Language, Cultural and Religious Minorities: What and Who are They?

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In international and constitutional law, minorities are often entitled to various protections and rights. As such, only persons who are regarded as 'minorities' may invoke these protections. Whilst this notion seems simple, it gives rise to a two-fold problem. First, the term 'minorities' bears no universally applicable definition. Secondly, it is a challenge for state constitutional law to practically implement the general principles of minority protection, which have crystallised at international law. This article examines the reasons for protecting minorities, the challenges to finding a universally applicable definition, and the minority protections in international law throughout history to the present day.

INTRODUCTION

Protecting 'minorities' is an oft-heard demand in international and constitutional law. It is especially in young, emerging democracies, such as Iraq, South Sudan, Yemen and Kenya where the challenge to find a balance between majoritarianism and protection of minorities can become debilitating to democratic transition. On the one hand, the dangers of minority vetos that could bring decision-making to a halt are often highlighted, but on the other hand the instability and violence that regularly result from unbridled majoritarianism also fill the headlines. The challenges faced by infant democracies to simultaneously protect minorities and provide for effective governance are well-known. Recent examples include political developments in Slovakia, Kosovo, Iraq, Poland, Afghanistan, Ethiopia, Kenya, Nepal, the Russian Federation and Indonesia.

The challenges associated with protecting minorities are, however, not limited to emerging democracies. Established democracies also face demands by minorities to receive special protection and treatment. The following are but a few examples

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of the ongoing attempts by established democracies to effectively protect the rights of minorities: In Australia, there are ongoing efforts to recognise Indigenous people and their special status in history and contemporary society. Concerted efforts are currently underway to amend the *Constitution of Australia Constitution Act 1901* to provide special recognition to the Indigenous people of Australia.[1] The United Kingdom is engaged in extensive decentralisation to Scotland which may ultimately lead to secession;[2] special autonomy arrangements are in place in Spain to give recognition to historic regions;[3] special protection exist for the Sami people in Finland;[4] the German speaking community in Brussels has received special recognition;[5] and in Estonia, cultural councils for several minorities have been established.[6] All of these efforts are directed at diffusing the tension that arises from the marginalisation of minorities by way of unbridled majoritarianism.

The question that arises is, 'What and who qualifies to be treated as a 'minority'?

Finding a definition for the concept: 'minority' that can be applied consistently in all situations around the world is not an easy task. Indeed, defining the term in a legally secure way is fraught with difficulty.

There is currently no internationally agreed definition, be it in international law or in constitutional law, as to what and who constitutes a 'minority'. Even some Constitutions that make use of the term fail to define it. For example, the *Constitution of India 1950* refers to the protection of 'minorities'; however it does not offer a definition as to what and who constitutes a 'minority'.[7] Similarly, the

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1 Refer, for example, to the work the Australian Government's Expert Panel on how Indigenous Australians could best be recognised in the Constitution: *Department of Families, Housing, Community Services and Indigenous Affairs (Cth),* Constitutional recognition of Indigenous Australians (2011) <http://www.fahcsia.gov.au/sa/indigenous/progserv/engagement/Pages/constitutional_recognition.aspx>.

2 George Calder, 'Self-Government structures for Scotland – Recent reforms in the United Kingdom' (Paper presented at The constitutional status of the regions in the Russian Federation and in other European countries, Kazan, Tatarsan, 11-12 July 2003); I White and J Yonwin 'Devolution in Scotland' (Standard Note No SN/PC/3000), House of Commons Library, UK Parliament, 2004).

3 C V Pi-Sunyer, *The Transition to a Decentralized Political System in Spain* (Forum of Federations, 2011).

4 L Hannikainen, '*Autonomy in Finland: The territorial autonomy of the Aland Islands and the cultural autonomy of the indigenous Sami People*' (Baltic Yearbook of International Law, 2002) 175-97.

5 A Lecours, 'Belgium' in A L Griffiths (ed), *Handbook of Federal Countries* (McGill-Queen's University Press, 2005) 58-72.

6 *Act on Cultural Minorities 1993* (Estonia) art 11. See also M Suksi, *On the constitutional features of Estonia* (Abo Abo Akademi, 1999).

7 *Constitution of India 1950* (India) arts 29 and 30. The Government Resolution of 12 January 1978 which established a Minorities Commission for India, also failed to define the term 'minority' although it was declared that 'there persists among the Minorities a feeling of inequality and discrimination' (Home Ministry Notification No II-160/2/2/77-MD). For an overview of the background and functioning of the Commission, see T Mahmood, 'Role and working of the Central Minorities Commission in India: Appraisal in a historical perspective' (2001) 37 *Civil and Military Law Journal* 207, 207-15.

Constitution of Ethiopia 1995 protects 'nations, nationalities and peoples' but does not define those entities.[8] Therefore, in state constitutional law it is often left to the judiciary to determine who, in specific factual circumstances, constitutes a 'minority' for purposes of the specific Constitution.

The difficulty to define 'minority' is nowhere better illustrated than in a remark by the first European High Commissioner on National Minorities, Mr Max van der Stoel, when he responded as follows to a question as to what in his view constituted a minority - 'I know a minority when I see one.'[9]

Answers to the question, 'What is a minority?' can be simple and complex at the same time. In its most rudimentary form, it can be said that 'minority' refers to a *numerical* minority of the population that shares common cultural, language and/or religious characteristics. On the other hand, however, the answer to the question is complex if 'minority' also takes into account the social, economic or political *status* of a group, its historic association with a country and its numerical position at a national, regional or local level. For example, the White community in apartheid South Africa was not regarded as a 'minority' for the purposes of special protection since they controlled so much political, economic and social power. In Canada, the French community constitutes a majority in the province of Quebec, but a minority at the national level. The status of a specific community may therefore fluctuate and this adds to the complexity in finding a consistent definition.

There seems to be growing consensus in international law, namely that without an effective regime to protect minorities, the democratisation efforts of nations that emerge from undemocratic systems, will soon flounder. The aim of this article is to consider why it is necessary to make any special arrangements for minorities and to explore some of the challenges that are experienced to develop a consistent definition for what is meant by 'minority'. Particular attention is paid to the efforts made in international law to define 'minority' with sufficient consistency to be applied in various nations. In this regard, an overview is given of the different approaches under the Leagues of Nations, the United Nations and recent developments in Europe. Consideration is given to recent agreements in Europe, for example, the European *Framework Convention for the Protection of Minorities* and how this Convention contributes to a more elaborate and secure framework to protect minorities. Finally, a number of general observations are

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8 *Constitution of Ethiopia 1995* (Ethiopia) preamble, art 8. The *Constitution of Ethiopia 1995* does not define what is meant by 'nations, nationalities and peoples' or what the difference is between a 'nation', a 'nationality' and a 'people'. Also it does not set out criteria according to which demands for recognition as a 'nation, nationality, and people' can be determined.

