

Roberta Medda-Windischer

# Human Rights and Minority Protection

## Reconciling Unity and Diversity

The concept of minority protection is one the oldest concerns of international law, finding its origin in the rise of the nation-state when many treaties were concluded for the benefit of specific groups<sup>1</sup>. In addition to the security concern that characterises largely the international protection of minorities and the traditional partition between individual and collective rights (*infra*), the idea underlying the protection of minorities was since the League of Nations twofold: on the one hand to allow minorities to live alongside the rest of the population in a position of equality, and on the other to preserve the characteristics and the separate identity of minorities<sup>2</sup>.

Minority protection and the difference with the prevention of discrimination was clarified by the UN-Sub-Commission on the Prevention of Discrimination and the Protection of Minorities, at its very first session, in 1947<sup>3</sup>. In that occasion it was indicated that there was a fundamental difference between them. Discrimination implied any act or conduct that denied to individuals or groups of people the equality of treatment they may wish. Protection of minorities was described as the protection of non-dominant groups and the individuals belonging to such groups, who while wishing in general for equality of treatment with the majority, wish for a measure of differential treatment in order to preserve basic characteristics which they possess and which distinguish them from the majority of the population. It follows that differential treatment of such groups or individuals belonging to such groups is justified when it is exercised in the interest of the community as a whole.

*Roberta Medda-Windischer is Senior Researcher at the European Academy of Bolzano/Bozen, Institute for Minority Rights, LL.M (University of Essex), PhD (Law - University of Graz). This article is based on a larger work by the same author entitled "Old and New Minorities. Reconciling Diversity and Cohesion" (Nomos Publisher, Baden-Baden, 2009).*

Prevention of discrimination and the protection of minorities represent therefore different developments of the same idea of equality of treatment for all peoples. One required the elimination of any distinction imposed, whereas the other required safeguards to preserve

certain distinctions voluntarily maintained. This concept of minority protection is based on the assumption that whilst general human rights standards remain an essential part of the platform for the protection of minorities, there are many minority concerns which cannot be fully handled by the application of universal human rights. One of these for instance is the right to maintain a particular way of life and to follow particular ways of controlling land or natural resources. Another set of concerns are those which require public spending by the governments or acceptance by states of particular restrictions which do not apply in their relations to members of other groups in society. When special measures or special arrangements are called for, they can be demanded only by particular groups in particular settings, and therefore require moving beyond universal human rights.

The differences between minority and majority groups may be profound or may be difficult to discern. However, what distinguishes all minority groups is that they manifest, albeit implicitly, a desire to maintain a collective identity which differs from the mainstream culture. Culture in this context is not synonymous with particular practices, customs or manners of dress. It is a sense of communal self-identity that pervades almost every aspect of life, including work and economic activity. It is the "traditions of everyday life"<sup>4</sup>.

Considering that the principal cause of the emergence of minorities in the world today is migration, in the current discussion on minority issues it is debated whether the scope of application of international treaties pertaining to minorities that are usually applied to historical, old minorities can be extended to new minority groups stemming from migration<sup>5</sup>. This approach is based on the conviction that in spite of their differences, old and new minorities share some common characteristics and thus voice similar claims, namely the right to existence, the right to equal treatment and non-discrimination, the right to identity and diversity, and the right to the effective participation in cultural, social and economic life and in public affairs.<sup>6</sup> Alongside common claims, the rationale behind the protection for old and new minorities has likewise a common basis, namely maintaining and promoting peace and security, protecting human rights and cultural diversity as well as democratic participation and democratic pluralism<sup>7</sup>.

While there are evident differences between old and new minority groups these relate only to certain rights in the international catalogue. This is not a matter of interpretation. It is clearly expressed in the international instruments. For instance, the most relevant legal instrument on minority protection, the Framework Convention for the Protection of National Minorities (hereinafter referred to as the "Framework Convention" or FCNM)<sup>8</sup> contains only three articles that condition their entitlements on 'traditional' ties, which, according to the Explanatory Report of the Framework Convention, are not necessarily only those of historical minorities.

