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PROTECTION OF MINORITIES: A SOUTH ASIAN DISCOURSE

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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 1

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 'minority'.¹ 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.² 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 makes it difficult to formulate a solution of universal application.³ Consequently, international law has found it difficult to provide any firm guidelines in relation to defining the concept.⁴ Both states and the potential minorities themselves obstruct the process of defining the scope of the term.⁵ 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'.⁶

In legal literature and official documents, the most widely acknowledged definition is the one formulated by Capotorti.⁷ For the purpose of his study on

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- 1 Francesco Capotorti, *Study on the Rights of Persons Belonging to Ethnic, Religious and Linguistic Minorities*, New York, United Nations, 1991, p. 5.
 - 2 Javaid Rehman, *The Weaknesses in the International Protection of Minority Rights*, Hague, Kluwer Law International, 2000, p.14.
 - 3 See, Philip Vuciri Ramaga, "Relativity of the Minority Concept", *Human Rights Quarterly*, vol.14, no.3, 1992, p.112.
 - 4 Javaid Rehman, *The Weaknesses in the International Protection of Minority Rights*, Hague, Kluwer Law International, 2000, p.14.
 - 5 Rhona K. M. Smith, "The Fate of Minorities – Sixty Years On", *Web Journal of Current Legal Issues*, vol.1, 2009, available at: <http://webjcli.ncl.ac.uk/2009/issue1/smith1a.html> (last accessed on May 21, 2009).
 - 6 See, section 1.2 for details.
 - 7 Jelena Pejic, "Minority Rights in International Law", *Human Rights Quarterly*, vol.19, no.3, 1997, p.671.

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.⁸

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.⁹

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 debate concerning the definition of the term 'minority'.¹⁰

1.2 Identifying minorities: Factors and criteria of consideration

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

9 Jules Deschenes, "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, *Democracy, Minorities and International Law*, London, Cambridge University Press, 2005, p.20.

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 the 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.¹¹ 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.¹² 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)".¹³ Although the definition of Capotorti only speaks about numerical inferiority of a minority group, 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 justify the state making the effort to protect and promote it.¹⁴ In 1953, the Sub-Commission on the Prevention of Discrimination and the Protection of Minorities provided that "minorities must include a sufficient number of persons to preserve by

11 Some scholars argue that although the use of the term 'inferior' is meant to indicate that numerical minority position of the group is required, a neutral term with no undesirable connotations would have been suitable. See generally, Kristin Henrard, *Devising an Adequate System of Minority Protection*, Hague, Martinus Nijhoff Publishing, 2000, p.33; G. Gilbert, "The Legal Protection Accorded to Minority Groups in Europe", *Netherlands Year Book of International Law*, vol.23, 1992, p.73

12 Malcom N. Shaw, "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, 1992, p.25.

13 Philip Vuciri Ramaga, "Relativity of the Minority Concept", *Human Rights Quarterly*, vol.14, no.3, 1992, p.117.

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

themselves their traditional characteristics".¹⁵ However, sufficiency of the group is certainly a question of fact depending on the nature of the characteristics and the social environment of the group.¹⁶ 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*,¹⁷ 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 numbers of members of a specific group. In fact, minorities are possibly undermined not so much by their weaknesses in numbers, but by their exclusion from power.¹⁸ Identifying minority groups only on the basis of numbers would mean to generalize the assumption that a group inferior in numbers is also inferior as regards its political status – an assumption which proves sometimes 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.¹⁹ 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.²⁰ In this regard, reference can be made to the definition of 'minority' offered by Professor Palley. According to her, minority means "any racial, tribal, linguistic, religious, caste or

15 Malcom N. Shaw, "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, 1992, p.25.

16 Philip Vuciri Ramaga, "The Group Concept in Minority Protection", *Human Rights Quarterly*, vol.15, no.3, 1993, p.577.

17 Communications 385/1985 and 359/1989.

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

19 See, Jennifer Jackson Preece, *Minority Rights: Between Diversity and Community*, Polity Press, 2005, P. 10-11

20 J. Robinson, "International Protection of Minorities: A Global View", *Israeli Yearbook on Human Rights*, 1971, p.61.

nationality groups within a nation state and which is not in control of the political machinery of the state".²¹

1.2.3 Nationality

The definition of minorities as offered by Capotorti and Deschenes rigidly maintains 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 the minority be nationals of the state.²² 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".²³ Nevertheless, there remains a prevalent confusion as to the national status of the claimant groups. Several of the recent minority rights instruments²⁴ make reference to the term 'national'. This has provided some states with the opportunity to claim a limitation on the scope of minority status.²⁵

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 ethnicity, religion or language.²⁶ In this regard, the terms 'religion' and 'language' seem easy to

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

22 Francesco Capotorti, "Minorities", in Rudlof Bernhardt (ed.), *Encyclopedia of Public International Law*, vol.8, 1985, 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, *The Weaknesses in the International Protection of Minority Rights*, Hague, Kluwer Law International, 2000, p.17.

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

understand and hardly leave any room for ambiguity. But, how to define 'ethnicity'?

The term 'ethnicity' is currently used with a variety of different, and not necessarily complementary, meanings.²⁷ But, there is no precise definition in international law and as such reliance has to be placed on secondary sources.²⁸ It has been since 1950 that the adjective 'ethnic' is used to refer to a particular category of minority groups.²⁹ Originally it was the adjective 'racial' that was used during the League of Nations period and later on during the initial years of the UN.³⁰ The UN Sub-Commission replaced the term 'racial' with 'ethnic' in 1950 because of the non-scientific basis of racial categorization and its being limited in scope in that it refers only to hereditary physical features, as opposed to the more inclusive meaning of 'ethnic' which covers biological, cultural and historical characteristics.³¹ Accordingly, the use of 'ethnic minorities' preferred by contemporary international norms covers 'racial minorities' 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.³² 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 matching the reference to "ethnic, religious or linguistic" in the initial part of the Article with "culture, religion or language" in the last part.³³

27 George Schopflin, "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, 2001, p.10.

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

29 See, W. McKean, *Equality and Discrimination under International Law*, Oxford, Clarendon Press, 1983, p.144.

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

31 Malcom N. Shaw, "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, 1992, p.17.

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

33 Philip Vuciri Ramaga, "The Bases of Minority Identity", *Human Rights Quarterly*, vol.14, no.3, 1992, p.414.

1.2.5 Collective will

Capotorti is of the view that a minority group should maintain a sense of solidarity, 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 kept its distinctive characteristics over a period of time.³⁴ The formulation of the 'collective will' by Capotorti, however, only covers minority by will and excludes minorities by force, i.e., minority that desires assimilation with the majority but is barred.³⁵ 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 and conflict concerning the legitimacy of claims and the full contents of their rights. It also poses a difficulty in assessing compliance by states".³⁶ 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

34 Malcom N. Shaw, "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, 1992, p.28.

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

36 John Packer, "On the Content of Minority Rights", in Juha Raikka (ed.), *Do We Need Minority Rights*, Hague, Martinus Nijhoff Publishers, 1996, p.121.

standards on the basic concepts on which they are premised.³⁷ Similarly Shaw contended that “a precise definition may serve to minimize controversy by drawing the bounds in a clear fashion, thus fitting the relevant rights to undeniable claimants”.³⁸

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”.³⁹ 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.⁴⁰ Thornberry maintains that the lack of a universal definition does not prevent a description of what is and has been understood by the terms.⁴¹ 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.⁴² According to Alfredsson and Zayas, “a precise definition is not necessary”, as “the answer is known in 90% of the cases”.⁴³

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, problem arises when a minority group refuses to be identified as minority

37 John Packer, “On the Content of Minority Rights”, in Juha Raikka (ed.), *Do We Need Minority Rights*, Hague, Martinus Nijhoff Publishers, 1996, p.121.

38 Malcom N. Shaw, “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, 1992, pp.1-2.

39 F. Capotorti, *Study on the Rights of Persons Belonging to Ethnic, Religious and Linguistic Minorities*, New York, United Nations, 1991, para.564.

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

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

42 Hurst Hannum, “Contemporary Developments in the International Protection of the Rights of Minorities”, *Notre Dame Law Review*, vol. 66, 1991, p.1431.

43 Gudmundur Alfredsson and Alfred de Zayas, “Minority Rights Protection by the United Nations”, *Human Rights Quarterly*, vol.14, no.1-2, 1993, p.3.

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.⁴⁴ However, this 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,⁴⁵ the terms 'peoples' and 'minorities' are not always mutually exclusive and accordingly if a given minority has a right to be called 'people', it is entitled to the right of self-determination.⁴⁶ 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".⁴⁷ Herein, the terms 'objective criteria' leaves 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

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

45 See, John B. Henriksen, "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, 2006, p. 26.

46 See, Francesco Capotorti, "Are Minorities Entitled to Collective International Rights?" *Israeli Yearbook of Human Rights*, vol. 20, 1990, 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.

political identity and thereby identify 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 conceive of a minority as a category defined by the observed rather than by the observers, a self-definition by a community itself rather than by others, we are faced with a methodological problem of considerable proportion.⁴⁸

1.5 Minorities by will and minorities by force

‘Minorities by will’ and ‘minorities by force’ are terms engineered by Laponce.⁴⁹ 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.⁵⁰ Minorities by will consist 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 desire to transmit this to succeeding generations.⁵¹ This group is defined by J. Packer as “positive/organic (or voluntary) association”.⁵² On the other hand, minorities by force are created by outside designation, invariably for negative purposes.⁵³ This group is defined by J. Packer as “negative association”⁵⁴ and

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

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

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

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

52 John Packer, “Problems in Defining Minorities”, in B. Bowring and D. Fottrell (eds.), *Minority and Group Rights in the New Millenium*, Hague, Martinus Nijhoff, 1999, p.254.

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

54 John Packer, “Problems in Defining Minorities”, in B. Bowring and D. Fottrell (eds.), *Minority and Group Rights in the New Millenium*, Hague, Martinus Nijhoff, 1999, p.254.

by Wiessner as “non-organic (or involuntary) association”.⁵⁵ 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 Ahmadiya of Pakistan, who claim to be Muslims but the existing legislations criminalizes their identification as Muslims, can be regarded as an example of minority by force.⁵⁶

1.6 National minorities

The term ‘national minority’⁵⁷ 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 Protection of National Minorities, 1994⁵⁸ (FCNM) and some other European instruments that addresses the protection of ‘national minorities’,⁵⁹ a term quite unknown to other international minority-protection regimes.⁶⁰ 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.⁶¹ Generally speaking, a minority is

55 Siegfried Wiessner, “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, 1996, p.221.

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

57 See generally, Jennifer Jackson Preece, *National Minorities and the European Nation-States System*, Oxford, Clarendon Press, 1994; J.R. Valentine, “Towards a Definition of National Minority”, *Denver Journal of International Law and Policy*, vol. 32, 2004, pp.445-474; Thomas D. Musgrave, *Self-Determination and National Minorities*, Oxford, Oxford University Press, 1997.

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, “Protecting the Rights of National Minorities in Europe”, *German Yearbook of International Law*, vol.44, 2001, p.237.

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

61 Jennifer Jackson Preece, “National Minority Rights vs. State Sovereignty in Europe: Changing Norms in International Relations?”, *Nations and Nationalism*, vol.3, no.3, 2004, p.345.

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".⁶² 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.⁶³

1.7 Old and new minorities

Sometimes a dividing line 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 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.⁶⁴ 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 which '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.⁶⁵ Nevertheless, there is a considerable grey area in between the two categories.

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

63 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.9.

64 For a critical analysis of the European standards on new minorities see, Steve Peers, "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, 2004, pp.149-162; Roberta Medda Windischer, *Old and New Minorities: Reconciling Diversity and Cohesion - A Human Rights Model for Minority Integration*, Baden, Nomos, 2009.

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

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.⁶⁶ At the same time, this commentary suggest that the best approach is to avoid making an absolute distinction between 'new' and 'old' minorities by excluding the former and including the latter.⁶⁷

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 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.⁶⁸ 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.⁶⁹ 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.⁷⁰ Since 1990, many European states⁷¹

66 See, 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.10.

67 See, 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.10.

68 Natalie Sabanadze, "Minorities and Kin-States", *Helsinki Monitor*, vol.17, no.3, 2006, p.245.

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

70 See generally, Judit Toth, "Connections of Kin-minorities to the Kin-state in the Extended Schengen Zone", *European Journal of Migration and Law*, vol. 5, 2003, pp. 201-227; Csilla Hatvany, "Legitimacy of Kin-State Politics: A Theoretical Approach", *Regio-Minorities, Politics, Society* (English Edition), no.1, 2006, pp.47-

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.⁷²

1.9 Minorities and indigenous peoples

Like 'minority', there is no internationally accepted legal definition of 'indigenous people'.⁷³ 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

64; European Council for Democracy through Law, *The Protection of National Minorities by their Kin-States*, Strasbourg, Council of Europe Publishing, 2002; Elizabeth Warner, "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, 2004, pp.379-432.

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

72 See, Venice Commission, *Report on the Preferential Treatment of National Minorities by Their Kin-State*, 2001, 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).

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

elements of an aboriginal population that remained within the borders of an independent state.⁷⁴ 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.⁷⁵ 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 existence as peoples, in accordance with their own cultural patterns, social institutions and legal system.⁷⁶

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.⁷⁷

The definition of 'indigenous people' confirms that international law treats indigenous groups as distinct from minority group. 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.⁷⁸ Clearly the definitional elements particularly such as non-

74 Russel Lawrence Barsh, "Evolving Conceptions of Group Rights in International Law", *Transnational Perspectives*, vol.13, no.1, 1987, available at: www.burmalibrary.org/docs3/Barsh.htm (last accessed on 11 June, 2009).

75 Kamrul Hossain, "Status of Indigenous Peoples in International Law", *Miskolc Journal of International Law*, vol.5, no.1, 2008, p.11.

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, "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, "Status of Indigenous Peoples in International Law", *Miskolc Journal of International Law*, vol.5, no.1, 2008, p.24.

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.

CHAPTER 2

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. It has prompted international concern and responsibility that collides against the principle of non-interference in the internal affairs of sovereign states.¹ Nevertheless, it comes as no surprise that international minority rights have lagged behind the development of other branches of human rights.² 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.³ The Edict of Toleration issued by the Roman emperor Galerius Maximianus⁴ and the Edict of Milan issued by the Roman emperor Constantine Augustus⁵ which safeguarded the Christian minority was granted in 311 and 313 respectively.⁶ Vijapur points out that as early as the seventh century, the Prophet

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

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

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

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

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

6 Malcom D. Evans, "Historical Analysis of Freedom of Religion or Belief as a Technique for Resolving Religious Conflict", in Tore Lindholm, et al. (eds.),

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,⁷ to practice their religions and cultures and to self-administer their personal laws.⁸ In 1250, the French king Saint Louis pledged himself as the protector Maronite Christians, a religious minority. This promise underwent periodical renewal by the French monarchs.⁹

The rise of the state system in the sixteenth and seventeenth centuries and the emergence of international law reflecting that system necessitated concentration on minority groups.¹⁰ Since then, the history of international protection of minorities remained, for several centuries, an exclusive European matters. The treatment accorded to religious minorities in a number of states in Europe was the first to attract international attention.¹¹ The Ottomans did experiment with the *Millet* system to guarantee certain rights for non-Muslim religious and ethnic minorities.¹² The system granted autonomy and recognition to religious groups and gave them the right to administer their religious, social, and legal affairs.¹³ The Ottoman millet system, as Kymlicka argues, is the most developed form of the group rights model of religious tolerance.¹⁴ Analyzing the Millet system, Van Dyke notes: “it was an application of the right of self-determination in advance of

Facilitating Freedom of Religion or Belief: A Deskbook, Leiden, Martinus Nijhoff Publishers, 2004, p.2.

- 7 See generally, Najwa Al-Qattan, “Dhimmis in the Muslim Court: Legal Autonomy and Religious Discrimination”, *International Journal of Middle East Studies*, vol.31, 1999, pp.429-444; Sayyed Qutb, “Citizenship Rights of Non-Muslims in the Islamic State of Hakimiyya”, *Islam and Christian Muslim Relations*, vol.13, no.2, 2002, pp.163-188; Bat Ye’or, *The Dhimmi: Jews and Christians under Islam*, London, Associated University Press, 1985; Abdullahi A. An-Naim, “Religious Minorities under Islamic Law and the Limits of Cultural Relativism”, *Human Rights Quarterly*, vol.9, no.1, 1987, pp.1-18.
- 8 Abdulrahim P. Vijapur, “International Protection of Minority Rights”, *International Studies*, vol. 43, 2006, p.368.
- 9 Carlile Aylmer Macartney, *National States and National Minorities*, London, Oxford University Press, 1934, p.161.
- 10 Patrick Thornberry, *International Law and the Rights of Minorities*, Oxford, Oxford University Press, 1991, p.1.
- 11 See, Tore Modeen, *The International Protection of National Minorities in Europe*, Abo, Abo Akademi, 1969, p.35.
- 12 Jay A. Sigler, *Minority Rights: A Comparative Analysis*, Connecticut, Greenwood Press, 1983, pp.70-71.
- 13 J. A. Laponce, *The Protection of Minorities*, Berkeley, University of California Press, 1960, pp.84-85. Also see, Jay A. Sigler, *Minority Rights: A Comparative Analysis*, Connecticut, Greenwood Press, 1983, p.70; Stanford J. Shaw, *History of the Ottoman Empire and Modern Turkey*, Cambridge, Cambridge University Press, 1976, pp.151-153.
- 14 See, Will Kymlicka, “Two Models of Pluralism and Tolerance”, in D. Heyd, (ed.) *Toleration: An Elusive Virtue*, New Jersey, Princeton University Press, 1996, p.85.

Woodrow Wilson".¹⁵ Although these practices of Ottomans were accepted to other states, they were not supported by international treaties.¹⁶ The system continued until 1878.¹⁷

During the seventeenth, eighteenth and nineteenth centuries, there were many examples of protective treaties concluded for the benefit of specific groups.¹⁸ These protective treaties, associated with cession of territory, addressed the rights of groups, who were mostly minority groups, consisting of former nationals of the protecting power on ceded territory.¹⁹ Of these treaties, the Treaty of Olivia of 1660 concluded between Poland and Sweden, the Multilateral Convention of 1881 between Greece and Turkey, and the 1879 Convention of Constantinople between Austria-Hungary and Turkey were of great significance. These treaties basically guaranteed religious liberties in exchange for territorial concessions.²⁰ This is because at that period religion was the major factor along which groups were divided and thus that was the major source of strife between groups.²¹ It was only in the 19th century that developments relating to the protection of minorities expanded beyond religious groups.²² The first international instrument to provide protection to ethnic minorities was the Final Act of the Congress of Vienna of 1815.²³

2.3 International protection of minority rights between the two world wars

Though the need for protection of national minorities occurred in the 19th century, its legal frameworks were established only in the first quarter of the 20th

15 Vernon Van Dyke, *Human Rights, Ethnicity and Discrimination*, London, Greenwood Press, 1985, p.74.

16 Jay A. Sigler, *Minority Rights: A Comparative Analysis*, Connecticut, Greenwood Press, 1983, p.71.

17 Thomas Benedikter (ed.), *Europe's Ethnic Mosaic: A Short Guide to Minority Rights in Europe*, Bolzano/Bozen, Institute for Minority Rights, 2008, pp.21-22.

18 Patrick Thornberry, *International Law and the Rights of Minorities*, Oxford, Oxford University Press, 1991, p.25.

19 See for details, Michael Hurst, *Key Treaties of the Great Powers, 1814-1914*, vol.2, Newton Abbot, David & Charles, 1972.

20 See, Carlile Aylmer Macartney, *National States and National Minorities*, London, Oxford University Press, 1934, pp.157-159.

21 Hurst Hannum, *Autonomy, Sovereignty and Self-Determination: The Accomodating of Conflicting Rights*, Philadelphia, University of Philadelphia Press, 1996, p.50.

22 Joel E. Oestreich, "Liberal Theory and Minority Group Rights", *Human Rights Quarterly*, vol. 21, no.1, February 1999, p.111.

23 Patrick Thornberry, "Is there a Phoenix in the Ashes? - International Law and Minority Rights", *Texas International Law Journal*, vol.15, 1980, p.426.

Century.²⁴ Following the World War I, the territorial readjustments that were brought about made it imperative that the issue of the position of minorities should be resolved in order to lay a firm foundation for a lasting peace.²⁵ Accordingly, the newly-created and the newly-expanded nations of Europe signed a series of treaties for protection for minority rights.²⁶ These treaties took various forms. Some were treaties of peace signed at the end of the war, some were special minority treaties, and some, binding declarations. These treaties referred to the establishment of new borders as well as provided guarantees for the communities becoming minorities within newly-created states. The *Treaty of Versailles* of 1919, the peace agreement that formally ended World War I and gave birth of the League of Nations, was the first of these instruments concentrating on the protection of minorities.²⁷ This treaty obliged Czechoslovakia to “protect the interests of inhabitants of that state who differ from the majority of the population in race, language, or religion”.²⁸ The treaty also referred to the “interests of inhabitants of Poland who differ from the majority of the population in race, language or religion”.²⁹ Moreover, the victorious powers of World War I in the peace treaties imposed on the new states the acceptance of an international system to protect the rights of minorities.³⁰ Austria, Hungary, Bulgaria, and Turkey, as defeated states, thus became bound by minority provisions inserted in various peace treaties.³¹ The treaty of 1919 between the allied and associated powers and the newly founded Republic of Poland served as a model for these other treaties.³² These treaties technically followed an individual rights approach to minority

24 Csaba Pakozdy, “Tendencies of Minority Protection in the Law of the European Union”, *Miskolc Journal of International Law*, vol.5, no.1, 2008, p.39.

25 Javaid Rehman, *The Weaknesses in the International Protection of Minority Rights*, Hague, Kluwer Law International, 2000, p.37.

26 See, Malcolm D. Evans, *Religious Liberty and International Law in Europe*, Cambridge, Cambridge University Press, 1997, p.104.

27 See generally, Liliana Riga and James Kennedy, “Tolerant Majorities, Loyal Minorities and ‘Ethnic Reversals’: Constructing Minority Rights at Versailles 1919”, *Nations and Nationalism*, vol.15, no.3, 2009, pp.461-482; Carole Fink, “The Minorities Question at the Paris Peace Conference: The Polish Minority Treaty, June 28, 1919”, in Manfred Franz Boemeke, Gerald D. Feldman and Elisabeth Glaser (eds.), *The Treaty of Versailles: A Reassessment after 75 Years*, Cambridge, Cambridge University Press, 1998, pp.249-274.

28 Article 86.

29 Article 93.

30 Thomas Benedikter (ed.), *Europe’s Ethnic Mosaic: A Short Guide to Minority Rights in Europe*, Bolzano/Bozen, Institute for Minority Rights, 2008, p.23.

31 For the contexts of these treaties see, Blanche E. C. Dugdale and Wyndham A. Bewes, “The Working of the Minority Treaties”, *Journal of the British Institute of International Affairs*, vol.5, no.2, 1926, pp. 79-95.

32 Mohammad Shahabuddin, “Dispelling the Myth of ‘Group Rights’ in International Law: A Historical Perspective”, in Mizanur Rahman (ed.), *Human Rights & Corruption*, Dhaka, Empowerment through Law of the Common People, 2007, p.229.

rights.³³ Although these treaties were concluded with the allied and associated powers, the League of Nations undertook to guarantee these treaties in most of the cases and was also involved in their implementation mechanisms.³⁴ Whereas in the past, the great powers used to take responsibility for implementing the minority protection clauses in international treaties,³⁵ it was the first time that the protection of minorities had been given to an international organization.³⁶

During the drafting of the Covenant of the League of Nations, US President Woodrow Wilson proposed a stipulation under which all states seeking admission to the League of Nations would bind themselves to accord equal treatment to their minorities.³⁷ But, his proposal was ultimately not inserted into the 1919 Covenant.³⁸ After signing of the Covenant, Lithuania and Finland unsuccessfully attempted to make minority regime applicable to all members of the League. Nevertheless, when Albania, Lithuania, Latvia, Estonia, and Iraq applied for membership of the League of Nations, because of international pressure they had to make declarations to the Council of the League of Nations to the effect that they would respect minority rights.³⁹ Finland made a similar declaration, applicable only to the Aaland Islands. Germany came under the system to a limited extent, on the basis of the Geneva Convention of 15 May 1922.⁴⁰

The minority rights regime of the League of Nations⁴¹ was essentially based on bilateral treaties. Accordingly, a 'minorities section' was established within the

33 David Wippman, "The Evolution and Implementation of Minority Rights", *Fordham Law Review*, vol. 66, 1997, p.600.

34 For a list of these instruments see, Patrick Thornberry, *International Law and the Rights of Minorities*, Oxford, Oxford University Press, 1991, pp.41-42.

35 Carole Fink, "The League of Nations and the Minorities Question", *World Affairs*, vol. 157, 1995, p.197.

36 See, Malcolm D. Evans, *Religious Liberty and International Law in Europe*, Cambridge, Cambridge University Press, 1997, p.104.

37 See for details, D.H. Miller, *The Drafting of the Covenant*, New York, GP Putnam's & Sons, 1928, vol.2, p.91.

38 Jacob Robinson, *Were the Minorities Treaties a Failure?*, New York, Institute of Jewish Affairs, 1943, p.14.

39 See, Malcom D. Evans, *Religious Liberty and International Law in Europe*, Cambridge, Cambridge University Press, 1997, pp.135-142.

40 See, Inis L. Claude, *National Minorities: An International Problem*, Cambridge, Harvard University Press, 1955, p.16.

41 See generally, Lucy Philip Mair, *The Protection of Minorities: The Working and Scope of the Minorities Treaties Under the League of Nations*, London, Christophers, 1928; Helmer Rosting, "Protection of Minorities by the League of Nations", *American Journal of International Law*, vol.17, no.4, 1923, pp.641-660; Carole Fink, "Minority Rights as an International Question", *Contemporary European History*, vol.9, no.3, 2000, pp.385-400;

framework of the League to consider petition brought by the minorities covered by these treaties.⁴² The minorities section was authorized to remit admissible petitions to a tripartite committee of the Council of the League. However, these petitions were admitted only under quite restrictive conditions,⁴³ and treated in strict confidentiality.⁴⁴ Consequently, it was very difficult to bring cases to the League's attention and get effective remedy. Although the League had the power to refer cases to the Permanent Court of International Justice (PCIJ), it rarely acted on it. However, in 1935 the PCIJ delivered an advisory opinion in the *Albania School Case*⁴⁵ that was of great significance as it marked an explicit recognition by the PCIJ of a need for positive action to ensure the rights of minorities, rather than a purely "negative" policy of benign neglect.⁴⁶

The machinery for the international protection of minorities provided by the League of Nations was not universal as it covered only a limited number of states.⁴⁷ It lacked a sound international-legal foundation and failed to provide for equality before the law for large and small peoples and nations.⁴⁸ It concentrated only on limited cultural rights of minorities. Even for the groups identified as minorities, the minorities' regime established by the League stamped them as second-class citizens of the international community.⁴⁹ Moreover, with the exception of the treaty between Finland and Sweden on the status of the Aland Islands (1921),⁵⁰ no other bilateral treaty on minority protection survived the

Tennent Harrington Bagley, *General Principles and Problems in the International Protection of Minorities*, Geneva, Imprimeries Populaires, 1950.

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

43 Jane Cowan, "Who's Afraid of Violent Language? Honour, Sovereignty and Claims-Making in the League of Nations", *Anthropological Theory*, vol.33, no.3, 2003, pp.271-291.

44 See for more details, Julius Stone, "Procedure under the Minorities Treaties", *The American Journal of International Law*, vol.26, no.3, 1932, pp.502-513.

45 PCIJ, *Advisory Opinion Regarding Minority Schools in Albania*, 6 April 1935, PCIJ Reports, Series A/B No.64, 1935, 17.

46 Joel E. Oestreich, "Liberal Theory and Minority Group Rights", *Human Rights Quarterly*, vol. 21, no.1, February 1999, p.112.