9 Mr van der Stoel, 'Case Studies on National Minority issues: Positive results' (Speech delivered at the CSCE Human Dimension Seminar on Case Studies on National Minority Issues, Warsaw, 24 May 1993) <http://www.osce.org/documents/hcnm/1993/05/3688_en.pdf>.

made about the status of minorities in international law.

WHY PROTECT MINORITIES?

The first question that often arises in the debate about the protection of minorities is, 'Why is it necessary to protect minorities in a democratic society?' The often heard 'wisdom' is that the simple application of democratic principles and majoritarian rule should be sufficient to protect language, cultural and religious minorities. Concerns are also expressed by the opponents of minority protection that special measures to identify and protect minorities can be abused or give rise to events such as those seen under Nazi rule, apartheid or ethnic cleansing in Yugoslavia.

The answer to this question lies in the theory and practice of democratic government. The theory of democratic government provides, in essence, that public policy is determined by the will of the majority. This presumes a majority that may change from time to time based on the choices that must be made in regard to the issues that confront a society. Whatever electoral system, form of state, form of government, or human rights provisions are in place, the essence of democratic theory is that ultimately, it is the majority that makes decisions.

The theory that majorities change depending on the policy issues at stake, often becomes undone in societies where the majority and minority status of political groupings is not determined by the flexibility of the electorate on policy issues, but by more static divisions based on language, religious or cultural considerations. The electoral result in deeply divided societies is often a straightjacket of perpetual majority and a perpetual minority status regardless of the policy issues at stake. As a consequence of the static nature of voting behaviour, minorities may therefore become permanently excluded from effective decision-making.

As Weller succinctly puts it:

> This legal framework generated by majority decision will in turn determine, shape, or colour most subordinate aspects of public decision-making. This fact poses obvious risks for minorities. For, if such decisions are taken by the electorate, or parliamentarians representing them, according to national, ethnic, cultural, or religious identity, rather than according to shifting interest, *minorities may face structural exclusion from the state*.[10]

The practice of democracy and majoritarian decision-making in deeply divided societies has shown that peace, stability and good government is not necessarily brought about by the simplicity of majoritarian government. In fact, unbridled majority rule is often the cause rather than the solution of conflict. As is observed by Horowitz, 'If majorities want majority rule, as they usually do, it is difficult

10 M Weller, 'Effective Participation of Minorities in Public Life' in M Weller (ed), *Universal Minority Rights: A Commentary on the Jurisprudence of International Courts and Treaty Bodies* (Oxford University Press, 2007) 477 (emphasis added).

to dislodge them from this position. Unfortunately, it often takes violence by minorities to move them.'[11]

The theory of democracy as being a purely majoritarian-driven process therefore requires adjustment in deeply divided societies so as to ensure the effective participation of all groupings in public policy formulation.

Countless majoritarian systems, especially those in emerging democracies, have experienced instability, violence and even collapse due to the reliance on rigid majoritarian decisions. Refer, for example, to the attempts of many African states to find democratic stability; the violence that has been experienced in some of the new democracies of Eastern Europe; and the challenges faced by emerging democracies in the Middle East. The diversity of society as reflected in a tapestry of religion, culture and language often become barricades to cooperation and give rise to practices of genocide, discrimination, exclusion, underdevelopment and neglect.

Untempered majoritarianism is purely based on the dominance of the majority and with it comes the risk that such majority is 'silent on many issues regarding human rights and restraint of power.'[12] As Horowitz succinctly puts it: 'When [the outcome of] elections are wholly governed by birth, the term *election* is scarcely appropriate.'[13]

The theory and practice of democracy as far as majoritarian principles are concerned, has therefore evolved and adapted to recognise that special arrangements need to be made in certain circumstances to ensure the effective participation of minorities in public policy making.[14]

Many creative solutions have been found in constitutional law to accommodate minority rights and interests in a manner that is sustainable with general democratic theory and practice.[15] Some of the mechanisms that have been used to ensure wider participation of minority groups in decision-making and administration are special provisions in the bill of rights; federalism and decentralisation; establishment of cultural councils and special advisory committees; recognition of customary law and protection of traditional leaders; specially designed electoral

11 D L Horowitz, 'Constitution-Making: A Process Filled with Constraint' (2006) 12(1) *Review of Constitutional Studies* 1, 14.

12 L W Beer, 'Introduction: Constitutionalism in Asia and the United States' in L W Beer (ed), *Constitutional Systems in Late Twentieth Century Asia* (Washington University Press, 1992), 12.

13 D L Horowitz, 'Conciliatory Institutions and Constitutional Processes in Post-Conflict States' (2008) *William and Mary Law Review* 1213, 1215 (emphasis in original).

14 J Frohwein and R Bank, *The participation of minorities in decision-making* (Strasbourg, 2001).

15 Y Ghai, 'The theory of the state in the Third World and the problematic of constitutionalism' in G Greenberg et al (eds), *Constitutionalism and Democracy: Transitions in the Contemporary World* (Oxford University Press, 1993) 361; A Lijphart, 'Constitutional Design for Divided Societies' (2004) 15(2) *Journal of Democracy* 96.

systems; bicameralism; formal and informal power-sharing in the executive; and quotas in legislative institutions.

CHALLENGES TO DEFINE 'MINORITY'

For many decades, there have been attempts to secure an appropriate definition for 'minority' that would satisfy all the practical circumstances at international and constitutional law where the definition could be applied. Despite all those efforts, it seems as if securing a definition has become more, rather than less, problematic.[16]

For example, some of the challenges that continue to confront the finding of an internationally consistent definition of 'minority' are the following:

(a) *Does the concept 'minority' refer to a numerical entity or does it refer to the social, political and economic inferior status of a group?*

Usually reference to 'minority' refers to the numerical status of a group, but it is accepted in international law that 'minority' can also refer to a numerical majority who are in a non-dominant position.[17] For example, the Whites in apartheid South Africa were a numerical minority, yet they could not be regarded as a 'minority' for purposes of protection in international law since they were in the politically and economically dominant position vis-a-vis the Black population.[18]

(b) *Are indigenous people who were the original inhabitants of a country included in the term 'minority'?*

There are different schools of thought, with some authors contending indigenous people are entitled to be treated as minorities, while other say that indigenous people, as first inhabitants, should receive special recognition and protection in international and constitutional law regardless of the protection afforded to other minorities.[19] According to the latter school special arrangements should therefore be made specifically to accommodate the indigenous people regardless of other minorities.

