Chapter-2

Concept of Minority and Its Status under International Law
An attempt has been made in the previous Chapter to discuss the problems of the rights of minorities. It emerges that the protection of the rights of minorities are recognised in both international and domestic law in India. Unfortunate aspects of modern civilisation are that the right of ethnic, religious or linguistic minorities to preserve their separate identity is persistently violated in many parts of the world. As for the collective human rights of education of minorities to fess and practise their own religion, it is noteworthy that this right is closely linked to the individual human right. It has already been observed that individual right to education may be contingent on the implementation of the collective right to construct the required institutions and installations. And, indeed, the international instruments which proclaim right to education explicitly lay down that such freedom may be exercised “either alone or in community with others, “either individually or in community with others,” and “either individually or together with others.” But again concretisation is missing and there are many practical stumbling-blocks on the road to implementation. Therefore, before undertaking any study on any aspect of right to education of minorities in India it is essential to examine the concept of minority and its status under international law. This chapter is devoted to the aforesaid aspect.

I. Concept of Minority under International Law

A. General
According to the Oxford dictionary, "minority" means the smaller number or part; especially of a group in a community either racial, religious or total of votes etc. in a nation. The term "minority" cannot be for practical purpose explained simply by interpreting the word in its literal sense. If this was the case, almost all the communities existing within a State would be styled minorities, including families, social class, cultural, linguistic groups etc. Generally, the minority is thought of as the opposite of the majority. In democratic societies, it is based on the numerical ratio to the population as a whole in a particular place. There are times when the majority is the minority and vice versa. But in international law the term "minority" is commonly used in a more restricted sense. It has come to refer chiefly to a particular kind of group which differs from the dominant group within the State. The origin of minority group may be possible in any of the following manners:

1. it may formerly have constituted an independent state with its own tribal organization;

2. it may formerly have been part of a State living under its own territory, which was later segregated from this jurisdiction and annexed to another State; or

3. it might have been, or yet be, a regional or scattered group which although bound to the predominant group by certain feelings of solidarity, has not reached even a minimum degree of real assimilation with the predominant group.

51 United Nations, Definition and Classification of Minorities (1950) at p. 9.
From a scientific point of view, the term “minority” includes many elements which are changeable both in content and in degree of intensity. Safely, it may be observed that this term is most frequently used to apply to communities with certain characteristics like ethnic, linguistic, cultural or religious etc., and always in a organised community. The members of such community feel that they constitute a national group, or sub-group, which is different from the majority group. Indeed it is true that, despite the differences among various groups, all are held together by a sense of nationality which is larger, though thinner, in national consciousness, than that of either of the separate groups.

B. Distinctive Features

Politically, the majority group is dominant.” The government is run by the majority party and political power is distributed among them. That is why, sometimes, the terms “dominant” and “subordinate” groups are used. To identify the minority group, five distinctive features\(^\text{52}\) are as under:

1. A minority group is a subordinate social group. Its members suffer disadvantages resulting from prejudice and discrimination’. These may include segregation and persecution.

2. The members of a minority group have their own physic, culture, dialect etc. which the dominant group holds in low esteem. The group usually has distinguished characteristics.

3. The members of a minority group identify themselves as a part of the group. There is an in-group feeling of loyalty.

4. Membership in a minority group is’ usually not voluntary.

\(^{52}\) Charles Wagley and Marvin Horris, *Minorities in the New World* (1964) pp. 4-11.
5. Members of a minority group have strong bounds of brotherhood and generally believe in endogamy.

C. The Present Concept of Minority

During the period of the League of Nations, the matter of minority was dealt with by a separate section. The Permanent Court of Justice gave its interpretation regarding the term “minority” in its advisory opinion. Accordingly, 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 to 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.

To determine the criterion of a “community”, many factors are relevant like the existence of a group of persons living in a country or locality, having a race, religion and traditions of their own, and united by the identity of such race, religion, language and traditions in a sentiment of solidarity, with a view to preserving their traditions, maintaining their form of worship, securing the instruction and upbringing of their children in accordance with the spirit and traditions of their race and mutually assisting one another. The PCIJ had another occasion to deal with question relating to minority. With the birth of the United Nations the concept of minority came to be covered by the concept of human rights and fundamental freedoms. The UN Charter and the Universal Declaration of Human Rights did not mention specifically the question of the minorities. No attempts were made to define in any special manner the concept of these groups.

53 Advisory opinion PCIJ on 31 July 1930 in connection with the emigration of the Greco-Bulgarian Communities, PCIJ, Series B, No. 17, pp. 19-22.

54 Advisory opinion PCIJ on 31 July 1930 in connection with the minority schools in Albania.
The Commission on Human Rights did not consider it necessary to define the term "minority" before setting up the Sub-Commission on Prevention of Discrimination and Protection of Minorities. The UN General Assembly also did not wait for an exhaustive and universal definition of the notion of the "right of peoples to self-determination" before proclaiming the application of the principle. The problem of defining the term "minority" has never been an obstacle to the drawing-up of the numerous international instruments containing provision on the rights of certain groups of the population to preserve their culture and use their own language. The terminology used to refer to such groups varies from one instrument to another. For example, the UNESCO Convention against Discrimination in Education mentions "national minorities", while the expression "national, ethnical, racial or religious groups" is used in the Convention on the Prevention and Punishment of the Crime of Genocide and "racial or ethnic groups" in the International Convention on the Elimination of All Forms of Racial Discrimination. Finally, the U.N. concept and protection of minorities came to be incorporated in its Covenant on Civil and Political Rights. The Article 27 of the Covenant is specifically concerned with the situation of persons belonging to the minorities. The Article 27 runs as under:

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 practice their own religion, or to use their own language.