47 See, A.H. Robertson and J.G. Merrills, *Human Rights in the World*, Manchester, Manchester University Press, 1996, pp.20-23.

48 See, Carlile Aylmer Macartney, *League of Nations Protection of Minority Rights*, London, E. Louard, 1967, p.11.

49 Patrick Thornberry, *International Law and the Rights of Minorities*, Oxford, Oxford University Press, 1991, p.47.

50 For the text of the treaty see, Hurst Hannum, *Documents on Autonomy and Minority Rights*, Dordrecht, Martinus Nijhoff Publishers, 1993, pp.141-143.

League of Nations period.⁵¹ This ultimately caused the League of Nations minority system to collapse.

Despite its many limitations and eventual failure, the minority system of the League of Nations afforded a degree of protection for the selected minority groups in the designated states.⁵² At least an attempt, be it limited in vision and ultimately unsuccessful, was made to elevate the issue of minority protection in the international arena.⁵³ Even after the collapse of the League of Nations, the minority rights and protections mechanisms developed by it continued to have an ongoing value for the articulation of norms of international law on minorities.⁵⁴

2.4 International protection of minority rights after the second world war

Just after the conclusion of the World War II, the possibility of ethnic conflicts and endangering stability arising out of discontents of minority groups led several European countries to negotiate bilateral agreements with neighbouring states for protection of kin-minorities.⁵⁵ Notable among these are: the 1946 Austro-Italian agreement on the status of South Tyrol,⁵⁶ and the 1955 agreement between Germany and Denmark on the rights of the Danish and German minorities on both sides of the German-Danish border.

51 Kinga Gal, "Bilateral Agreements in Central and Eastern Europe: A New Inter-State Framework for Minority Protection?" ECMI Working Paper No. 4, 1999, p.3.

52 See, Asbjorn Eide, "Minority Situations: In Search of Peaceful and Constructive Solutions", *Notre Dame Law Review*, vol. 66, 1991, pp.1316-1319.

53 Javaid Rehman, *The Weaknesses in the International Protection of Minority Rights*, Hague, Kluwer Law International, 2000, p.42. Regarding the positive impacts of minority protection system of League of Nations, see, Natan Lerner, *Group Rights and Discrimination in International Law*, Dordrecht, Martinus Nijhoff Publishers, 1991, p.11.

54 See, Patrick Thornberry, "The UN Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities: Background, Analysis, Observation, and an Update", in Alan Phillips and Allan Rosas (eds.), *Universal Minority Rights*, London, Minority Group International, 1995, pp.14-18.

55 See generally, Raymond Dennett and Amelia C. Leiss, *European Peace Treaties after World War II: Negotiations and Texts of Treaties with Italy, Bulgaria, Hungary, Rumania, and Finland*, Boston, World Peace Foundation, 1954.

56 See generally, Joseph Marko, Francesco Palermo und Jens Woelk (eds.), *Tolerance Established by Law. Self-Government and Group Rights: The Autonomy of South Tyrol*, Leiden, Martinus Nijhoff Publishers, 2007.

Another landmark during this period was the adoption of the Genocide Convention in 1948.⁵⁷ This was, in fact, the first of the post World War II general convention having any bearing on minority protection.⁵⁸ This instrument, by outlawing the physical or biological destruction of national, ethnic, religious or racial group,⁵⁹ formally recognized the right of minority groups to exist as group, which surely must be considered as the most fundamental of all cultural rights.⁶⁰

Despite these bilateral arrangements and the adoption of Genocide Convention, the League's failure to address minority issues successfully through specialized treaties and dispute resolution processes during the inter-war period had led to a complete shift in international law's treatment of that question after World War II.⁶¹ The system of minority protection also lost much of its legitimacy due to its selective application and its manipulation by Nazi for its expansionist policies.⁶² Consequently, the issue of minority rights, on the whole, was seen as damaging, its potential for abuse more pre-eminent than its constructive faculties.⁶³

In the early days of the UN, the prevailing view was that special provisions for the rights of minorities were not needed if individual human rights, in particular the prohibition of discrimination on grounds such as ethnicity, language, race, and religion, were properly protected.⁶⁴ Accordingly, the doctrine of human rights was put forward as a substitute for the concept of minority rights,⁶⁵ with the strong implication that minorities whose members enjoy individual equality of treatment cannot legitimately demand facilities for the maintenance of their

57 Convention on the Prevention and Punishment of the Crime of Genocide, 78 UNTS 277, entered into force on 12 January 1951.

58 Patrick Thornberry, *International Law and the Rights of Minorities*, Oxford, Oxford University Press, 1991, p.59.

59 Article 2.

60 Thomas Buergenthal, *International Human Rights in a Nutshell*, Minnesota, West Publishing Co., 1988, p.49.

61 Steven R. Ratner, "Does International Law Matter in Preventing Ethnic Conflict?", *New York University Journal of International Law and Politics*, vol. 32, 2000, p. 599.

62 Jay A. Sigler, *Minority Rights: A Comparative Analysis*, Connecticut, Greenwood Press, 1983, p4.

63 Javaid Rehman, *The Weaknesses in the International Protection of Minority Rights*, Hague, Kluwer Law International, 2000, p.43.

64 John P. Humphrey, *No Distant Millennium: The International Law of Human Rights*, Paris, UNESCO, 1989, p.113. Also see, Asbjorn Eide, "Minorities at the United Nations: From Standard-setting to the Working Group on Minorities", in Gudmundur Alfredsson et al (eds.), *International Human Rights Monitoring Mechanisms: Essays in Honour of Jakob Th Moller*, Hague, Kluwer Law International, 2001, p.381.

65 See generally, J. L. Kunz, "The Present Status of the International Law for the Protection of Minorities", *American Journal of International Law*, vol.48, 1954, pp.282-287.

ethnic particularism.⁶⁶ Thus, instead of protections for groups, individual civil, political, economic, social, and cultural rights became the *lingua franca* for the protection of human rights.⁶⁷ Moreover, the UN had no interest to create minority protection mechanism due to the pressure from, in particular, the European and Latin American countries.⁶⁸

The United Nations Charter,⁶⁹ like the Covenant of the League of Nations, did not contain any explicit provision for the protection of minorities.⁷⁰ The right of minorities was also specifically excluded from the UDHR.⁷¹ The Soviet Union placed this matter on the floor of the General Assembly suggesting an article on the rights of minorities. Denmark and Yugoslavia supported the move.⁷² Accordingly, the initial draft of the UDHR included a guarantee that “in all countries inhabited by a substantial number of persons of a race, language or religion other than those of the majority . . . minorities shall have the right to establish and maintain, out of an equitable proportion of public funds . . . their schools, cultural institutions, and to use their language before courts, organs of the state and in the press and public assembly”.⁷³ However, due to stiff opposition from many states, political considerations outweighed pure humanitarian idealism⁷⁴ and the proposed provision was omitted from the final version adopted by the UN General Assembly in 1948.⁷⁵ Instead, the General Assembly transferred the matter of minority protection to the Sub-Commission on

66 Inis Claude, *National Minorities: An International Problem*, Cambridge, Harvard University Press, 1955, p.211.

67 David Wippman, “The Evolution and Implementation of Minority Rights”, *Fordham Law Review*, vol. 66, 1997, pp. 602-605.

68 John. P. Humphrey, “The United Nations Sub-Commission on the Prevention of Discrimination and Protection of Minorities”, *American Journal of International Law*, vol. 62, 1968, p.870.

69 The Charter of the United Nations, 59 Stat. 1031, T.S. 993, 3 Bevans 1153, entered into force on 24 October 1945.

70 Javaid Rehman, *The Weaknesses in the International Protection of Minority Rights*, Hague, Kluwer Law International, 2000, p.105.

71 Natan Lerner, “Proselytism, Change of Religion and International Human Rights”, *Emory International Law Review*, vol. 12, 1998, p.557.

72 See, Alfred de Zayas, “The International Judicial Protection of the Rights of Peoples and Minorities”, in C. Brolmann et al. (eds.), *Peoples and Minorities in International Law*, Hague, Martinus Nijhoff Publishers, 1993, pp.258-259.

73 United Nations, E/CN.4/Sub.2/384/Add.2, p.44.

74 See, U. Haskar, *Minority Protection and International Bill of Rights*, Bombay, Allied Publishers, 1974, pp.36-57.

75 Patrick Macklem, “Minority Rights in International Law”, *International Journal of Constitutional Law*, vol.6, no.3-4, 2008, p.534. Also See, Alfred de Zayas, “The International Judicial Protection of the Rights of Peoples and Minorities”, in C. Brolmann et al. (eds.), *Peoples and Minorities in International Law*, Hague, Martinus Nijhoff Publishers, 1993, pp.258-259.

Prevention of Discrimination and Protection of Minorities, instructing it to undertake “a thorough study of the problem of minorities”.⁷⁶ In the words of Peter Hilpold, the General Assembly’s “reluctance to act coupled with a request for more knowledge was a characterizing trait of the entire development of minority rights within the UN system”.⁷⁷ Nevertheless, within the UDHR, there is mention of a number of rights which can be treated as forming the basis of minority protection.⁷⁸ The Declaration specifically provides the right to equality and non-discrimination,⁷⁹ the right to freedom of thought, conscience and religion,⁸⁰ the right to freedom of opinion and expression,⁸¹ the right to peaceful assembly and association,⁸² the right to education,⁸³ and the right to participate in the cultural life of the community.⁸⁴ All these rights lay the foundation for protection of, amongst others, individual members of minority groups.

The approach changed considerably in the 1960s.⁸⁵ The first step taken was the adoption of the 1965 Convention on the Elimination of all Forms of Racial Discrimination (CERD).⁸⁶ Although this Convention is best known for prohibiting discrimination on the basis of ‘race, colour, descent, national or ethnic origin’, it provides for special measures for the advancement of racial or ethnic groups – an implicit acknowledgment of minority rights. Its provisions, in particular Article 5, have been used by the CERD Committee as an important tool to safeguard the rights of minorities going far beyond protection against discrimination.⁸⁷ The next landmark was the adoption of the International Covenant on Civil and Political Rights (ICCPR)⁸⁸ in 1966. Article 27 of this instrument⁸⁹ is the first international

76 General Assembly Resolution 217A(III), 10 December 1948.

77 Peter Hilpold, “UN Standard-Setting in the Field of Minority Rights”, *International Journal on Minority and Group Rights*, vol.14, no.2-3, 2007, p.183.

78 Javaid Rehman, *International Human Rights Law: A Practical Approach*, London, Longman, 2003, p.312.

79 Articles 1 and 2.

80 Article 18.

81 Article 19.

82 Article 20.

83 Article 26.

84 Article 27.

85 See, Patrick Thornberry, *International Law and the Rights of Minorities*, Oxford, Oxford University Press, 1991, p.39.

86 G.A. res. 2106 (XX), Annex, 20 U.N. GAOR Supp. (No. 14) at 47, U.N. Doc. A/6014 (1966), 660 U.N.T.S. 195, entered into force on 4 January 1969.

87 See for details, Rudiger Wolfrum, “The Committee on the Elimination of Racial Discrimination”, *Max Planck Yearbook of United Nations Law*, vol.3, 1999, pp.489-519.

88 G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, entered into force on 23 March 1976

89 The Article reads as such: “In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in

norm that has universalized the concept of minority rights.⁹⁰ Notwithstanding the fact that certain scholars vigorously take Article 27 of the ICCPR to be “declaratory in nature” and to reflect “a minimum of rights recognised by customary international law”,⁹¹ it obviously served as the starting point for all subsequent changes in the international regime of minority rights.⁹²

In 1979, the Sub-Commission on Prevention of Discrimination and Protection of Minorities decided upon the desirability of a General Assembly resolution on the rights of minorities, and then, based on drafts submitted by Yugoslavia, established a special working group to study the issue.⁹³ That process moved extremely slowly, only gaining momentum in 1990.⁹⁴ In the early 1990s, the Yugoslavia crisis refocused the attention of the international community on a draft declaration on the rights of minorities prepared by the working group. Consequently, at the General Assembly’s 47th session in 1992, the UN unanimously adopted the Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities⁹⁵ (UNDM).⁹⁶ It is ironic that while the UNDM originated from a proposal by Yugoslavia in 1978, it was adopted at the very time when Yugoslavia was facing dissolution due to problems of minorities and ethnic unrest.

Although the UNDM is a non-binding instrument, it carries considerable moral authority.⁹⁷ It marked a significant advancement in the elaboration of norms on minority rights and its impact has been substantive in guiding the development of new minority rights theories and in reading existing documents, including Article 27 of the ICCPR. Moreover, the UNDM is noteworthy in the history of international human rights since it was the first such instrument devoted

community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language.”

90 Patrick Thornberry, “Is there a Phoenix in the Ashes? – International Law and Minority Rights”, *Texas International Law Journal*, vol.15, 1980, p.443.

91 Yoram Dinstein, “Collective Human Rights of Peoples and Minorities”, *International & Comparative Law Quarterly*, vol.25, 1976, p.118.

92 Miodrag A. Jovanovic, “Recognizing Minority Identities Through Collective Rights”, *Human Rights Quarterly*, vol.27, no.2, 2005, p.634.

93 Hurst Hannum, “Contemporary Developments in the International Protection of the Rights of Minorities”, *Notre Dame Law Review*, vol. 66, 1991, pp.1437-1438.

94 Steven R. Ratner, “Does International Law Matter in Preventing Ethnic Conflict?”, *New York University Journal of International Law and Politics*, vol. 32, 2000, p. 601.

95 United Nations Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities, United Nations, G.A. Res. 47/135, U.N. Doc. A/RES/47/135 (Dec. 18, 1992).

96 For text of the instrument see, APPENDIX A.

97 See generally, Natan Lerner, “The 1992 UN Declaration on Minorities”, *Israel Yearbook on Human Rights*, vol.23, 1993, pp.111-128.

exclusively to minority concerns.⁹⁸ As to the contents, the UNDM represents a marked shift from limited protection against discrimination that characterized the original efforts of the UN regarding minorities, towards a more active engagement of the state in facilitating the development of minority cultures and promoting a political role for minorities.⁹⁹ This declaration not only elaborates the rights under Article 27 but it also provides for additional special rights. It also goes on to remedy the failure of Article 27 to specify state measures aimed at the promotion of minority rights.

2.5 Conclusion

The foregoing discussions reveal that over the years international communities have addressed the issue of minority rights through varying norms and strategies. But a comprehensive legal regime for protection of minorities is yet to emerge. Although the adoption of the UNDM by the UN General Assembly is considered as a significant advancement in this regard, a legally binding treaty or convention is the demand of the day.¹⁰⁰ Once a legally binding instrument is welcome by the states, international protection of minority rights might start a renewed journey and thus keep our pluralistic and heterogeneous world away from ethnic, religious or linguistic conflicts.

98 Jennifer Jackson Preece, "National Minority Rights vs. State Sovereignty in Europe: Changing Norms in International Relations?", *Nations and Nationalism*, vol.3, no.3, 2004, p.348.

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

100 See, S. J. Roth, "Towards a Minority Convention: Its Need and Contents", in Yoram Dinstein and Mala Tabory (eds.), *The Protection of Minorities and Human Rights*, London, Martinus Nijhoff Publishers, 1992, pp.83-116.

CHAPTER 3

Overview of International Instruments and Mechanisms

During the early days of the UN, as indicated in chapter 2, majority of its members were against any special norms let alone instruments or mechanisms for the protection of minorities. In the subsequent decades, international community, however, demonstrated a more responsive attitude towards minority issues. Resultantly, a good number of international instruments recognizing minority rights emerged and several mechanisms mandated to minority protection developed. This chapter attempts to present an overview of these instruments and mechanisms. However, the focus of the chapter is concentrated on instruments and mechanisms having substantive bearing on the protection of minorities and as such the instruments and mechanisms described hereinafter are not to be taken as an exhaustive version of all the instruments and mechanisms contributing to the protection of minorities.¹

3.1 International Instruments for the Protection of Minorities

Contemporary international standards on minority protection include a wide range of legally binding international treaties (convention, covenant) and legally non-binding declarations. Among these instruments, the followings are of greater importance in terms of contexts and contents:

3.1.1 International Covenant on Civil and Political Rights, 1966

In 1966 the International Covenant on Civil and Political Rights (ICCPR)² was adopted by the General Assembly. Article 27 of this legally binding instrument is

1 For a detailed account of these instruments and mechanisms see, Gudmundur Alfredsson and Erika Ferrer, *Minority Rights: A Guide to United Nations Procedures and Institutions*, London, Minority Rights Group International, 2004.

2 G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, entered into force on 23 March 1976

the first international norm that universalizes the concept of minority rights.³ The Article reads as such:

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

Despite the negative rights language used in the Article, “shall not be denied,” the Human Rights Committee points to the positive obligations placed on states parties to actively protect minorities from violations of their rights, both by state and private actors.⁴

Article 27 of the ICCPR, however, limits the rights for “persons belonging to minorities”.⁵ Despite the reference to “in community with the other members of their group”, the rights guaranteed under this provision must be asserted individually.

Notwithstanding the fact that certain scholars vigorously take Article 27 of the ICCPR to be “declaratory in nature” and to reflect “a minimum of rights recognised by customary international law”,⁶ it obviously served as the starting point for all subsequent changes in the international regime of minority rights.⁷

Apart from Article 27, there are several other provisions in the ICCPR that have considerable relevance in protecting the rights of minority groups. These include, *inter alia*, principle of non-discrimination;⁸ freedom of thought, conscience and expression;⁹ freedom of expression;¹⁰ prohibition against any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility

3 Patrick Thornberry, “Is there a Phoenix in the Ashes? – International Law and Minority Rights”, *Texas International Law Journal*, vol.15, 1980, p.443.

4 See, Human Rights Committee, General Comment 23, *The Rights of Minorities (Article 27)*, U.N. Doc.HRI/GEN/1/Rev.1 at 52, 1994, para.6.1.

5 See for details, Hurst Hannum, “Contemporary Developments in the International Protection of the Rights of Minorities”, *Notre Dame Law Review*, vol. 66, 1991, pp.1434-1438.

6 Yoram Dinstein, “Collective Human Rights of Peoples and Minorities”, *International & Comparative Law Quarterly*, vol.25, 1976, p.118.

7 Miodrag A. Jovanovic, “Recognizing Minority Identities Through Collective Rights”, *Human Rights Quarterly*, vol.27, no.2, 2005, p.634.

8 Article 2.

9 Article 18.

10 Article 19.

and violence;¹¹ freedom of association;¹² right to equal suffrage and equal access to public service;¹³ and equality before the law.¹⁴

3.1.2 Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities, 1992

In 1992, the UN General Assembly adopted the Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities¹⁵ (UNDM) - the first international instrument of universal application which is devoted exclusively to minority concerns.¹⁶ According to the preamble, the UNDM was “inspired by the provisions of Article 27” of the ICCPR. Nevertheless, this instrument represents a fresh start and is not simply an expansion of the ICCPR.¹⁷ In fact, this instrument not only elaborates the rights under Article 27 but it also provides for additional special rights. It also goes on to remedy the failure of Article 27 to specify state measures aimed at the promotion of minority rights.

Although the UNDM is a non-binding instrument, it carries considerable moral authority.¹⁸ It marked a significant advancement in the elaboration of norms on minority rights and its impact has been substantive in guiding the development of new minority rights theories and in reading existing documents, including Article 27 of the ICCPR.

The UNDM is one of the most comprehensive international documents of its kind, setting out both the rights of minorities and the duties of states. It sets out rights of persons belonging to minorities mainly in article 2 and spell out the duties of

11 Article 20(2).

12 Article 22.

13 Article 25.

14 Article 26.

15 United Nations Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities, United Nations, G.A. Res. 47/135, U.N. Doc. A/RES/47/135 (Dec. 18, 1992).

16 Jennifer Jackson Preece, “National Minority Rights vs. State Sovereignty in Europe: Changing Norms in International Relations?”, *Nations and Nationalism*, vol.3, no.3, 2004, p.348.

17 Patrick Thornberry, “An Unfinished Story of Minority Rights”, 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, 2001, p.55.

18 See generally, Natan Lerner, “The 1992 UN Declaration on Minorities”, *Israel Yearbook on Human Rights*, vol.23, 1993, pp.111-128.

the States in which they exist in articles 1, 4 and 5. While the rights are consistently set out as rights of individuals, the duties of States are in part formulated as duties towards minorities as groups.¹⁹

3.1.3 Convention on the Elimination of all Forms of Racial Discrimination, 1965

The Convention on the Elimination of all Forms of Racial Discrimination (CERD)²⁰ was adopted in 1965. Although this Convention is best known for prohibiting discrimination on the basis of 'race, colour, descent, national or ethnic origin', it provides for special measures for the advancement of racial or ethnic groups – an implicit acknowledgment of minority rights. CERD specifically advances racial equality before the law, the condemnation of organizations that promote superiority and racial hatred, adoption of educational and cultural programmes to promote racial tolerance, and other measures to control racial discrimination. Its provisions, in particular Article 5, have been used by the CERD Committee as an important tool to safeguard the rights of minorities going far beyond protection against discrimination.²¹

3.1.4 Convention on the Prevention and Punishment of the Crime of Genocide, 1948

The Convention on the Prevention and the Punishment of the Crime of Genocide,²² the first international attempt to affirm the right of minorities to exist, was adopted in 1948. This was, in fact, the first of the post World War II general convention having any bearing on minority protection.²³ This instrument, by outlawing the physical or biological destruction of national, ethnic, religious or

19 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.14.

20 G.A. res. 2106 (XX), Annex, 20 U.N. GAOR Supp. (No. 14) at 47, U.N. Doc. A/6014 (1966), 660 U.N.T.S. 195, entered into force on 4 January 1969.

21 See for details, Rudiger Wolfrum, "The Committee on the Elimination of Racial Discrimination", *Max Planck Yearbook of United Nations Law*, vol.3, 1999, pp.489-519.

22 78 UNTS 277, entered into force on 12 January 1951.

23 Patrick Thornberry, *International Law and the Rights of Minorities*, Oxford, Oxford University Press, 1991, p.59.

racial group,²⁴ formally recognized the right of minority groups to exist as group, which surely must be considered as the most fundamental of all cultural rights.²⁵

3.1.5 Convention on the Rights of the Child, 1989

The General Assembly unanimously adopted the Convention on the Rights of the Child²⁶ (CRC) in 1989. Among the core human rights treaties of universal scope, only the CRC contains provision, apart from Article 27 of the ICCPR, specifically addressing the rights of minorities.²⁷ Its Article 30 reads:

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

3.2 International Mechanisms for the Protection of Minorities

Within the UN, there are numerous bodies and many procedures with the mandate of protecting minorities. However, not all these mechanisms are exclusively dedicated to minority protection and several of these mechanisms possess overlapping mandate. The paragraphs that follow in this section demystify the main mechanisms for the protection of minorities:

3.2.1 Commission on Human Rights (till 2006) and Human Rights Council (since 2006)

The Commission on Human Rights (CHR), the highest ranking UN forum dedicated to human rights within the hierarchy of UN political organs, was set up in 1946 by the Economic and Social Council (ECOSOC) as one of its subsidiary

24 Article 2.

25 Thomas Buergenthal, *International Human Rights in a Nutshell*, Minnesota, West Publishing Co., 1988, p.49.

26. G.A. res. 44/25, annex, 44 U.N. GAOR Supp. (No. 49) at 167, U.N. Doc. A/44/49 (1989).

27 Joshua Castellino and Elvira Dominguez Redondo, *Minority Rights in Asia: A Comparative Legal Analysis*, New York, Oxford University Press, 2006, p.6.

bodies. The initial terms of reference of the CHR included, among other matters, submission of proposals, recommendations and reports to ECOSOC concerning the protection of minorities.²⁸

Initially, the CHR acted as a kind of legislative body, and its efforts were concentrated on the creation of international human rights standards. In the field of minority rights, the CHR engaged itself in the preparation *inter alia* of the UDHR, the ICCPR, the DROB and the UNDM. Apart from these, the CHR set up various procedures and mechanisms that were authorized to examine, monitor, and publicly report either on human rights situations in specific countries (country mechanisms or mandates) or on major themes of human rights violations or issues (thematic mechanisms or mandates). These procedures were collectively referred to as the special procedures of the Commission. Some of these procedures quite successfully addressed the issues of minority rights both in thematic and in country contexts.

In 2006, the HRC was abolished and all its mandates, mechanisms, functions and responsibilities were assumed by the Human Rights Council (HRC), a newly established subsidiary body of the General Assembly.²⁹

3.2.2 Sub-Commission on the Promotion and Protection of Human Rights (till 2007) and Human Rights Council Advisory Committee (since 2007)

The CHR was authorized to establish separate sub-commissions on protection of minorities and prevention of discrimination, but decided at its first session in 1947 to establish only one.³⁰ Accordingly, the Sub-Commission on Prevention of Discrimination and Protection of Minorities was established in 1947 as the main subsidiary body of the CHR. Unlike the CHR which was composed of government representatives, the Sub-Commission was made up of independent experts. The Sub-Commission's terms of reference, as clarified and extended in 1949, were: (a) to undertake studies, particularly in the light of the Universal Declaration of Human Rights, and to make recommendations to the Commission of Human Rights concerning the prevention of discrimination of any kind relating to human rights and fundamental freedoms and the protection of racial, national, religious and linguistic minorities; and (b) to perform any other functions which may be entrusted to it by the Economic and Social Council or the Commission on

28 See, ECOSOC Res. 5(1) of 16 February 1946 and ECOSOC Res. 5(11) of 21 June 1946.

29 See, GA Res. 60/251 of 15 March 2006.

30 Patrick Thornberry, *International Law and the Rights of Minorities*, Oxford, Oxford University Press, 1991, p.124.

Human Rights.³¹ However, in 1999, the Sub-Commission on Prevention of Discrimination and Protection of Minorities was renamed as Sub-Commission on the Promotion and Protection of Human Rights. With this change, the mandate and functions of the Sub-Commission extended beyond the issues of discrimination and minority rights.

The Sub-Commission has a track record of undertaking many studies on minority rights. These studies concentrated on various issues such as: the legal validity of undertakings relating to the protection of minorities placed under the guarantee of the League of Nations;³² the definition and classification of minorities;³³ the problem of the juridical treatment of minorities;³⁴ and ways and means for facilitating the resolution of situations involving racial, national, religious and linguistic minorities.³⁵

In 2007, the Sub-Commission was replaced by the Human Rights Council Advisory Committee (HRCAC).³⁶

3.2.3 Working Group on Minorities (till 2007) and Forum on Minority Issues (since 2007)

The Working Group on Minorities (WGM), the only minority specific UN organ, was established by ECOSOC in 1995³⁷ as a subsidiary organ of the Sub-Commission on the Promotion and Protection of Human Rights (then known as the Sub-Commission on Prevention of Discrimination and Protection of Minorities).³⁸ The WGM was composed of five experts who are members of the Sub-Commission, one representing each of the five geographic regions the United

31 Francesco Capotorti, *Study on the Rights of Persons Belonging to Ethnic, Religious and Linguistic Minorities*, New York, United Nations, 1991, p. 28.

32 UN Doc. E/CN.4/367 (7 April 1950).

33 Jules Deschenes, "Proposal concerning a definition of the term minority", UN Doc. E/CN.4/Sub.2/1985/31/Corr.1 (14 May 1985), Mr. Stanislav Chernichenko, "Definition of minorities", E/CN.4/Sub.2/AC.5/1996/WP.1 and E/CN.4/Sub.2/AC.5/1997/WP.1; Asbjorn Eide, "Classification of minorities and differentiation in minority rights", E/CN.4/Sub.2/AC.5/1996/WP.2.

34 Francesco Capotorti, "Rights of persons belonging to ethnic, religious and linguistic minorities", United Nations Study Series No. 5.

35 Asbjorn Eide, "Possible ways and means to facilitate the peaceful and constructive solution of problems involving racial minorities", E/CN.4/Sub.2/1993/34 and Add.1-4.