16 See generally J Donelly, *Universal Human Rights in Theory and Practice* (Cornell University Press, 1989); J Donelly, 'Third Generation Rights' in Brolmann et al, *Peoples and Minorities in International Law (*1993) 119-54.

17 A Alen and K Henrard, 'The relevance for South Africa of minority protection in Belgium' in B De Villiers, F Delmartino and A Alen, *Institutional development in divided societies* (HSRC Publishers Pretoria, 1989) 108-9.

18 The situation of a numerical minority dominating a numerical majority is obviously not unique to South Africa, for example the dominant role of the Ibo in Nigeria; the dominant role of the ruling classes in India and the dominance of the Amharic in Ethiopia.

19 K Henrard, *Devising an Adequate System of Minority Protection: Individual Human Rights, Minority Rights, and the Right to Self-Determination* (Martinus Nijhoff Publishers Leiden, 2000).

(c) Are 'new' minorities included in the definition?

The term, 'new' minorities refers to those groups who have recently settled in countries by way of immigration or as refugees without having had a long history with that country.[20] Internationally, the large movement of people by way of immigration and as refugees have caused many 'new' minorities to settle in countries with which such a community has not had a long history of residence. Again there are different schools of thought in this regard. Some scholars contend that those 'old' minorities that have been in countries for many generations and who are closely associated with a specific country, are entitled to special protection but that new immigrant communities are expected to integrate or assimilate with the new nation.[21] Other scholars contend that no distinction should be drawn between 'old' and 'new' categories of minorities, and that all minorities are entitled to special protection regardless of how long they have resided in a country.

(d) Is a majority determined in terms of the national numerical status of a group or its regional or local status?

A group may be a national minority, but within a specific geographical area such as a region or a local government it might be a majority. For example, the English speaking national majority in Canada is a minority in the province of Quebec. Does this mean that the English minority in Quebec is entitled to special protection, in a similar vein as the French minority is entitled to protection at a national level in Canada?

(e) Is the membership of a 'minority' defined by way of subjective considerations (self-definition by the group) or through objective criteria (external definition by others and particularly by the judiciary) or a combination of objective and subjective criteria?

Whichever option is supported gives rise to complexity. If the test of membership of a minority is purely subjective, in other words a

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20 See W Kymlicka, *Multicultural Citizenship: A Liberal Theory of Minority Rights* (Oxford University Press, 1989). The essence of his argument is that 'old' minorities want to ensure their survival as distinct, historical societies, whereas 'new' minorities are formed by recent immigration and their goal is rather that of integration with the recipient nation's culture. Several European states such as Germany, Australia, Estonia, Switzerland and Latvia has restricted the application of the European Convention for the Protection of National Minorities to 'old' minorities with a long standing relationship with the host nation in which they reside. E Craig, 'The Framework Convention for the Protection of National Minorities and the Development of a 'Generic' Approach to the Protection of Minority Rights in Europe?' (2010) *International Journal on Minority and Group Rights* 307, 311.

21 Catellino identifies the following six options that face minorities, be it old or new minorities: assimilation; integration; fusion, pluralism, segregation and ethno-development. J Castellino, 'Order and Justice: National Minorities and the Right to Secession' (1999) 6(4) *International Journal on Minority and Group Rights* 389, 406-7.

group defines itself without any external accountability, it may lead to a proliferation of groups where forming a 'minority' within a larger group is encouraged and rewarded.[22] If the test is purely objective, in other words where reliance is placed on objective, external criteria to determine if a group exists and which individuals form part of the group, it may give rise to forced group-classification (such as was practiced in apartheid South Africa)[23] and restrict the ability of an individual to move outside the scope of his or her group-classification, or it may force an individual within a group he or she does not want to associate with.

(f) Do members of a minority exercise their rights 'as individuals', in other words, pursuant to a bill of rights, or do minorities also exercise their rights as a group, in other words, as a collective entity?

Some experts contend that the most consistent and non-discriminatory way to protect the rights of minority groups is to secure the rights of individuals belonging to these minorities by way of protecting their individual freedom of association, right to equal treatment and rights to maintain and practice language, culture and religion.[24] Others contend that although a bill of rights is *the* point of departure for the protection of minorities, it does not offer the full spectrum of minority rights protection and additional mechanisms are required to protect minority groups as groups, for example by way of cultural councils, decentralisation,

22 Refer for example, to contemporary developments in Ethiopia where sub-groups have been attempting to be recognised as a 'nation, nationality and peoples'. The Silte group achieved their own representation in the House of Federation in 2001 and their own administrative zone after they separated from the Gurage group to whom they previously were deemed to have belonged. The Silte has for long agitated to be recognised as a distinct group rather than a part of the Gurage. The House of Federation organised a referendum in March 2001 to determine public opinion in the areas concerned. A massive majority favoured being recognised as a separate nationality, and the Silte was accorded zonal status. See N Maskato, 'Making and Unmaking of the National-State and Ethnicity in Modern Ethiopia: A Study on the History of the Silte People' (African Studies Monograph, 2003) 29.

23 See *Population Registration Act 1950* (South Africa) according to which a national register existed with records of every person's race. A Race Classification Board made the final decision on what a person's race was in disputed cases. A person's social, economic, political, and economic status flowed from the group in which he or she was classified. See also K Aun, 'On the spirit of the Estonian Minorities Law' (Estonian Information Centre, 1950) 244.

24 Aun, above n 23, puts it as follows: 'Unless the individual and not a superior or supreme group – be it nationality, a class, or a party – becomes the very end of the law, the problem of minorities will never be solved satisfactorily. *A workable system of minorities protection must always be construed out of the individual and its main aim is the protection of human rights*' (emphasis in original).

power-sharing mechanisms or special recognition of non-governmental organisations established by a minority.[25]

(g) Are minorities a 'people' under international law with the effect that they are entitled to 'self-determination' under international law instruments?[26]

There is substantial agreement that minorities do not, as right, qualify to be treated as a 'people' that is entitled to self-determination in international law. Thornberry summarises the generally held view as follows: 'Self-determination is usually described as the right of peoples not minorities.'[27] Thornberry, however, also highlights the complexity of any final conclusion by accepting that in some instances 'self-determination and the rights of minorities are two sides of the same coin.'[28]

Finding a definition for 'minority' that can be applied consistently in all practical situations where language, cultural and religious groups exist, remains elusive. The elusiveness of a definition is nowhere better illustrated than in the absence of a definition of 'minority' in the *International Covenant on Civil and Political Rights* ('*Covenant*') although art 27 purports to protect the rights of minorities.[29] The *Covenant* is the only legally binding international norm for the protection of minorities, yet it contains no definition of 'minority'.