In this regard, the Explanatory Report states, rather ambiguously, that the term 'inhabited ... traditionally' – referred to by Art. 10<sup>2</sup>, Art. 11<sup>3</sup>, and Art. 14<sup>2</sup> of the FCNM – "does not refer to historical minorities, but only to those still living in the same geographical area."<sup>9</sup> These provisions pertain to the use of the minority language in public administration and on public signs and also in relation to education in the mother tongue; all other entitlements relate to all individuals who may be in the position of a minority, thus old and new minorities alike, groups officially recognised as national minorities and those not recognised, individuals with or without the citizenship of the country in which they live.

Obviously, when reference is made to universal human rights or some basic norms of minority protection there is no need to distinguish between persons belonging to ethnic, religious or linguistic groups made up of recent immigrants, or those living in a given territory from 'immemorial' time. Other claims, such as the claim to use a minority language in relations with the authorities or the claim to street names in the minority language are more specific and need to be differentiated.

The difference, however, is not (only) based upon the fact that a given group belongs to the 'old' or 'new' minority category: other factors are also relevant and apply without distinction to old and new minorities alike, such as on the one hand, socio-economic, political and historical factors, legacy of past colonisation or forms of discrimination, but on the other, the fact that members of a minority live compactly together in a part of the state territory or are dispersed or live in scattered clusters, or that members of a community having distinctive characteristics have long been established on the territory, while others have only recently arrived. Minority groups, old and new minorities alike, are not indistinct monoliths but are composed of groups very different from each other. The catalogue of minority rights has been so far implemented to historical minorities without an abstract differentiation amongst various minority groups, but by taking into account other more pragmatic factors, as those mentioned above. The same approach should be applied when extending minority protection to new minority groups stemming from migration. This is the so-called 'article-by-article' approach favoured by many international bodies as the Coe Advisory Committee of the Framework Convention (ACFC)<sup>10</sup>.

### Individual versus Collective Rights

As seen earlier, the 'securitisation' of ethnic relations has been one of the main short-term concerns behind most international treaties and declarations on the protection of minorities<sup>11</sup>. The avoidance of violence and civil war was indeed the original agenda behind an internationalization of minority rights<sup>12</sup>. Many of the peace treaties signed after the Second World War did not contain clauses protecting minorities but only general rules on non-discrimination: history tended to show that states such as Germany relied upon mino-

rity provisions in the treaties to intervene militarily<sup>13</sup>, thus the abuse of minority treaties by Germany – and the consequent failure of the League of Nations – had left minority clauses with a poor reputation.

As a result, in the process of codifying general human rights after the Second World War the emphasis shifted from group protection to the protection of individual rights and freedoms. The non-discrimination principle was applied accordingly, which meant that whenever a persons' rights were violated because of a group characteristic, be it race, religion or nationality to name a few, the matter was to be resolved by protecting the rights of the individual on a purely individual basis.

Minority rights have therefore been traditionally admitted in contemporary standards of human rights as rights of individuals rather than collective or group rights. The refusal by states of any insinuation that some minority rights may be collective rights is illustrated by the discussion at the 1993 UN Vienna Conference on Human Rights on whether references in two controversial passages of the Concluding Document had to be to either indigenous 'people' or indigenous 'peoples'. The former of the two prevailed<sup>14</sup>. Many governments were and are still reluctant with the use of the term 'peoples' for fear that it can be used to assert the right of peoples to self-determination<sup>15</sup>. Indeed, the title of the UN Declaration on the Rights of Indigenous Peoples<sup>16</sup> remained unsettled for some time: the Intergovernmental Commission on Human Rights had refrained from using the term "rights of indigenous peoples" preferring to refer to a draft "declaration of indigenous rights."<sup>17</sup> These concerns are reflected in most recent international documents concerning minorities, in which, whilst it is acknowledged that the promotion and protection of rights of minorities contribute to the stability of states, it is pointed out that minority rights cannot serve as a basis for claims of secession or dismemberment of the state, and special mention is made to the principle of sovereignty and territorial integrity<sup>18</sup>.

