be a peculiarly European term, as it does not appear in the UDHR, the ICCPR, the ICESCR, the ACHR, or the ACHPR. It is the European Framework Convention for the

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51 Steven Whitley (2002) 'Non-Discrimination and Equality in the Right of Political Participation for Minorities', *Journal of Ethnopolitics and Minority Issues in Europe*, Issue. 2, p. 4.

52 John Packer (1999) 'Problems in Defining Minorities'. In B. Bowring and D. Fottrell (eds.) *Minority and Group Rights in the New Millennium*. The Hague: Martinus Nijhoff. p. 254.

53 Steven Whitley (2002) 'Non-Discrimination and Equality in the Right of Political Participation for Minorities', *Journal of Ethnopolitics and Minority Issues in Europe*, Issue. 2, p. 3.

54 John Packer (1999) 'Problems in Defining Minorities'. In B. Bowring and D. Fottrell (eds.) *Minority and Group Rights in the New Millennium*. The Hague: Martinus Nijhoff. p. 254.

55 Siegfried Wiessner (1996) 'Faces of Vulnerability: Protecting Individuals in Organic and Non-organic Groups'. In Gudmundur Alfredsson and Peter Macalister Smith (eds.) *The Living Law of Nations: Essays on Refugees, Minorities, Indigenous Peoples and The Human Rights of Other Vulnerable Groups*. Kehl: NP Engel. p. 221.

56 See Javaid Rehman (2000) *The Weaknesses in the International Protection of Minority Rights*. The Hague: Kluwer Law International. p. 18.

57 See generally, Jennifer Jackson Preece (1994) *National Minorities and the European Nation-States System*. Oxford: Clarendon Press; J. R. Valentine (2004) 'Towards a Definition of National Minority', *Denver Journal of International Law and Policy*, Vol. 32, No. 3, pp. 445-474; Thomas D. Musgrave (1997) *Self-Determination and National Minorities*. Oxford: Oxford University Press.

Protection of National Minorities, 1994<sup>58</sup> (FCNM) and some other European instruments that address the protection of ‘national minorities’,<sup>59</sup> a term quite unknown to other international minority-protection regimes.<sup>60</sup> However, the definition of the term remains a contested concept and it is not defined in any international human rights document - including those specifically addressing national minority concerns.<sup>61</sup> Generally speaking, a minority is designed as a ‘national minority’ if it shares its cultural identity with a larger community that forms a national majority elsewhere. Kymlicka defines national minorities as ‘groups who formed functioning societies on their historical homelands prior to being incorporated into a larger state’.<sup>62</sup> National minority in a European context always means a group rooted in the territory of a state, whose ethno-cultural features are markedly different from the rest of the society. In relation to the European regional instruments, some states also argue that ‘national minorities’ only comprise groups composed of citizens of the state.<sup>63</sup>

## 1.7 Old and new minorities

Sometimes a line of classification is drawn, particularly in Europe, between minorities based on the temporal duration of settlement in a given state. According to this classification, ‘old minorities’ consist of minorities historically settled in a state. They are also described as ‘historical’, ‘autochthonous’ or ‘traditional’ minorities. On the other hand, ‘new minorities’ consist of the migrants, asylum seekers, refugees and their

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58 For the text of the Convention, see *Human Rights Law Journal*, Vol. 16, 1995, p. 98.

59 However, some of the provisions of the FCNM may also protect other minorities. See Rainer Hoffman (2001) ‘Protecting the Rights of National Minorities in Europe: First Experiences with the Council of Europe Framework Convention for the Protection of National Minorities’, *German Yearbook of International Law*, Vol. 44, p. 237.

60 G. Gilbert (1999) ‘Minority Rights under the Council of Europe’. In P. Cumper and S. Wheatley (eds.) *Minority Rights in the ‘New’ Europe*. The Hague: Martinus Nijhoff Publishers. p. 55.

61 Jennifer Jackson Preece (2004) ‘National Minority Rights vs. State Sovereignty in Europe: Changing Norms in International Relations?’, *Nations and Nationalism*, Vol. 3, No. 3, p. 345.

62 Will Kymlicka (2001) *Politics in the Vernacular: Nationalism, Multiculturalism, and Citizenship*. Oxford: Oxford University Press. p. 54.