36 See, Human Rights Council resolution 5/1.

37 See, ECOSOC Res. 1995/31 (25 July 1995).

38 See, Commission on Human Rights Resolution 1995/24 (3 March 1995).

Nations uses to apportion seats on UN bodies. Its mandate was to review the practical implementation of the UNDM and to recommend further measures appropriate for promoting and protecting the rights of minorities with a view to 'contributing to mutual tolerance understanding and peace'.³⁹

From the very beginning, the WGM had been influential in promoting the issue of minority rights at the global level,⁴⁰ and notwithstanding its brief history created a lasting impression within the United Nations as an effective forum for deliberation and producing mutual understanding between minorities and their governments.⁴¹ It provided a framework within which NGOs, members of minority groups or associations, academics, governments, and international agencies could meet to discuss issues of concern and attempt to seek solutions to problems.⁴²

In 2007, the WGM was replaced by the Forum on Minority Issues, established by the HRC.⁴³ The aims and objectives of the Forum on Minority Issues are established in HRC resolution 6/15 of 2007 which requires that, under the guidance and preparation of the IEMI, the Forum shall: (a) meet annually to provide a platform for dialogue and cooperation on issues pertaining to persons belonging to national or ethnic, religious and linguistic minorities; (b) provide thematic contributions and expertise to the work of the Independent Expert on minority issues; (c) identify and analyse best practices, challenges, opportunities and initiatives for the further implementation of the UNDM; (d) produce thematic recommendations to be reported to the HRC by the IEMI; (e) contribute to efforts to improve cooperation among UN mechanisms, bodies and specialized agencies, funds and programmes on activities related to the promotion and protection of the rights of persons belonging to minorities, including at the regional level. The outcome of the Forum will be thematic recommendations that will be reported to the HRC by the Independent Expert. The Forum will be open to participants of states, UN mechanisms, treaty bodies and specialized agencies, funds and programmes, intergovernmental organizations, regional organizations and mechanisms in the field of human rights, national human rights institutions and

39 Asbjorn Eide, "The Non-Inclusion of Minority Rights: Resolution 217C(III)" in Gudmundur Alfredsson and Asbjorn Eide (eds), *The Universal Declaration of Human Rights - A Common Standard of Achievement*, Hague, Martinus Nijhoff Publishing, 1999, p.721.

40 For the activities and achievements of WMG see, Asbjorn Eide, "Minorities at the United Nations: The UN Working Group on Minorities in Context", *European Yearbook of Minority Issues*, vol.3, 2004/2005, pp.615-636.

41 Javaid Rehman, *The Weaknesses in the International Protection of Minority Rights*, Hague, Kluwer Law International, 2000, p.178.

42 See, Rianne Letschert, *The Impact of Minority Rights Mechanisms*, Hague, TMC Asser Press, 2005, pp.95-98.

43 See, Human Rights Council resolution 6/15 of 2007.

other relevant national bodies, academics and experts on minority issues and NGOs in consultative status with the ECOSOC. The Forum shall also be open to other NGOs and organizations representing minorities whose aims and purposes are in conformity with the spirit, purposes and principles of the UN Charter.

3.2.4 Independent Expert on Minority Issues

In 2005, following recommendations from the WGM and a campaign by NGOs, the CHR established the Independent Expert on Minority Issues (IEMI)⁴⁴ as the first special procedure mandate dedicated to address minority issues. The IEMI has the authority to receive written information from minorities and take up specific situations with governments on their behalf. The IEMI can also conduct country visits to meet with government representatives and minorities. The IEMI, in its early works, has focused on three broad strategic objectives. These are: (a) increasing the focus on minority communities in the context of poverty alleviation, development and the Millennium Development Goals (MDGs); (b) increasing the understanding of minority issues in the context of promoting social inclusion and ensuring stable societies; and (c) mainstreaming the consideration of minority issues within the work of the UN and other important multilateral forums. Even after the abolishment of the CHR, the office of the IEMI has been continuing under the auspice of the HRC.

3.2.5 Human rights treaty bodies

Each of the core human rights treaties has established a committee to supervise compliance with that particular treaty. These committees have played so far a significant role in developing the jurisprudence on minority rights.⁴⁵ However, the Committees which are of particular relevance to the implementation of minority rights are the Human Rights Committee (overseeing implementation of the ICCPR); the Committee on Economic, Social and Cultural Rights (overseeing implementation of the ICESCR); the Committee on the Elimination of Racial Discrimination (overseeing implementation of the CERD); and the Committee on the Rights of the Child (overseeing implementation of the CRC).

The Human Rights Committee has issued a detailed general comment relating to minority rights.⁴⁶ This document has elaborated, through constructive

44 See, Commission on Human Rights Resolution 2005/79.

45 See generally, Marc Weller, *Universal Minority Rights, A Commentary on the Jurisprudence of International Courts and Treaty Bodies*. Oxford, Oxford University Press, 2007.

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

interpretation, the scope and extent of Article 27 of the ICCPR guaranteeing minority rights.⁴⁷ This document, in particular, has placed the states under positive obligations to actively protect minorities from violations of their rights even though there is no explicit provision in the ICCPR to that effect. Moreover, in dealing with state parties' report and individual communications, the Committee has clarified various aspects of minority rights from a pro-minority viewpoint.

The Committee on the Elimination of Racial Discrimination has established an early-warning mechanism drawing the attention of the members of the Committee to situations which have reached alarming levels of racial discrimination.

⁴⁷ For a review of the views of the Human Rights Committee on Article 27 of the ICCPR, see, Gaetano Pentassuglia, *Minorities in International Law*, Strasbourg, Council of Europe Publishing, 2002, pp.97-111.

CHAPTER 4

Rights of Minorities under International Standards

4.1 Introduction

Minority issues are among the most controversial subjects of international relations.¹ The articulation of the norms on the protection and rights of minorities through the years has been fought with deep controversies. These controversies relate to the nature as well as contents of minority rights. In this chapter an attempt is made to throw light on the ongoing debate concerning the nature of minority rights and interrogate various norms and principles of international law conferring rights on the minorities.

4.2 Nature of minority rights – individualistic or collective?

How should one perceive the notion of ‘minority rights’ – as individual rights conferred on an individual member belong to a minority group or as collective rights conferred on the minority group itself? This issue surrounding the dimension of minority rights remain a battlefield, not only in the United Nations but unfortunately more so on the ground”.² On the theoretical and philosophical discourse this issue calls for determination of at least two questions. The first question asks whether groups can hold rights and, if they can, what are the conditions that a group must satisfy to be a right-holder. The second question asks whether individual rights are compatible to co-exist with collective rights.³

1 Jennifer Jackson Preece, “National Minority Rights vs. State Sovereignty in Europe: Changing Norms in International Relations?”, *Nations and Nationalism*, vol.3, no.3, 2004, pp.345-364.

2 Asbjorn Eide, “Minorities at the United Nations: From Standard-setting to the Working Group on Minorities”, in Gudmundur Alfredsson et al. (eds.), *International Human Rights Monitoring Mechanisms: Essays in Honour of Jakob Th Moller*, Hague, Kluwer Law International, 2001, p.389.

3 For analytical opinions on the debate see generally, Vernon Van Dyke, “Human Rights and the Rights of Groups”, *American Journal of Political Science*, vol.18, 1974, pp.725-741; Victor Segesvary, “Group Rights: the Definition of Group Rights in the Contemporary Legal Debate based on Socio-Cultural Analysis”, *International Journal on Group Rights*, vol.3, no.2, 1995, pp.89-107; Christine Sistare, Larry May, and Leslie Francis (eds), *Groups and Group Rights*, Lawrence, University of Kansas Press, 2001; Marlies Galenkamp, *Individualism versus Collectivism: The Concept of Collective Rights*,

As to the first question, some of the proponents of group rights conceive minority groups as moral entities in their own right and argue that the status of a minority group, as a right holder, is analogous to an individual person. There are some others who give groups no such independent standing, but conceive group rights as rights that are shared in and held jointly by the group's members. On the other hand, most of the opponents of group rights challenge the very proposition that groups can bear rights.

As to the second question, some of the proponents of group rights opine that group rights and individual rights are essentially compatible to co-exist. Some others argue that, even if there is any conflict between these two dimensions of rights, it cannot be a ground to deny the collective dimension of rights and in case of any conflict, the collective rights should have primacy. On the other hand, for those opposing collective rights including some scholars who acknowledge that groups are capable of bearing rights, potential threat of collective rights to individual rights seems to be one of the strongest arguments.⁴ According to one commentator, the more one consults actual case studies the more one comes to the

Rotterdam, Sanders Institute, 1998; Michael Freeman, "Are There Collective Human Rights?", *Political Studies*, vol.43, 1995, pp. 25-40; Michael McDonald, "Should Communities Have Rights? Reflections on Liberal Individualism", *Canadian Journal of Law and Jurisprudence*, vol.4, no.2, 1991, pp. 217-237; Leslie Green, "Two Views of Collective Rights", *Canadian Journal of Law and Jurisprudence*, vol.4, no.2, 1991, pp. 315-327; Jan Narveson, "Collective Rights?", *Canadian Journal of Law and Jurisprudence*, vol.4, no.2, 1991, pp. 329-345; Mohammad Shahabuddin, "Liberal Understanding, Shortcoming, and Controversy apropos Group Rights: Do we Need a Different Paradigm?", *Yokohama Law Review*, vol.16, no.1, 2007, pp.155-176; Leighton McDonald, "Can Collective and Individual Rights Coexist?", *Melbourne University Law Review*, vol.22, 1998, pp. 310-36; Dwight G. Newman, "Collective Interests and Collective Rights", *American Journal of Jurisprudence*, vol.49, 2004, pp. 127-63; Michael Hartney, "Some Confusion Concerning Collective Rights", *Canadian Journal of Law and Jurisprudence*, vol.4, no.2, 1991, pp. 293-314; Philip Vuciri Ramaga, "The Group Concept in Minority Protection", *Human Rights Quarterly*, vol.15, no.3, 1993, pp.575-588; Mohammad Shahabuddin, "Dispelling the Myth of 'Group Rights' in International Law: A Historical Perspective", in Mizanur Rahman (ed.), *Human Rights & Corruption*, Dhaka, Empowerment through Law of the Common People, 2007, pp.227-240; Nathan Glazer, "Individual Rights against Group Rights", in Eugene Kamenka and Alice Erh-Soon Tay (eds.), *Human Rights*, Melbourne, Edward Arnold, 1978, pp.121-138; Ishtiaq Ahmed (ed.), *The Politics of Group Rights: The State of Multiculturalism*, New York, University Press of America, 2005; Asbjorn Eide, "Cultural Rights and Minorities: On Human Rights and Group Accomodation", in Kirsten Hastrup (ed.), *Legal Cultures and Human Rights*, Hague, Kluwer Law International, 2001.

4 Miodrag A. Jovanovic, "Recognizing Minority Identities Through Collective Rights", *Human Rights Quarterly*, vol.27, no.2, 2005, p.645.

conclusion that the category of collective rights which are harmless to individual members is (for all practical purposes) an empty one.⁵

How have the international standards responded to the debate concerning the dimension of minority rights? International law so far has provided limited rights to minorities, and there remains a strong perception that it affords recognition only to those rights that are capable of being accommodated within the general framework of individual human rights.⁶ Article 27 of the ICCPR limits any special rights for “persons belonging to minorities” (not the groups themselves) to the enjoyment of their culture, religion, and language, without further elaboration.⁷ Despite the reference to a person's right to enjoy his or her culture, religion, or language “in community with the other members of their group”, the rights guaranteed under Article 27 of the ICCPR must be asserted individually. Thornberry notes that the text limits the community or collective dimension of the rights.⁸ The counter argument to this proposition is that Article 27 of the ICCPR explicitly protects the rights of minorities within a group context.⁹ On the other hand, the majority of the rights enshrined by the UNDM are individual rights held by members of minority groups by virtue of their membership, but the paramount rights to exist and to preserve and develop a minority's identity are held by the group as a collective.

Therefore, it is undeniable that international law adopts a largely individualist paradigm,¹⁰ and there still exists quite a strong individualistic bias in international human rights law.¹¹ On the contrary, it is evident that UN treaty-monitoring bodies day by day have been developing the group-oriented component of

5 Yael Tamir, “Against Collective Rights”, in Christian Joppke and Steven Lukes (eds.), *Multicultural Questions*, Oxford, Oxford University Press, 1999, p.164.

6 Nigel S. Rodley, “Conceptual Problems in the Protection of Minorities: International Legal Developments”, *Human Rights Quarterly*, vol.17, no.1, 1995, p.64.

7 See for details, Hurst Hannum, “Contemporary Developments in the International Protection of the Rights of Minorities”, *Notre Dame Law Review*, vol. 66, 1991, pp.1434-1438.

8 Patrick Thornberry, “International and European Standards on Minority Rights”, in Hugh Miall (ed.), *Minority Rights in Europe*, London, Royal Institute of International Affairs, 1994, p.15.

9 See Thomas W. Simon, “Prevent Harms First: Minority Protection in International Law”, *International Legal Perspectives*, vol. 9, 1997, pp.12-132.

10 Adeno Addis, “Individualism, Communitarianism, and the Rights of Ethnic Minorities”, *Notre Dame Law Review*, vol. 67, 1992, p.615.

11 Peter Leuprecht, “Minority Rights Revisited: New Glimpses of An Old Issue”, in Philip Alston (ed.), *Peoples' Rights*, Oxford, Oxford University Press, 2001, p.122.

various provisions found within the human rights treaties they oversee.¹² In such circumstances, the protection of minorities as a group cannot be separated from the question of the different approaches and ideas of collective and individual human rights.¹³

4.3 Established rights under international law

Although the boundaries of any outline of minority rights are contestable,¹⁴ there are certain rights that seem relatively well-established. However, these rights are interrelated and are built upon the existing framework of rights of the individual human being.¹⁵ Consequently recognition of these rights does not deprive a person in the enjoyment of universally recognized human rights and fundamental freedoms.¹⁶ The following paragraphs in this section attempt to outline these rights:

4.3.1 Protection of existence and identity

In any consideration of the rights of minorities under contemporary international law, the right of existence must be a necessary prerequisite for other rights,¹⁷ and the right to identity is sometimes regarded as constituting the whole of 'minority rights'.¹⁸ Existence, however, is a term with myriad connotations reflecting

12 Margot E. Salomon (ed.), *Economic, Social and Cultural Rights: A Guide for Minorities and Indigenous Peoples*, London, Minority Rights Group International, 2005, p.8.

13 Csaba Pakozdy, "Protection of national minorities, international security and the freedom of expression", *Miskolc Journal of International Law*, vol.2, no.1, 2005, p.33.

14 Patrick Thornberry, "An Unfinished Story of Minority Rights", 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, 2001, p.70.

15 Javaid Rehman, *International Human Rights Law: A Practical Approach*, London, Longman, 2003, p.303.

16 See, United Nations Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities, United Nations, G.A. Res. 47/135, U.N. Doc. A/RES/47/135 (Dec. 18, 1992), Article 8(2).

17 Patrick Thornberry, *International Law and the Rights of Minorities*, Oxford, Oxford University Press, 1991, p.57.

18 Patrick Thornberry, *International Law and the Rights of Minorities*, Oxford, Oxford University Press, 1991, p.392.

differences in the case of individuals and minorities.¹⁹ Thornberry offers a comprehensive interpretation as follows:

‘Existence’ is a notion which has a special sense for a collectivity. A collectivity such as a minority group exists in the individual lives of its members; the physical death of such member does not destroy the ‘existence’ of the group, though it may impair its health. There is, however, another existence for a minority through the shared consciousness of its members, manifested perhaps through language, culture, or religion, a shared sense of history, a common destiny. Without this ‘existence’ it is possible to say that individuals live but the group does not: it has been replaced by something other than itself, perhaps a new group, larger or smaller.²⁰

The first international attempt to affirm the right of minorities to exist is the adoption of the 1948 Genocide Convention.²¹ It prohibits the physical or biological destruction of national, ethnic, religious or racial group.²² By outlawing such destruction, the Convention formally recognizes the right of minority groups to exist as group.²³ However, the right to existence and identity of minorities is elaborately addressed by the UNDM. It obligates the states to protect the existence of minorities within their territories and encourage conditions for the promotion of national, ethnical, cultural, religious and linguistic identity of such minorities.²⁴ This provision confirms that protection of identity of minorities means not only that the state should abstain from policies which have the purpose or effect of assimilating minorities into the dominant culture, but also that it should protect them against activities by third parties which have an assimilatory effect.²⁵ The Human Rights Committee when commenting on Article 27 underlined that states have the duty to adopt positive measures of protection in order to protect the

19 Javaid Rehman, *The Weaknesses in the International Protection of Minority Rights*, Hague, Kluwer Law International, 2000, p.51.

20 Patrick Thornberry, *International Law and the Rights of Minorities*, Oxford, Oxford University Press, 1991, p.57.

21 Convention on the Prevention and Punishment of the Crime of Genocide, 78 UNTS 277, entered into force on 12 January 1951.

22 Article 2.

23 Thomas Buergenthal, *International Human Rights in a Nutshell*, Minnesota, West Publishing Co., 1988, p.49. There is, however, a contrary view that the purpose of the Genocide Convention is to affirm the rights of minority members to live, but not to give them the right to live as members of a minority. See, J. A. Laponce, *The Protection of Minorities*, Berkeley, University of California Press, 1960, p.34.

24 Article 1(1).

25 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.

identity of minorities.²⁶ The language and educational policies of the State concerned are crucial in this regard. Denying minorities the possibility of learning their own language and of receiving instruction in their own language, or excluding from their education the transmission of knowledge about their own culture, history, tradition and language, would be a violation of the obligation to protect their identity.²⁷ Under the UNDM, states also have an obligation to adopt appropriate legislative and other measures to protect the existence and identity of minorities.²⁸ Herein, the terms “other measures” include, but are not limited to, judicial, administrative, promotional and educational measures.²⁹

4.3.2 Right to equality and non-discrimination

The prohibition of discrimination is a principle which has a long history of acceptance as one of the pillars for an adequate system of minority protection.³⁰ The Permanent Court of International Justice (PCIJ) in an advisory opinion³¹ held that minority protection consists of two main components: non-discrimination on the one hand and special measures for minority protection on the other.³² However, since the adoption of the UN Charter, the principles of equality and non-discrimination became the linchpins of the human rights regime.³³ At present, almost all international treaties and declarations relating to human rights prohibit discrimination.³⁴ However, the grounds on which discrimination is prohibited differ from one instrument to another, but repeated references to birth,

26 Human Rights Committee, General Comment 23, *The Rights of Minorities (Article 27)*, U.N. Doc.HRI/GEN/1/Rev.1 at 52, 1994, para.6.1

27 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.

28 Article 1(2).

29 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.31.

30 Mary Ayad, “Integration is a Human Rights”, *Mediterranean Journal of Human Rights*, vol.12 (double issue), 2008, p.93.

31 PCIJ, *Advisory Opinion Regarding Minority Schools in Albania*, 6 April 1935, PCIJ Reports, Series A/B No.64, 1935, 17.

32 Kristin Henrard, *Devising an Adequate System of Minority Protection: Individual Human Rights, Minority Rights and the Right to Self-Determination*, Hague, Martinus Nijhoff Publishing, 2000, p.59.

33 Javaid Rehman, *International Human Rights Law: A Practical Approach*, London, Longman, 2003, p.270.

34 For a detailed list of international instruments prohibiting discrimination see, Javaid Rehman, *The Weaknesses in the International Protection of Minority Rights*, Hague, Kluwer Law International, 2000, pp.105-106.

colour, gender, language, national origin, race, religion, social origin and other status clearly cover traditional minority situations.³⁵ Apart from these treaties and declarations, the prohibition of discrimination, at least of racial discrimination, now bears the value of customary international law, which partakes the norm of *jus cogens*.³⁶ This *jus cogens* protects the ethnical minorities even if they are not protected by any human rights instruments.

While the ultimate objective of all versions of equality and non-discrimination is perceived to be the creation of a just and equitable order,³⁷ 'equality' and 'non-discrimination' are in themselves controversial terms with immense uncertainty as to their precise scope and ingredients.³⁸ There is no universally accepted definition of discrimination and equality. Nor do the core UN human rights treaties offer a definition of these terms.³⁹ In the general sense of terms, non-discrimination reflects the principle that no one should be subjected to unfair or less favourable treatment because of personal characteristics that in a given context are irrelevant. According to McKean, the word 'discrimination' is used in 'the pejorative sense of an unfair, unreasonable, unjustifiable or arbitrary distinction' applicable to 'any act or conduct which denies to individuals equality of treatment with other individuals because they belong to particular groups in society'.⁴⁰ The principle of non-discrimination is to a certain extent the corollary of the principle of equality, i.e., it is the negative restatement of the principle of equality - likes should be treated alike.⁴¹

35 Gudmundur Alfredsson and Erika Ferrer, *Minority Rights: A Guide to United Nations Procedures and Institutions*, London, Minority Rights Group International, 2004, p.8.

36 Javaid Rehman, *The Weaknesses in the International Protection of Minority Rights*, Hague, Kluwer Law International, 2000, p.104.

37 Javaid Rehman, *The Weaknesses in the International Protection of Minority Rights*, Hague, Kluwer Law International, 2000, p.104.

38 See, Natan Lerner, *Group Rights and Discrimination in International Law*, Dordrecht, Martinus Nijhoff Publishers, 1991, p.25.

39 Wouter Vandenhoe, *Non-Discrimination and Equality in the View of the UN Human Rights Treaty Bodies*, Oxford, Intersentia, 2005, p.33.

40 W.A. McKean, *Equality and Discrimination under International Law*, Oxford, Clarendon Press, 1983, pp.10-11.

41 For more on the concept of equality and non-discrimination see, Titia Loenen and Peter R. Rodrigues (eds.), *Non-Discrimination Law: Comparative Perspectives*, Hague, Martinus Nijhoff Publishers, 1999; E.W. Viredag, *The Concept of Discrimination in International Law with Special Reference to Human Rights*, Hague, Martinus Nijhoff Publishers, 1973; Vernon Van Dyke, *Human Rights, Ethnicity and Discrimination*, London, Greenwood Press, 1985; W.A. McKean, "The Meaning of Discrimination in International and Municipal Law", *British Year Book of International Law*, vol.44, 1970, pp.177-192; Tuhin Malik, "The Principles of Non-Discrimination and Human Rights", in Tuhin Malik (ed.), *Human Rights Law*, Dhaka, Bangladesh Bar Council, 2000, pp..282-293.

The UNDM provides that persons belonging to minorities may exercise their rights, individually as well as in community with other members of their group, without any discrimination.⁴² It also provides that such minority persons have the right to enjoy their own culture, to profess and practise their own religion, and to use their own language, in private and in public, freely and without any form of discrimination.⁴³ Herein, the words “freely and without interference or any form of discrimination” indicate that it is not enough for the state to abstain from interference or discrimination. It must also ensure that individuals and organizations of the larger society do not interfere or discriminate.⁴⁴ This instrument also urges the states to take necessary measures to ensure such equality and non-discrimination.⁴⁵ Finally, the UNDM prescribes that measures taken by states to ensure the effective enjoyment of the rights of minorities shall not *prima facie* be considered contrary to the principle of equality contained in the UDHR.⁴⁶

The principle of equality not only envisages treating equal situations equally but also treating different situations differently. Particularly, in the context of groups, the right to equality and non-discrimination often raises issues of affirmative action and positive discrimination for the groups that have historically been deprived of equal opportunities.⁴⁷ Eide is of the view that elimination of discrimination includes not only formal freedom and equality, but also empowerment of those who in the past have been the subject of discrimination.⁴⁸ Accordingly, it is imperative that affirmative actions and positive discrimination measures⁴⁹ should be taken by the states for empowering the disadvantaged minority groups so that they can be placed in an equal footing with their majority counterpart. However, these measures are “exceptions, temporary expedients,

42 See, Article 3(1).

43 See, Article 2(1).

44 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.34.

45 See, Article 4(1).

46 See, Article 8(3).

47 Javaid Rehman, *International Human Rights Law: A Practical Approach*, London, Longman, 2003, p.303.

48 See, Asbjorn Eide, *Possible Ways and Means of Facilitating the Peaceful and Constructive Solution of Problems Involving Minorities*, E/CN.4/Sub.2/1993/34, para.93.

49 Affirmative actions and positive discrimination measures are meant to overcome past injustices or systematic disadvantages that a particular group has been exposed to in certain segments of public life. See, Miodrag A. Jovanovic, “Recognizing Minority Identities through Collective Rights”, *Human Rights Quarterly*, vol.27, no.2, 2005, p.638.

often with a specified time limit".⁵⁰ As soon as the intended goal has been achieved, affirmative action measures cease to exist, even if the beneficiary is a "traditional" minority group.⁵¹ It is essential, however, that such measures do not go beyond what is reasonable under the circumstances and are proportional to the aim sought to be realized.⁵² Moreover, the proportionality principle should be used to determine the width of positive state obligations by taking into account the scale of the respective minority groups.⁵³

4.3.3 Right to religious, linguistic and cultural autonomy

The history of religious, linguistic and cultural autonomy stretches to the time when minorities as distinct groups came to be recognized.⁵⁴ Article 27 of the ICCPR, however, appears the first universal manifestation of such right. The obligations contained in this Article 27 require states not to deny the persons belonging to minorities their right to enjoy their own culture, to profess and practice their own religion and to use their own language. With a similar voice, but in a more explicit manner, the UNDM recognizes that persons belonging to national or ethnic, religious and linguistic minorities have the right to enjoy their own culture, to profess and practise their own religion, and to use their own language, in private and in public, freely and without interference or any form of discrimination.⁵⁵ It is significant that whereas Article 27 of the ICCPR requires that persons belonging to the minorities "shall not be denied the right to . . .", Article 2(1) of the UNDM uses the positive expression "have the right to . . .".⁵⁶

50 Donald L. Horowitz, *Ethnic Groups in Conflict*, Berkeley, University of California Press, 1985, p.657.

51 Rainer Baubock, "Liberal Justifications for Ethnic Group Rights", in Christian Joppke and Steven Lukes (eds.), *Multicultural Questions*, Oxford, Oxford University Press, 1999, p.144.

52 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.83.

53 Kristin Henrard, *Devising an Adequate System of Minority Protection: Individual Human Rights, Minority Rights and the Right to Self-Determination*, Hague, Martinus Nijhoff Publishing, 2000, p.33.

54 Javaid Rehman, *The Weaknesses in the International Protection of Minority Rights*, Hague, Kluwer Law International, 2000, p.167.