In the debate on the individual or collective dimension of minority rights it emerges also a pragmatic position according to which, as the human experience is such that human beings possess both individual and social dimensions, there is no dichotomy on individual or collective dimension and so no need to choose<sup>19</sup>.

As Packer puts it: "[T]here is no problem either for liberal philosophy or for international human rights law, to conceive and prescribe entitlements for groups (i.e. individuals in community): one needs not choose between the extreme of the isolated individual or the amorphous 'collective'."<sup>20</sup> Ultimately the real issue is whether the groups which human beings form are free and whether members of those groups are able to live in dignity, including with regard to maintenance and development of their identity.

### Human Rights and Minority Protection

Questions concerning whether and how the rights of minorities should be recognised in politics, and how to maintain and strengthen the bonds of community in ethnically diverse societies are among the most salient and vexing on the political agenda of many societies. The growing diversity of national communities has generated pressures for the construction of new and more defensible forms of accommodating unity and diversity.

States seem increasingly more convinced that it is not enough to ensure 'equality' to ethnic, linguistic and religious minorities living within their borders, and that minorities are entitled to a variety of measures aimed at enhancing their culture, their language and their religion. But if it was relatively easy to reach a general agreement on the prevention and punishment of genocide, and on the elimination of racial discrimination – subjects for which there exist important and widely-ratified instruments – it is far more difficult to convince those who still manifest the view that minority claims are subversive and a danger to the integrity of the state, and that minority rights and diversity need to take second place to imperatives of state security and unity.

A defensible pluralist model that seeks to accommodate minority claims implies searching for a balance between unity and separation, cohesion and respect for diversity. If one opts solely for unity, the risk is assimilation and the disappearance of a minority as a distinct group; if one chooses exclusively diversity, the result can be the cultural 'ghettoization' of a minority group with consequent separation and marginalisation from society. How to reconcile the demands of cultural diversity and political unity; that is, how to create a political community that is both

cohesive and stable and satisfies the legitimate aspirations of minorities, has been a subject of considerable discussion ever since the rise of the modern state, and particularly during the past few decades.

Minority rights, along with human rights, represent important tools for the accommodation of minorities, old and new groups alike, as they create a legal framework in which minorities can see their claims recognised within the limits of the legal provisions enshrined in the texts of relevant international instruments as interpreted and implemented by national and supranational bodies. Such a pluralist framework has thus two strong components:

(a) the recognition of diversity, namely the recognition of religious, ethnic, linguistic and cultural identity that can be achieved through the extension of the scope of application of certain provisions typical of the protection of historical minorities, such as those from the Framework Convention on National Minorities, to all minority groups, including new minority groups stemming from migration;

(b) the preservation of unity and cohesion through the protection of a core of common values based on the universal human rights catalogue<sup>21</sup>, contextualised and detailed, as far as Europe is concerned, by the European Court of Human Rights that, with its several decades of interpretative case-law, has engendered the most sophisticated jurisprudence of any of the international judicial instruments promulgated to protect human rights<sup>22</sup>. This approach recognises the diversity of minorities as a legitimate and valued part of the community, but with the limit of international human rights standards and the scrutiny of international bodies. By making minorities to identify with the broader community, this model acquires both the right to demand their loyalty and support, and the power to mobilise their moral and emotional energies.

This legal framework is composed of rights and freedoms but also of limitations and restrictions providing a guarantee that minority claims as well as majority concerns will not exceed certain limits. Accordingly, the minority (diversity) - majority (unity) debate will be framed in a peaceful and more constructive dialogue. This will contribute to defuse tensions and conflicts by rationalising the dilemmas over the most complex and urgent issues that our increasingly diverse societies encounter, namely se-

curity and public order, on the one hand, and recognition of traditional, community-based practices, on the other. In this way, minority claims for diversity and the more general concern for unity, cohesion, security and public order can be accommodated in a peaceful framework: an 'institutionalised' dialogue in which a supranational body such as the Strasbourg Court is the custodian of these principles and values and acts as objective and neutral third party.