The Minority Rights Group has observed the following about the many efforts to develop an appropriate definition for 'minority':

> Thus the definitions [of minority] will differ from state to state and the defining process *within* the state will differ according to specific circumstances,

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25 Alen and Henrard, above n 17, 111, correctly observe as follows: 'Several authors emphasise that there is no necessary conflict between group and individual rights but that they are on the contrary complementary, considering the intimate relation between an individual and the group with which he or she identifies.'

26 See, eg, *International Covenant on Civil and Political Rights,* opened for signature 16 December 1966, UNTS 171 (entered into force 23 March 1976) art 1(1).

27 P Thornberry, *International law and the rights of minorities* (Claredon Press, 1991) 14; M Shaw, 'The Definition of Minorities in International Law' in Y Dinstein and M Tabory (eds), *Israel Yearbook of Human Rights* (Kluwer, 1991), 14; P Thornberry, 'Is there a Phoenix in the Ashes? – International Law and Minority Rights' (1980) 15(3) *Texas International Law Journal* 421; J C Heunis, *Volkeregtelike beskerming van minderheidsgroete* (LLM Thesis, University of Johannesburg, 1981); V Van Dyke, 'Self-Determination and Minorities' (1969) 13(3) *International Studies Quarterly* 223.

28 P Thornberry, 'Self-Determination, Minorities, Human Rights: A Review of International Instruments' (1989) 38 *International Constitutional Law Quarterly* 867. Refer also to the conclusion drawn by Castellino, above n 21, 406-11, that 'it may be stated that though minorities might have a legitimate claim to being separate people, it is with extreme difficulty that they gain the right to self-determination.'

29 a27 provides as follows: '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.'

> usually relating to the state's perception of the political power of groups under discussion. Even the definitions upheld by international organisations are subject to similar forces and will change over time, leading to further redefinition.[30]

The complexity of finding an adequate definition does not mean that efforts to protect minorities should be aborted, but rather that answers should be found within the context of the practical situation in which countries find themselves, even if those answers do not necessarily apply at a universal basis for purposes of international law.

In his groundbreaking work undertaken for the United Nations on the protection of minorities as Special Rapporteur, Capotorti proposed the following definition of what constitutes a 'minority':

> A group which is numerically inferior to the rest of the population of a State and in a non-dominant position, whose members possess ethnic, religious or linguistic characteristics which differ from the rest of the population who, if only implicitly, maintain a sense of solidarity, directed towards preserving their culture, traditions, religion and language. [31]

The Capotorti-definition is generally used in international discourse to define 'minority', although it has not received formal endorsement in international law.

In light of the recommendations by Capotorti and the practices that have been developing in international law as well as in constitutional law, the following can be proposed as the essential elements of what constitutes as 'minority'. It is a group of members which:

(a) Share ethnic, religious, language and/or cultural characteristics;[32]

(b) Are generally in a numerical minority in the entire state or in a region of the state;

(c) Are in a non-dominant position; and

(d) Are recognised objectively to be a minority (since they share the same linguistic, cultural and/or religious characteristics) and by the members subjectively that they constitute a minority (since they wish to be separately recognised).

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30 C Jones, *Education rights and minorities* (Minority Rights Group, 1995) 8 (emphasis in original).

31 F Capotorti, *Study on the Rights of Persons Belonging to Ethnic, Religious and Linguistic Minorities* UNO, UN-Doc E/CN.4Sub.2/384 (1977) [568].

32 A racial group without common culture, language or religion does not constitute a 'minority'. Ahmed observes that: 'Ethnic minorities are distinct from groups based on race (ie a group which shares a common ancestry and certain physical features), but groups based on race in itself are not minorities under international law as they lack the independent culture, history and tradition that binds together ethnic groups': T Ahmed, *The impact of EU Law on minority rights* (Hart Publishing, 2011) 17.

RECENT DEVELOPMENTS IN INTERNATIONAL LAW

International attention to the protection of minorities has gone through ebbs and flows for most of the past century, if not longer.[33]

League of Nations

During the first half of the twentieth century, the accepted practice in many parts of Europe, especially in the eastern parts of the European continent, was to give some form of recognition to minorities on the basis of their cultural, language and religious characteristics. This recognition of minorities was reflected in international law under the guidance of the League of Nations. One of the countries at the time prior to the outbreak of World War II with the most advanced system of human rights protection was Estonia.[34] The system of minority protection in this country was regarded as one of the most successful in Europe. It was said at the time that 'the pride of the Estonian nationhood was its treatment of national minorities.'[35]

One of the first international instruments that formally recognised the rights of minorities was the 1919 *Polish Minority Protection Treaty,* which provided that Polish minorities had the right to 'establish, manage and control at their own expense charitable, religious and social institutions, schools and other educational establishments, with the right to use their own language and to exercise their religion freely therein.'[36] Several other treaties aimed at the protection of minorities were also concluded at this time.[37]

The League of Nations witnessed territorial arrangements in Europe where populations of many states were diverse in terms of language, religion and culture. The League of Nations was established in 1919 with the objective to maintain and promote international peace and this objective included dealing with the aspirations of minorities. Extensive arrangements were therefore made for the recognition of the population diversity in the fear that by ignoring minority groups, new instability would arise. It was recognised at the time that each minority could not be endowed with its own nation-state and therefore arrangements had to be made to protect the minority groups within the states they found themselves in.

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33 The recognition of minority protection can be traced back many centuries with the Edict of Nantes signed on 30 April 1598 recognising the rights of the Protestant minority in Catholic dominated France.

34 Estonia had an elaborate system of minority protection through cultural councils. The system was overthrown by occupying forces of Russia and after the fall of the Berlin Wall, Estonia re-instituted the system.

35 E Nodel, *Estonia: Nation on the Anvil* (Bookman Associates, 1963) 176.

36 *Polish Minority Protection Treaty*, signed 28 June 1919, 225 CTS 412 art 8.