55 Article 2.1.

56 See, 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.33.

The UNDM also urges the states to create favourable conditions to enable persons belonging to minorities to express their characteristics and to develop their culture, language, religion, traditions and customs.⁵⁷ Although this provision casts a positive obligation on the states, it gives little guidance on what is expected of states to enable minorities to express and develop their culture, language and religion.⁵⁸

The only permissible restriction, according to the UNDM, on the exercise of religious, linguistic and cultural autonomy concerns cultural and traditional practices which are “in violation of national law” and are “contrary to international standards”.⁵⁹ However, the criterion “in violation of national law” does not authorize a state to adopt whatever prohibitions against minorities’ cultural practices that it wants. What is intended is to respect the margin of appreciation which any state must have regarding which practices it wants to prohibit, taking into account the particular conditions prevailing in that country provided the prohibitions are based on reasonable and objective grounds.⁶⁰ On the other hand, the criterion “contrary to international standards” should apply to practices of both majorities and minorities. Cultural or religious practices which violate human rights law should be outlawed for everyone, not only for minorities.⁶¹

Regarding the right of minorities to religious autonomy, the Human Rights Committee held that although states are duty-bound not to discriminate between religions, the right of minority members to profess and practice their religions does not impose an obligation on the state to fund private religious schools.⁶² Sometimes a question arises – whether recognition by a state of the religion of majority population as the state religion offends the rights of religious minorities or not. In an attempt to reply, the Human Rights Committee clarifies that the fact that a religion is recognized as a state religion or that it is established as official or traditional or that its followers comprise the majority of the population, shall not result in any impairment of the enjoyment of any of the rights under the Covenant, including articles 18 and 27, nor in any discrimination against adherents to other religions or non-believers.⁶³ Apart from religious autonomy,

57 Article 4.2.

58 Jelena Pejic, “Minority Rights in International Law”, *Human Rights Quarterly*, vol.19, no.3, 1997, p.677.

59 Article 4.2.

60 See, 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.58.

61 See, 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.57.

62 See, *Waldman, vs. Canada*, Communication 694/1996.

63 Human Rights Committee, *General Comment No.22: The Right to Freedom of Thought, Conscience and Religion (Art.18)*, CCPR/C/21/Rev.1/Add.4, paragraph.9.

minorities are also entitled to freedom of religion. While Article 18 of the ICCPR dealing with freedom of religion does not specifically mention religious minorities, General Comment 22 to Article 18 suggests that the Article contemplates protection of religious minorities:

Article 18 is not limited in its application to traditional religions or to religions and beliefs with institutional characteristics or practices analogous to those of traditional religions. The Committee therefore views with concern any tendency to discriminate against any religion or belief for any reason, including the fact that they are newly established, or represent religious minorities that may be the subject of hostility on the part of a predominant religious community.⁶⁴

Realization of linguistic right is another common concern for minorities. This right is currently not limited to issue of linguistic autonomy.⁶⁵ Denial of this right subjects minorities to the will of the majority and contributes to a process of assimilation.⁶⁶ However, this right is essential not only for the protection of the identity of minority groups but also for the proper enjoyment of all other legitimate rights by individual members of minorities. This right concerns a variety of areas such as education, justice, administration, media, cultural and economic life, social life and transfrontier exchanges. Regarding the linguistic right of minorities, the Human Rights Committee held that provision for an official language in the public sphere *ipso facto* does not violate the ICCPR. However, the state may not exclude, outside the sphere of public life, the freedom

64 Human Rights Committee, General Comment 22, *The Right to Freedom of Thought, Conscience and Religion (Article 18)*, U.N. Doc.HRI/GEN/1/Rev.1 at 35, 1993, para.2.

65 For scope and extent of language rights of minorities see generally, Fernand De Varennes, *Language, Minorities and Human Rights: International Studies in Human Rights*, Hague, Martinus Nijhoff Publishers, 1996; Nathan Brett, "Language Laws and Collective Rights", *Canadian Journal of Law and Jurisprudence*, vol.4, no.2, 1991, pp. 347-360; Denise G. Reaume, "Official-Language Rights: Intrinsic Value and the Protection of Difference", in Will Kymlicka and Wayne Norman (eds.), *Citizenship in Diverse Societies*, Oxford, Oxford University Press, 2000, pp.245-272; Robert Dunbar, "Minority Language Rights in International Law", *International and Comparative Law Quarterly*, vol.50, 2001, pp.90-120; Lauri Malksoo, "Language Rights in International Law: Why the Phoenix is Still in the Ashes?", *Florida Journal of International Law*, vol.12, 2000, pp.431-465; Patrick Thornberry, "Education and Minority Rights: International Standards", in Iqbal A. Ansari (ed.), *Readings On Minorities: Perspectives & Documents*, vols. III, New Delhi, Institute of Objective Studies, 1996, pp.65-78; C. J. Reeber, "Linguistic Minorities and their Right to an Effective Education", *California Western International Law Journal*, vol. 3, no. 1, 1972-1973. pp. 112-132.

66 Patrick Thornberry, "An Unfinished Story of Minority Rights", 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, 2001, p.64.

to express oneself in a language of one's choice.⁶⁷ The UNDM prescribes that states should take appropriate measures so that, wherever possible, persons belonging to minorities may have adequate opportunities to learn their mother tongue or to have instruction in their mother tongue.⁶⁸ Accordingly, states should ensure the existence of and fund some institutions which can ensure the teaching of minority language.⁶⁹ However, the extent to which such measures be taken depend on a number of variable factors. Of significance will be the size of the group and the nature of its settlement, i.e., whether it lives compactly together or is dispersed throughout the country. Also relevant will be whether it is a long-established minority or a new minority composed of recent immigrants, whether or not they have obtained citizenship.⁷⁰ The declaration is, however, silent on the issue of recognition of the languages of minorities for official purposes and in the interaction of members of minorities with state authorities.

4.3.4 Right of participation

Participation of minorities in all aspects of the life of the larger national society is essential, both in order for persons belonging to minorities to promote their interests and values and to create an integrated but pluralist society based on tolerance and dialogue.⁷¹ Accordingly, the UNDM affirms that persons belonging to minorities have the right to participate effectively in cultural, religious, social, economic and public life.⁷² Herein, the right to participate in "public life" includes, among other rights, rights relating to election and to being elected, the holding of public office, and other political and administrative domains.⁷³

To add more value to the participation right of minorities, the UNDM also prescribes that persons belonging to minorities have the right to participate

67 See, *Ballantyne, Davidson and McIntyre vs. Canada*, Communications 385/1985 and 359/1989.

68 Article 4.3.

69 See, 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.63.

70 See, 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.60.

71 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.35.

72 Article 2.2.

73 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.36.

effectively in decisions on the national, and where appropriate, regional level concerning the minority to which they belong or the regions in which they live, in a manner not incompatible with national legislation.⁷⁴ Earlier, in the case of *Ilmari Lansman et al. v. Finland*,⁷⁵ the Human Rights Committee indicated that the existence of prior consultation of the group concerned is one consideration for determining whether the development activities of the state constituting interference with a minority culture amounts to 'denial' in the sense of Article 27 of the ICCPR.

4.3.5 Right to association

The UNDM provides that persons belonging to minorities have the right to establish and maintain their own associations.⁷⁶ This right can be limited only by law and the limitations can only be those which apply to associations of majorities: limitations must be those necessary in a democratic society in the interests of national security or public safety, public order, the protection of public health or morals, or the protection of rights and freedoms.⁷⁷

4.3.6 Right to contacts

In recognition of minorities' right to contacts, the UNDM provides that persons belonging to minorities have the right to establish and maintain, without any discrimination, free and peaceful contacts with other members of their group and with persons belonging to other minorities, as well as contacts across frontiers with citizens of other States to whom they are related by national or ethnic, religious or linguistic ties.⁷⁸ The right to contacts as manifested in this provision has three facets, permitting intra-minority contacts, inter-minority contacts, and transfrontier contacts. The right to intra-minority contacts is inherent in the right of association. Inter-minority contacts make it possible for persons belonging to minorities to share experience and information and to develop a common minority platform within the State. The right to transfrontier contacts constitutes the major innovation of the Declaration, and serves in part to overcome some of

74 Article 2.3.

75 Communication No. 511/1992.

76 Article 2.4.

77 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.51.

78 Article 2.5.

the negative consequences of the often unavoidable division of ethnic groups by international frontiers.⁷⁹

4.4 Conclusion

In most parts of the world minority groups are often seen as a kind of 'fifth column', likely to be working for a neighbouring enemy. This is particularly a concern where the minority is related to a neighbouring state by ethnicity or religion, so that the neighbouring state claims the right to intervene to protect 'its' minority.⁸⁰ To overturn this situation, it is not enough that international standards recognize certain rights for minorities. Rather states should understand that the promotion and protection of the rights of minorities contribute to the political and social stability,⁸¹ and the constant promotion and realization of these rights, as an integral part of the development of society as a whole and within a democratic framework based on the rule of law, would contribute to the strengthening of friendship and cooperation among peoples and states.⁸²

79 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.52.

80 Will Kymlicka, "Multiculturalism and Minority Rights: West and East", *Journal of Ethnopolitics and Minority Issues in Europe*, Issue. 4, 2002, p.19.

81 See, United Nations Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities, United Nations, G.A. Res. 47/135, U.N. Doc. A/RES/47/135 (Dec. 18, 1992), preamble, paragraph. 5.

82 See, United Nations Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities, United Nations, G.A. Res. 47/135, U.N. Doc. A/RES/47/135 (Dec. 18, 1992), preamble, paragraph. 6.

CHAPTER 5

National Level Protection of Minorities in South Asia

South Asia, comprising India, Pakistan, Bangladesh, Nepal, Sri Lanka, Bhutan, Maldives, and Afghanistan, represents a region of mega diversity. Its population is divided into numerous crosscutting and overlapping groups identified on the basis of religion, religious sub-sect, language, ethnicity, caste, and region. In the contexts of minorities of these South Asian states, an endeavor is made in this chapter of the study to present an overview of minorities of different states and outline the national policies towards the protection of these minorities. The focus of the chapter, being general and appraising major issues leaving many other issues unaddressed, is, however, not comprehensive.

5.1 Minorities in India

India's billion strong populations consist of 6 main ethnic groups, 52 major tribes, 6 major religions, and 6400 castes and sub-castes. Besides, there are 18 major languages and 1600 minor languages and dialects.¹ The identity composition of these ethno-communities has been further complicated by the imposition of class distinctions, not only between one and another ethno-community, but also within each.² However, it is practically useful to think of four types of minorities in India: linguistic, religious, caste, and tribal.³

5.1.1 The Constitution of India on minorities

1 See, *T.M.A. Pai Foundation and others vs. State of Karnataka and others*, WP (Civil) No. 317/1993, para.158.

2 See generally, Marguerite Ross Barnett, *The Politics of Cultural Nationalism in South India*, Princeton, Princeton University Press, 1976.

3 Myron Weiner, *The Indian Paradox: Essays in Indian Politics*, New Delhi, Sage Publications, 1989, p.43. For more on the identification of minorities in India see, Sebastian Vempenny, *Minorities in Contemporary India*, New Delhi, Kanishka Publishers, 2003; Bidyut Chakrabarty (ed.), *Communal Identity in India: Its Constitution and Articulation in the Twentieth Century*, New Delhi, Oxford University Press, 2003.

Arguably, the Constitution of India comprehensively addresses the various aspects of the legitimate rights of minority groups.⁴ Part III of the Indian Constitution guarantees certain fundamental rights for each and every citizen of India. These general rights have significant bearing on the protection of minorities. In particular, these rights include: equality before law,⁵ safeguard against discrimination on grounds of religion, race, caste, sex or place of birth,⁶ equality of opportunity in matters of public employment;⁷ abolition of untouchability;⁸ freedom of expression;⁹ freedom of association;¹⁰ right to free education up to the age of fourteen;¹¹ right to freely profess, practice and propagate religion;¹² right of religious denominations to manage religious affairs;¹³ safeguard against taxation for promotion of any particular religion;¹⁴ and safeguard against religious instruction in state-funded educational institutions.¹⁵

Despite the guarantee of non-discrimination as a fundamental right, Indian Constitution enables the state to make special provision for the advancement of any socially and educationally backward classes of citizens or for the schedule castes and the scheduled tribes.¹⁶ Moreover, promotion of educational and economic interests of schedule castes, scheduled tribes and other weaker sections of the people is one of the state policies formulated by the Constitution.¹⁷ The Constitution further provides that 'seats shall be reserved' in proportion to their

4 For a legal analysis on the minority rights regime of Indian Constitution, see, Joshua Castellino and Elvira Dominguez Redondo, *Minority Rights in Asia: A Comparative Legal Analysis*, New York, Oxford University Press, 2006, pp.58-103; Tahir Mahmud (ed.), *Minorities and the State at the Indian Law*, New Delhi, Institute of Objective Studies, 1991; Paras Diwan and Peeyushi Diwan, *Human Rights and the Law: Universal and Indian*, New Delhi, Deep & Deep Publications, 1998, pp.351-405.

5 Article 14.

6 Article 15. The terms 'race' and 'caste' are mentioned separately in the Indian Constitution as prohibited grounds of discrimination. This is because the official position of India is that 'caste' cannot be equated with 'race'. See, Nineteenth Periodic Report of India to the UN Committee on the Elimination of Racial Discrimination, CERD/C/IND/19, 29 March 2006, paragraph.16.

7 Article 16.

8 Article 17.

9 Article 19(1)(a).

10 Article 19(1)(c).

11 Article 21A.

12 Article 25.

13 Article 26.

14 Article 27.

15 Article 28.

16 Article 15(4).

17 Article 46.

numbers to scheduled castes and in the parliament,¹⁸ and in the state legislatures.¹⁹

According to the Constitution, Hindi in Devanagari script is the official language of Indian Union and English is the associate language.²⁰ However, a state is at liberty to adopt any one or more of the languages in use in the state or Hindi as the official language of the state.²¹ Moreover, if the President is satisfied that a substantial proportion of the population of a state desire the use of any language spoken by them to be recognized by that state, he may direct that such language shall also be recognized as an official language of the said state.²²

The Constitution pledges that any section of the citizens having a distinct language, script or culture of its own shall have the right to conserve the same.²³ The Constitution also allows religious and linguistic minorities to establish and administer educational institutions of their choice²⁴ and ensures that the state shall not, in granting aid to educational institutions, discriminate against any such institutions.²⁵ The Constitution further provides that linguistic minorities have the right to be taught and have instruction in their language at the primary stage of education.²⁶ However, this is a discretionary provision, and not mandatory for the states. The Constitution also provides for the appointment of a 'Special Officer for Linguistic Minorities',²⁷ whose duties include, *inter alia*, investigation of all matters relating to the safeguards provided for linguistic minorities under the Constitution.²⁸

The Constitution also grants limited self-government rights to certain tribal minority groups through provisions of the Fifth and Sixth Schedules of the

18 Article 330.

19 Article 332.

20 Article 343.

21 Article 345.

22 Article 347.

23 Article 29(1). For more details see, Anwarul Yaqin, "Educational and Cultural Rights of Minorities Under the Indian Constitution: Drafting History of Articles 29 & 30", in Iqbal A. Ansari (ed.), *Readings On Minorities: Perspectives & Documents*, vols. III, New Delhi, Institute of Objective Studies, 1996, pp.101-116.

24 Article 30(1).

25 Article 30(3). See for more details, Anwarul Yaqin, *Constitutional Protection of Minority Educational Institutions in India*, New Delhi, Deep & Deep, 1982; Iqbal A. Ansari, "Minority Educational Institutions under Articles 29 & 30 of the Indian Constitution", in Iqbal A. Ansari (ed.), *Readings On Minorities: Perspectives & Documents*, vols. III, New Delhi, Institute of Objective Studies, 1996, pp.117-155.

26 Article 350A.

27 Article 350B(1).

28 Article 350B(2).

Constitution.²⁹ According to the Fifth Schedule of the Constitution, which is generally applicable for tribal inhibited areas of central India, the governors of the concerned states are empowered to repeal or amend any law enacted by parliament or the state assembly that could harm the interests of the tribal people. However, before exercising such powers, the Governor is required to consult the Tribal Advisory Council whose composition include 75% representatives of the scheduled tribes in the legislative assembly. On the other hand, the Sixth Schedule of the Constitution, applicable for tribal hill areas in the north-east states of Assam, Meghalaya, Tripura and Mizoram, provides for the creation of autonomous districts and autonomous regions. However, the sixth schedule of the Constitution does not apply to Manipur state, for which a separate Act,³⁰ was passed in 1971. Its provisions are, however, similar to those of the sixth schedule. To effectively implement the various safeguards for scheduled tribes and scheduled castes, the Constitution provides for setting up of the National Commission for Scheduled Castes,³¹ and the National Commission for Scheduled Tribes.³²

5.1.2 Religious minorities

India is among the most diverse societies in the world in terms of religious minorities. It has people from all the major religions in the world—Hindus, Muslims, Christians, Sikhs, Buddhists, Jains and Zoroastrians (Parsis). Religious Composition of Indian Population, as revealed in 2001 census, is as follows: Hindus: 81.4%, Muslims: 12.4%, Christians: 2.3%, Sikhs: 1.9%, Buddhists: 0.8%, Jains: 0.4%, and others: 0.7%. Constitutionally India maintains secularism without unnecessarily curtailing the essential religious freedom of individuals and groups in the society.³³ However, it is often argued that by not combining the principle of toleration with that of secularism, the Constitution enables the state to use the administrative strategy of secularism to govern all communities in a manner that speaks of protection for minorities without encouraging tolerance.³⁴

The Muslims constitute the largest religious minority in India and are scattered all over the country. There is only one Muslim majority state in India - Jammu & Kashmir (67%). In terms of ration, Muslims also have sizable pockets in Assam (30.9%), West Bengal (25.2%), Kerala (24.7%), Uttar Pradesh (18.5%), Bihar

29 See, Article 244.

30 The Manipur (Hill Areas) District Act, 1971.

31 Article 338.

32 Article 338A.

33 See, Tahir Mahmood, "Religion - State Relations in India", *Religious Studies Review*, vol.1, no.1, 2007, pp.50-58.

34 See, Ranabir Samaddar, *The Materiality of Politics*, vol.1, London, Anthem Press, 2007, p.161.

(16.5%), Jharkhand (13.8%), Karnataka (12.2%), Uttarakhand (11.9%), and Maharashtra (10.6%). Among the union territories, the Muslims constitute majority in Lakshadweep (95%). However, in terms of number, most Muslims reside in Uttar Pradesh, West Bengal, Bihar, Maharashtra, Assam, Kerala, Jammu & Kashmir, Andhra Pradesh, Gujarat, Madhya Pradesh, Jharkhand, and Tamil Nadu.

There are three states in India where the Christians, the second largest religious minority of India, constitute the majority. All these states are in the north-east, viz., Nagaland (90%), Mizoram (87%) and Meghalaya (70.3%). In terms of ration, Christians also have sizable pockets Manipur (34%), Goa (26.7%), Kerala (19%), and Arunachal Pradesh (18.7%). Among the union territories, the Christians constitute a substantial number in Andaman & Nicobar Islands (21.7%). However, in terms of number, most Christians reside in Kerala, Tamil Nadu, Nagaland, Meghalaya, Andhra Pradesh, Jharkhand, Maharashtra, and Karnataka.

Among the other religious minorities, the Sikhs are mainly concentrated in Punjab where they form a majority (59.9%). The Buddhists³⁵ are mainly concentrated in Maharashtra. Jains, the India's oldest religious minority,³⁶ mainly live in the states of Maharashtra, Rajasthan, Gujarat and Karnataka.

Sense of insecurity caused by communal violence and hate campaign by Hindu religious fundamentalists appears to be one of the most common concerns of religious minorities in general and the Muslim community in particular.³⁷ It is largely Muslims who are the victims of such communal violence. During the communal riots following the demolition of *Babri Masjid* in 1992, almost all institutions of state and civil society in India – executive, judiciary, legislature, political parties, police, trade unions etc. – failed to protect the besieged Muslim community and uphold the secular principles that the Indian Constitution is committed to.³⁸ In 2002, the state of Gujarat in western India witnessed the most horrendous massacres of Muslims by Hindu nationalist groups with the overt involvement of state machinery.

35 See generally, Sukomal Chaudhuri, "Buddhists as Minorities in India", in Monirul Hussain & Lipi Ghosh (eds.), *Religious Minorities in South Asia: Selected Essays on Post-Colonial Situations*, vol.2, New Delhi, Manak Publications, 2002, pp.3-29.

36 R.A. Schermerhorn, *Ethnic Plurality in India*, Arizona, University of Arizona Press, 1978, p.101.

37 See generally, Asghar Ali Engineer (ed.), *Communal Riots in Post Independence India*, Delhi, Sangam Publications, 1984; P.R. Rajgopal, *Communal Violence in India*, New Delhi, Uppal, 1991; Amrita Basu and Atul Kohli (eds.), *Community Conflicts and the State in India*, Cambridge, Oxford University Press, 1998.

38 Sumanta Banerjee, "Introduction", in Sumanta Banerjee (ed.), *Shrinking Space: Minority Rights in South Asia*, Kathmandu, South Asia Forum for Human Rights, 1999, p.12.

Socio-economic backwardness and disproportionate representation in almost every aspect of public life are also among the pressing issues for the religious minorities in India.³⁹ Dr. Gopal Singh Report on Minorities submitted to the Government in 1983 found that amongst poorest of the poor, minorities constitute the majority. In particular, the report revealed that there were only 128 Muslims in the Indian Administrative Services out of a total of 3,785 (3.2%), and 57 Muslims in Indian Police service (2.6%). The Report on 'Social, Economic and Educational Status of the Muslim Community of India' submitted to the government of India in 2006 (popularly known as 'Sachar Commission Report') also documented the overall situation of Muslims, the largest religious minority of India, in India. Some of the findings of this report are as follows:⁴⁰

- ❖ Muslims live with an inferiority complex as “every bearded man is considered an ISI agent”;
- ❖ Social boycott of Muslims in certain parts of the country has forced them to migrate from places where they lived for centuries;
- ❖ A community specific factor for low educational achievement is that Muslims do not see education as necessarily translating into formal employment;
- ❖ Schools beyond the primary level are few in Muslim localities;
- ❖ Many banks have designated a number of Muslim concentration areas as 'negative or red zones', where they do not give loans;
- ❖ It is common to find names of Muslims missing in the voter lists of a number of states;
- ❖ Unemployment rate among Muslim graduates is the highest among Socio-religious groups both among the poor and the non-poor;
- ❖ The participation of Muslims in regular jobs in urban areas is quite limited compared to even the traditionally disadvantaged scheduled castes and scheduled tribes;

39 For the status of Muslims and other minorities in terms of their representation in services and other sectors see generally, High Power Panel On Minorities, S.C., S.T. and other Weaker Sections, *Report on Minorities*, vol. I & II, New Delhi, Government of India, 1993; Iqbal A. Ansari (ed.), *The Muslim Situation In India*, New Delhi, Institute of Objective Studies, 1989; Abu Saleh Shariff, *Relative Economic and Social Deprivation of Indian Muslims* (Paper Presented in a Seminar Muslims In India Since Independence, Institute of Objective Studies, New Delhi, 28-29 March 1998); Javed Anand, “Minority Rights in India: Constitution and Reality”, in Sumanta Banerjee (ed.), *Shrinking Space: Minority Rights in South Asia*, Kathmandu, South Asia Forum for Human Rights, 1999, pp.143-172.

40 For the report, visit:
www.minorityaffairs.gov.in/newsite/sachar/sachar_comm.pdf (last accessed on 27 June 2009).

- ❖ Participation of Muslims in security related activities (e.g. Police) is considerably lower than their share in population;
- ❖ Compared to the Muslim majority areas, the areas inhabiting fewer Muslims had better roads, sewage and drainage, and water supply facilities;
- ❖ The presence of Muslims is only 3% in the IAS, 1.8% in the IFS and 4% in the IPS;
- ❖ In no state does the representation of Muslims in the government departments match their population share;
- ❖ The presence and participation of Muslims in the Judiciary has been a major point of concern.

Although the religious minorities always claim the benefits of affirmative action as stipulated in Articles 15(4) and 16(4) of the Constitution, the government of India consistently refuses to extend reservations to religious groups on the ground that it would be divisive.⁴¹ However, it is part of the Indian political strategy, as often argued, to periodically appoint Muslims on positions of high visibility like a President & a Chief Justice to give the impression that Muslims are equal participants in the public life in India.⁴²

5.1.3 Linguistic minorities

By one estimate, there were some 1,632 languages spoken in India.⁴³ However, the speakers of 18 major languages constitute about 91% of the population. Although the Constitution of India offers detailed provisions on language, it does not provide a clear criterion for defining minority languages.⁴⁴ However, it is agreed upon by all that there is no linguistic group at the national level which can claim the majority status and as such the majority-minority question is considered in reference to the state only.⁴⁵

41 Myron Weiner, *The Indian Paradox: Essays in Indian Politics*, New Delhi, Sage Publications, 1989, p.67.

42 See, Iqbal A. Ansari (ed.), *Communal Riots, The State & Law In India*, New Delhi, Institute of Objective Studies, 1997, pp. 66-75

43 D. D. Basu, *Introduction to the Constitution of India*, New Delhi, Prentice Hall of India, 1997, p.187.

44 Rajeshwari V. Pandharipande, "Minority Matters: Issues in Minority Languages in India", *International Journal on Multicultural Societies*, vol.4, no.2, 2002, p.214.

45 S. Chaklader, *Linguistic Minority as a Cohesive Force in Indian Federal Process*, New Delhi, Associate Publishing House, 1981, p.14.

The major demand of linguistic groups is that their language be recognized as an official language of states. This recognition, linguistic minorities argue, reduces the pressures for linguistic assimilation and enables the group to strengthen its identity and solidarity.⁴⁶ Accordingly, after independence, many of the Indian states were reorganized, not of course without widespread struggles of the people, along linguistic lines.⁴⁷ Thus, almost every major states of India has what may be called a 'home' language, of which it is a 'home' state.⁴⁸ At present, the officially recognized languages are - Assamese, Bengali, Bodo, Dogri, Gujarati, Hindi, Kannada, Kashmiri, Konkani, Maithili, Malayalam, Manipuri, Marathi, Nepali, Oriya, Punjabi, Sanskrit, Santhali, Sindhi, Tamil, Telugu, and Urdu.

The anomalies and contradictions apparent in the scheme of official recognition of language generate some concerns for linguistic minorities.⁴⁹ There are states, most notably in India's northeast, where the local languages of overwhelming number of people are not yet 'officially' recognized. For example, the state level official languages in Meghalaya, Mizoram and Nagaland are not spoken by the majority of the people in these states. Kashmiri, which is spoken by 53 per cent of the total population in the state of Jammu and Kashmir, is not the state language. Contrarily, Urdu, the official language of Jammu and Kashmir, is spoken by less than 1 per cent of the total population of the state. Similarly, English, the official language of Meghalaya, is spoken by 0.01 per cent of the total population.⁵⁰

5.1.4 Indigenous tribal groups

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- 46 Myron Weiner, *The Indian Paradox: Essays in Indian Politics*, New Delhi, Sage Publications, 1989, p.66.
- 47 For a brief description of the reorganization of states in India, see P.C. Mathur, *Social Bases of Indian Politics*, Jaipur, Aalekh Publishers, 1984, pp. 135-191.
- 48 A. R. Kamat, "Ethno-Linguistic Issues in the Indian Federal Context", in Bidyut Chakraborty (ed.), *Communal Identity in India: Construction and Articulation in the Twentieth Century*, New Delhi, Oxford University Press, 2003, p.152.
- 49 See generally, Anvita Abbi (ed.), *The Languages of Tribal and Indigenous Peoples of India: The Ethnic Space*, New Delhi, Motilal Banarsidass, 1997; A. R. Kamat, "Ethno-Linguistic Issues in the Indian Federal Context", in Bidyut Chakraborty (ed.), *Communal Identity in India: Construction and Articulation in the Twentieth Century*, New Delhi, Oxford University Press, 2003, pp.150-180; Iqbal A. Ansari, "Inadequate Constitutional Protection of Minority Languages in India", in Iqbal A. Ansari (ed.), *Readings On Minorities: Perspectives & Documents*, vols. III, New Delhi, Institute of Objective Studies, 1996, pp.157-168; H.S. Biligiri, "Problems of Tribal Languages in India", in N. Ray (ed.), *Language and Society in India*, Simla, Institute of Advanced Study, 1969, pp.245-250; Kamal K. Sridhar, "Languages in Education: Minorities and Multilingualism in India", *International Review of Education*, vol.42, no.4, 1996, pp.327-347.
- 50 Rajeshwari V. Pandharipande, "Minority Matters: Issues in Minority Languages in India", *International Journal on Multicultural Societies*, vol.4, no.2, 2002, p.215.

Indigenous tribal people of India are concentrated in three principal regions. One is India's northeast. The second is in middle India, and includes Bihar, the hill areas of inland Orissa, southeastern Madhya Pradesh, and a portion of northern Andhra. The third region is in India's west, and includes parts of eastern Gujarat, western Madhya Pradesh, and southern Rajasthan. There is also a small tribal area in the mountain region of Himachal Pradesh and in the Nilgiri hills in Tamil Nadu. Among the tribal groups, six largest tribes constitute nearly one-half of the India's tribal population. These tribes are: the Gonds of central India; the Bhils of western India; the Santals of Bihar, West Bengal and Bihar; the Oraons of Bihar and West Bengal; the Minas of Rajasthan; and the Mundas of Bihar. Some tribes, though considerably smaller, constitute a majority of the areas in which they live: the Nagas, Khasis and Garos, forexample, in India's northeast.⁵¹

According to the 2001 census, the schedule tribal population constitutes 8.2% of the total population of India. Among the states, Mizoram has the highest proportion of scheduled tribes (94.5%) while Goas has the lowest (0.04%). The census lists 461 groups recognised as tribes, while estimates of the number of tribes living in India reach up to 635.