63 Asbjorn Eide (2001) *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, para. 9.



descendants, with a common cultural, ethnic and linguistic background, who are living on a more than merely transitional basis in a country other than that of their origin. Since European standards only recognizes national minorities – who are mostly ‘old minorities’, ‘new minorities’ are not recognized as minorities in the classical, conventional sense.<sup>64</sup> If we look at the international jurisprudence of universal application, it appears that Article 27 of the ICCPR confers rights on persons belonging to minorities that ‘exist’ in a state. In this connection, the Human Rights Committee has held that it is not relevant to determine the degree of permanence that the term ‘exist’ connotes.<sup>65</sup> Nevertheless, there is a considerable grey area in between the two categories. The WGM’s commentary to the UNDM affirms that those who have been established for a long time on the territory may have stronger rights than those who have recently arrived.<sup>66</sup> At the same time, this commentary suggests that the best approach is to avoid making an absolute distinction between ‘new’ and ‘old’ minorities by excluding the former and including the latter.<sup>67</sup>

## 1.8 Kin-minorities and kin-state

The term ‘kin minority’ refers to a minority group residing in a state that has a strong identity link to the majority population of a neighbouring state. Such neighbouring states are termed as kin-states. The terms ‘kin-minorities’ and ‘kin-states’ usually attract attention of the international community when kin-states pursue policies and extend protection for their kin-minorities. Even though there is no internationally recognized ‘right’ or ‘obligation’ of a state to protect its kin-minorities in other countries, there has been a detectable trend of states adopting policies, enacting

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64 For a critical analysis of the European standards on new minorities, see Steve Peers (2004) ‘New Minorities: What Status for Third-Country Nationals in the EU System?’. In Gabriel N. Toggenburg (ed.) *Minority Protection and the Enlarged European Union: The Way Forward*. Budapest: Open Society Institute. pp. 149-162; Roberta Medda Windischer (2009) *Old and New Minorities: Reconciling Diversity and Cohesion - A Human Rights Model for Minority Integration*. Baden: Nomos.

65 Human Rights Committee, General Comment 23, *The Rights of Minorities* (Article 27), U.N. Doc.HRI/GEN/1/Rev.1 at 52, 1994, para.5.2

66 See Asbjorn Eide (2001) *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, para. 10.

67 See Asbjorn Eide (2001) *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, para. 10.

legislation, engaging in international and bilateral instruments in the pursuit of what they perceive as a legitimate interest in the well-being of their kin abroad.<sup>68</sup> Consequently, kin-minorities, unlike minorities without a kin-state, are in a twofold minority status. They are treated as a minority by the home state and in parallel though with different repercussions by the kin-state.<sup>69</sup> There are examples where bilateral arrangements between neighbouring states for protection of kin-minorities have contributed to ensuring long-lasting peace and stability in the border regions. Such arrangements usually have better potentials of success when both the countries act as kin-states for protection of kin-minorities residing in their counterpart state. A more recent trend of protecting kin-minorities is legislation by kin-states.<sup>70</sup> Since 1990, many European states<sup>71</sup> have passed laws, usually known as status laws, conferring special protection to their kin-minorities residing in their neighbouring states. The Venice Commission characterizes it as 'a positive trend' as long as four basic principles of international law are respected. These principles are: (a) the territorial sovereignty of States; (b) *pacta sunt servanda*; (c) good neighbourly relations; and (d) human rights and fundamental freedoms, in particular, the prohibition of discrimination.<sup>72</sup>

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68 Natalie Sabanadze (2006) 'Minorities and Kin-States', *Helsinki Monitor*, Vol. 17, No. 3, p. 245.

69 George Schopflin (2003) 'Autonomy: Present and Past', *Regio-Minorities, Politics, Society* (English Edition), No. 1, p. 69.

70 See generally, Judit Toth (2003) 'Connections of Kin-minorities to the Kin-state in the Extended Schengen Zone', *European Journal of Migration and Law*, Vol. 5, No. 2, pp. 201-227; Csilla Hatvany (2006) 'Legitimacy of Kin-State Politics: A Theoretical Approach', *Regio-Minorities, Politics, Society* (English Edition), Vol. 2006, No.1, pp. 47-64; European Council for Democracy through Law (2002) *The Protection of National Minorities by their Kin-States*. Strasbourg: Council of Europe Publishing; Elizabeth Warner (2004) 'Unilateral Preferences Granted to Foreign National Minorities by a Kin-State: A Case Study of Hungary's Status Law', *Georgetown Journal of International Law*, Vol. 35, No. 2, pp. 379-432.

71 For example, Bulgaria, Germany, Greece, Hungary, Italy, Poland, Romania, Russia, Slovenia, Slovakia, and Turkey.

72 See Venice Commission (2001) *Report on the Preferential Treatment of National Minorities by Their Kin-State*. Available at: [www.venice.coe.int/docs/2001/CDL\(2001\)097-e.pdf](http://www.venice.coe.int/docs/2001/CDL(2001)097-e.pdf) (last accessed on May 29, 2009).