Clearly, this approach is not without difficulties and is burdensome for both parties. Minorities must learn to negotiate often in an unfamiliar or even hostile environment where their minority statuses make them vulnerable to marginalisation and segregation. The majority group, on the other hand, must cope with diversity in its schools, workplaces, housing, public spaces, and neighbourhoods and must display tolerance and broadness. At the heart of any successful model lays, in the end, a sincere willingness on both sides – majority and minority – for continuous interaction, mutual adjustments and accommodation.

1 The Treaty of Paris of 30 March 1856 that settled the Crimean War between Russia and the alliance of the Ottoman Empire, France and the United Kingdom contained, for instance, provisions referring to the protection of Christian minorities in the Ottoman Empire, or the Treaty of Berlin of 13 July 1878 between United Kingdom, Austria-Hungary, France, Germany, Italy, Russia and the Ottoman Empire accorded a special legal status to some religious groups. See, *Thomas Buergenthal, International Human Rights in a Nutshell (West Publishing Company; St. Paul, Minnesota, 3rd ed., 2002), 7.*

2 This double-track system of protection was confirmed by the International Court of Justice in its leading case on the Minority Schools in Albania. PCIJ, *Minority Schools in Albania, Advisory Opinion*, 6 April 1935, XXXIV Session, Series A-B, No.64. The dispute originated with an amendment that was introduced into the Albanian Constitution whereby all private schools were abolished throughout the country. The Greek minority maintained that the amendment was in violation of the Albanian Declaration of 1921 concerning the protection of minorities. The Government of Albania contended that, since the abolition of the private schools constituted a general measure applicable to the majority as well as the minority, it was in conformity with the Declaration. In this case, the Permanent Court introduced the concept of equality in law and fact: „Equality in law precludes discrimination of any kind: whereas equality in fact may involve the necessity of different treatment in order to attain a result which establishes an equilibrium between different situations. (...) The equality between members of the majority and of the minority must be an effective, genuine equality.“ (Ibid., 19)

3 See, Marc Bossuyt, *The Concept and Practice of Affirmative Action*, Preliminary Report submitted by the Special Rapporteur to the