The main demand prevalent among many tribal people is their right to autonomy.⁵² In response, the successive governments have relied on two political-administrative solutions: the creation of autonomous district and regional councils provided for by the sixth schedule of the Constitution, and the formation of separate states.⁵³ Such solutions being not in accordance with the aspiration of tribal people, many indigenous groups, particularly in the north-eastern region, have been struggling for self-rule.⁵⁴ The overall socio-economic condition of these tribal groups is also far below the national average.

5.1.5 Dalits as a caste minority

The caste system, is a traditional Hindu system of social segregation, which works on the principle of purity and pollution. In this structure of segregation, dalits

51 See, Myron Weiner, *The Indian Paradox: Essays in Indian Politics*, New Delhi, Sage Publications, 1989, pp.53-55.

52 See generally, Govind Sadashiv Ghurye, *The Scheduled Tribes of India*, New Brunswick, Transaction Publishers, 1980; Virginius Xaxa, "Culture, Politics and Identity: The Case of the Tribes in India", in Mary E. John, Praveen Kumar Jha and Surinder S. Jodhka (eds.), *Changing Economics and Identities in Contemporary India*, New Delhi, Tulika, 2006, pp. 277-289; Rabinda Nath Pati and Jagannatha Dash (eds.), *Tribal and Indigenous People of India: Problems and Prospects*, New Delhi, APH Publishing, 2002.

53 Christian Erni, "Indigenous Peoples' Self-Determination in Northeast India", *Indigenous Affairs*, vol.3, no.1, 2001, p.61.

54 See generally, Sanjib Baruah, "Territoriality, Indigeneity and Rights in the North-east India", *Economic and Political Weekly*, March 22, 2008, pp.15-19.

occupy the lowest position. Traditionally they are considered as untouchable by so called higher castes/dominant caste group. At present, dalits are not necessarily present only in the Hindu community. Many Dalits who converted to other religions in the past few centuries continue to retain their Dalit heritage. Although the Constitution of India formally outlawed the practice of untouchability - the imposition of social disabilities on persons by reason of their birth in certain castes - back to almost sixty years ago, in practice the dalit communities are still subjected to extreme forms of social and economic exclusion and discrimination.

According to the Indian Constitution, dalits are not classified as minorities, although the Court, in one instance, labeled them as the “world’s most oppressed minority”.⁵⁵ Within the constitutional scheme, dalits are perceived to be included in the term ‘scheduled castes’. However, the Constitution does not define or specify as to who are to be regarded as ‘scheduled castes’,⁵⁶ rather leaves it to the discretion of the President to determine and accordingly notify.⁵⁷

According to the 2001 census, the schedule caste population constitutes 16.2% of the total population of India. Four fifth (79.8%) of them live in rural areas while the rest one-fifth (20.2%) in urban areas. The highest percentage of scheduled castes population to the total scheduled castes population of the country live in Uttar Pradesh (21.1%) followed by West Bengal (11.1%) and Bihar (7.8%), Andhra Pradesh (7.4%) and Tamil Nadu (7.1%).

The ground reality for the dalits is that India’s social hierarchy and ethno-demography have affected the context of equal protection provisions of the Constitution.⁵⁸ Their socio-economic condition is quite inhuman.⁵⁹ Although the constitutionally mandated affirmative action has had some impact in enabling them to overcome histories of social injustice and religiously sanctified discrimination,⁶⁰ still now dalits continue to be one of the most underprivileged

55 *State of Karnataka vs. Babu Ingale*, (1992) 3 SCR 284, para.15.

56 See, Paras Diwan and Peeyushi Diwan, *Human Rights and the Law: Universal and Indian*, New Delhi, Deep & Deep Publications, 1998, p.384.

57 See, Articles 366(24) and 341 of the Indian Constitution.

58 See, Maya Chadda, *Minority Rights and Conflict Prevention: Case Study of Conflicts in Indian Jammu and Kashmir, Punjab and Nagaland*, London, Minority Rights Group International, 2006, p.3.

59 See generally, Anirban Kashyap and Sarajit Kumar Chatterjee, *The Scheduled Castes in India*, New Delhi, Gyan Publishing House, 1996.

60 On affirmative actions for minorities in India see, Amajeet Kaur, “India”, in Jane Hodges Aeberhard and Carl Raskin, *Affirmative Action in the Employment of Ethnic Minorities and Persons with Disabilities*, Geneva, ILO, 1997, pp.29-44.

groups in India in every index of human development.⁶¹ Caste based violence is another concern for the dalit community in India.⁶²

5.2 Minorities in Pakistan

The official position of Pakistan does not recognize the existence of any ethnic or linguistic minorities in Pakistan. According to the fourth periodic report of Pakistan to the Committee on the Elimination of All forms of Racial Discrimination: "In Pakistan there were no racial or ethnic minorities but only religious minorities".⁶³ According to the twentieth report to the same committee, minorities in Pakistan consist of Christians, Hindus, Ahmadis, Parsis, Buddhists and Sikhs.⁶⁴ Despite this official position, it is undeniable that Pakistan is a home to different religious, ethnic as well as linguistic minorities.

5.2.1 The Constitution of Pakistan on minorities

The Constitution of Pakistan declares Islam as the state religion.⁶⁵ However, one of the nine basic principles proclaimed in the 'Objection Resolution'⁶⁶ annexed to the Constitution of Pakistan says: "Adequate provision should be made for the minorities to freely profess and practice their religions and develop their cultures". However, because of its Islamic character, the Objection Resolution is claimed by the religious minorities as detrimental to the legitimate interests.⁶⁷ On the question of language, while the Constitution of Pakistan sets Urdu as the national language and English as the official language of Pakistan, it also enables the provincial legislatures to determine provincial language.⁶⁸ Chapter III of the

61 Rita Manchandra (ed.), *The No-Nonsense Guide to Minority Rights in South Asia*, New Delhi, South Asia Forum for Human Rights, 2006, p.86.

62 See, Smita Narula, *Broken People: Caste Violence against India's 'Untouchables'*, New York, Human Rights Watch, 1999.

63 CERD/C/SR 322, para 3.

64 See, Twentieth Periodic Report of Pakistan to the UN Committee on the Elimination of Racial Discrimination, CERD/C/PAK/20, 19 March 2008, paragraph.93.

65 Article 2.

66 The 'Objective Resolution', one of the most important documents in the constitutional history of Pakistan, was a resolution adopted on 1949 by the Constituent Assembly. In 1985, this document were annexed to and made a substantive part of the 1973 Constitution of Paksitn. See, Article 2A of the Constitution of the Islamic Republic of Pakistn, 1973.

67 See, Javaid Rehman, "Minority Rights and the Constitutional Dilemmas of Pakistan", *Netherlands Quarterly for Human Rights*, vol.19, no.4, 2001, pp.417-443.

68 Article 251.

Constitution dealing with fundamental rights guarantees to every person the freedom of association,⁶⁹ the freedom of speech,⁷⁰ the freedom to profess religion and to manage religious institutions,⁷¹ safeguard against taxation for purposes of any particular religion,⁷² safeguard as to educational institutions in respect of religion,⁷³ equality before law,⁷⁴ non-discrimination on the basis of religion, race, caste, sex, residence etc. in access to public places and services,⁷⁵ and preservation of language, script and culture.⁷⁶ Moreover, the Constitution provides that the State shall safeguard the legitimate rights and interests of minorities, including their due representation in the federal and provincial services.⁷⁷ However, despite a number of references to the term 'minorities',⁷⁸ no definition of whatsoever has been offered by the Constitution.⁷⁹

5.2.2 Religious minorities

According to the official statistics of Pakistan, religious minorities constitute about 3.72% of the total population.⁸⁰ Among the religious minorities, the Hindus constitute 1.9%, the Christians constitute 1.6%, the Ahmadis constitute 0.1% and the Parsis, Buddhists, Sikhs, Bahais cumulatively constitute 0.12% of the total population of Pakistan.

Pakistan is relatively typical of states in this region in that it reflects a high awareness of minority rights, enshrined in law and institutions.⁸¹ Under the Devolution of Power Plan 2000, religious minorities have been represented in all the three tiers of the local bodies. They are also represented in the national and provincial assemblies.⁸² Ten seats are reserved in the National Assembly and 23 in

69 Article 17.

70 Article 19.

71 Article 20.

72 Article 21.

73 Article 22.

74 Article 25.

75 Article 26.

76 Article 28.

77 Article 36.

78 See, e.g., the Preamble, Article 2(a) and Article 36.

79 Javaid Rehman, *The Weaknesses in the International Protection of Minority Rights*, Hague, Kluwer Law International, 2000, p.136.

80 See, Twentieth Periodic Report of Pakistan to the UN Committee on the Elimination of Racial Discrimination, CERD/C/PAK/20, 19 March 2008, paragraph.93.

81 Joshua Castellino and Elvira Dominguez Redondo, *Minority Rights in Asia: A Comparative Legal Analysis*, New York, Oxford University Press, 2006, p.46.

82 8 in Punjab, 9 in Sindh, 3 in NWFP, and 3 in Balochistan.

the four provincial assemblies. These seats are in addition to the seats they win in direct elections. In May 2009, the government issued a notification saying that in all federal government jobs, a quota of 5% would be reserved for religious minorities. To protect the rights of minorities as envisaged in the Constitution of Pakistan, a full fledged Ministry of Minorities was established in 2004. However, it is often argued that the Ministry is largely ineffective and its role has been reduced merely to giving awards on special occasions to members of the minority community.⁸³

Low intensity communal violence is a matter of concern for the religious minorities in Pakistan. Reported incidents of violence are primarily targeted at the Ahmadis. Hindus also suffer especially during communal unrest in neighbouring India. The incidents of violence against Christians were rare until the start of the so-called 'war on terror'. The last few years, however, have witnessed several attacks on churches. The other religious minorities such as the Bahais, the Parsis and the Sikhs have escaped any collective anger from other majority communities due to their small number and limited activities.⁸⁴

In Pakistan, there are several laws that discriminate against the religious minorities and promote marginalization of these groups in the society.⁸⁵ For example, according to the Constitution, a non-Muslim is disqualified to adorn the post of the President of Pakistan.⁸⁶

The Ahmadis are the most oppressed of the religious minorities in Pakistan.⁸⁷ By way amendment to the Constitution, the Ahmadiya amongst others have been declared non-Muslim.⁸⁸ This amendment was unsuccessfully challenged as

83 Meghna Guhathakurta (ed.), *Including the Excluded: Rights of Minorities in South Asia*, Colombo, South Asians for Human Rights, 2006, p.37.

84 Iftikhar H. Malik, *Religious Minorities in Pakistan*, London, Minority Rights Group International, 2002, p.11.

85 See generally, Khalid Ahmed, "Violation of the Rights of the Minorities in Pakistan", in Sumanta Banerjee (ed.), *Shrinking Space: Minority Rights in South Asia*, Kathmandu, South Asia Forum for Human Rights, 1999, pp.119-136; Amnesty International, *Pakistan: Insufficient Protection to Religious Minorities*, 2001, AI Index: ASA 33/008/2001.

86 See, The Constitution of Pakistan, Article 41.

87 See generally, Amjad Mahmood Khan, "Persecution of the Ahmadiyya Community in Pakistan: An Analysis under International Law and International Relations", *Harvard Human Rights Journal*, vol.16, 2003, pp.217-244; Tayyab Mahmud, "Freedom of Religion & Religious Minorities in Pakistan: A Study of Judicial Practice", *Fordham International Law Journal*, vol.19, 1995, pp.40-100; Ashaar Rahman, *Religious Minorities and Extremism: A View of Contemporary Realities in Pakistan*, London, Minority Rights Group, 2004; Akbar S. Zaidi, "Religious Minorities in Pakistan Today", *Journal of Contemporary Asia*, vol.18, no.4, 1998, pp.444-457.

88 See, The Constitution (Fifth Amendment) Act, 1976 (62 of 1976), section 16.

repugnant to Islam before the Court.⁸⁹ In the case of *Zaheeruddin vs. State*,⁹⁰ a statute prescribing punishment for public practice of religion by Ahmadiya community was challenged as opposed to fundamental right to freedom of religion. But, the Court upheld the impugned penal provisions and thereby contributed to the continuing persecution of the Ahmadis.

5.2.3 Ethno-linguistic minorities

All the major ethnic groups of Pakistan have their own languages. Accordingly, language and ethnicity are intertwined. Pakistan has several ethno-linguistic groups such as Punjabis, Sindhis, Pakhtuns (also called Pathan) and Baluchis who are traditionally concentrated in four different provinces.⁹¹ The province of Punjab is named after the Punjabis who constitute the majority in the province and speak the Punjabi as their mother language. Similarly the provinces of Sindh and Balochistan are named after the Sindhis and Baluchis who speak Sindhi and Balochi respectively as their mother languages. However, the home land of Pakhtuns, who use Pashto as their mother language, still carries the name coined by the British - the North Western Frontier Province (NWFP). Since the late 1960s and early 1970s, the ethnic boundaries of these provinces have become blurred. Thus, despite the apparent homogeneity each of the four provinces of Pakistan - Balochistan, NWFP, Punjab and Sindh - has become immensely plural.⁹² Apart from these four groups, the Mohajirs are the most significant ethno-linguistic group. They are the only non-indigenous ethnic group who had migrated from India. At present, they use Urdu as their mother language and constitute 8% of the total population. The other ethno-linguistic groups include: Hindko, Brahvi, Shina, Burushaski, Balti, Khowar, Gujrati, Potohari, and Farsi.

The Constitution of Pakistan has failed to reflect the multilingual character of the country with six major and over fifty-nine small languages. While Punjabi is spoken as first language by 44% of Pakistanis, the Constitution recognizes Urdu as the national language which is spoken as first language only by 8% of the total population of the country. In 1971 and 1972 there were language riots in Sindh province where the Sindhis, protesting the dominance of Urdu, clashed with the

89 *Mujibur Rahman vs. Pakistan*, PLD 1985 FSC 8.

90 1993 SCMR 1718.

91 See generally, Sardar Shaheen Ali and Javaid Rehman, *Indigenous Peoples and Ethnic Minorities of Pakistan: Constitutional and Legal Perspectives*, London, Curzon Press, 2001.

92 Iftikhar H. Malik, *Religious Minorities in Pakistan*, London, Minority Rights Group International, 2002, p.4.

Mohajirs.⁹³ Among the ethno-linguistic groups in Pakistan, the Punjabis constitute the majority. The other groups - Baluchis, Sindhis, and Pakhtuns - not only suffer from the characteristic minority syndrome of discrimination and persecution, but also are denied the official status of minorities.⁹⁴ What is most worrying is the feeling of injustice prevalent among the Baluchis, Sindhis and Pakhtuns.⁹⁵ They frequently demand that their provinces do not get due share of the national resources.⁹⁶

5.3 Minorities in Bangladesh

Bangladesh is one of the most homogenous nation states in the world. But despite its place among the states with the highest per centage of social homogeneity, there are minorities in Bangladesh. It recognizes the existence of religious and ethnic minorities, but the presence of linguistic minorities is an issue that is fraught with controversies.⁹⁷

5.3.1 The Constitution of Bangladesh on minorities

The original constitution of Bangladesh adopted in 1972 set 'secularism' as one of four fundamental principles of state policy. Later, in 1977, this principle was substituted with the principle of 'absolute trust and faith in the Almighty Allah'.⁹⁸ In 1988, through a constitutional amendment, Islam, the religion of majority population, was declared as the state religion with additional guarantee that "other religions may be practiced in peace and harmony".⁹⁹ The Constitution also declares Bangla, the language of the majority population.¹⁰⁰

93 On the language policy of Pakistan see, Tariq Rahman, *Language and Politics in Pakistan*, Karachi, Oxford University Press, 1996.

94 Javaid Rehman, *The Weaknesses in the International Protection of Minority Rights*, Hague, Kluwer Law International, 2000, p.7.

95 See generally, Feroz Ahmed, *Ethnicity and Politics in Pakistan*, Karachi, Oxford University Press, 1999.

96 See, Akbar S. Zaidi (ed.), *Regional Imbalances and the Regional Question in Pakistan*, Lahore, Vanguard Books, 1992.

97 See, Mohammad Tajuddin, "Minorities in Bangladesh: A Conspectus", in Sumanta Banerjee (ed.), *Shrinking Space: Minority Rights in South Asia*, Kathmandu, South Asia Forum for Human Rights, 1999, p.97.

98 See, Article 8.

99 Article 2A.

100 Article 3.

The Constitution of Bangladesh does not recognize any minority and, therefore, allow no special protection or promotion for them.¹⁰¹ However, Part III of the Constitution dealing with fundamental rights guarantees to every citizens, *inter alia*, equality before law,¹⁰² safeguard against discrimination on grounds of religion, race, caste, sex or place of birth,¹⁰³ equality of opportunity in public employment,¹⁰⁴ the freedom of association,¹⁰⁵ the freedom of thought, conscience and speech,¹⁰⁶ and the freedom of religion.¹⁰⁷

5.3.2 Religious minorities

According to the latest census report, there are 10.3% religious minorities in Bangladesh. They are mainly from Hinduism (9.2%), Buddhism (0.7%), and Christianity (0.3%). There are some other people of different beliefs also, though in a very negligible quantity (0.2%).¹⁰⁸ Among the religious minorities, Hindus mostly live in Barisal, Khulna, Faridpur and Jessore districts which are adjacent to the India-Bangladesh border. The highest ratio of Hindu Muslim population is found in Comilla, another border area district.¹⁰⁹ The Buddhists¹¹⁰ are largely concentrated in the Chittagong area while the other communities are spread across the country.

Low intensity violence causing a sense of insecurity is the major problem faced by religious minorities in Bangladesh.¹¹¹ In most of the cases, Hindu communities are

101 Gobinda Chandra Mandal, "Treatment of Law to the Minorities in Bangladesh: Rhetoric and Reality", in Mizanur Rahman (ed.), *Human Rights & Corruption*, Dhaka, Empowerment through Law of the Common People, 2007, p.221.

102 Article 27.

103 Article 28.

104 Article 29.

105 Article 38.

106 Article 39.

107 Article 41.

108 Gobinda Chandra Mandal, "Treatment of Law to the Minorities in Bangladesh: Rhetoric and Reality", in Mizanur Rahman (ed.), *Human Rights & Corruption*, Dhaka, Empowerment through Law of the Common People, 2007, p.220.

109 See, Saleem Samad, "State of Minorities in Bangladesh", in Sumanta Banerjee (ed.), *Shrinking Space: Minority Rights in South Asia*, Kathmandu, South Asia Forum for Human Rights, 1999, p.75.

110 On the situation of Buddhists in Bangladesh see, Bimal Bhikshu, "Buddhists Minority in Bangladesh", in Monirul Hussain & Lipi Ghosh (eds.), *Religious Minorities in South Asia: Selected Essays on Post-Colonial Situations*, vol.1, New Delhi, Manak Publications, 2002, pp.17-52.

111 For a credible account on the situation of religious minorities in Bangladesh see, *Situation in Bangladesh* (Interim report of the Special Rapporteur of the Commission

the primary victims of violence. In particular, during the communal unrest in the neighbouring India and during national election and post-election period, the incidents of violence against Hindu communities escalate.¹¹² Occasionally, there are also reported incidents of violence against Christian minorities.

Legislation of vested property is a matter of concern for religious minorities, particularly for the Hindu community. After the independence of Bangladesh, all alleged enemy properties and assets were vested in the government of Bangladesh by the Bangladesh (Vesting of Property and Assets) Order, 1972.¹¹³ In many instances, the political and social elites have used this law to dispossess the Hindu minorities from their properties.

It is also alleged that religious minorities in Bangladesh enjoy very limited scope of participation. They are not adequately represented in public services, in armed forces and in political parties.

The disadvantages faced by religious minorities in Bangladesh are manifested in the gradual demographic change in the number of minorities. The proportion of the largest religious minority, the Hindus, has been going down. The head count shows that while the population of Muslims rose by 219.5% during 1941-91 that of Hindus increased only by 4.5%. According to the 2001 census report, religious minorities in Bangladesh are only 10.3%, while they were 12.7% and 13.3% in census reports of 1991 and 1981 respectively.¹¹⁴

5.3.3 Ethnic and linguistic minorities

In Bangladesh 27 different indigenous or tribal ethnic groups accounting for 1.13% of the population are officially recognized, though different organizations claim the number as up to 45.¹¹⁵ These groups are mainly concentrated in CHT and the border regions in the northwest (Rajshahi-Dinajpur), north (Mymensingh-Tangail), northeast (greater Sylhet), south and southeast (Chittagong, Cox's Bazar

on Human Rights on the elimination of all forms of intolerance and of discrimination based on religion or belief), A/55/280/Add.2, 9 August 2000.

112 On the violence against Hindu minority following the national election of 2001 see, Amnesty International, *Bangladesh: Attacks on Members of the Hindu Minority*, 2001, AI Index: ASA 13/006/2001.

113 President's Order No.29 of 1972. See, Article 2.

114 Gobinda Chandra Mandal, "Treatment of Law to the Minorities in Bangladesh: Rhetoric and Reality", in Mizanur Rahman (ed.), *Human Rights & Corruption*, Dhaka, Empowerment through Law of the Common People, 2007, pp.223-224.

115 Gobinda Chandra Mandal, "Treatment of Law to the Minorities in Bangladesh: Rhetoric and Reality", in Mizanur Rahman (ed.), *Human Rights & Corruption*, Dhaka, Empowerment through Law of the Common People, 2007, p.220.

and greater Barisal). These ethnic communities belong to diverse cultures with different languages and identities. Apart from these tribal or indigenous ethnic groups, Biharis constitute another ethno-linguistic minority in Bangladesh. The ethnic and linguistic minorities in Bangladesh are victims of various discriminatory policies.¹¹⁶ However, the major issues concerning the ethnic and linguistic minorities are: demand for autonomy of tribal people in CHT, language rights and marginalization of Biharis.

5.3.3.1 Demand for autonomy of tribal people in CHT

Over the centuries, CHT, lying in the southeastern corner of Bangladesh bordering India and Myanmar has been the home of thirteen indigenous ethnic groups - Chakma, Marma, Tripura, Tanchangya, Mro, Murung, Lushai, Khumi, Chak, Khyang, Bawm, Pankhua, and Reang. Of them, Chakmas form the largest group followed by Marma and Tripura. Chakmas are accounting for one-half of the ethnic population of CHT and profess Buddhism. Marmas are also Buddhists (with some animist beliefs) while Tripuras are Hindus.¹¹⁷

The history of the indigenous people of CHT during the last century is a history of gradual erosion of autonomy leading to ethnic armed conflict. During the British rule of the Indian sub-continent, the Chittagong Hill Tracts Regulation 1900¹¹⁸ accorded CHT the special status of an autonomously administered district. Earlier the Chittagong Hill Tracts Frontiers Police Regulation 1881¹¹⁹ allowed Hill Tracts people to form their own independent police force. Although the Regulation of 1900 gave final authority to a British-appointed Deputy Commissioner (DC), it allowed the indigenous people to oversee their own district and thus enjoy limited self-governance. The Government of India Act, 1919¹²⁰ and the Government of India Act, 1935¹²¹ also designated CHT as an 'excluded area'.¹²²

116 See generally, Md. Faridul Islam, "Ethnicity, Ethnic Conflict and Discrimination against Ethnic Minorities of Bangladesh", *Journal of Ethnic Affairs*, vol.2, 2006, pp.27-31.

117 See, Gobinda Chandra Mandal, "Rights of the Minorities: The Case of Bangladesh", in Mizanur Rahman (ed.), *Human Rights and Good Governance*, Dhaka, Empowerment through Law of the Common People, 2004, pp.161-162.

118 Regulation No. 1 of 1900. For text of the Regulation see, *East Pakistan Code*, vol. I, pp. 299-312.

119 Regulation 3 of 1881. For text of the Regulation see, *East Pakistan Code*, vol. I, pp. 293-297.

120 9 & 10 Geo.5, C.101.

121 26 Geo.5, Ch.2.

122 The term 'excluded area' was meant to refer to an area where no Act of the Federal Legislature or of the Provincial Legislature applied unless otherwise directed by the

According to the Regulation of 1900, entry of non-indigenous people to the region was conditioned upon obtaining a permit.¹²³ However, this condition was relaxed in 1930 allowing limited settlement, subject to certain conditions, of non-tribal people in the region. According to Rule 51 of the 1900 Regulation, the DC had the power to expel any non-tribal person from CHT if he or she was found to be undesirable. After the partition of British India, the 1956 Constitution of Pakistan retained the special administrative status of the CHT as an 'excluded area'.¹²⁴ However, this status was later changed to a 'tribal area' by the 1962 Constitution of Pakistan.¹²⁵ Finally, in 1964, even this status was stripped off. Absence of the constitutional recognition of CHT consequently led the Court to strike down Rule 51 of the Regulation of 1900 as unconstitutional.¹²⁶

After the emergence of Bangladesh as an independent state, in the wake of formulation of a Constitution for Bangladesh, a delegation from the indigenous people of CHT led by Manobendra Narayan Larma, the only elected member to the then national parliament from CHT, met the President Sheikh Mujibur Rahman and demanded: (a) autonomy for CHT with its own legislature, (b) constitutional protection of the 1900 Regulation, (c) continuation of the tribal chiefs' offices, and (d) imposition of a ban on the influx of non-tribal people into CHT. These demands were, however, summarily rejected.¹²⁷ Moreover, the indigenous people were advised to forget about their separate identity, admonished to embrace Bengali nationalism and threatened to be turned into minorities through sending of Bengalis into CHT.¹²⁸ To the utmost disappointment of the indigenous people of CHT, the Constitution declared Bangladesh as a unitary state.¹²⁹ This ruled out the possibility of having a complete autonomy for CHT. Consequently, Larma formed PCJSS¹³⁰ and started an agitation movement for autonomy that was later to culminate into a full-fledged armed struggle along Maoist lines.¹³¹ In response to this armed struggle

Governor. See, section 52A (2) of the Government of India Act, 1919 and section 92 of the Government of India Act, 1935.

123 Rule 34.

124 See, Article 103 of the Constitution of the Islamic Republic of Pakistan 1956.

125 See, Article 223 of the Constitution of the Republic of Pakistan 1962.

126 *Mustafa Ansari vs. Deputy Commissioner, Chittagong Hill Tracts and another, Dhaka Law Reports (DLR)*, vol. 17, 1965, p.553.

127 See for details, Selina Haq and Ehsanul Haque, *Disintegration Process in Action: The Case of South Asia*, Dhaka, 1990, BILIA, pp.44-46.

128 See Amena Mohsin, *The Politics of Nationalism: The Case of the Chittagong Hill Tracts Bangladesh*, Dhaka, 2002, The University Press Limited, p.58.

129 See, Article 1 of the Constitution of the People's Republic of Bangladesh.

130 Parbattya Chattagram Jana Samhati Samiti (Chittagong Hill Tracts People's Solidarity Association)

131 See for details, Asish Nandy, *The Intimate Enemy: Loss and Recovery of Self Under Colonialism*, Delhi, 1983, Oxford University Press, p.xv.

for autonomy, the government of Bangladesh not only resorted to military action to overpower the indigenous community but also adopted an aggressive settlement policy to outnumber them.¹³² The successive governments actively resettled non-indigenous Bengalis from plain lands to CHT in exchange for land, cash and other incentives.¹³³ Accordingly, the demographical composition of the area drastically changed – the Bengali settlers became almost 50% of the total population in 1991 from less than 10% in 1947.¹³⁴ This triggered an ethnic character to the conflict.

To pacify this conflict, the successive governments initiated numerous efforts which ultimately succeeded in 1997 when the government of Bangladesh signed a peace accord - Chittagong Hill Tracts Peace Accord (CHT Peace Accord) - with the representative of the indigenous people. Its scope is relatively unique in the region,¹³⁵ and the listing of the tribes as “indigenous” also makes Bangladesh an exception to the continental trend where states appear to assert that the tag “indigenous peoples” has little application within Asia.¹³⁶ However, an audit on the extent to which various aspects of autonomy for indigenous people of CHT as was promised in the accord has been fulfilled to date presents a frustrating picture.¹³⁷ More importantly, the prospect of the accord in ensuring autonomy in the days to come is also challenged by various complicated issues and factors.