## 1.9 Minorities and indigenous peoples

Like ‘minority’, there is no internationally accepted legal definition of ‘indigenous people’.<sup>73</sup> The term ‘indigenous’ was originally used in the League Covenant to distinguish colonized peoples from their colonizers. Beginning with ILO Convention No. 107 (1957), it assumed a somewhat different meaning, referring to the ‘less advanced’ or unassimilated elements of an aboriginal population within the borders of an independent state.<sup>74</sup> The most cited definition, to understand who indigenous peoples are, has been introduced by Jose R. Martinez Cobo, the Special Rapporteur of the Sub-Commission on Prevention of Discrimination and Protection of Minorities.<sup>75</sup> According to Cobo:

Indigenous communities, peoples and nationals are those which, having a historical continuity with pre-invasion and pre-colonial societies that developed on their territories, consider themselves distinct from other sectors of the societies now prevailing on those territories, or parts of them. They form at present non-dominant sectors of society and are determined to preserve, develop and transmit to future generations their ancestral territories, and their ethnic identity, as the basis of their continued

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73 For history of the legal status of indigenous peoples, see Hurst Hannum (1988) ‘New Developments in Indigenous Rights’, *Virginia Journal of International Law*, Vol. 28, No. 4, pp. 649-678; Raidza Torres (1991) ‘Rights of Indigenous Populations: The Emerging International Norm’, *Yale Journal of International Law*, Vol. 16, No. 1, pp. 127-175; Elsa Stamatopoulou (1994) ‘Indigenous Peoples and the United Nations: Human Rights as a Developing Dynamic’, *Human Rights Quarterly*, Vol. 16, No. 1, pp. 58-81; Russell Lawrence Barsh (1986) ‘Indigenous Peoples: An Emerging Object of International Law’, *American Journal of International Law*, Vol. 80, No. 2, pp. 369-385; Siegfried Wiessner (1999) ‘Rights and Status of Indigenous Peoples: A Global Comparative and International Legal Analysis’, *Harvard Human Rights Journal*, Vol. 12, No. 1, pp. 57-128; S. James Anaya (1996) *Indigenous Peoples in International Law*. New York: Oxford University Press; Robert N. Clinton (1990) ‘The Rights of Indigenous Peoples as Collective Group Rights’, *Arizona Law Review*, Vol. 32, No. 4, pp. 739-747; S. James Anaya (1991) ‘Indigenous Rights Norms in Contemporary International Law’, *Arizona Journal of International and Comparative Law*, Vol. 8, No. 2, pp. 1-39.

74 Russel Lawrence Barsh (1987) ‘Evolving Conceptions of Group Rights in International Law’, *Transnational Perspectives*, Vol. 13, No.1. Available at: [www.burmalibrary.org/docs3/Barsh.htm](http://www.burmalibrary.org/docs3/Barsh.htm) (last accessed on 11 June, 2009).

75 Kamrul Hossain (2008) ‘Status of Indigenous Peoples in International Law’, *Miskolc Journal of International Law*, Vol. 5, No. 1, p. 11.

existence as peoples, in accordance with their own cultural patterns, social institutions and legal system.<sup>76</sup>

This definition is based on four criteria: first, priority in time; second, voluntary perpetuation of cultural uniqueness; third, self-identification as indigenous; and fourth, the experience of subjugation, marginalization, dispossession, exclusion, and discrimination by the dominant population in a society.<sup>77</sup>

The definition of 'indigenous people' confirms that international law treats indigenous groups as distinct from minority groups. But there are groups that fall under the legal definitions of both categories. More precisely speaking, while an indigenous group may qualify as a minority but not all minorities are indigenous.<sup>78</sup> Clearly the definitional elements particularly such as non-dominant position, cultural distinctiveness are features common to both indigenous groups and minorities. Viewed from this perspective, there is little debate that indigenous groups can be treated as minorities as long as they are numerically inferior to the rest of the population of the state in which they live. However, for example, in Bolivia and Guatemala, the indigenous groups are numerically superior and hence cannot be treated as minorities.

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76 Study of the Problem of Discrimination against Indigenous Populations by Jose R. Martinez Cob, Special Rapporteur of the Sub-Commission on Prevention of Discrimination and Protection of Minorities (E/CN.4/Sub.2/1986/7/Add.4).

77 Yousef T. Jabareen (2008) 'Towards Participatory Equality: Protecting Minority Rights under International Law', *Israel Law Review*, Vol. 41, No. 3, p. 659.

78 As far as Article 27 of the ICCPR is concerned, indigenous peoples are in many instances classified as both minority and indigenous at the same time. See Kamrul Hossain (2008) 'Status of Indigenous Peoples in International Law', *Miskolc Journal of International Law*, Vol. 5, No. 1, p. 24.