37 Refer, for example, to treaties between the Allied and Associated Powers involving Poland (28 June 1919); Serbia, Slovenia and Croatia (10 September 1919); and Greece (10 August 1920).

At that stage, the population diversity of large parts of world such as in Africa, Asia and South America was not the immediate concern of the League of Nations since democratisation and decolonisation efforts had not expanded outside the ambit of Europe.

The typical rights of minorities in both private and public spheres were those of equality and non-discrimination; the right to practice their language, culture and religion; the obligation on states to support minority institutions where the concentration of people or the size of the group justified it;[38] recognition of the customary laws and practices of minorities in the public sphere; and decentralisation and autonomy to regional and local areas, and even to cultural groups.[39]

The Permanent Court of International Justice, which was established under the auspices of the League of Nations, attempted to give content to the concept of 'minority' by suggesting that the concept refers to a group of persons living in a given country or locality, having a race, religion, language, and traditions of their own and united by this identity of race, religion, language and traditions in a sentiment of solidarity, with a view of preserving their traditions, maintaining their form of worship, ensuring the instruction and upbringing of their children in accordance with the spirit and traditions of their race, and rendering mutual assistance to each other.[40]

United Nations

After the advent of World War II and the atrocities that went along with it (especially as against minorities), international opinion shifted away from minority protection to the protection of individual rights as the sole way to protect the rights of individuals belonging to minority groups. In 1954, Kunz stated that the accepted approach in the immediate post-World War II period was as follows: '[T]he well dressed international lawyer wears 'human rights' as the new fashion, while prior to World War II the fashion was 'minority rights'.'[41]

It was contended, in hindsight mistakenly, that the rights of all individuals, including those that belong to minority groups, can best be protected through a bill of rights which protects the rights of individuals to equality, freedom of association, religion and so forth. By including those rights in a bill of rights, it was

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38 Refer, for example, to *Polish Minority Protection Treaty* art 9 which provides that: 'Poland will provide in the public educational system in towns and districts in which a considerable proportion of Polish nationals of other than Polish speech are residents adequate facilities for ensuring that in the primary schools the instruction shall be given to the children of such Polish nationals through the medium of their own language.'

39 F Ermacora, 'The Protection of Minorities before the United Nations' (1983) 182 *Recueil des Cours de l'Academie de Droit International de la Haye,* 247.

40 *Grego-Bulgarian Communities (Advisory Opinion)* [1930] PCIJ (ser B) No 17, 17.

41 J L Kunz, 'The Present Status of the International Law in the Protection of Minorities' (1954) 48 *American Journal of International Law* 282.

believed that no additional mechanisms were needed to protect minorities. The 1948 *Universal Declaration of Human Rights*, for example, makes no mention of minority protection, or minority or group rights. No other special mechanisms for the protection of minority rights were catered for by the United Nations in the immediate post-World War II period.

Since the 1950's and 1960's, international opinion towards minority protection has however evolved. Contemporary international and constitutional law as well as political science takes a more balanced and nuanced approach to the protection of minorities. Hilpold observes the following:

> Over the last years, it has, however, become clear that minority protection is no longer an issue only for specialists and of secondary importance as it has been viewed at the UN level for many years ... Minority rights protection has been identified as a major factor for securing peace and stability.[42]

There have always been, and there remain many sceptics about the merit of recognising and protecting minorities other than by means of a bill of rights. The 'homogeneity' approach, which emphasises the bill of rights as the sole instrument of minority protection, is preferred by sceptics to the 'pluralism' approach. The latter approach contends that additional mechanisms, in particular collective rights to minorities as groups, should be recognised.[43]

The international dislike after World War II of any recognition of group or minority rights was exacerbated by the political developments in several countries where members of minorities were the subject of persecution and discrimination for reason of belonging to a minority. One of the most notorious examples of minority classification and discrimination was in South Africa during the post-1948 *apartheid* era where each individual was classified into a racial category with rights and privileges flowing from such classification. Individuals could not 'opt out' of their classification. Membership of a specific racial group was therefore forced upon the entire nation. This system of racial classification and resultant discrimination cast a dark cloud over any attempts internationally to protect minority groups. Alen and Henrard put it as follows:

> Apartheid has a negative influence on the development of the UN law governing the protection of minorities. The apartheid policy produced hostility to the idea of special minority rights because of its emphasis on the importance of ethnicity and minority rights and especially because of the extensive privileges extended to the white group on South Africa. [44]

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42 P Hilpold, 'UN Standard-Setting in the Field of Minority Rights' (2007) 14 *International Journal on Minority and Group Rights* 183, 204.

43 T Ahmed, *The impact of EU Law on Minority Rights* (Hart Publishing, 2011) 17.

44 Alen and Henrard, above n 17, 108-9.

The political and economic dominance by the White minority over the Black majority, the forced classification of persons into racial groups, the homeland system, the discriminatory nature of the entire political, economic and social system and all the injustices that went along with defending and enhancing it, meant the end for a long time of any credible discussion in South Africa (and in many African states) about minority group protection.

The practice and failures of democratisation in Africa and other parts of the world has, however, brought about a new reality in regard to minorities. The genocide in Rwanda; persecution of minorities in Nigeria and India; and inter-ethnic conflict and violence in the new democracies of Europe have contributed to a greater awareness to protect minorities other than by way of a bill of rights. Emerging democracies are more likely than not to be ethnically heterogeneous and the demands brought about by such diversity need to be taken into account when constitutional designing takes place.

The constitutional and legal dispensations and the democratic theories of Western Europe with the historic emphasis on the nation-state, do not sit well with the realities of pluralism that are faced in Africa, Asia, the Middle East, South America and the new democracies of Eastern Europe. The irony is that even in Europe, the home of the nation-state, the debate on the effective protection of minorities is now more relevant than ever.[45]

Article 27 of the 1966 *International Covenant on Civil and Political Rights* remains the most widely agreed upon basis for the protection of minority rights in international law. Article 27 provides that:

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

While art 27 is a very important milestone in the recognition and development of minority rights, it leaves open many important questions such as the definition of a minority; whether the rights are exercised by each individual or by individuals acting together as a collective entity; whether there is a duty on the state to take positive action to assist a minority group or whether the state should merely refrain from interfering with minorities exercising their rights; and whether it provides the base for institutional development that assist minorities, for example, autonomy to make decisions about matters that affect them and being included into governmental processes by way of coalitions, quotas etc.[46]

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45 Refer, for example, to the most comprehensive instrument ever enacted by the Council of Europe on the protection of minorities entitled *Framework Convention for the Protection of National Minorities,* opened for signature 1 February 1995, ETS No 157 (entered into force 1 February 1998).