132 See, Raja Devasish Roy, “The Population Transfer Programme of 1980s and the Land Rights of the Indigenous Peoples of the Chittagong Hill Tracts”, in Subir Bhaumik, Meghna Guhathakurta and Sabyasachi Basu Ray Chaudhury (eds.), *Living on the Edge: Essays on the Chittagong Hill Tracts*, Calcutta, South Asia Forum for Human Rights and Calcutta Research Group, 1997, pp. 167-208.

133 Raja Devasish Roy, “The Discordant Accord: Challenges towards the Implementation of the Chittagong Hill Tracts Accord of 1997”, *Journal of Social Studies*, 2003, April-June, p.6.

134 According to the 1991 census, the total population of the CHT is 974,465. Of them 501,145 (i.e. 51%) are Jumma people and the rest 473,300 (i.e. 49%) are Bangladeshi people.

135 Joshua Castellino and Elvira Dominguez Redondo, *Minority Rights in Asia: A Comparative Legal Analysis*, New York, Oxford University Press, 2006, p.46.

136 See, Benedict Kingsbury, “Indigenous Peoples in International Law: A Constructivist Approach to the Asian Controversy”, *American Journal of International Law*, vol.92, no.2, 1998, pp.414-457.

137 For an analysis on the implementation of the agreement, see generally, Faustina Pereira, “The Chittagong Hill Tracts Peace Accord and the Long Road to Peace: A Case Study”, in Joshua Castellino and Niamh Walsh (eds.), *International Law and Indigenous Peoples*, Leiden, Martinus Nijhoff Publishers, 2005, pp.293-302; Amena Mohsin, *The Chittagong Hill Tracts, Bangladesh: On the Difficult Road to Peace*, London, Lynne Rienner Publishers, 2003; Ishtiaq Jamil and Pranab Kumar Panday, “The Elusive Peace Accord in the Chittagong Hill Tracts of Bangladesh and the Plight of the Indigenous People”, *Commonwealth & Comparative Politics*, 2008, vol.48, no.4, pp.464-489.

Prior to the peace accord, there were three Hill District Local Government Councils in CHT. These local government bodies had limited powers of local governance while the DC was the real executive and administrator of the region. In order to strengthen local governance and ensure autonomy for CHT, the peace accord designed a three-tier framework of administration wherein Chittagong Hill Tracts Regional Council would have the central role. In particular, this regional body was empowered by the accord to supervise and coordinate the activities of District Councils, the matters of general administration, law and order and development. The accord also made provisions for strengthening the District Councils with more subjects and functions and establishing a Ministry on CHT.¹³⁸ However, the following factors are impeding the accomplishment of the purpose of the whole administrative arrangement designed by the accord:

- (a) After the peace accord, the government enacted the Chittagong Hill Tracts Regional Council Act, 1998¹³⁹ and amended the relevant laws on Hill District Councils.¹⁴⁰ However, these legislations betrayed many provisions contained in the peace accord and thus curtailed many aspects of autonomy as promised by the government;¹⁴¹
- (b) Regarding empowerment of the District Councils, it was agreed that 33 subjects would be devolved upon the Councils. Of them, only 19 subjects so far have been transferred and 5 others are in progress. The remaining 9 subjects include vital ones like land management, maintenance of law & order, administration of local police etc. without which local governance cannot be effective and meaningful;

138 The accord, however, did not elaborate the powers and functions of the Ministry.

139 Act No. 12 of 1998.

140 Rangamati Hill District Local Government Council Act, 1989 (Act No 19 of 1989) [now renamed as Rangamati Hill District Council Act, 1989], Khagrachari Hill District Local Government Council Act, 1989 (Act No 20 of 1989) [now renamed as Khagrachari Hill District Council Act, 1989], and Bandarban Hill District Local Government Council Act, 1989 (Act No 20 of 1989) [now renamed as Bandarban Hill District Council Act, 1989]. The Acts were amended by Rangamati Hill District Local Government Council (Amendment) Act, 1998 (Act No 9 of 1998), Khagrachari Hill District Local Government Council (Amendment) Act, 1998 (Act No 13 of 1998), and Bandarban Hill District Local Government Council (Amendment) Act, 1998 (Act No 11 of 1998) respectively.

141 For a detailed discussion on the discrepancies between laws enacted and the accord signed, visit: <www.angelfire.com/ab/jumma/treaty/bill.html> (last visited on May 3, 2009).

- (c) Formation of three District Councils by elected representatives as was agreed in the peace accord is also yet to be materialized.¹⁴² Alternatively the successive governments are appointing the chairmen and members of these councils according to their political choice. Accordingly, these councils, being almost like an extension of the government administration operating in other parts of the country, inherently lack the potentials to exercise autonomy on behalf of the tribal people;
- (d) The role of the DC in the light of the peace accord remains a grey area. No legislative or executive measures have been taken to ensure that the DC is accountable to the Regional Council. Moreover, the indigenous people allege that the office of the DC is exercising many powers falling within the ambit the District Councils and Regional Council; and
- (e) The Rules and Regulations necessary for the smooth functioning of the District Councils and Regional Council are yet to be made.

The peace accord also stipulated the formation of a Land Commission for settling land disputes. Consequently, the Chittagong Hill Tracts Land Dispute Resolution Commission Act¹⁴³ was passed in 2001. According to this Act, the chairman of the five members' Land Commission would be a retired Justice of the Supreme Court. Although indigenous people have substantial representation in this Commission, what is most worrying is that the law has vested almost unfettered powers to the chairman to overrule opinions of the other members if there is no consensus.¹⁴⁴ This provision is likely to affect the purpose of the Commission. At present, this commission is not activated enough to claim any visible progress in addressing the land-related problems of CHT.

The peace accord is purely executive in nature and not protected by constitutional safeguards. Consequently, it is open to revocation by the government at any time. For the same reason, constitutional validity of the accord and many laws enacted in response to the accord are open to challenge before the Court.¹⁴⁵ Apart from

142 Since the first elections of the District Councils in 1989, no further elections have been held. However, on 6 May 2009, the High Court Division issued a *Rule Nisi* calling upon the government and the Election Commission to show cause as to why non-holding of elections to the Chittagong Hill Tracts Regional Council and Rangamati, Khagrachhari and Bandarban District Councils should not be declared illegal and without lawful authority.

143 Act No. 53 of 2001.

144 Chittagong Hill Tracts Land Dispute Resolution Commission Act 2001 (Act No. 53 of 2001), section 7(5).

145 In 2007 the High Court issued a *Rule Nisi* calling upon the government to explain why the CHT peace accord should not be declared 'unconstitutional' after a writ petition was filed alleging that the accord compromised the integrity and sovereignty of the state as enshrined in the Constitution. Similarly, the government

this legal challenge, there are political challenges to the implementation of the peace accord. The process preceding the signing of the accord did not receive organized and wider discourse, debate and deliberation in appropriate forums that could foster nationwide support. Consequently, it failed to build trust among political parties at the national level as well as among factional groups in CHT region.¹⁴⁶ A section of indigenous people led by UPDF¹⁴⁷ rejected this peace accord as a compromise. They still now demand full autonomy meaning all the matters except taxation, currency, foreign policy, defence and heavy industries would remain with the CHT administration. Bangla-speaking settlers in the region have added another dimension to the problem by launching a movement named *Sama Odhikar Andolon* (Equal Rights Movement) against the accord alleging that the accord has made them second class citizens.

There is no denying the fact that the 1997 peace accord has ensured a pause on long-standing self-determination armed conflict. However, unless the question of autonomy of CHT, which was the root cause of conflict, is resolved by implementing the peace accord and addressing the issues and challenges concerned with such implementation, it would be unrealistic to expect sustainable peace in CHT. The sooner the provisions of the accord are implemented, the quicker will be the mitigation of many of the existing problems and the elimination of the causes of potential conflict.

5.3.3.2 Language rights

Broadly speaking, indigenous ethnic groups belong to three unique linguistic families: (i) Tibeto-Burmese (all the tribal people CHT and the Garos, Kochs and Tipras); (ii) Austro-Asiatic or Mon-Khmer (Khasis, Santal, Mundas, Mahalis); and (iii) Dravidians (Oroans and Paharis). Other tribal groups speak some form of Bangla. Chakma and Tanchingya, for example, speak a language that is a dialect variant of Bangla. Rajbanshis, Pahari, Kochs and Pathors have lost their original language, and primarily speak Bangla. In fact, almost all the tribal communities are now bilingual. They have learnt Bangla to communicate with the wider Bangali society, but they continue to speak in their own language amongst themselves. Among the tribal groups consisting linguistic minorities, only

was also asked in 1998 to explain the constitutional validity of laws on Regional Council and District Councils. If the final decision in these cases which are now pending for hearing goes against the government, the accord itself would be null and void.

146 See, Ishtiaq Jamil and Pranab Kumar Panday, "The Elusive Peace Accord in the Chittagong Hill Tracts of Bangladesh and the Plight of the Indigenous People", *Commonwealth & Comparative Politics*, 2008, vol.48, no.4, pp.481-482.

147 United Peoples Democratic Front.

Chakmas and Marmas have any script or written form of their language, although all the communities have their own dialects.¹⁴⁸

The government of Bangladesh is yet to take any significant step to ensure the linguistic rights of minorities. In particular, arrangement for mother tongue-based education, a long-standing demand of small ethnic groups, still awaits responsive initiatives on the part of the state. Although the Cultural Institute for the Adivasis has introduced primary education as well as a language course in Chakma, this has failed to leave an impact on the society at large. Nevertheless, during the last fifteen years remarkable progresses have been recorded in this regard.¹⁴⁹

UNICEF has established many pre-school centers across the three districts of CHT for primary education of indigenous children in their mother tongues, but the introduction of bilingual text books remains at a standstill as the community leaders are divided over whether to opt for Roman or Bangla script. UNESCO is also working, to a limited extent, with the ethnic minorities in the northern districts. Several others NGOs have also come forward with projects and programme aimed at ensuring mother tongue-based education of the Adivasi people.

5.3.3.3 Marginalization of Biharis

In Bangladeshi parlance, the Urdu-speaking Muslim people who had migrated to the then East Pakistan from Uttar Pradesh, Madhya Pradesh and Rajasthan are categorized as 'Biharis'.¹⁵⁰ The communal riot of Bihar during 1946-47 led these ethnic communities to take refuge in the territory of Bangladesh.¹⁵¹ In the early days of Pakistan, there was confusion as to the legal identity of these people, i.e., whether they would be regarded as refugees or voluntary migrants or political asylees or stateless persons. In 1951 they were granted the citizenship of Pakistan.¹⁵² Because of their active anti-liberation role, the Biharis became subject to widespread political persecution preceding and during the 1971 liberation war

148 See, Mohammad Tajuddin, "Minorities in Bangladesh: A Conspectus", in Sumanta Banerjee (ed.), *Shrinking Space: Minority Rights in South Asia*, Kathmandu, South Asia Forum for Human Rights, 1999, p.101.

149 For details about these successes see, UNESCO Asia and Pacific Regional Bureau for Education, *Mother Tongue-based Literacy Programmes: Case Studies of Good Practice in Asia*, Bangkok, UNESCO Bangkok, 2007.

150 Sultana Nahar, "Biharis in Bangladesh: Present Status, Legal Impediments and Solutions", in Chowdhury R. Abrar (ed.), *On the Margin: Refugees, Migrants and Minorities*, Dhaka, Refugee and Migratory Movement Research Unit, 2000, p.173.

151 See for details, Lord Ennals, "Biharis in Bangladesh: The Third Great Migration?", *Journal of Muslim Minority Affairs*, vol.8, no.2, 1987, pp.238-245.

152 See, The Pakistan Citizenship Act, 1951 (Act No. II of 1951); section 3(d).

of Bangladesh as well as in the aftermath of liberation. Since then, the Biharis are suffering from a crisis of their legal identity and status. When the government of Bangladesh offered them the citizenship of Bangladesh, some 600,000 Biharis accepted the offer while 539,669 registered with the ICRC opting to return to Pakistan.¹⁵³ Thereafter, from 1973 to 1993, some 178,069 Biharis were repatriated to Pakistan.¹⁵⁴ At present, it is generally estimated that there are more than 300,000 Biharis in Bangladesh, half of whom live in 116 camps all over the country. For several decades the successive governments of Bangladesh have been treating the Biharis who opted for repatriation to Pakistan but are left in Bangladesh as 'refugees', not as 'citizens'. Ultimately, the Supreme Court of Bangladesh had to confirm that Biharis are citizens of Bangladesh and the mere fact that a person opts to migrate to another country cannot take away his citizenship.¹⁵⁵ Despite this recognition of identity, Biharis in Bangladesh, particularly those living in camps, are facing social exclusion and severe discrimination in every aspect of life - education, employment, health services, business, access to justice, development, etc. Their living conditions in the camps is not only sub-standards but also inhuman.¹⁵⁶

5.4 Minorities in Nepal

Ethnic, linguistic and religious diversity in Nepal is far greater than one would expect in a small country.¹⁵⁷ This diversity is further complicated by geographical dimension, i.e., the region where a particular ethnic, linguistic or religious minority resides. Nepal has three different regions - mountains, hills and *terai* (plain land). Regional diversity, in terms of ecology, traditions, development etc., among these regions has a significant impact on the fate of a particular group residing in a particular region. Consequently, the task of identifying minority groups in the context of Nepalese society is a complex exercise.

153 Iftekharul Bashar, "Unresolved Statelessness: The Case of Biharis in Bangladesh", *Journal of International Affairs*, vol.10, 2006, p.94.

154 See, Sumit Sen, "Stateless Refugees and Right to Return : The Bihari Refugees of South Asia", *International Journal of Refugee Law*, vol.12, no.1, 2000, p.55.

155 See, *Mukhter Ahmed vs. Government of Bangladesh and others*, 34 DLR (1982) 29; *Abdul Khaleque vs. The Court of Settlement and others*, 44 DLR (1992) 273; *Abid Khan and others vs. Government of Bangladesh and others*, 55 DLR (2003) 322.

156 For an exclusive account on the socio-economic condition of the Biharis in Bangladesh see, Mizanur Rahman (ed.), *A Community in Transition: The Biharis in Bangladesh*, Dhaka, Empowerment through Law of the Common People, 2003; B. Whitaker *et al.*, *The Biharis in Bangladesh*, London, Minority Rights Group, 1977.

157 I. A. Rehamn, *Minorities in South Asia* (a paper presented to the 9th session of the Working Group on Minorities, Sub-Commission on Promotion and Protection of Human Rights, 12-16 May 2003), UN Doc. E/CN.4/Sub.2/AC.5/2003/WP.13.

5.4.1 The Constitution of Nepal on minorities

Since 2007, Nepal is being governed by an Interim Constitution. The fundamental rights guaranteed by this Interim Constitution includes *inter alia*: freedom of opinion and expression;¹⁵⁸ freedom of association;¹⁵⁹ equality before law;¹⁶⁰ safeguard against discrimination on grounds of religion, race, sex, caste, tribe, origin, language or ideological conviction;¹⁶¹ right against untouchability;¹⁶² and right to religion.¹⁶³ However, this 2007 Interim Constitution enables the state to take steps of affirmative action and positive discrimination for the protection, empowerment or advancement of the interests of, amongst others, Dalit, indigenous ethnic tribes, and Madeshi.¹⁶⁴

This Constitution of Nepal also provides that all the languages spoken as the mother tongue in Nepal are the national languages of Nepal.¹⁶⁵ It also stipulates that the Nepali Language in Devnagari script shall be the official language.¹⁶⁶ It further guarantees that use of the mother language in local bodies and offices shall not be hindered and the state shall translate the languages so used to an official working language and maintain record thereon.¹⁶⁷ According to the Constitution, each community shall have the right to get basic education in their mother tongue,¹⁶⁸ and preserve and promote its language, script, culture, cultural civility and heritage.¹⁶⁹

5.4.2 Ethnic and caste minorities

The mountain region inhabiting only 1% of the total population of Nepal has several groups (Bhotia, Thakali and Sherpa) identified by ethnicity alone, but in the hill and terai regions, ethnic groups are also classified by castes. The population census of Nepal in 2001 census enumerated 103 distinct castes and

158 Article 12, Clause 3(a).

159 Article 12, Clause 3(d).

160 Article 13, Clause 1.

161 Article 13, Clause 2.

162 Article 14.

163 Article 23.

164 Proviso to Article 13, Clause 3.

165 Article 5, Clause 1.

166 Article 5, Clause 2.

167 Article 5, Clause 3.

168 Article 17, Clause 1.

169 Article 17, Clause 3.

ethnic groups including an unidentified group. The census data reveal that no single ethnic and caste group forms a numerical majority. Chhetri is the largest caste group, which constitutes only 15.8% of the total population, followed by Bahun with 12.7%. The other major groups are Magar (7.1%), Tharu (6.8%), Tamang (5.6%), Newar (5.5%), Kami (3.9%), Rai (2.7%), Gurung (2.5%) and Dholi (2.4%). Many of these groups fall under the category of indigenous people. In 1996, a report of the government sponsored Academy for Upliftment of the Nationalities identified at least 61 indigenous ethnic groups in Nepal.¹⁷⁰ These indigenous groups cumulatively constitute 22.2% of the total population.

Among the ethnic and caste groups, Chhetri and Bahun belong to high caste groups and are historically dominant groups in terms of excess to resources, power and politics although the aggregate population of this population is just 28.5% of the total population of Nepal. Accordingly, all other ethnic and caste groups qualify as minorities.

However, the most oppressed groups in Nepal are those caste groups that fall under the category of 'Dalits'. Different estimates exist regarding the percentage of the population classified or that should be characterized as Dalits. The estimates range from between 13 and 20 per cent of the population. They are economically, socially, and educationally backward. They face excessive economic suppression and social exclusion that hinder them in accessing resources equitably and living a normal human life. Displacement from traditional occupation and lack of employment in both agriculture and non-agriculture sectors are common problems of Dalit. It is estimated that about 68% of Dalits live below the absolute poverty line and among the total Nepalese population who live below the absolute poverty line most of them are Dalits.

Two-thirds of Nepal's total population belongs to the hill origin group while almost one-third belongs to the terai origin groups. The latter groups collectively are called Madhesi. Since the dominating groups - Chhetri and Bahun - belong to hill origin group, Madhesi people are discriminated on the basis of region. They have been resisting the domination of the hill peoples and state encouraged settlement of hill peoples in terai region. In August 2008, the Nepali government reached a crucial peace agreement with one of the major Madhesi groups, the Madhesi People's Rights Forum. The deal aimed at granting Madhesis more autonomy and expanded their political and economic rights. Smaller Madhesi groups, however, dissociated themselves from the agreement, claiming it was signed only by one group. These groups also accused the government of failing to

170 Krishna Bhattachan, "Nepal: Minority Rights in the Predatory Nepalese State", in Sumanta Banerjee (ed.), *Shrinking Space: Minority Rights in South Asia*, Kathmandu, South Asia Forum for Human Rights, 1999, p.42.

grant their main demands – for electoral reform and federalism – and accused the ruling party of attempting to divide and rule.¹⁷¹

5.4.3 Linguistic minorities

According to the 2001 census, 93 languages and dialects are spoken in Nepal. Among them, Nepali language is predominant in respect to the percentage of people speaking it and in terms of its legal and constitutional recognition. 48.6% of the people speak in Nepali. The other major languages are: Maithali (12.3%), Bhojpuri (7.5%), Tharu (5.9%), Tamang (5.2%), Newari (3.6%), and Magar (3.4%).

Until 1990, the language policy of Nepal put exclusive emphasis on Nepali language and excluded the other languages from the field of administration and education.¹⁷² In protest, the Newars initiated a language movement that was supported by the indigenous groups. This movement was intensified during the democracy movement in 1989-1990. Consequently, the 1990 Constitution recognized the multilingual character of Nepal. The same position is also retained by the present interim Constitution of 2007.

Despite the constitutional recognition, minority languages as well as linguistic minorities are facing many problems. Many of the minority languages in Nepal have already extinct, and many are in the process of extinction.¹⁷³ The insistence on the use of official language to the exclusion of other languages in administrative affairs often acts against the interests of linguistic minorities. Moreover, the role of the judiciary, in this regard, appears inconsistent. In *Lal Bahadur Thapa vs Local Development Ministry*,¹⁷⁴ Supreme Court declared, the decision of Kathmandu Metro Municipality, Rajbiraj Municipality and Dhanusa District Development committee's decision to include local languages adjacent to Nepali language in their respective official communication, as unconstitutional.

171 Minority Rights Group International, *State of the World's Minorities 2008 - Nepal*, 2008, available at: www.unhcr.org/refworld/docid/48a7eae35f.html (last accessed on 11 June, 2009).

172 For more details see, Selma K. Sonntag, "Change and Permanence in Language Politics in Nepal", in Amy B.M. Tsui and James W. Tollefson (eds.), *Language Policy, Culture and Identity in Asian Contexts*, New Jersey, Routledge, 2007, pp.205-218; Rhoderick Chalmers, "Nepal and the Eastern Himalayas", in Andrew Simpson (ed.), *Language and National Identity in Asia*, London, Oxford University Press, 2007, pp.84-99.

173 See, Krishna Bhattachan, "Nepal: Minority Rights in the Predatory Nepalese State", in Sumanta Banerjee (ed.), *Shrinking Space: Minority Rights in South Asia*, Kathmandu, South Asia Forum for Human Rights, 1999, pp.48-49.

174 Nepal Law Journal, Writ Number 2931 of 2054.

But in the case of *Dr Chuda Nath Bhattarai v Public Service commission*,¹⁷⁵ Supreme court issued an order to the Public Service commission to include Nepali as a compulsory subject in the test it takes for the admission of third class officers.

5.4.4 Religious minorities

Hindus (80.6%) are the majority religious group in Nepal. The religious minorities include: Buddhists (10.7%), Muslims (4.2%),¹⁷⁶ Kirats (3.6%), Christians (0.5%) and others (0.4%).

Hindu monarchy with Hinduism as the state religion ruled Nepal for centuries. The system of governance was also based on Hindu scriptures. All these policies tended to assimilate the followers of non-Hindu faith into Hinduism for religious and cultural homogeneity.¹⁷⁷ However, the interim Constitution of 2007, by introducing secularism and dropping Hinduism as the state religion, has brought about renewed hopes for religious minorities.

Communal violence in Nepal is very rare. However, in 2004 an anti-Muslim violence took place in the wake of the beheading of several Nepali migrant workers in Iraq. There is evidence to suggest that the police and the ruling political party was complicit in the attack and desecration of a historic mosque in the heart of Kathmandu.¹⁷⁸

5.5 Minorities in Sri Lanka

Compared to several other South Asian states, Sri Lankan population demonstrates less diversity in terms of ethnicity, religion and language. Nevertheless, Sri Lanka appears to be a classic example of how the failure of national policies to accommodate minority rights can threaten the peace and stability of a state for a long time.

175 Nepal Law Journal, 2054, p.360.

176 See generally, Muhammad Siddique, "Muslim Population in the Kingdom of Nepal: Some Outstanding Features", *Journal of Muslim Minority Affairs*, vol.21, no.2, 2001, pp.333-345.

177 See for details, Mollica Dastider, *Religious Minorities in Nepal: An Analysis of the State of the Buddhists and Muslims in the Himalayan Kingdom*, New Delhi, Nirala Publication, 1995.

178 Rita Manchandra (ed.), *The No-Nonsense Guide to Minority Rights in South Asia*, New Delhi, South Asia Forum for Human Rights, 2006, p.77.

5.5.1 The Constitution of Sri Lanka on minorities

The Constitution of Sri Lanka has several provisions having direct or indirect bearing on the protection of minority groups. Chapter III of the Constitution which is headed 'Fundamental Rights' guarantees to every person the freedom of thought, conscience and religion;¹⁷⁹ the freedom from torture and cruel, inhuman or degrading treatment;¹⁸⁰ the right to equality;¹⁸¹ the freedom of speech and expression;¹⁸² the freedom of association;¹⁸³ the freedom to manifest religion or belief in worship, observance, practice and teaching;¹⁸⁴ and the freedom to promote culture and to use own language.¹⁸⁵ Chapter IV of the Constitution, which deals with 'Language', proclaims that while the official language of Sri Lanka shall be Sinhala,¹⁸⁶ Tamil shall also be an official language.¹⁸⁷ The Constitution also regards English as the link language.¹⁸⁸

5.5.2 Ethnic and linguistic minorities

Tamils, who are predominantly Hindus by religion, constitute the main minority group and their language – Tamil – the main minority language in Sri Lanka. According to census of 2001, the distribution of the population by ethnic groups is as such: Sinhalese 82.0%, Sri Lanka Tamil 4.3%, Indian Tamil 5.1% and Sri Lanka Moor 7.9%. In terms of language, 68% speak in Sinhala, 16% in Tamil, 9% in English and 7% in other languages.

Conflict between Sinhalese and Tamils that put Sri Lanka in a civil war situation for more than two decades has a historic origin in denial of minority rights.¹⁸⁹ A

179 Article 10.

180 Article 11.

181 Article 12.

182 Article 14(1)(a).

183 Article 14(1)(C) and (d).

184 Article 14(1)(e).

185 Article 14(1)(f).

186 Article 18(1).

187 Article 18(2).

188 Article 18(3).

189 See generally, Satchi Ponnambalam, *Sri Lanka: National Conflict and the Tamil Liberation Struggle*, London, Zed Books, 1983; Chelvadurai Manogaran, *Ethnic Conflict and Reconciliation in Sri Lanka*, Honolulu, University of Hawaii Press, 1987; Visakha Kumari Jayawardena, *Ethnic and Class Conflicts in Sri Lanka*, Colombo, Navagama Printers, 1986; K.N.O. Dharmadasa, *Language, Religion and Ethnic Assertiveness: The Growth of Sinhalese Nationalism in Sri Lanka*, Ann Arbor, Michigan University Press, 1992.

primary source of the conflict has been the position adopted by successive Sinhalese dominated governments of denying an appropriate recognition to the Tamil language.¹⁹⁰ In 1960, the Official Language Act made Sinhala the only national language of Sri Lanka. This language policy was affirmed in the 1972 Constitution. In the early 1970s state-sponsored settlement schemes put many Sinhalese settlers into Tamil areas. This led both the ethnic groups to move towards extremism. In 1976, the idea of a separate state for Tamils became dominant with the formation of the Tamil United Liberation Front (TULF). Thereafter, several hundred Tamil civilians were killed by Sinhalese in an ethnic riot of 1983. This became the turning point in the history of conflict between Tamils and Sinhalese.¹⁹¹ Thereafter, a large scale civil war between LTTE representing Tamil interests and the government forces representing Sinhalese interests broke out in Sri Lanka. This armed conflict targeted civilians of all ethnicities. However, it appears to come to an in 2009 with the massive military operation conducted by the Sri Lankan army overpowering the LTTE.

Although Tamil language is recognized as one of the official languages by the present Constitution, Tamil-speakers face many problems, like the receipt of government communication only in the Sinhala language, denial of the right to file cases in Tamil, non-availability of facilities for translation from Sinhala to Tamil, and the compulsion to sign statements made to the police which the latter write down in Sinhala, making it difficult for the Tamil complainants to verify whether their statements are being faithfully recorded.¹⁹² To check such violations the Official Languages Commission Act, 1991 made provision for the establishment of the Official Language Commission. Any person can make a complaint to the Commission that his or her language rights under the Constitution have been violated. The Commission, on receiving such a complaint, has the duty to inquire into the complaint. If it finds that the complaint was justified, it has power to ask the authority concerned to redress the grievance. If the authority fails to comply, the Commission can, as a last resort, ask the courts to issue a directive. However, the working of the Commission has been widely criticized as ineffective, since it is constrained by lack of resources and an absence of political will on the part of the government.¹⁹³

190 See, Javaid Rehman and N. Roy, "South Asia" in Minority Rights Group (ed.), *World Directory of Minorities*, London, Minority Rights Group, 1997, p.580-585.

