



Development of Minorities' Rights and Critical Analysis of Contemporary Comparative International Human Rights Law for their Protection

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Abstract

Minorities have been a controversial issue throughout human's history; their legal protection has been even more problematic. It took hundreds of years to define the term 'minority' but even the definition is problematic. The paper traces the development of minorities' protection in international law, its definition and the contemporary comparative regional and international human rights law on the issue.

Keywords: Minority, definition, development, protection, convention, standards, international, regional.

Introduction

Protection of minorities has been one of the oldest concerns of international law¹, yet the word "minority" is tricky enough to be defined as the problem of defining "the minorities (is not) as susceptible of solution as those of physics and mathematics"². Some attempts have been made to define the term. First of all the problem of defining them and their definition will be discussed so that we could know whose rights we are discussing about.

The paper also traces the development of minority rights. We shall see that European history furnishes examples of minority protection through international law instruments (i.e. treaties) from the time as early as 1615 AD. In the medieval age the focus has been mainly on the protection of religious minorities. However, "the new era in Europe developed treaty protection in more secular style" (Thornberry P., International Law and the Rights of Minorities). In twentieth century, one of the major developments which the post World War One era witnessed was that the peace treaties signed then included a number of provisions for the protection of minorities. With failure of League of Nations, the system of minority protection, after the Second World War was also replaced by the United Nation's Charter and Universal Declaration of Human Rights³. But neither the Charter nor the UDHR has any direct reference to 'Minority'⁴. Later on instruments specifically dedicated to minorities protection, both at UN and Regional level, were enacted.

Later part of the study covers the development of minority rights from World War Two till present, the critical analysis of the existing instruments containing minorities' rights and the implementation mechanisms. This part, out of necessity, is divided into two parts: International and Regional standards. In conclusion, we shall see that whether rights of minorities are

adequately protected? What needs to be done, if they are not? And if they are, how can they be further protected?

What constitutes minority?

"Who is minority? Who defines minority? Who are the beneficiaries of minority rights?"⁵ International law found it difficult to answer these questions. Hence there is no legally binding and generally accepted definition of minority up to date. It seems paradoxical to discuss the right of 'people' who could not be identified yet. As for example, the Romanian government in 19th century constantly attempted to exclude Jews from constitutional rights offered to all Romanians by defining them as foreigners. D. Schutter says that one obstacle to the protection of minorities rights, both at international and regional level, may reside in the absence of a generally agreed upon definition of minorities⁶. There are a number of factors behind the difficulty to define the minority: Some people, who can be called as minority, may live in one geographical area separated from the rest of the population, while other may live scattered in different parts of the State. Some minorities may have, more or less, autonomy while others may not have it at all. Some minorities may have a strong 'sense of solidarity directed toward preserving their distinct identity' while in other minorities this sense of solidarity may be weaker. Some minorities may live in one State, while other may have existence trans-border, in more than one States.

Despite the difficulties many a definitions of "minorities or national minorities" have been proposed within the international organizations⁷. Special Rapporteur Francesco Capotorti, while drafting a study in 1977 for the UN Sub-Commission on the Prevention of Discrimination and Protection of Minorities, also formulated a definition. According to him, 'minority' is:

"A group numerically inferior to the rest of the population of a State, in a non-dominant position, whose members-being

nationals of the State possess ethnic, religious or linguistic characteristics differing from those of the rest of the population and show, if only implicitly, a sense of solidarity, directed towards preserving their culture, traditions, religion or language”⁸.

Jules Deschenes, charged with the study, by the same body in 1985, of the question of definition of minorities, also gave a definition, which slightly differs from that of Capotorti’s. Similarly Parliamentary Assembly of the Council of Europe also defined “National Minority”⁹. Although neither of them is legally binding, they serve as reference to determine what the term ‘minority’ may mean in international law.