46 C Tomuschat, 'Protection of Minorities under article 27 of the International Covenant on Civil and Political Rights' in R Bernhardt (ed), *Volkerrecht als Rechtsordnung,*

Article 27 provides important recognition to minority rights and protection, but it leaves many questions unresolved.

Most importantly, art 27 does not provide a normative framework or objective criteria for the protection of minorities. It sets important principles, but lacks substance as to how those principles translate into practice. As a result, the international yardstick by which states deal with minorities is vague and few states could not justify, under art 27, their respective treatment of minorities.

As important as art 27 is, it leaves unanswered many questions in regard to an international standard for the protection of minorities, for example:

(a) To what extent does international law require states to take positive action to assist minorities (for example, through funding of their language-based education)? Or are states merely required to refrain from interfering with the rights of minorities without any positive obligation to assist them financially or otherwise in the maintenance and development of their culture, language or religion?

(b) What is the definition is 'minority'?

(c) What, if any, obligations rest on states to provide minorities with special mechanisms to ensure their effective participation in decision-making as well as arrangements for autonomous decision-making?

Given the overemphasis that was placed in the immediate post-World War II period on individual rights as the sole basis for the protection of minorities, it is therefore no surprise that Capotorti made the following observation in his groundbreaking report on the protection of minorities in 1979:

> For quite a long time after the end of the Second World War, it was thought – and stated in writing – that the question of the international protection of minorities was no longer topical. During the past few years however, that view has proved to be mistaken.[47]

Since World War II, and especially in the past two decades since the end of the Cold War, great strides have been made in international law and constitutional law for the direct and indirect protection of the rights of minorities. Ermacora summarised the progress that has been made under the United Nations as follows:

> [T]he United Nations is not indifferent to the fate of minorities … there is a conceptual difference [in international law] between 'protection of human rights', 'prevention of discrimination, and 'protection of minorities';

Internationale Gerichtbarkeit, Menschenrechte: Festschrift Fur Hermann Mosler (Springer, 1983); N Lerner, 'The Evolution of Minority Rights in International Law' in C Brolmann, R Lefeber and M Zieck (eds), *Peoples and Minorities in International Law* (Martinus Nijhoff, 1993), 77-101; T D Musgrave, *Self-Determination and National Minorities* (Clarendon Press, 1997).

47 Capotorti, above n 31, [38].

protection of human rights is any measure to safeguard human rights directly or indirectly; protection of minorities will mean to take or to order special measures safeguarding minorities as groups …'[48]

Although the consensus reached in international law has been slow, great strides have been made in constitutional law with indirect and direct protection of minorities, for example by way of specially designed electoral systems, federalism and decentralisation, informal and formal power sharing in the executive, bills of rights which also recognised language, religious and cultural rights, and the protection of dispersed minority groups.[49]

Many questions continue to challenge the development of a comprehensive international framework for the protection of minorities. One such question is whether minority groups have a right to claim some form of autonomy of internal self-determination for purposes of matters that affect them and if so, whether such autonomy can only be granted on a territorial basis or also by way of non-territorial means.[50]

The use of the words 'autonomy' and 'self-determination' often raises concerns since they carry a baggage of secession, self-interest and disunity. It is not entirely surprising that reference to 'right to autonomy' is shied away from in European and other international forums.[51]

In some cases, however, states have made reference to a right to internal self-determination within their constitutions. A few examples of the developments in state constitutions where the right to self-determination, collective action and autonomy have been included are the *Constitution of Ethiopia* which recognises the right to self-determination of nationalities, including the right to secession;[52] the *Constitution of the Republic of South Africa* which recognises the right to self-determination of 'any community sharing a common cultural and language heritage';[53] the *Constitution of Brazil* which recognises the right of Indians to protect their rights collectively;[54] and the *Slovene Constitution* which recognises the collective rights of the Italian and Hungarian groups to establish collective entities that could act on behalf of their members, provide educational facilities

48 F Ermacora, *The Protection of Minorities before the United Nations* (Martinus Nijfhoff, 1987), 345.

49 See generally C Sistare, L May and L Francis (eds), *Groups and Group Rights* (University Press of Kansas, 2001); P Thornberry and M Estebanez, *Minority Rights in Europe* (Council of Europe, 2004).

50 S C Roach, 'Minority Rights and an Emergent International Right to Autonomy: A Historical and Normative Assessment' (2004) 11(4) *International Journal on Minority and Group Rights* 411.

51 W Kymlicka, 'The Internationalization of Minority Rights' (2008) 6(1) *International Journal of Constitutional Law* 1.

52 *Constitution of Ethiopia* (Ethiopia) art 47.

53 *Constitution of the Republic of South Africa* (South Africa) art 235.

54 *Constitution of Brazil* (Brazil) art 232.

and set up a press and information system.[55]

At the level of international law and within regional agreements, ongoing progress is made to set international and regional standards for the protection of minorities. Refer, for example, to the *European Convention for the Protection of Human Rights and Fundamental Freedoms* (1950); the *American Convention on Human Rights* (1969); and the *African Charter on Human and Peoples' Rights* (1981).[56]

The absence of an African-wide charter for the treatment of minorities remains an inhibiting factor to the democratisation process of many African countries. Although one can understand the concerns harboured by many African governments that recognition of minority rights may lead to instability and potential demands for secession, the converse has also proven to be the case, namely that ignoring minorities have led to instability and violence.[57] As Murithi observed:

> Attaining effective minority protection on the [African] continent is vital to the restoration of social and political wellbeing of African societies. The issue is where to go from here and what can be done to enhance effective implementation of the provisions for the protection of minorities on the continent.[58]

The 1992 *UN Declaration on the Rights of Persons belonging to National or Ethnic, Religious and Linguistic Minorities* ('*Declaration*')[59] expands the intended operation of art 27 of the *International Covenant on Civil and Political Rights* by requiring states to take positive action to assist minorities.

The *Declaration* is not legally enforceable, but it sets a new standard for the protection of minorities, for example in the way it recognises the rights of minorities to 'participation' and to 'mother-tongue education':

(a) Participation: 'Persons belonging to minorities have the right to participate freely in decisions on the national and, where appropriate regional level, concerning the minority to which they belong or the regions in which they live, and in a manner not incompatible with national legislation.'[60]

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55 *Constitution of Slovenia* (Slovenia) art 64.