191 See, Tennekoon Serena, "Newspaper Nationalism: Sinhala Identity as Historical Discourse" in Spence Jonathan (ed.), *Sri Lanka - History and the Roots of Conflict*, London, Routledge, 1997, p.205.

192 Jehan Perera, "Minorities in Sri Lanka", in Sumanta Banerjee (ed.), *Shrinking Space: Minority Rights in South Asia*, Kathmandu, South Asia Forum for Human Rights, 1999, p.71.

193 Jehan Perera, "Minorities in Sri Lanka", in Sumanta Banerjee (ed.), *Shrinking Space: Minority Rights in South Asia*, Kathmandu, South Asia Forum for Human Rights, 1999, p.71.

Another major concern for ethnic and linguistic minorities is the mono-ethnic and mono-lingual Sinhalese composition of the Sri Lankan security forces, which inevitably creates a gap of distrust and suspicion between them and the people belonging to a different ethnic and linguistic community.¹⁹⁴

5.5.3 Religious minorities

Muslims, Hindus and Christians constitute the religious minorities in Sri Lanka. According to census of 2001, the distribution of the population by religion is as such: Buddhists 76.7%, Muslims 8.5%, Hindus 7.8%, and Christians 6.1%.¹⁹⁵

Article 9 of the Constitution appears to be a matter of concern for religious minorities. This provision proclaims that “the Republic of Sri Lanka shall give to Buddhism the foremost place and accordingly it shall be the duty of the State to protect and foster the Buddha *Sasana*”. The ‘foremost place’ which has been constitutionally guaranteed for Buddhism alone implies the marginalization of other religious minorities in Sri Lanka to a position of subordination to the state-recognized paramount religion.¹⁹⁶

Among the religious minorities of Sri Lanka, Muslims are most vulnerable. In 1990 the LTTE evicted Muslims residing in the areas under its control. This made some 72,000 Muslims internally displaced. The majority of these displaced persons are still now living in camps or temporary relocation sites. Moreover, during civil war starting in 1983, Muslims were, on several occasions, victimized by large scale violence caused by the LTTE. Another concern for Muslims is their serious under-representation in the public service. Although the Sri Lanka Muslim Congress successfully agitated for a quota system for appointments in the public service, the relevant circular was struck down by the Supreme Court in *Ramupillai v Minister of Public Administration, Provincial Councils & Home Affairs and Others*.¹⁹⁷

194 Jehan Perera, “Minorities in Sri Lanka”, in Sumanta Banerjee (ed.), *Shrinking Space: Minority Rights in South Asia*, Kathmandu, South Asia Forum for Human Rights, 1999, p.64.

195 On the condition of Christian minorities in Sri Lanka see, Paul Casperez, “Sri Lanka Christians in a Plural Religious System”, in Monirul Hussain & Lipi Ghosh (eds.), *Religious Minorities in South Asia: Selected Essays on Post-Colonial Situations*, vol.1, New Delhi, Manak Publications, 2002, pp.183-192.

196 Jehan Perera, “Minorities in Sri Lanka”, in Sumanta Banerjee (ed.), *Shrinking Space: Minority Rights in South Asia*, Kathmandu, South Asia Forum for Human Rights, 1999, pp.65-66.

197 (1991) 1 Sri LR 11.

5.6 Minorities in Bhutan

Population figures for Bhutan have been notoriously problematic since the government of Bhutan, as a matter of its population politics, does not publish the actual disaggregated statistics based on ethnicity, religion, language, culture and religion etc. of the country. According to different sources, the people of Bhutan mainly consist of three broad but not necessarily exclusive groups: the Ngalungs (often called Drukpas), the Sharchops, and the Lhotshampas. Each of these groups has different language and lives in cultural separation from one another in different territorial regions. The Ngalungs or Drukpas, estimated to be 16% to 20% of the total population of Bhutan, mostly speak Dzonkha language, follow the Drukpa Kargyupa school of Tibetan Buddhism and are concentrated in north-western parts of Bhutan. The Sharchops, estimated to be 40% to 50% of the total population of Bhutan, mostly speak Tsangla language, follow the Nyingmapa sect of Buddhism and are concentrated in north-eastern parts of Bhutan. The Lhotshampas, estimated to be 30% to 35% of the total population of Bhutan, mostly speak Nepali language, follow Hinduism and are concentrated in southern parts of Bhutan. There are also some small ethnic groups with distinct cultures, traditions and dialects, such as the Khengs, Brokpas, Doyas, Totas, Kurteopas and Mangdepas. The ruling group, the Ngalungs, is smaller in size than both of the main ethnic groups, the Sharchops and the Lhotshampas. Accordingly all the ethnic groups except the Ngalungs are treated like minorities.¹⁹⁸

The Bhutan has no written Constitution or Bill of Rights. However, the state is in the process of adopting a written Constitution. The Draft Constitution provides that the State shall endeavour to preserve, protect and promote the cultural heritage of the country, including monuments, places and objects of artistic or historic interest, Dzongs, Lhakhangs, Goendeys, Ten-sum, Nyes, language, literature, music, visual arts and religion to enrich society and the cultural life of the citizens.¹⁹⁹ The Draft Constitution declares Dzonkha as the national language of Bhutan.²⁰⁰ The fundamental rights guaranteed by the Draft Constitution include: the right to freedom of speech, opinion and expression;²⁰¹ the right to freedom of thought, conscience and religion;²⁰² the right to equal access and

198 See generally, Narayan Katel, "Minority Rights in Bhutan", in Sumanta Banerjee (ed.), *Shrinking Space: Minority Rights in South Asia*, Kathmandu, South Asia Forum for Human Rights, 1999, pp.19-37.

199 See, Section 1 of Article 4.

200 See, Section 8 of Article 1.

201 See, Section 2 of Article 7.

202 See, Section 4 of Article 7.

opportunity to join the Public Service;²⁰³ freedom of association including the right not to be compelled to belong to any association;²⁰⁴ equality before the law;²⁰⁵ and safeguard against discrimination on the grounds of race, sex, language, religion, politics or other status.²⁰⁶

The most serious grievance of the minorities of Bhutan stems from the citizenship law of 1985, which deprives a large number of Lhotshampas of their right to citizenship and thus exposed them to persecution. Consequently, nearly one-third of the country's population belonging to Lhotshampas group had to take refuge in Nepal.²⁰⁷

Under the national integration policy of the government, the ethnic minorities are forced to assimilate their social and cultural identity with the society dominated by Ngalung or Drukpa ethnic group. The policy requires all Bhutanese to look alike by adorning the dress worn by the ruling elite, be fluent in Dzongkha, and follow their ancient code of conduct.²⁰⁸

Though Bhutan is a multi-lingual country, Dzongkha spoken by the Ngalong community, which is less than 20% of Bhutanese population, is made the national language of Bhutan, disregarding Tshangla spoken by nearly 50% population of the country. Similarly, Nepali, which is spoken in southern Bhutan and had been in the school curriculum for more than three decades, was discontinued in 1998.

5.7 Minorities in Maldives

The people of Maldives are homogenous in terms of ethnicity, religion and language. Ethnically, Maldives people consist of a homogenous mixture of Sinhalese, Dravidian, Arabs, Australasian and Africans. According to the official data, Sunni Muslims constitute 100% of the population of Maldives. However, sometimes it is claimed that there are small numbers of Buddhists and Hindus in Maldives, the authenticity of the claim is not well-supported by reliable data.

203 See, Section 8 of Article 7.

204 See, Section 12 of Article 7.

205 See, Section 15 of Article 7.

206 See, Section 15 of Article 7.

207 See for more details, Michael Hutt, *Unbecoming Citizens: Culture, Nationhood, and the Flight of Refugees from Bhutan*, Oxford, Oxford University Press, 2006; Dhurba Rizal, "The Unknown Refugee Crisis: Expulsion of the Ethnic Lhotsampa from Bhutan", *Asian Ethnicity*, vol.5, no.2, 2004, pp.151-177.

208 See for more details, B. R. Giri, "Bhutan: Ethnic Policies in the Dragon Kingdom", *Asian Affairs*, vol.35, no.3, 2004, pp.353-364; Mathew Joseph C., "Political Economy of Ethnic Conflict in Bhutan", in Ramakant and Ramesh Chandra Misra (eds.), *Bhutan: Society and Polity*, New Delhi, Indus Publishing, 1996, pp.116-136.

Maldivian Dhivehi, a language closely related to Sinhala and written in a specialised Arabic script (Tana) is the official language and is spoken by virtually the whole population. English is also spoken as a second language by some. Accordingly, Maldives virtually has no ethnic, religious and linguistic minority.

The 2008 Constitution of the Republic of Maldives states that a non-Muslim is not eligible to be a citizen.²⁰⁹ The Constitution also declares Islam as the religion of the state²¹⁰ and Dhivehi as the national language.²¹¹ The fundamental right guaranteed by the Constitution include: safeguard against discrimination on grounds of race, national origin, colour, sex, age, mental or physical disability, political or other opinion, property, birth or other status, or native island;²¹² equality before law;²¹³ freedom of expression;²¹⁴ and freedom of association.²¹⁵

Appraisal of the national level protection of minorities in Maldives does not seem justified because of the demographic composition of the people. Nevertheless, it can be said that the Constitution of the country is not sensitive to the concept of minority rights. Since the fundamental rights are guaranteed for citizens and non-Muslims are deprived of citizenship, religious minorities are not entitled to fundamental rights. Moreover, the non-discrimination right of the Constitution does not guarantee protection against discrimination on ground of religion.²¹⁶ Furthermore, freedom of expression is not recognized as a fundamental right in the Constitution. Laws of the land also prohibit its citizens to profess and practice any religion other than Islam. Foreigners are permitted to practice there religions in privacy but not in public places. All these provisions are meant to deny the rights of minorities, if there is any at present or in near future.

5.8 Minorities in Afghanistan

Sometimes Afghanistan is called 'a nation of minorities' since Afghanistan consists of a number of different ethnic groups - none of which constitute an

209 See, Article 9.

210 See, Article 10.

211 See, Article 11.

212 See, Article 17(a).

213 See, Article 20.

214 See, Article 21.

215 See, Article 30.

216 See, Article 17(a).

absolute majority of the population.²¹⁷ The Pashtuns (42%) are the largest ethnic group followed by Tajiks (27%). The other groups include Hazaras (9%), Uzbeks (9%), Aimaks (4%), Turkmen (3%), Baluch (2%). More than 30 languages are spoken in Afghanistan. Among them, languages of two largest ethnic groups – Pashtu spoken by Pashtuns and Dari (Persian) spoken by Tajiks – are the national languages of Afghanistan. The languages include: Aimaq, Arabic, Ashkun, Baluchi, Gujari, Hazaragi, Kazaki and Moghili. Uzbeki, Turkmani, Pashai, Nuristani, and Pamiri (alsana). In terms of religion, about 99% of Afghanistan's population is Muslim with the majority as Sunni Muslims. Non-Muslim minorities (Buddhists, Hindu, Shikhs) cumulatively account for 1% of the total population.

The Constitution of Afghanistan declares Islam as the state religion and at the same time ensures that followers of other religions are free to perform their religious rites within the limits of the provisions of law.²¹⁸ Designating Pashto and Dari as the official languages of the state, the Constitution provides that the state shall adopt and implement effective plans for strengthening and developing all languages of Afghanistan.²¹⁹ The fundamental rights guaranteed by the Constitution include, amongst others, non-discrimination and equality before the law;²²⁰ freedom of expression;²²¹ and freedom of association.²²²

The history of Afghanistan is a history of wars and conflicts. With these wars and conflicts, different ethnic groups, at different time, became either powerful or strategically important. Accordingly, the fate of ethnic groups is destined to change with the outcome of wars or conflict.²²³ But, in general, small ethnic groups are traditionally marginalized in Afghan society. In particular, the Hazaras have a long history of being marginalized and persecuted in the land of Afghanistan.²²⁴ Their religious identity as Shia Muslim also contributes to their vulnerability.²²⁵ This marginalization and persecution have been very much

217 See, Nassim Jawad, *Afghanistan: A Nation of Minorities*, London, Minority Rights Group International, 1992.

218 See, Article 2.

219 See, Article 16.

220 See, Article 22.

221 See, Article 34.

222 See, Article 35.

223 See generally, Richard S. Newell, "Post-Soviet Afghanistan: The Position of the Minorities", *Asian Survey*, vol.29, no.2, 1989, pp. 1090-1108; Richard Tapper, "Ethnic Identities and Social Categories in Iran and Afghanistan", in Elizabeth Tonkin *et al.*, *History and Ethnicity*, London, Taylor & Francis, 1989, pp.232-246.

224 See, Frank Clements and Ludwig W. Adamec, *Conflict in Afghanistan: A Historical Encyclopedia*, California, ABC-CLIO, 2003, pp.103-106.

225 See, Amnesty International, *Afghanistan: The Human Rights of Minorities*, 1999, AI Index: ASA 11/14/99.

resented by the Hazara population.²²⁶ The Pashtuns, who are the largest, and historically most powerful, single ethnic group, are politically marginalized after the fall of Taliban regime. This is a major cause for continuing concern.

226 Peter Mardsen, *Afghanistan: Minorities, Conflict and the Search for Peace*, London, Minority Rights Group International, 2001, p.9.

CHAPTER 6

Regional Cooperation for the Protection of Minorities in South Asia

6.1 Introduction

Because of the mosaic and heterogeneous character of the elements outlining the political geography of the region,¹ majority-minority syndrome is a common element of conflicts in South Asia. These conflicts are, day by day, becoming problematic because of the increasing violent dimension that it is acquiring in certain parts of the sub-continent.² It is imperative that the situation should improve. At the same time, it is undeniable that unless a sound protection system for minorities is installed in this region, improvement is unlikely. Keeping these realities in mind, this chapter explores regional aspect of the protection of minorities in South Asia.

The present chapter is divided in several sections. Section 6.2 inquires, from different dimensions, the importance of regional cooperation in South Asia for protection of its minorities; section 6.3 and section 6.4 appraise the achievements and limitations of prevailing regional cooperation for the protection of minorities in South Asia at the government level and at the non-government level respectively; and finally section 6.5 titled 'Conclusion' aims to look forward based, although not exclusively, on the findings of previous sections.

6.2 Importance of regional cooperation

Why should sovereign states of South Asia go for cross-border cooperation for minority protection, especially when the states have every option to refine or redesign their national protection policies and programmes aimed at minorities? Given the challenging contexts of South Asian states, it is rather very easy to find a convincing answer to this question.

1 See for details, Javaid Rehman, "Re-Assessing the Right to Self-Determination: Lessons from the Indian Experience", *Anglo-American Law Review*, vol.29, no.4, 2000, pp.454-475.

2 Sumanta Banerjee, "Introduction", in Sumanta Banerjee (ed.), *Shrinking Space: Minority Rights in South Asia*, Kathmandu, South Asia Forum for Human Rights, 1999, p.2.

Consequences of ethnic or religious conflicts in the South Asian states have a regional dimension. The partition of India in 1947 was a direct consequence of the inability to accommodate minority interests within an independent India.³ This historic partition, be it justified or not, from the very beginning became the cause of continuing violation of minority rights in India, Pakistan and Bangladesh due to animosity between Muslims and Hindus.⁴ Moreover, an unfortunate aspect of the present day South Asia is that minority problems quickly cross national frontiers.⁵ Persecution of minorities in one country produces severe repercussion in another where they are not necessarily in a minority. Not only that, such persecution in one country very often puts neighbouring country to accept and accommodate a good number of refugees, sometimes even for an indefinite period.⁶ From this point of view, it is in the interest of every state that minorities of neighbouring states are well protected.⁷ But, such an expectation of a state cannot be materialized unless the issue of minority protection is viewed as a supranational priority.

Viewed from another dimension, constant communal conflicts/tensions in the region inevitably lead the neighbouring states, in the absence of an effective regional forum for peaceful dialogue, to the game of accusations and counter-accusations, ultimately producing nothing but deterioration of bilateral relationship. To avoid this situation, what is indispensable is a regional forum to address such conflict situations, whose establishment as well as functioning essentially requires mutually beneficial, and sincere regional cooperation.

6.3 Achievements and limitations of government level cooperation

Since the partition of Indian sub-continent, some isolated attempts were made to create some kind of cooperative mechanism among South Asian countries but

3 Javid Rehman, *The Weaknesses in the International Protection of Minority Rights*, Hague, Kluwer Law International, 2000, p.5.

4 For historical surveys see, Gopal Das Khosla, *Stern Reckoning: A Survey of the Events Leading up to and Following the Partition of India*, New Delhi, Oxford University Press, 1989.

5 I. A. Rehamn, *Minorities in South Asia* (a paper presented to the 9th session of the Working Group on Minorities, Sub-Commission on Promotion and Protection of Human Rights, 12-16 May 2003), UN Doc. E/CN.4/Sub.2/AC.5/2003/WP.13.

6 See for example, Michael Hutt, *Unbecoming Citizens: Culture, Nationhood, and the Flight of Refugees from Bhutan*, Oxford, Oxford University Press, 2006; Dhurba Rizal, "The Unknown Refugee Crisis: Expulsion of the Ethnic Lhotsampa from Bhutan", *Asian Ethnicity*, vol.5, no.2, 2004, pp.151-177.

7 See generally, Mahmud Ali Durrani, *India & Pakistan: The Cost of Conflict and Benefits of Peace*, New York, Oxford University Press, 2002.

without any success. In 1980, Zia-ur-Rahman, the then President of Bangladesh, made a formal proposal to the South Asian states for establishment of a South Asian regional organization for mutual cooperation between the states. After several years of negotiation and diplomacy, the foreign ministers of seven South Asian states (India, Pakistan, Bangladesh, Sri Lanka, Nepal, Bhutan, and Maldives), in a meeting at New Delhi, adopted a Declaration on South Asian Regional Cooperation in 1983.⁸ Subsequently, in 1985, South Asian Association for Regional Cooperation (SAARC) was formally launched with the signing of the Charter of the South Asian Association for Regional Cooperation. With the admission of Afghanistan as a member state, the present membership of SAARC stands at eight.

The objectives of SAARC as provided by the Charter of SAARC⁹ include: promoting the welfare of the peoples of South Asia and improving their quality of life; accelerating economic growth, social progress and cultural development in the region and providing all individuals the opportunity to live in dignity and realizing their full potentials; promoting and strengthening collective self-reliance among the countries of South Asia; contributing to mutual trust, understanding and appreciation of mutual problems; promoting active collaboration and mutual assistance in the economic, social, cultural, technical and scientific fields; strengthening cooperation with other developing countries; strengthening cooperation among developing countries in international forums on matters of common interests; and cooperation with international and regional organizations with similar aims and purposes.¹⁰

The institutions of SAARC are multi-layered with the highest authority conferred to the Summit consisting of heads of state or governments. The Council of Ministers, which consists of foreign ministers of member states, has the principal responsibility for reviewing existing policies and devising new strategies for further co-operation. The Standing Committee, which consists of foreign secretaries, has the overall responsibility for monitoring and co-ordination of projects and programmes. A Programme Committee consisting of senior civil servants has been established to assist the Standing Committee for scrutinising the budget and for finalising its activities. In order to achieve the objectives, as outlined in the Charter, a range of so-called Technical Committees were set up. The Technical Committees plan specialised projects and programmes and have the responsibility of monitoring implementation. The seven technical committees currently cover agriculture and rural development, communication and transport, social development, environment, meteorology and forestry, science and technology, human resources development, energy. In order to facilitate the

8 See for more information, Information and Publications Division, *From SARC to SAARC: Milestones of Regional Cooperation in South-Asia*, vol. 1 and 2, Kathmandu, SAARC, 1990.

9 For text of the Charter see, APPENDIX B.

10 See, Article 1.

implementation of the Technical Committees, a number of Regional Centres have also been set up.¹¹ In order to achieve its objectives relating to economic growth, SAARC has also established a number of institutions and agreements, which includes the Committee on Economic Cooperation, SAARC Preferential Trading Arrangement (SAPTA) and South Asian Free Trade Area (SAFTA).¹²

The early years of SAARC concentrated in economic, social and cultural cooperation and excluded from its purview, bilateral and contentious issues.¹³ The multi-layered institutions of SAARC as described in the preceding paragraph confirms the bias of SAARC towards economic and development issues and its sheer neglect towards human rights issues. Even, the promotion of human rights is not a goal listed by the SAARC Charter. Nevertheless, at the summit level, at the Council of Ministers level, at the levels of other standing/technical committees, and in various conferences organized from time to time, unsuccessful discussions were held to formulate instrument for human rights protection. However, in 2002, two human rights instruments were adopted. These are (a) SAARC Convention on Regional Arrangements for the Promotion of Child Welfare in South Asia, and (b) SAARC Convention on Preventing and Combating Trafficking in Women and Children for Prostitution.

A significant step towards concentrating on human rights protection was the signing of SAARC Social Charter in 2004.¹⁴ This instrument addressing social, economic and cultural human rights contains 21 objectives.¹⁵ Some of these objectives have direct bearing on protection of minorities. They are:

- (a) Ensuring tolerance, non-violence, pluralism and non-discrimination in respect of diversity within and among societies;
- (b) Ensuring that disadvantaged, marginalized and vulnerable persons and groups are included in social development, and that society acknowledges and responds to the consequences of disability by securing the legal rights of the individual and by making the physical and social environment accessible;
- (c) Promoting universal respect for and observance and protection of human rights and fundamental freedoms for all;

11 These include SAIC, STC, SDC, SMRC, and SHRDC.

12 Javaid Rehman, "Institutions of International Law and the Development of Regional Forum for Peaceful Dialogue in South Asia", *Asian Journal of Comparative Law*, vol.1, no.1, 2006, pp.14-15.

13 K.K. Bhargava, H. Bongartz and F. Sobhan, *Shaping South Asia's Future: Role of Regional Cooperation*, New Delhi, Vikas Publishing, 1995, p.52.

14 For text of the instrument see, APPENDIX C.

15 See, Article II.

- (d) Recognizing and supporting people with diverse cultures, beliefs and traditions in their pursuit of economic and social development with full respect for their identity, traditions, forms of social organization and cultural values;

The SAARC Social Charter requires that its implementation shall be facilitated by a National Coordination Committee or any appropriate national mechanism as may be decided in each country and information on such mechanism will be exchanged between States Parties through the SAARC Secretariat. Appropriate SAARC bodies shall review the implementation of the Social Charter at the regional level. The Charter also obligates the member States to formulate a national plan of action or modify the existing one, if any, in order to operationalise the provisions of the Social Charter.¹⁶ On careful examination of these provisions relating to implementation of the Charter, it transpires that enforcement is largely dependent on the goodwill of the member States of SAARC.

6.4 Achievements and limitations of non-government level cooperation

In the context of any region of the world, non-government organizations possess remarkable potentials to play a significant role towards minority protections.¹⁷ In South Asian countries, for many years, non-government organizations have been assisting the minorities in ensuring access to justice, and promoting the norms of minority rights. But, at the regional level, their activities and initiatives are of very recent origin.

One of the earliest attempts was made by South Asian Forum for Human Rights (SAFHR) in 1998. It organized a South Asian regional consultation on minority rights in South Asia, participated by delegates from India, Pakistan, Bangladesh, Sri Lanka, Nepal, and Bhutan. The participants discussed various issues necessary for formulation of a regional agenda on the issue of minorities: definition of 'minorities' in South Asian contexts; constitutional and legal reforms for the protection of minority rights in South Asia; rise of religious fundamentalism and politics of intolerance in South Asia; and majoritarian nationalism and

¹⁶ See, Article X.

¹⁷ See, Alan Phillips, "The Role of International Non-Governmental Organisations in Promoting Minority Rights Monitoring", in Gudmundur Alfredsson *et al.* (eds.), *International Human Rights Monitoring Mechanisms: Essays in Honour of Jakob Th Moller*, Hague, Kluwer Law International, 2001, pp.897-906.

suppression of the cultures and languages of minorities in South Asia.¹⁸ In particular, the meeting urged on the SAARC to create the office of a Special Rapporteur for monitoring minority rights situation in the region, to adopt a South Asian Charter of Human Rights, and to establish a South Asian Human Rights Commission. The meeting also called on SAFHR to create, in collaboration with NGOs and other civil society actors of the region, a forum for monitoring and preparing an annual people's report on the status of minority rights in South Asia. This consultation can be regarded as the beginning of cross-boarder regional cooperation among South Asian civil society organizations on minority issues.

In 2003, the International Centre for Ethnic Studies (ICES), after consultation with the experts from the countries of the region, drafted a 'Statement of Principles on Minority and Group Rights in South Asia'. The major aim of this statement of principles is to effectively address minority issues and concerns, which cut across countries in South Asia and enhance regional responses. The statement includes 11 principles and an explanation. It was also submitted to the 2003 session of the WGM and subsequently revised in 2006. On the basis of this instrument, the ICES developed in 2008 a 'South Asian Charter on Minority and Group Rights'. Several NGOs from the countries of the region took active part in the development of this Charter. The main aim of the Charter is to effectively address minority issues and concerns, which cut across countries in South Asia and enhance regional responses to some of the current weaknesses in constitutional and legislative protection and promotion of minority and group rights. The Charter - instead of formulating new norms for the protection of minority and group rights - builds on the existing instruments like SAARC Social Charter, the ICCPR, the ICESCR, the CERD, the CEDAW and adapts them to the specific context of South Asia.

On the whole, it can be said that non-government level regional cooperation for minority protection in South Asia is passing an elementary stage of development. Different civil society organizations are concentrating more on standards setting. This process is likely to unite different actors, in the fight for protection of minorities in South Asia, working with common mission and strategies in mind.

6.5 Conclusion

One of the most common criticisms targeted against SAARC is that, on the surface, South Asia today looks no different than when it first took up the initiative to set up a regional organization. The fact that SAARC has not yet attracted the attention of its citizenry is one of the main reasons behind such pessimist evaluation. As a way out, more extensive regional cooperation in the

18 For recommendations and resolutions of the consultation see, Sumanta Banerjee (ed.), *Shrinking Space: Minority Rights in South Asia*, Kathmandu, South Asia Forum for Human Rights, 1999, pp.206-213.

field of human rights and minority rights can attract the attention of South Asian people and add fuel even to the economic cooperation. In fact, it can hardly be overemphasized that cooperation in the economic field is contingent upon maintenance of peace and stability, and that in turn, is linked with human/minority rights protection.

So far minority protection is concerned, SAARC should initiate drafting of a legally binding instrument that would deal with minority rights and establish a strong implementation mechanism. In doing so, impression from other regional regime on minority rights, in particular the European model, should be taken into consideration. But, emphasis should definitely be on indigenous method/approach best suited in South Asian realities. The non-binding instruments adopted by non-government organizations of South Asia can also guide the SAARC in this regard.

Despite the modest progress so far made and lack of confidence among the member states, SAARC is the only available regional mechanism in South Asia that can provide some form of stability and forum for dialogue.¹⁹ This option for regional stability cannot be kept under-utilized.

19 See, Javaid Rehman, "Institutions of International Law and the Development of Regional Forum for Peaceful Dialogue in South Asia", *Asian Journal of Comparative Law*, vol.1, no.1, 2006, pp.1-18.