## CHAPTER TWO

# HISTORY OF THE PROTECTION OF MINORITIES

### 2.1 Introduction

Historically, the failure to protect the rights of minorities within states has resulted in major internal and international conflicts. Such conflicts, on the other hand, prompted international concerns and responsibilities that arguably collide with the principle of non-interference in the internal affairs of sovereign states.<sup>1</sup> Nevertheless, it comes as no surprise that international minority rights have lagged behind the development of other branches of human rights.<sup>2</sup> This is primarily because international law is made by the governments, most of whom are reluctant to recognize even the existence of minorities in their territories let alone to ensure their protection and enjoyment of legal rights. This chapter offers a brief account of whatever progress international community has achieved throughout the ages.

### 2.2 International protection of minority rights before the First World War

International concern for protection of minorities predates the modern state system, and can be traced as far back as the high middle ages and perhaps earlier still.<sup>3</sup> The Edict of Toleration issued by the Roman emperor Galerius Maximianus in 311 A.D.<sup>4</sup> and the Edict of Milan issued

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1 Rita Manchandra (ed.) (2006) *The No-Nonsense Guide to Minority Rights in South Asia*. New Delhi: South Asia Forum for Human Rights. p. 3.

2 Marc Weller (ed.) (2005) *The Rights of Minorities*. New York: Oxford University Press. p. 1.

3 See Carlile Aylmer Macartney (1934) *National States and National Minorities*. London: Oxford University Press. pp.157-159.

4 See Henry Bettenson and Chris Maunder (eds.) (1999) *Documents of the Christian Church*. Oxford: Oxford University Press. p. 16.

by the Roman emperor Constantine Augustus in 313 A.D.<sup>5</sup> safeguarded the Christian minority.<sup>6</sup> Vijapur points out that as early as the seventh century, the Prophet Mohammad drafted the 'Constitution of Medina', under which minority groups were protected. In particular, Christians and Jews were allowed, as per the Islamic law of religious minorities,<sup>7</sup> to practice their religions and cultures and to self-administer their personal laws.<sup>8</sup> In 1250, the French king Saint Louis pledged himself as the protector of Maronite Christians, a religious minority. This promise underwent periodical renewal by subsequent French monarchs.<sup>9</sup>

The rise of modern state system in the sixteenth and seventeenth centuries brought the issues of minority groups in the forefront of international law discourse.<sup>10</sup> From then onward, international protection of minorities remained, for several centuries, an exclusive European matter. The treatment accorded to religious minorities in a number of states in Europe was the first to attract international attention.<sup>11</sup> The Ottomans did experiment with the *millet* system to guarantee certain rights for non-Muslim religious and ethnic minorities.<sup>12</sup> This system granted autonomy and recognition to religious groups and gave them the right to

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5 See Henry Bettenson and Chris Maunder (eds.) (1999) *Documents of the Christian Church*. Oxford: Oxford University Press. p. 17.

6 Malcom D. Evans (2004) 'Historical Analysis of Freedom of Religion or Belief as a Technique for Resolving Religious Conflict'. In Tore Lindholm *et al.* (eds.) *Facilitating Freedom of Religion or Belief: A Deskbook*. Leiden: Martinus Nijhoff Publishers. p. 2.

7 See generally, Najwa Al-Qattan (1999) 'Dhimmi in the Muslim Court: Legal Autonomy and Religious Discrimination', *International Journal of Middle East Studies*, Vol. 31, No. 3, pp. 429-444; Sayyed Qutb (2002) 'Citizenship Rights of Non-Muslims in the Islamic State of Hakimiyya', *Islam and Christian Muslim Relations*, Vol. 13, No. 2, pp. 163-188; Bat Ye'or (1985) *The Dhimmi: Jews and Christians under Islam*. London: Associated University Press; Abdullahi A. An-Naim (1987) 'Religious Minorities under Islamic Law and the Limits of Cultural Relativism', *Human Rights Quarterly*, Vol. 9, No. 1, pp. 1-18.

8 Abdulrahim P. Vijapur (2006) 'International Protection of Minority Rights', *International Studies*, Vol. 43, No. 4, p. 368.

9 Carlile Aylmer Macartney (1934) *National States and National Minorities*. London: Oxford University Press. p. 161.

10 Patrick Thornberry (1991) *International Law and the Rights of Minorities*. Oxford: Oxford University Press. p. 1.

11 See Tore Modéen (1969) *The International Protection of National Minorities in Europe*. Abo: Abo Akademi. p. 35.

12 Jay A. Sigler (1983) *Minority Rights: A Comparative Analysis*. Connecticut: Greenwood Press. pp. 70-71.