The basic feature of Capotorti’s definition is a combination of both the objective and subjective criteria for determining the minority. Objective criteria would involve factual analysis of a group such as distinct entity within the State possessing stable ethnic, religious or linguistic characteristics that differ from the rest of the population. Subjective criteria mean that there exists a sense of solidarity, directed towards preserving the distinctive characteristics of the group¹⁰. But the identification of a minority group on the evaluation of both the objective and subjective criterion seems onerous and difficult. (Rehman J., International Human Right Law) The proposition of numerical inferiority for a people to be qualified as minority is also worth attention. For sometimes people, even though they are in numerical majority, will have to be considered as minority because they are in non-dominant position; as was the case of Black African in South Africa under the apartheid. (Rehman J., International Human Right Law) The nationality criterion has also been often criticized¹¹; migrants, workers, refugees, etc are seemed to be vulnerable because of the nationality criteria. This is also often questioned as to whether or not persons who belong to certain political groups or persons with particular sexual orientations (gay, lesbian, transgender) fall under the definition of minority? (Minority Rights: International Standards and Guidance for Implementation (United Nations, New York and Geneva)

Development of Minority Rights

Although J. Rehman and D. Schutter both start their discourses ‘customarily’ from the League¹², however, Thornberry sees the minority rights back in the seventeenth century, when the Austro-Ottoman Treaty was signed in 1615 AD. The emergence of the National State in sixteenth and seventeenth centuries and the consequent “ideals of national unity, manifested by a centralization of power, a common language, culture and religion, fundamental to the self-identification of the States”, says Thornberry, “tended to express themselves in intolerant attitudes and repression of those who were perceived as ‘others’” (Thornberry P., International Law and the Rights of Minorities). During the seventeenth and eighteenth centuries treaties meant for minorities protection mainly focused on the religious rights and liberties¹³. However, “the new era in

Europe” after the French and American Revolutions, “A World Restored”, in the words of Henry Kissinger¹⁴ developed treaty protection in more secular style (Thornberry P., International Law and the Rights of Minorities). For example first article of the Final Act of the Congress of Vienna (1815 AD) reads as:

“The Poles, respectively subjects of Russia, Austria and Prussia, shall obtain a representation of their National Institutions regulated according to the mode of political existence that each of these Governments to which they belong will judge useful and appropriate to grant them.”

This trend i.e. protection of minorities on seculars basis can be seen in a number of treaties of nineteenth century, for example, article XLIV of the Treaty of Berlin, 1878 provides for civil and political rights, freedom and outward exercise of worship, and equal treatment of foreigners in Romania. This mechanism of protection of minorities continued in the twentieth century but the main problem was implementation; it “was condemned to failure for the inadequacy of its scope, the vagueness of its substantive provisions, rudimentary nature of its machinery and organization, and the uncertainty, ineffectiveness and susceptibility to abuse its sanctions”¹⁵.

For the Allied and Associated Powers, when they were clearing the mess of First World War, one issue, amongst others, was the protection of ‘racial, linguistic and religious minorities.’ The peace settlement included a number of Minority Treaties (Thornberry P., International Law and the Rights of Minorities). The basic purpose of the League’s minority regime was twofold: “to guarantee equality with the majority population for the members of minority group and to ensure that minority could preserve its characteristics and tradition for without the latter, the former amounted to little more than assimilation”¹⁶. Before the League completely collapsed the weaknesses in its minority regime were arising out, however, it received the final blow with the bursting out of the Second World War. After United Nations replaced the League one important question was the fate of obligations incurred under the League’s treaties system. A UN Study held that “between 1939 and 1947 circumstances as a whole changed to such an extent that, generally speaking, the system should be considered as having ceased to exist”¹⁷.

The idea of universal protection of human rights and fundamental freedom, based on equality and non-discrimination, was in vogue at the time when UN Charter and Universal Declaration of Human Rights were being drafted which, it was believed, could protect not only minorities but all human beings in all countries; this is the reason why we do not see any direct reference to ‘minorities’ either in the Charter or in the UDHR. But the necessity of special provisions for protection of minorities was felt very soon.

(D). Minority Rights UN Standards: After nineteen years of its establishment, Sub-Commission on Prevention of

Discrimination and Protection of Minorities succeeded to insert a provision on minority protection in the draft of International Covenant on Civil and Political Rights (ICCPR)¹⁸. Article 27 is the most important, legally binding and generally accepted provision of current international law which provides protection to minorities. It reads as:

“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 other members of their group, to enjoy their own culture, to profess and practice their own religion or to use their own language.”

Keeping in mind the Cold War age, article 27 can be considered as a mile stone achievement, however it is criticized on many grounds: The wordings of the article invite the State parties to deny that any minority exists within their national boundaries; it does not impose positive obligations on the States. The sole obligation of the States is “not to deprive or deny members of the minority group the status they were already enjoying” (Rehman J., International Human Right Law). Further wordings of the article suggest that it recognizes only the long established minorities and prevent and discourage the formation of new minorities (Rehman J., International Human Right Law).