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APPENDIX A

Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities

Adopted by General Assembly resolution 47/135 of 18 December 1992

Reaffirming that one of the basic aims of the United Nations, as proclaimed in the Charter, is to promote and encourage respect for human rights and for fundamental freedoms for all, without distinction as to race, sex, language or religion,

Reaffirming faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small,

Desiring to promote the realization of the principles contained in the Charter, the Universal Declaration of Human Rights, the Convention on the Prevention and Punishment of the Crime of Genocide, the International Convention on the Elimination of All Forms of Racial Discrimination, the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, the Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief, and the Convention on the Rights of the Child, as well as other relevant international instruments that have been adopted at the universal or regional level and those concluded between individual States Members of the United Nations,

Inspired by the provisions of article 27 of the International Covenant on Civil and Political Rights concerning the rights of persons belonging to ethnic, religious and linguistic minorities,

Considering that the promotion and protection of the rights of persons belonging to national or ethnic, religious and linguistic minorities contribute to the political and social stability of States in which they live,

Emphasizing that the constant promotion and realization of the rights of persons belonging to national or ethnic, religious and linguistic minorities, as an integral part of the development of society as a whole and within a democratic framework based on the rule of law, would contribute to the strengthening of friendship and cooperation among peoples and States,

Considering that the United Nations has an important role to play regarding the protection of minorities,

Bearing in mind the work done so far within the United Nations system, in particular by the Commission on Human Rights, the Subcommission on Prevention of Discrimination and Protection of Minorities and the bodies established pursuant to the International Covenants on Human Rights and other relevant international human rights instruments in promoting and protecting the rights of persons belonging to national or ethnic, religious and linguistic minorities,

Taking into account the important work which is done by intergovernmental and non-governmental organizations in protecting minorities and in promoting and protecting the rights of persons belonging to national or ethnic, religious and linguistic minorities,

Recognizing the need to ensure even more effective implementation of international human rights instruments with regard to the rights of persons belonging to national or ethnic, religious and linguistic minorities,

Proclaims this Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities:

Article 1

1. States shall 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.
2. States shall adopt appropriate legislative and other measures to achieve those ends.

Article 2

1. Persons belonging to national or ethnic, religious and linguistic minorities (hereinafter referred to as persons belonging to minorities) have the right to enjoy their own culture, to profess and practise their own religion, and to use their own language, in private and in public, freely and without interference or any form of discrimination.
2. Persons belonging to minorities have the right to participate effectively in cultural, religious, social, economic and public life.
3. Persons belonging to minorities have the right to participate effectively in decisions on the national and, where appropriate, regional level concerning the minority to which they belong or the regions in which they live, in a manner not incompatible with national legislation.

4. Persons belonging to minorities have the right to establish and maintain their own associations.

5. Persons belonging to minorities have the right to establish and maintain, without any discrimination, free and peaceful contacts with other members of their group and with persons belonging to other minorities, as well as contacts across frontiers with citizens of other States to whom they are related by national or ethnic, religious or linguistic ties.

Article 3

1. Persons belonging to minorities may exercise their rights, including those set forth in the present Declaration, individually as well as in community with other members of their group, without any discrimination.

2. No disadvantage shall result for any person belonging to a minority as the consequence of the exercise or non-exercise of the rights set forth in the present Declaration.

Article 4

1. States shall take measures where required to ensure that persons belonging to minorities may exercise fully and effectively all their human rights and fundamental freedoms without any discrimination and in full equality before the law.

2. States shall take measures to create favourable conditions to enable persons belonging to minorities to express their characteristics and to develop their culture, language, religion, traditions and customs, except where specific practices are in violation of national law and contrary to international standards.

3. States should take appropriate measures so that, wherever possible, persons belonging to minorities may have adequate opportunities to learn their mother tongue or to have instruction in their mother tongue.

4. States should, where appropriate, take measures in the field of education, in order to encourage knowledge of the history, traditions, language and culture of the minorities existing within their territory. Persons belonging to minorities should have adequate opportunities to gain knowledge of the society as a whole.

5. States should consider appropriate measures so that persons belonging to minorities may participate fully in the economic progress and development in their country.

Article 5

1. National policies and programmes shall be planned and implemented with due regard for the legitimate interests of persons belonging to minorities.
2. Programmes of cooperation and assistance among States should be planned and implemented with due regard for the legitimate interests of persons belonging to minorities.

Article 6

States should cooperate on questions relating to persons belonging to minorities, inter alia, exchanging information and experiences, in order to promote mutual understanding and confidence.

Article 7

States should cooperate in order to promote respect for the rights set forth in the present Declaration.

Article 8

1. Nothing in the present Declaration shall prevent the fulfilment of international obligations of States in relation to persons belonging to minorities. In particular, States shall fulfil in good faith the obligations and commitments they have assumed under international treaties and agreements to which they are parties.
2. The exercise of the rights set forth in the present Declaration shall not prejudice the enjoyment by all persons of universally recognized human rights and fundamental freedoms.
3. Measures taken by States to ensure the effective enjoyment of the rights set forth in the present Declaration shall not prima facie be considered contrary to the principle of equality contained in the Universal Declaration of Human Rights.
4. Nothing in the present Declaration may be construed as permitting any activity contrary to the purposes and principles of the United Nations, including sovereign equality, territorial integrity and political independence of States.

Article 9

The specialized agencies and other organizations of the United Nations system shall contribute to the full realization of the rights and principles set forth in the present Declaration, within their respective fields of competence.

APPENDIX B

Charter of the South Asian Association for Regional Cooperation

We, the Heads of State or Government of BANGLADESH, BHUTAN, INDIA, MALDIVES, NEPAL, PAKISTAN and SRI LANKA;

1. Desirous of promoting peace, stability, amity and progress in the region through strict adherence to the principles of the UNITED NATIONS CHARTER and NON-ALIGNMENT, particularly respect for the principles of sovereign equality, territorial integrity, national independence, non-use of force and non-interference in the internal affairs of other States and peaceful settlement of all disputes;
2. Conscious that in an increasingly interdependent world, the objectives of peace, freedom, social justice and economic prosperity are best achieved in the SOUTH ASIAN region by fostering mutual understanding, good neighbourly relations and meaningful cooperation among the Member States which are bound by ties of history and culture;
3. Aware of the common problems, interests and aspirations of the peoples of SOUTH ASIA and the need for joint action and enhanced cooperation within their respective political and economic systems and cultural traditions;
4. Convinced that regional cooperation among the countries of SOUTH ASIA is mutually beneficial, desirable and necessary for promoting the welfare and improving the quality of life of the peoples of the region;
5. Convinced further that economic, social and technical cooperation among the countries of SOUTH ASIA would contribute significantly to national and collective self-reliance;
6. Recognising that increased cooperation, contacts and exchanges among the countries of the region will contribute to the promotion of friendship and understanding among their peoples;
7. Recalling the DECLARATION signed by their Foreign Ministers in NEW DELHI on August 2, 1983 and noting the progress achieved in regional cooperation;
8. Reaffirming their determination to promote such cooperation within an institutional framework;

DO HEREBY AGREE to establish an organisation to be known as SOUTH ASIAN ASSOCIATION FOR REGIONAL COOPERATION hereinafter referred to as the ASSOCIATION, with the following objectives, principles, institutional and financial arrangements:

Article I: OBJECTIVES

The objectives of the ASSOCIATION shall be:

- (a) to promote the welfare of the peoples of SOUTH ASIA and to improve their quality of life;
- (b) to accelerate economic growth, social progress and cultural development in the region and to provide all individuals the opportunity to live in dignity and to realise their full potentials;
- (c) to promote and strengthen collective self-reliance among the countries of SOUTH ASIA;
- (d) to contribute to mutual trust, understanding and appreciation of one another's problems;
- (e) to promote active collaboration and mutual assistance in the economic, social, cultural, technical and scientific fields;
- (f) to strengthen cooperation with other developing countries;
- (g) to strengthen cooperation among themselves in international forums on matters of common interests; and
- (h) to cooperate with international and regional organisations with similar aims and purposes.

Article II: PRINCIPLES

1. Cooperation within the framework of the ASSOCIATION shall be based on respect for the principles of sovereign equality, territorial integrity, political independence, non-interference in the internal affairs of other States and mutual benefit.
2. Such cooperation shall not be a substitute for bilateral and multilateral cooperation but shall complement them.

3. Such cooperation shall not be inconsistent with bilateral and multilateral obligations.

Article III: MEETINGS OF THE HEADS OF STATE OR GOVERNMENT

The Heads of State or Government shall meet once a year or more often as and when considered necessary by the Member States.

Article IV: COUNCIL OF MINISTERS

1. A Council of Ministers consisting of the Foreign Ministers of the Member States shall be established with the following functions:

- (a) formulation of the policies of the ASSOCIATION;
- (b) review of the progress of cooperation under the ASSOCIATION;
- (c) decision on new areas of cooperation;
- (d) establishment of additional mechanism under the ASSOCIATION as deemed necessary;
- (e) decision on other matters of general interest to the ASSOCIATION.

2. The Council of Ministers shall meet twice a year. Extraordinary session of the Council may be held by agreement among the Member States.

Article V: STANDING COMMITTEE

1. The Standing Committee comprising the Foreign Secretaries shall have the following functions:

- (a) overall monitoring and coordination of programme of cooperation;
- (b) approval of projects and programmes, and the modalities of their financing;
- (c) determination of inter-sectoral priorities;
- (d) mobilisation of regional and external resources;
- (e) identification of new areas of cooperation based on appropriate studies.

2. The Standing Committee shall meet as often as deemed necessary.
3. The Standing Committee shall submit periodic reports to the Council of Ministers and make reference to it as and when necessary for decisions on policy matters.

Article VI: TECHNICAL COMMITTEES

1. Technical Committees comprising representatives of Member States shall be responsible for the implementation, coordination and monitoring of the programmes in their respective areas of cooperation.
2. They shall have the following terms of reference:
 - (a) determination of the potential and the scope of regional cooperation in agreed areas;
 - (b) formulation of programmes and preparation of projects;
 - (c) determination of financial implications of sectoral programmes;
 - (d) formulation of recommendations regarding apportionment of costs;
 - (e) implementation and coordination of sectoral programmes;
 - (f) monitoring of progress in implementation.
3. The Technical Committees shall submit periodic reports to the Standing Committee.
4. The Chairmanship of the Technical Committees shall normally rotate among Member States in alphabetical order every two years.
5. The Technical Committees may, inter-alia, use the following mechanisms and modalities, if and when considered necessary:
 - (a) meetings of heads of national technical agencies;
 - (b) meetings of experts in specific fields;

- (c) contact amongst recognised centres of excellence in the region.

Article VII: ACTION COMMITTEES

The Standing Committee may set up Action Committees comprising Member States concerned with implementation of projects involving more than two but not all Member States.

Article VIII: SECRETARIAT

There shall be a Secretariat of the ASSOCIATION.

Article IX: FINANCIAL ARRANGEMENTS

1. The contribution of each Member State towards financing of the activities of the ASSOCIATION shall be voluntary.
2. Each Technical Committee shall make recommendations for the apportionment of costs of implementing the programmes proposed by it.
3. In case sufficient financial resources cannot be mobilised within the region for funding activities of the ASSOCIATION, external financing from appropriate sources may be mobilised with the approval of or by the Standing Committee.

Article X: GENERAL PROVISIONS

1. Decisions at all levels shall be taken on the basis of unanimity.
2. Bilateral and contentious issues shall be excluded from the deliberations.

APPENDIX C

Social Charter of the SAARC

Re-affirming that the principal goal of SAARC is to promote the welfare of the peoples of South Asia, to improve their quality of life, to accelerate economic growth, social progress and cultural development and to provide all individuals the opportunity to live in dignity and to realize their full potential.

Recognising that the countries of South Asia have been linked by age-old cultural, social and historical traditions and that these have enriched the interaction of ideas, values, cultures and philosophies among the people and the States and that these commonalities constitute solid foundations for regional cooperation for addressing more effectively the economic and social needs of people.

Recalling that all Member States attach high importance to the imperative of social development and economic growth and that their national legislative, executive and administrative frameworks provide, in varying degrees, for the progressive realization of social and economic goals, with specific provisions, where appropriate, for the principles of equity, affirmative action and public interest.

Observing that regional cooperation in the social sector has received the focused attention of the Member States and that specific areas such as health, nutrition, food security, safe drinking water and sanitation, population activities, and child development and rights along with gender equality, participation of women in development, welfare of the elderly people, youth mobilization and human resources development continue to remain on the agenda of regional cooperation.

Noting that high level meetings convened since the inception of SAARC on the subjects of children, women, human resettlements, Sustainable developments, agriculture and food, poverty alleviation etc. have contributed immensely to the enrichment of the social agenda in the region and that several directives of the Heads of State or Government of SAARC Countries at their Summit meetings have imparted dynamism and urgency to adopting regional programmes to fully and effectively realize social goals.

Reiterating that the SAARC Charter and the, SAARC Conventions, respectively on Narcotic Drugs and Psychotropic Substances, Preventing and Combating Trafficking in Women and Children for Prostitution, Regional Arrangements for the Promotion of Child Welfare in South Asia and the SAARC Agreement on Food Security Reserve provide regional frameworks for addressing specific social issues, which require concerted and coordinated actions and strategies for the effective realization of their objectives.

Realizing that the health of the population of the countries of the region is closely interlinked and can be sustained only by putting in place coordinated surveillance mechanisms and prevention and management strategies.

Noting, in particular, that Heads of State or Government of SAARC Countries, at their Tenth Summit in Colombo in July 1998, re-affirmed the need to develop, beyond national plans of action, a regional dimension of cooperation in the social sector and that the Eleventh SAARC Summit in Kathmandu in January 2002 directed that a SAARC Social Charter be concluded as early as possible.

Convinced that it was timely to develop a regional instrument which consolidated the multifarious commitments of SAARC Member States in the social sector and provided a practical platform for concerted, coherent and complementary action in determining social priorities, improving the structure and content of social policies and programmes, ensuring greater efficiency in the utilization of national, regional and external resources and in enhancing the equity and sustainability of social programmes and the quality of living conditions of their beneficiaries.

The Member States of the South Asian Association for Regional Cooperation hereby agree to adopt this Charter:

Article I: General Provisions

1. States Parties shall maintain a social policy and strategy in order to ensure an overall and balanced social development of their peoples. The salient features of individual social policy and programme shall be determined, taking into account the broader national development goals and specific historic and political contexts of each State Party.
2. States Parties agree that the obligations under the Social Charter shall be respected, protected and fulfilled without reservation and that the enforcement thereof at the national level shall be continuously reviewed through agreed regional arrangements and mechanisms.
3. States Parties shall establish a people-centered framework for social development to guide their work and in the future, to build a culture of cooperation and partnership and to respond to the immediate needs of those who are most affected by human distress. States Parties are determined to meet this challenge and promote social development throughout the region.

Article II: Principles, Goals and Objectives

1. The provisions made herein shall complement the national processes of policymaking, policy-implementation and policy-evaluation, while providing broad parameters and principles for addressing common social issues and developing and implementing result-oriented programmes in specific social areas.
2. In the light of the commitments made in this Charter, States Parties agree to:
 - (i) Place people at the center of development and direct their economies to meet human needs more effectively;
 - (ii) Fulfill the responsibility towards present and future generations by ensuring equity among generations, and protecting the integrity and sustainable use of the environment;
 - (iii) Recognize that, while social development is a national responsibility, its successful achievement requires the collective commitment and cooperation of the international community;
 - (iv) Integrate economic, cultural and social policies so that they become mutually supportive, and acknowledge the interdependence of public and private spheres of activity;
 - (v) Recognize that the achievement of sustained social development requires sound, equitable and broad-based economic policies;
 - (vi) Promote participatory governance, human dignity, social justice and solidarity at the national, regional and international levels;
 - (vii) Ensure tolerance, non-violence, pluralism and non-discrimination in respect of diversity within and among societies;
 - (viii) Promote the equitable distribution of income and greater access to resources through equity and equality of opportunity for all;
 - (ix) Recognize the family as the basic unit of society, and acknowledge that it plays a key role in social development and as such should be strengthened, with attention to the rights, capabilities and responsibilities of its members including children, youth and the elderly;
 - (x) Affirm that while State, society, community and family have obligations towards children, these must be viewed in the context of inculcating in children intrinsic and attendant

- sense of duty and set of values directed towards preserving and strengthening the family, community, society and nation;
- (xi) Ensure that disadvantaged, marginalized and vulnerable persons and groups are included in social development, and that society acknowledges and responds to the consequences of disability by securing the legal rights of the individual and by making the physical and social environment accessible;
 - (xii) Promote universal respect for and observance and protection of human rights and fundamental freedoms for all, in particular the right to development; promote the effective exercise of rights and the discharge of responsibilities in a balanced manner at all levels of society; promote gender equity; promote the welfare and interest of children and youth; promote social integration and strengthen civil society;
 - (xiii) Recognize the promotion of health as a regional objective and strive to enhance it by responding to urgent health issues and outbreak of any communicable disease in the region through sharing information with each other, imparting public health and curative skills to professionals in the region; and adopting a coordinated approach to health related issues in international fora;
 - (xiv) Support progress and protect people and communities whereby every member of society is enabled to satisfy basic human needs and to realize his or her personal dignity, safety and creativity;
 - (xv) Recognize and support people with diverse cultures, beliefs and traditions in their pursuit of economic and social development with full respect for their identity, traditions, forms of social organization and cultural values;
 - (xvi) Underline the importance of transparent and accountable conduct of administration in public and private, national and international institutions;
 - (xvii) Recognize that empowering people, particularly women, to strengthen their own capacities is an important objective of development and its principal resource. Empowerment requires the full participation of people in the formulation, implementation and evaluation of decisions and sharing the results equitably;
 - (xviii) Accept the universality of social development, and outline an effective approach to it, with a renewed call for international cooperation and partnership;

- (xix) Ensure that the elderly persons lead meaningful and fulfilling lives while enjoying all rights without discrimination and facilitate the creation of an environment in which they continue to utilize their knowledge, experience and skills;
- (xx) Recognize that information communication technology can help in fulfilling social development goals and emphasize the need to facilitate easy access to this technology;
- (xxi) Strengthen policies and programmes that improve, broaden and ensure the participation of women in all spheres of political, economic, social and cultural life, as equal partners, and improve their access to all resources needed for the full enjoyment of their fundamental freedoms and other entitlements.

Article III: Poverty Alleviation

1. States Parties affirm that highest priority shall be accorded to the alleviation of poverty in all South Asian Countries. Recognising that South Asia's poor could constitute a huge and potential resource, provided their basic needs are met and they are mobilized to create economic growth, States Parties reaffirm that the poor should be empowered and irreversibly linked to the mainstream of development. They also agree to take appropriate measures to create income-generating activities for the poor.
2. Noting that a large number of the people remain below the poverty line, States Parties re-affirm their commitment to implement an assured nutritional standards approach towards the satisfaction of basic needs of the South Asian poor.
3. Noting the vital importance of biotechnology for the long-term food security of developing countries as well as for medicinal purposes, States Parties resolve that cooperation should be extended to the exchange of expertise in genetic conservation and maintenance of germplasm banks. They stress the importance of the role of training facilities in this area and agree that cooperation in the cataloguing of genetic resources in different SAARC countries would be mutually beneficial.
4. States Parties agree that access to basic education, adequate housing, safe drinking water and sanitation, and primary health care should be guaranteed in legislation, executive and administrative provisions, in addition to ensuring of adequate standard of living, including adequate shelter, food and clothing.

5. States Parties underline the imperative for providing a better habitat to the people of South Asia as part of addressing the problems of the homeless. They agree that each country share the experiences gained in their efforts to provide shelter, and exchange expertise for effectively alleviating the problem.

Article IV: Health

1. States Parties re-affirm that they will strive to protect and promote the health of the population in the region. Recognizing that it is not possible to achieve good health in any country without addressing the problems of primary health issues and communicable diseases in the region, the States Parties agree to share information regarding the outbreak of any communicable disease among their populations.
2. Conscious that considerable expertise has been built up within the SAARC countries on disease prevention, management and treatment, States Parties affirm their willingness to share knowledge and expertise with other countries in the region.
3. Noting that the capacity for manufacture of drugs and other chemicals exists in different countries, States Parties agree to share such capacity and products when sought by any other State Party.
4. Realizing that health issues are related to livelihood and trade issues which are influenced by international agreements and conventions, the States Parties agree to hold prior consultation on such issues and to make an effort to arrive at a coordinated stand on issues that relate to the health of their population.
5. States Parties also agree to strive at adopting regional standards on drugs and pharmaceutical products.

Article V: Education, Human Resource Development and Youth Mobilization

1. Deeply conscious that education is the cutting edge in the struggle against poverty and the promotion of development, States Parties re-affirm the importance of attaining the target of providing free education to all children between the ages of 6 - 14 years. They agree to share their respective experiences and technical expertise to achieve this goal.
2. States Parties agree that broad-based growth should create productive employment opportunities for all groups of people, including young people.

3. States Parties agree to provide enhanced job opportunities for young people through increased investment in education and vocational training.
4. States Parties agree to provide adequate employment opportunities and leisure time activities for youth to make them economically and socially productive.
5. States Parties shall find ways and means to provide youth with access to education, create awareness on family planning, HIV/AIDS and other sexually-transmitted diseases, and risks of consumption of tobacco, alcohol and drugs.
6. States Parties stress the idealism of youth must be harnessed for regional cooperative programmes. They further stress the imperative of the resurgence of South Asian consciousness in the youth of each country through participation in the development programmes and through greater understanding and appreciation of each other's country. The Organized Volunteers Programme under which volunteers from one country would be able to work in other countries in the social fields shall be revitalized.
7. States Parties recognize that it is essential to promote increased cross-fertilization of ideas through greater interaction among students, scholars and academics in the SAARC countries. They express the resolve that a concerted programme of exchange of scholars among Member States should be strengthened.

Article VI: Promotion of the status of women

1. States Parties reaffirm their belief that discrimination against women is incompatible with human rights and dignity and with the welfare of the family and society; that it prevents women realizing their social and economic potential and their participation on equal terms with men, in the political, social, economic and cultural life of the country, and is a serious obstacle to the full development of their personality and in their contribution to the social and economic development of their countries.
2. States Parties agree that all appropriate measures shall be taken to educate public opinion and to direct national aspirations towards the eradication of prejudice and the abolition of customary and all other practices, which are based on discrimination against women. States Parties further declare that all forms of discrimination and violence against women are offences against human rights and dignity and that such offences must be prohibited through legislative, administrative and judicial actions.

3. States Parties shall take all appropriate measures to ensure to women on equal terms with men, an enabling environment for their effective participation in the local, regional and national development processes and for the enjoyment of their fundamental freedoms and legitimate entitlements.
4. States Parties also affirm the need to empower women through literacy and education recognizing the fact that such empowerment paves the way for faster economic and social development. They particularly stress the need to reduce, and eventually eliminate, the gender gap in literacy that currently exists in the SAARC nations, within a time-bound period.
5. States Parties re-affirm their commitment to effectively implement the SAARC Convention on Combating the Trafficking of Women and Children for Prostitution and to combat and suppress all forms of traffic in women and exploitation of women, including through the cooperation of appropriate sections of the civil society.
6. States Parties are of the firm view that at the regional level, mechanisms and institutions, to promote the advancement of women as an integral part of mainstream political, economic, social and cultural development be established.

Article VII: Promotion of the Rights and Well-being of the Child

1. States Parties are convinced that the child, by reason of his or her physical and mental dependence, needs special safeguards and care, including appropriate legal protection, before as well as after birth.
2. The child, for the full and harmonious development of his or her personality, should grow up in a family environment, in an atmosphere of happiness, love and understanding.
3. States Parties shall protect the child against all forms of abuse and exploitation prejudicial to any aspects of the child's well-being.
4. States Parties shall take necessary actions to implement effectively the SAARC Convention on Regional Arrangements for the Promotion of Child Welfare and to combat and suppress all offences against the person, dignity and the life of the child.
5. States Parties are resolved that the child shall enjoy special protection, and shall be given opportunities and facilities, by law and by other means, to enable him or her to develop its full potential physically, mentally, emotionally, morally, spiritually, socially and culturally in a healthy and

normal manner and in conditions of freedom and dignity. The best interests and welfare of the child shall be the paramount consideration and the guiding principle in all matters involving his or her life.

6. States Parties agree to extend to the child all possible support from government, society and the community. The child shall be entitled to grow and develop in health with due protection. To this end, special services shall be provided for the child and its mother, including pre-natal, natal (especially delivery by trained birth attendant) and post-natal care, immunization, early childhood care, timely and appropriate nutrition, education and recreation. States Parties shall undertake specific steps to reduce low birth weight, malnutrition, anemia amongst women and children, infant, child and maternal morbidity and mortality rates, through the inter-generational life cycle approach, increase education, literacy, and skill development amongst adolescents and youth, especially of girls and elimination of child/early marriage.
7. States Parties shall take effective measures for the rehabilitation and re-integration of children in conflict with the law.
8. State Parties shall take appropriate measures for the re-habilitation of street children, orphaned, displaced and abandoned children, and children affected by armed conflict.
9. States Parties pledge that a physically, mentally, emotionally or socially disadvantaged child shall be given the special treatment, education and care required by his or her particular condition.
10. States Parties shall ensure that a child of tender years shall not, save in exceptional circumstances, be separated from his or her mother and that society and the public authorities shall be required to extend particular care to children without a family and to those without adequate means of support, including where desirable, provision of State and other assistance towards his or her maintenance.
11. States Parties shall take all appropriate measures, including legislative, administrative, social and educational measures, to protect children from the illicit use of narcotic drugs and psychotropic substances as defined in the relevant international treaties, and to prevent the use of children in the illicit production and trafficking of such substances. In this respect, States Parties shall expedite the implementation of the SAARC Convention on Narcotic Drugs and Psychotropic Substances at the national and regional levels.

Article VIII: Population Stabilisation

1. States Parties underscore the vital importance of enhanced cooperation in the social development and well-being of the people of South Asia. They agree that national programmes evolved through stakeholder partnership, with enhancement of allocation of requisite resources and well-coordinated regional programmes will contribute to a positive atmosphere for the development of a socially content, healthy and sustainable population in the region.
2. States Parties are of the view that population policies should provide for humancentered approach to population and development and aim towards human survival and wellbeing. In this regard, they affirm that national, local or provincial policies and strategies should aim to bring stabilization in the growth of population in each country, through voluntary sustainable family planning and contraceptive methods, which do not affect the health of women.
3. States Parties shall endeavour to inculcate a culture of self-contentment and regulation where unsustainable consumption and production patterns would have no place in the society and unsustainable population changes, internal migration resulting in excessive population concentration, homelessness, increasing poverty, unemployment, growing insecurity and violence, environmental degradation and increased vulnerability to disasters would be carefully, diligently and effectively managed.
4. States Parties shall take action to ensure reproductive health, reduction of maternal and infant mortality rates as also provision of adequate facilities to enable an infant to enjoy the warmth of love and support of his/her parents.
5. States Parties also agree to set up a SAARC Network of Focal Institutions on population activities for facilitating the sharing of information, experiences and resources within the region.

Article IX: Drug de-addiction, Rehabilitation and Reintegration

1. States Parties agree that regional cooperation should be enhanced through exchange of information, sharing of national experiences and common programmes in the specific areas, which should receive the priority consideration of the appropriate mechanisms both at the national and regional levels.
2. States Parties identify for intensive cooperation, the strengthening of legal systems to enhance collaboration in terms of financial investigation; asset forfeiture; money laundering; countering criminal conspiracies and organized crime: mutual legal assistance; controlled deliveries; extradition; the updating of laws and other relevant structures to meet the obligations of the SAARC

Convention and other related international obligations, and developing of measures to counter drug trafficking through exchange of information; intercountry cooperation; controlled deliveries; strengthened SDOMD; regional training; frequent meetings at both policy and operational levels; strengthening the enforcement capabilities in the SAARC countries; enhanced control of production and use of licit drugs, and precursors and their essential chemicals.

3. Keeping in view the complementarities between demand reduction activities and supply control programmes, States Parties agree that all aspects of demand reduction, supply control, de-addiction and rehabilitation should be addressed by regional mechanisms.

Article X: Implementation

1. The implementation of the Social Charter shall be facilitated by a National Coordination Committee or any appropriate national mechanism as may be decided in each country. Information on such mechanism will be exchanged between States Parties through the SAARC Secretariat. Appropriate SAARC bodies shall review the implementation of the Social Charter at the regional level.
2. Member States shall formulate a national plan of action or modify the existing one, if any, in order to operationalise the provisions of the Social Charter. This shall be done through a transparent and broad-based participatory process. Stakeholder approach shall also be followed in respect of implementation and evaluation of the programmes under National Plans of Action.

Article XI: Entry into force

The Social Charter shall come into force upon the signature thereof by all States Parties.

Article XII: Amendment

The Social Charter may be amended through agreement among all States Parties.