56 See generally S Slimane, *Recognising minorities in Africa* (Minority Rights Group International, 2003); I Kane, *Protecting the rights of minorities in Africa* (Minority Rights Group International, 2008).

57 Ghai contends that federal and other autonomy arrangements have prevented rather than stimulated secession: Y Ghai, 'Ethnicity and autonomy: a framework for analysis' in Y Ghai, (ed) *Autonomy and Ethnicity: Negotiating Competing Claims in Multi-ethnic States* (Cambridge University Press, 2000) 1.

58 T Murithi, 'Developments under the African Charter on Human and Peoples' Rights relevant to minorities' in K Henrard and R Dunbar, *Synergies in minority protection* (Cambridge University Press, 2008) 397.

59 GA Res 47/135, UN GAOR, 47th Session (19 December 1992).

60 Ibid art 2(3).

(b) Education: 'States should take appropriate measures so that, wherever possible, persons belonging to minorities have adequate opportunities to learn their mother tongue or to have instruction in their mother tongue.'[61]

The *Declaration* does not have the status as an international treaty and therefore cannot be regarded as binding in international law, but the fact that it recognises the positive role that the state should take to assist minorities is a major step forward in developing a binding regime. In the field of education, for example, the *Declaration* places an obligation on states to 'take appropriate 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.'[62]

EUROPEAN FRAMEWORK CONVENTION FOR THE PROTECTION OF NATIONAL MINORITIES

Arguably the most important contemporary regional instrument aimed at the protection of minorities is the European-wide *Framework Convention for the Protection of National Minorities* (*FCNM*)[63] and the *European Charter for Regional or Minority Languages*.[64]

The *FCNM* is the first legally binding charter solely aimed at the protection of minority rights within international law.[65] The *FCNM* is solely dedicated to the rights of minorities and it acknowledges in the Preamble that within the context of Europe, 'the protection of national minorities is essential to stability, democratic security and peace.' The *FCNM* contains general principles to which respective member states must give practical content to through their constitutional and political arrangements. The *FCNM* is therefore prescriptive in terms of its general principles, but not in terms of the way in which those principles must be complied with in practice.

Although the *FCNM* is limited in its application to the European domain, some of the principles thereof may be of relevance to other parts of the world where the protection of minority rights faces challenges. Some of the important principles of the *FCNM* of relevance for the purposes of this study are as follows:[66]

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61 Ibid art 4.3.

62 Ibid art 4.5.

63 Opened for signature on 1 February 1995, ETS No 157 (entered into force 1 February 1998).

64 Opened for signature on 5 November 1992, ETS No 148 (entered into force 1 March 1998). The Charter does not have the status of binding law, in contrast to the *FCNM* that is legally enforceable.

65 See generally M Weller (ed), *The rights of minorities in Europe: a commentary on the European Convention for the Protection of National Minorities: An introduction* (Rainer Hofmann, 2005).

66 P Thornberry, *The Framework Convention on National Minorities: A provisional appraisal and a memory of the Baltic States* (Baltic Yearbook of International Law, 2002) 127-57.

(a) Article 1 determines that the rights of minorities form an integral part of the international protection of human rights. Minority protection is therefore part of the human rights framework and not separate thereof. According to the *FCNM*, 'no collective rights of minorities are envisaged', which means that in order to exercise the rights provided for in the *FCNM*, individual members of a minority must act in their individual capacity and not as a collective entity.[67]

(b) Article 3 recognises the rights of individuals to choose if they wish, to belong to a minority and to be treated as being part of the minority group. Self-identification is therefore acknowledged and members of a minority group may exercise their rights individually or collectively with other members of their community.

(c) Article 4 recognises the principles of non-discrimination, equality and that no person may be disadvantaged by reason of belonging to a minority group.

(d) Article 5 refers to the essential elements of minority identity as 'religion, language, traditions and cultural heritage' and art 5(1) places an obligation on the state to promote conditions in which minorities can maintain their culture, language, traditions and religion.

(e) Articles 10, 11 and 14 acknowledge that minorities that inhabit specific areas may be entitled to enhanced rights such as various forms of territorial autonomy. The *FCNM* does not make mention of non-territorial rights or autonomy. The provisions of the FCNM apply, however, to minorities wherever they live, be it concentrated in a certain geographical area or dispersed across a territory.

(f) Article 10 recognises the right of minorities to use their language in private and in public, and in particular to speak their language when engaging public authorities such as the judicial system.

(g) Article 13(2) recognises the right of minorities to establish educational institutions, but it does not place an obligation on the states to support or finance such institutions.

(h) Article 15 requires states to create conditions for the effective participation of minorities in public affairs, and with particular regard to those matters that affect identity of the minorities.[68] This provision relates not only to various forms of autonomy that may be bestowed on minorities but also to giving them an opportunity to participate in legislative and executive

67 Explanatory Report, *Framework Convention on National Minorities* [31].

68 *FCNM* art 15 provides that: 'The Parties shall create the conditions necessary for the effective participation of persons belonging to national minorities in cultural, social and economic life and in public affairs, in particular those affecting them.' This may, in practice, give rise to power-sharing arrangements as well as territorial and non-territorial forms of autonomy.

processes of government.[69]

It is trite to conclude that international law is still in search of a comprehensive and consistent system of minority protection but progress is being made albeit at a slow pace.

Many countries have tried and experimented with various techniques within their respective constitutional arrangements to protect minorities, but there is not yet synergy at the international level that can be codified in a way that brings the certainty and predictability in international law for which many young democracies are searching.

LUND RECOMMENDATIONS

In the European context, where the codification of minority rights is actively pursued and arguably the most advanced, the most detailed overview of mechanisms that can facilitate the protection of minorities were contained in the 1999 *Lund Report entitled Lund Recommendations of Effective Participation of National Minorities in Public Life* ('*Lund Report*').[70] Some of the key recommendations contained in the *Lund Report* are that states:

(a) Must take steps to ensure that minorities are given an effective voice within national government institutions;[71]

(b) Design an electoral system that facilitates representation of minorities;[72]

(c) Design similar institutions at a national, regional and local level to ensure effective minority participation;[73] and

(d) Make effective arrangements for self-governance on a territorial and non-territorial basis to enable minorities to make decisions over matters that impact on their culture and identity.[74]

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69 The Explanatory Report to the *FCNM* refers to the following measures as examples of steps that can be taken to give effect to art 15: consultation when states are contemplating legislative or administrative measures that affect minorities; involving minorities in the preparation, implementation and assessment of development plans; effective participation in decision-making process and elected bodies at national and regional levels and decentralised and other forms of government at [80].