- UN Sub-Commission on the Promotion and Protection of Human Rights Fifty-second session, UN Doc. E/CN.4/Sub.2/2000/11, 19 June 2000.
- 4 Steven Wheatley, "Deliberative Democracy and Minorities", 14(3) *European Journal of International Law* (2003), at 508.
- 5 The terms historical, traditional, autochthonous minorities - the 'old minorities' - refer to communities whose members have a distinct language and/or culture or religion compared to the rest of the population. Very often, they became minorities as a consequence of a re-drawing of international borders and their settlement area changing from the sovereignty of one country to another; or they are ethnic groups which, for various reasons, did not achieve statehood of their own and instead form part of a larger country or several countries. The new minority groups stemming from migration - the 'new minorities' - refers to groups formed by individuals and families, who have left their original homeland and emigrate to another country generally for economic and, sometimes, also for political reasons. They consist, thus, of migrants and refugees and their descendants who are living, on a more than merely transitional basis, in another country than that of their origin. The term 'new minorities' is thus broader than the term 'migrants' as it encompasses not only the first generation of migrants, but also their descendants, second and third generations, who are individuals with a migration background often born in the country of 'immigration' and who cannot objectively and subjectively be subsumed under the category of 'migrants'. An example of the difference between new and historical minorities can be observed, in Italy, within the Albanian community: the Albanian immigrants arrived in the 1990s and the Albanian minority (Arbëreshe) settled since the last five centuries in the south of Italy; or, in the U.S., within the Latinos: the Spanish-speaking immigrants recently arrived from Latin America and the Spanish-speaking minorities - Puerto Ricans and Chicanos.
- 6 The positions in this regard are extremely diversified: among states, some have adopted rather narrow views firmly opposing the extension of minority provisions to new minorities (Declaration by Germany, CoE Framework Convention for the Protection of National Minorities, dated 11 May 1995, and Declaration by Estonia, FCNM, dated 6 January 1997, at <http://conventions.coe.int>), others have instead pragmatically applied some provisions to new groups (Opinion of the CoE Advisory Committee of the Framework Convention for the Protection of National Minorities on the United Kingdom, 30 November 2001, ACFC/INF/OP/I(2002)006, para. 14; ACFC, Second Report submitted by Finland, 10 December 2004, ACFC/SR/II(2004)012 (Art.3)), others have not yet taken an official position. Most international bodies dealing with minorities have adopted an open approach especially the Advisory Committee of the Framework Convention (Opinion on Austria, 16 May 2001, ACFC/INF/OP/I/009, paras. 19-20, at 34; ACFC, Opinion on Germany, 1 March 2002, ACFC/INF/OP/I/008, paras. 17-18, at 40; ACFC, Opinion on Ukraine, 1 March 2002, ACFC/INF/OP/I/010, para. 18), the European Commission for Democracy Through Law (the CoE Venice Commission) (Report on Non-Citizens and Minority Rights, CDL-AD(2007)001, 18 January 2007), the UN Human Rights Committee (HRC, CCPR, General Comment No. 23, The rights of minorities (Art. 27), CCPR/C/21/Rev.1/Add.5, 8 April 1994, paras.5.1-5.2).
- 7 See, Sia Spiliopoulou Åkermark, "Shifts in the Multiple Justifications of Minority Protection", 7 *European Yearbook on Minority Issues* (2007/8), 5-18.
- 8 Framework Convention for the Protection of National Minorities, adopted on 1 February 1995, entered into force on 1 February 1998, ETS No. 157.
- 9 Explanatory Report of the FCNM (Emphasis added) (para. 66), at <http://conventions.coe.int>.
- 10 See, among others, ACFC, Opinion on Austria, 16 May 2001, ACFC/INF/OP/I/009, paras. 19-20, at 34; ACFC, Opinion on Germany, 1 March 2002, ACFC/INF/OP/I/008, paras. 17-18, at 40; ACFC, Opinion on Ukraine, 1 March 2002, ACFC/INF/OP/I/010, para. 18. See, also Asbjørn Eide, Chairman of the former UN Working Groups on Minority, who best summarised this approach by saying: „The scope of rights is contextual.“ Asbjørn Eide, Protection of Minorities, Report submitted to the UN Sub-Commission on Prevention of Discrimination and Protection of Minorities, Forty-fifth session, 10 August 1993, UN Doc. E/CN.4/Sub.2/1993/34, para. 27.
- 11 Ole Waever, „Securitization and Desecuritization“, in Ronnie D. Lipschutz (ed.), *On Security* (Columbia University Press, New York, 1995).
- 12 Will Kymlicka, „Multiculturalism and Minority Rights: West and East“, 4 *Journal on Ethnopolitics and Minority Issues in Europe* (JEMIE), 2002.
- 13 The Polish Minorities Treaty between the Principal Allied and Associated Powers and Poland, signed at Versailles on 28 June 1919 states (Art. 8): „Polish nationals who belong to racial, religious or linguistic minorities shall enjoy the same treatment in law and in fact as the other Polish nationals.“ Consolidated Treaty Series, Vol. 225, 412. See, Patrick Thornberry, *International Law and the Rights of Minorities* (Clarendon Press, Oxford, 1991).
- 14 United Nations, General Assembly, Vienna Declaration and Programme of Action, World Conference on Human Rights, Vienna, 14-25 June 1993, A/Conf.157/23, 12 July 1993, paras. 28-32. See, Nigel S. Rodley, "Conceptual Problem in the Protection of Minorities: International Legal Developments", 17 *Human Rights Quarterly* (1995), 48-71, at 61-65. See also, Thomas D. Musgrave, *Self-Determination and National Minorities* (Oxford University Press, Oxford, 2002), at 148-179.
- 15 Art. 1(1) ICCPR reads: "All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development." Thornberry summarises best the reasons for this restrictive approach towards minority rights as follows: "The first is that the corporate conception challenges State monopoly on power and loyalty, purporting to create an 'entity' with a legal and moral existence, capable of reaching international law directly over the heads of governments. The second is self-determination: it is sensed that reifying the group will contribute to the intensification of intensification of its potential for separatism. This also affects perceptions of the legitimacy of autonomy - applauded but not mandated by international law. The third is cultural - the literature is full on 'cultural relativism', often and unfairly carrying the assumption that minorities are peculiarly oppressive of women, dissidents, etc. All this washes over minority rights with insinuations