Human Rights Committee (HRC) in its General Comment No. 23¹⁹, cleared all these ambiguities, it said that the decision of a State party cannot determine that whether a minority exist in its territories or not; it requires objective and subjective criteria to be determined, and that the nature of the rights contained in the Art 27 suggest that the rights belong to persons belonging to minorities who need not be the citizens or permanent residents of the State. As for obligations of the State, HRC said that Art. 27 should be interpreted with liberal approach which requires the State to take positive measures for the effective enjoyment of the rights conferred; by restrictive approach Art. 27 would be rendered meaningless.

As for protecting the minorities’ rights in practice: HRC stroke a nice balance between the rights of the collective and those of individuals in *Sandra Lovelace v. Canada*²⁰ when it accepted the need for restrictions on the right to residence on a reserve but, required that such limitations affecting the rights of individual members of minority must be non-subjective and reasonable and be necessary to preserve the identity of the group.

With the end of Cold War “a period of revelation”²¹ started. The Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities, 1992²², intended to cover the shortcomings of article 27 of ICCPR, was another milestone achievement for protection of minorities. The striking features of the Declaration are: its language, as compared to article 27 of ICCPR, is stronger; States are obliged “to protect the existence and the national, or ethnic, cultural, religious and linguistic identity of minorities within their respective territories and shall encourage conditions for the promotion of that

identity”²³. It imposes positive obligations on the States to adopt “appropriate legislative and other measures”²⁴ for the protection and development of minorities. The Declaration gives minorities the right to participate effectively in the decision making process on the national, and where appropriate, on the regional level. Declaration also calls for non-discrimination against minorities. But its main problem is that it is just a General Assembly, non-binding, resolution and its impact on international law is not clear, yet it “has become the most important frame of reference when questions regarding minorities are discussed” (Hilpold P., UN Standard Setting in the Field of Minority Rights).

High Commissioner for Human Rights, a post established in 1993 by UN General Assembly,²⁵ establishment of the Working Group on Minorities in 1995²⁶, and appointment of Independent Expert on Minorities, are the manifestation of UN institutional building up to promote and protect minority rights.

(II). Minority Rights Regional Standards: Regional organizations were encouraged to set up their own mechanism of human rights protection by the modesty with which human rights were addressed within the UN, (Schutter O.D., International Human Rights Law) “although concern for minority rights has not been a strength of any of these systems.”(Rehman J., International Human Right Law)

Europe

Within the Council of Europe, Framework Convention for the Protection of National Minorities (FCNM), 1994 is “the most important international instrument to date on minority protection”²⁷. Salient features of the Convention are: equality, non-discrimination, undertaking on behalf of State parties to take measure, in the fields of education and research to foster knowledge of culture, history, language and religion of the national minorities, and non-interference with the right of persons belonging to national minorities to establish and maintain free and peaceful contacts with persons lawfully staying in other States, particularly with whom they share ethnic, cultural, linguistic or religious identity. Analysis of the Convention shows that it has weaknesses too: it failed to define the ‘national minority’. The absence of definition of ‘national minority’ is further aggravated by the ‘margin of appreciation’; States parties are given the discretion to qualify the minorities who can benefit from the Convention. But the Advisory Committee said that for application of FCNM it is not necessary that “the authorities should in their domestic legislation and practice use the term “national minority” to describe the group concerned”²⁸. Convention emphasizes on individual rights as opposed to collective group rights and it has a weak complaint procedure (Rehman J., International Human Right Law).

European Charter for Minority Languages was adopted by the Council of Europe in 1992 to protect the regional and minority languages spoken in the Europe. But it does not “resolve

immigration phenomena in the sense of groups speaking a different language in the country of immigration or non-European groups who have migrated into Europe and become the nationals of the receiving State²⁹.

Various provisions of European Convention on Human Rights protect the rights of minorities; however, it is only article 14 and Protocol 12 which makes direct reference to minorities. Contribution of European Court of Human Rights to minority protection is considerable but in majority of the cases the protection has been on the basis of general provisions of equality, non-discrimination, right to private and family life, right to peaceful assembly and association³⁰ etc of ECHR.