70 OSCE High Commissioner on National Minorities, *Lund Recommendation on Effective Participation of National Minorities in Public Life & Explanatory Note* (Foundation on Inter-Ethnic Relations, 1999).

71 *Lund Report,* [6]. Such special arrangements may include, but are not limited, to special representation of minorities; allocation of seats to minorities in the executive and judiciary; and special arrangements to ensure the appointment of minorities within the civil service.

72 Ibid [7]-[10]. Such special mechanisms may include, but are not limited to demarcation of constituencies where minorities form a majority; forms of proportional representation that facilitate minority representation and electoral systems that encourage inter-communal cooperation.

73 Ibid [11].

74 Ibid [14]-[16].

In regard to the thorny issue of non-territorial autonomy, the *Lund Report* makes the following recommendations:

> 17) Non-territorial forms of governance are useful for the maintenance and development of the identity and culture of national minorities.
>
> 18) The issues most susceptible to regulation by these arrangements include education, culture, use of minority language, religion, and other matters crucial to the identity and way of life of national minorities.
>
> - Individuals and groups have the right to choose to use their names in the minority language and obtain official recognition of their names.
> - Taking into account the responsibility of the governmental authorities to set educational standards, minority institutions can determine curricula for teaching of their minority languages, cultures, or both.
> - Minorities can determine and enjoy their own symbols and other forms of cultural expression.[75]

Although the recommendations of the *Lund Report* are not legally binding, they have been very influential in public policy making and the design and improvement of institutions of democratic governance in Europe.

The protection of minority rights is not intended to neutralise or reverse normal majoritarian principles by imposing a minority veto on all aspects of public policy making. A balance must be struck between majoritarian principles and protection of minorities in a manner that is sustainable and allows for effective government, decision-making and administration to continue.

The challenge for democracies is to establish a basis whereby within the principles of democracy and decisions by majority, room is left for minorities to be protected and to exercise rights in regard to their unique culture, language and religion.

Importantly, the European Court of Human Rights has confirmed that a 'balance must be achieved which ensures the fair and proper treatment of minorities and avoids any abuse of a dominant position.'[76] Consistent with the foregoing, the European Court of Human Rights also found that an electoral system based on proportional representation does not unduly interfere with the rights of the majority since in the case of Northern Ireland there were specific reasons 'for applying a different electoral system' in order to protect the rights of a minority. The Court concluded that '[t]he electoral system complained of is, therefore, based on reasonable and objective criteria which justify the differentiation applied.'[77]

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75 Ibid [17]-[18].

76 *Gorzelik v Poland* (European Court of Human Rights, Application No 44158/98, 17 February 2004) [90].

77 *Lindsay v United Kingdom* (European Commission on Human Rights, Application No 8364/78, 8 March 1979) [III 1].

After an assessment of the developments in international law in developing uniform standards for the protection of minorities, Weller concluded that, '[o]ne may therefore note that full and effective participation of national minorities in public life has been established itself as a right in international documents concerning the protection of national minorities.'[78]

In summary, the following are examples of the most important individual rights that have crystallised in international law as being essential for the protection of minorities:

(a) Freedom of expression, assembly and association;

(b) The right to privacy and to adhere to personal family law and customs;

(c) Protection of equality and against non-discrimination;

(d) Rights to maintain and develop traditions, culture, religion and other characteristics that make the minority unique;

(e) The right to speak language, including in interaction with administrative structures of the state and in courts; and

(f) The right to be educated in mother-tongue including state supported mother-tongue education when numbers justify it.

In addition to these individual rights, states may also make arrangements for the effective participation of minorities in public life and decision-making through power-sharing and autonomy arrangements, although this is not yet recognised as a 'right' under international law.

CONCLUSION

International law has moved beyond the post-World War II belief that minority rights can solely be protected by way of a bill of rights. Today it is widely recognised in international and constitutional law that special arrangements must be made within pluralistic societies to balance majoritarian and minority protection principles. A bill of rights, important as it may be in a democratic society, is only one element of a spectrum of options to protect minority rights. Other mechanisms such as decentralisation and federalism; power-sharing arrangements in the executive and legislature; and quotas form part of an elaborate network of options that can be pursued for the purposes of protecting minorities.

International law has, however, not yet succeeded to provide a universally applicable definition to 'minority' nor has international law been able to develop normative framework of institutions designed to protect minorities. The general principles of minority protection have therefore crystallised in international law,

78 M Weller, *Minority Consultative Mechanisms: Towards Best Practices* (European Yearbook of Minority Issues, vol 7, 2007/8) 56. Weller identifies the following consultative mechanisms: co-decision making; consultation; coordination, and self-governance.

however the detail of how those principles are applied in practice falls within the discretion of state constitutional law.

Although constitutions do not by themselves bring peace and stability, the design of constitutions can play a crucial role to establish a framework for the exercise of government power and what role minorities can play therein.

The challenge for institutional development is therefore to temper the undulated will of a permanent majority, while at the same time not creating a situation where a minority exercises a veto in a similar rigid fashion where government processes are brought to a halt unless the will of the minority prevails. The danger of a minority tyranny by abusive use of a veto is as dangerous as the tyranny of the majority that permanently excludes minority interests. International law is therefore mindful that a consensual model is required whereby the majoritarian system takes into account and considers non-majoritarian concerns and aspirations.

International law recognises that an adequate system for minority protection rests on two pillars,[79] namely, the pillar of non-discrimination and equal protection and the pillar of special minority rights (of which the content is determined on a state to state basis).[80]

Finally, as far as the ever-elusive definition of 'minority' is concerned, the following seems to be most widely accepted definition: A minority group is regarded as a group of individuals that shares ethnic, religious, language and/or cultural characteristics; is generally a numerical minority in the entire state or in a region of the state; is in a non-dominant position via-a-vis the rest of the population; and is recognised objectively to be a minority and of which the members demand subjectively that they constitute a minority.

79 In *Minority Schools in Albania (Advisory Opinion)* [1935] PCIJ (ser A/B) No 64, the Court found that the right to establish and manage their own schools, is 'indispensable to enable the minority to enjoy the same treatment as the majority, not only in law but also in fact.'

80 K Henrad, *International protection of minorities* (Max Planck Encyclopaedia of Public International Law, 2011) 5.