## *The Universal Declaration of Human Rights*

PREAMBLE (December 10, 1948)

Whereas recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world,

Whereas disregard and contempt for human rights have resulted in barbarous acts which have outraged the conscience of mankind, and the advent of a world in which human beings shall enjoy freedom of speech and belief and freedom from fear and want has been proclaimed as the highest aspiration of the common people,

Whereas it is essential, if man is not to be compelled to have recourse, as a last resort, to rebellion against tyranny and oppression, that human rights should be protected by the rule of law,

Whereas it is essential to promote the development of friendly relations between nations,

Whereas the peoples of the United Nations have in the Charter reaffirmed their faith in fundamental human rights, in the dignity and worth of the human person and in the equal rights of men and women and have determined to promote social progress and better standards of life in larger freedom,

Whereas Member States have pledged themselves to achieve, in co-operation with the United Nations, the promotion of universal respect for and observance of human rights and fundamental freedoms,

Whereas a common understanding of these rights and freedoms is of the greatest importance for the full realization of this pledge,

Now, therefore the General Assembly proclaims this Universal Declaration of Human Rights as a common standard of achievement for all peoples and all nations, to the end that every individual and every organ of society, keeping this Declaration constantly in mind, shall strive by teaching and education to promote respect for these rights and freedoms and by progressive measures, national and international, to secure their universal and effective recognition and observance, both among the peoples of Member States themselves and among the peoples of territories under their jurisdiction.

of inadmissible practices". 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* (LGI, Budapest, 2001). 47-73, at 70.

16 UN Declaration on the Rights of Indigenous Peoples, adopted by the UN General Assembly on 13 September 2007, UN Doc. GA/10612

17 See, UN Commission on Human Rights, Resolution 1993/31 - Report of the Forty-nine Session, adopted on 5 March 1993.

18 Art. 21 FCNM; Art. 8(4) UN 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.

19 See, among others, Joseph Marko, "Equality and Difference: Political and Legal Aspects of Ethnic Group Relations", in Franz Matscher (ed.), *Vienna International Encounter on Some Current Issues Regarding the Situation of National Minorities* (N.P.Engel Verlag, Kehl, Strasbourg, Arlington, 1997), 67-97, at 87; Geoff Gilbert, "The Legal Protection Accorded to Minority Groups in

Europe", 23 *Netherlands Yearbook of International Law* (1992), 67-104, at 80.

20 John Packer, "Problems in Defining Minorities", in Deirdre Fottrell and Bill Bowring (eds.), *Minority and Group Rights in the Millennium* (Kluwer Law International, The Hague, London, Boston 1999), 223-274, at 244.

21 The universality, indivisibility and interdependency of human rights has been acknowledged by the UN World Conference on Human Rights held in Vienna in 1993, and later confirmed in the 2000 UN Millennium Declaration (United Nations, General Assembly, *Vienna Declaration and Programme of Action of the World Conference on Human Rights* (1993), A/CONF.157/23, 12 July 1993, para. 5; *United Nations Millennium Declaration* - Resolution adopted by the General Assembly 55/2, 8 September 2000).

22 For a detailed analysis of the ECHR judgments as illustrative of a 'common European standard' for minority and human rights protection, see Roberta Medda-Windischer, "Old and New Minorities. Reconciling Diversity and Cohesion" (Nomos Publisher, Baden-Baden, 2009).