European Union's European Charter of Fundamental Rights has no reference to minority, although article 22 provides for respect of cultural, religious and linguistic diversity. Organization for Security and Co-operation in Europe, a non-legal body, promotes the rights of minorities; identifies and seeks early resolution of ethnic tension that might endanger peace and stability.

Africa

"The notion of 'minorities' in Africa can be difficult, as often entire populations consists of numerical minorities; Zambia, for instance, has 70 ethno-linguistic groups, none of which constitutes a majority."³¹ African Charter on Human and People's Rights though covers a wide range of rights than either ECHR or the American Convention on Human Rights as it contains individual as well as collective rights yet it does not make any reference to minorities as such. But like other human rights conventions there are various provisions in the Charter that afford protection to minorities, for example, article 2 says that the Charter must guarantee rights "without distinction of any kind such as race, ethnic group, colour, sex, language, religion, political or other opinion, national and social origin, fortune, birth or other status". Other provisions in the Charter protecting the minorities are: right to equality before the law³²; right to take part in the cultural life of one's community,³³ People's right to equality,³⁴ and right to self-determination³⁵. Right to self-determination is considered by the African Commission on Human and People's Rights in only one case, brought by people of Katanga, in what was then known as Zaire. The Commission held that a variant of self-determination that is not incompatible with the sovereignty and territorial integrity of Zaire must be exercised by Katanga. It further held that self-determination cannot be equated with secession³⁶. In *Legal Resources Foundation v. Zambia*,³⁷ LRF alleged the Zambia Amendment Act, 1996 as discriminatory against 35% of the Zambian population as it provided that anybody who intends to contest the presidential election must prove that both his parents are/were Zambian by birth or descent. Commission found violations of Articles 2, 3(1) and of 13 of the Charter.

America

The main human rights instruments on Western Hemisphere are the American Declaration on the Rights and Duties of Man, 1948, the American Convention on Human Rights, 1969 and its additional Protocol, known as Protocol of San Salvador (1990). Neither of them has any reference to 'minority'; the main source of protection to minorities comes from the general provisions of equality and non-discrimination, for example, in Declaration, right to equality before law,³⁸ freedom of religion and expression,³⁹ right to private and family life and protection of honor,⁴⁰ right to education,⁴¹ right to participate in cultural life,⁴² freedom of association⁴³. Inter-American Commission on Human Rights has the jurisdiction to investigate individual complaints or to prepare country specific reports. But as the Declaration is not legally binding, States are not obliged to respond directly to Commission's finding. But "a public report by the Commission is a powerful means of exercising political pressure to improve human rights"⁴⁴.

Legal and Judicial protection to minorities is provided by American Convention on Human Rights and Inter American Court of Human Rights. Convention is legally binding among the signatory States. The Court's decisions are legally binding but acceptance of its jurisdiction is optional even for those States that are parties to the Convention. But the contribution of the Court is still significant to minority protection e.g. in *The Yean and Bosico Children v. Dominican Republic*,⁴⁵ where two girls born in Dominican Republic were refused birth certificates on the basis of being of Haitian descent and consequently they could not go to school, the Court found racial discrimination and violation of a number of articles of ACHR.

Conclusion

Hundreds of years ago only religious minorities have been concern of international law. But after the French and American revolutions protection has been on rather secular basis. The League established an elaborate system of minority protection but it also failed and was replaced by UN. Authors of UN Charter and UDHR were wearing human rights and minority rights found no buyer (Andre L., *Minority as inferiority: minority rights in historical perspective*); there is no reference to minority either in the Charter or in the UDHR. Instruments specific for minority protection, however, were enacted later. After the end of Cold War progress in 'adequate protection of minorities' is considerable. But the UN Declaration on Minorities, the most important minority document, needs to be converted to a binding treaty; implementation mechanism also needs to be reformed.

The same difficulties have been reflected on regional levels. Various instruments and institutions in Europe are playing important roles to promote and protect minority rights, though a lot needs to be done; OSCE is highly recommended to be converted to a binding treaty. Minorities in Africa and America are not that fortunate as in Europe. For example, African Charter on Human and People's Rights does not equate

minorities with people and in America we do not see any minority specific instrument.

“Minority Rights has been a problematic issue for international law to handle.” (Rehman J., International Human Right Law) But it needs a concerted effort on the part of international community to ‘adequately protect’ them otherwise “Nothing, I venture to say, is more likely to disturb the peace of the world than the treatment which might, in certain circumstances be meted out to minorities”.

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