On the analysis of the article, it is clear that the protection is available to only ethnic, religious or linguistic minorities who are already in the existence. Other

groups or newly created minority groups have not been protected by this article. For example, the burning question of black majority in South Africa is outside the Scope of this article. On the basis of a logical and literal, interpretation of the article, the following certain positive rights have been conferred on members of minority groups:

(i) to enjoy their own culture,

(ii) to profess and practice their own religion, or

(iii) to use their own language.

In examining the three categories of rights guaranteed in Article 27, one should not lose sight of the link that exists between them because practically, watertight compartments cannot be created between these rights.

II. Criteria to Define the term “Minority”

The definition of the term “minority” can be examined on the principles set forth in Article 27 of the Covenant. Accordingly, these are two criteria to define the term of minority. The United Nations has two sorts of criteria for this purpose as under:

(i) Objective; and

(ii) Subjective.

A. Objective Criteria

For this criteria first of all a reference may be made to the existence, within a State’s population of distinct groups possessing stable ethnic, religious or linguistic characteristics that differ sharply from those of the rest of the

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population. Second objective criterion concerns the numerical size of such groups. It means these groups must be in numerically less to the rest of the population. Also the objective criterion consists in the non-dominant position of the groups in question in relation to the rest of the population.” Besides, the objective criterion concerns the juridical status of members of the above-mentioned groups in relation to the State of residence. It is essential that the members of the minority groups must be nationals of the State. The social groups; in general, and those forming minorities: in particular, are characterized not only by their inherited distinctive characteristics, but also by their desires for the future. Taking the desires of various minority groups as a criterion, the following types can, be distinguished:

(a) A minority which wishes at most only to preserve certain of its distinguishing characteristics and has little or no interest, because of a feeling of active solidarity with the predominant group, in becoming autonomous;

(b) A minority which not only desires preservation and further development of its distinguishing characteristics but also desires to attain either political or administrative autonomy, or full independence or annexation to another State.

The members of each of these types of minorities are, of course, entitled to non-discriminatory treatment, especially in respect of the rights and freedoms set forth in the Universal Declaration of Human Rights. Minorities falling under category (a) may pose the problem of the preservation of their distinguishing characteristics, The problem posed by minorities falling into category (b)
however, is one which is related to the political organization of the State. Thus, J. K. Das, in his *Indigenous Peoples and Human Rights*\(^{57}\) observed:

For objective criteria, first of all a reference may be made to the existence, within a State, of distinct groups possessing stable ethnic and cultural identity with traditional lands, dress, livelihood, linguistic characteristics that differ sharply from those of the rest of population. Second objective criteria concerned with the numerically less to the rest of the population. It means these groups must be in numerically less number in comparison to the rest of the population. The third objective criterion consists in the non-dominant position of the groups in question in relation to the rest of the population. The fourth and last objective criterion related to the juridical status of members of the above-mentioned groups in relations to the State of residence. It is essential that the members of the indigenous groups must be nationals of the State.

**B. Subjective Criteria**

As to the subjective criteria, it lies generally been defined as a will on the part of the members of the groups in question to preserve their own characteristics. In preserving, the will generally emerges from the fact that a minority groups has kept its distinctive identity over a period of time. Once the existence of a group or particular community having its own characteristics in relation to the population as a whole is established, this identity implies solidarity between the members of the group, and consequently a common will on their part to contribute to the preservation of their distinctive identity. Another criterion for classification takes into account the voluntary or involuntary nature of the

inclusion of individuals within a State. This classification may overlap with the preceding one, yet since it is not entirely covered thereby, it is presented here separately. From this point of view it is possible to distinguish the following types of minorities:

(a) Minorities which were compulsorily brought within the jurisdiction of the State usually in comparatively recent times; and

(b) Minorities which came within the jurisdiction of the State voluntarily.\(^{58}\)

The members of each of these types of minorities are; of course, entitled to non-discriminatory, treatment especially in respect of the rights and freedoms set forth in the Universal Declaration of Human Rights. Minorities falling into category (a) may well base a claim to special measures for the protection of their distinctive characteristics upon the fundamental "wrongness" or their compulsory annexation. However, such a claim would normally be considered reasonable only if the annexation had taken place in comparatively recent times, and would normally be considered unreasonable if the annexation had taken place in the remote past (for example, during the Roman Conquest). Obviously a strict limitation of time cannot be applied in such cases, since the circumstances vary so widely. What is important is the question whether the feelings of the minority have altered in the course of time; the element of time is in itself not the criterion. In certain cases descendants of such minorities, which may have been compulsorily brought within, the jurisdiction of a State many years ago, may have a 'legitimate 'claim to special measures for the preservation of their distinctive characteristics. This would depend, in large measure, upon whether the later-generation members of the minority still

preserve a consciousness consciousness of these characteristics, a desire to maintain them, and a keen sense of the "wrongness" of the annexation; or whether on the other hand they become practically assimilated with the predominant group.

In the case of minorities falling into category (b) any claim of the minority to special measures for the protection of its distinctive characteristics must be based upon the conditions, formal or informal, under which the group came under the jurisdiction of the State. It may have been annexed either on the basis of agreements granting the minority inter alia special measures of protection or on the basis of the minorities explicit or tacit acceptance of the laws of the annexing State, without any reservations or special conditions.

On the basis of above criterions, it may be observed that the subjective factor is implicit in the basic objective elements or at all events in the behaviour of the members of the groups. If the problem is examined without political prejudice and from a truly universal point of view, there can be no gainsaying that the essential elements of the concept of a minority are well known. The only point at issue as far as the definition is concerned is whether an indisputable objective "Core" can be widened or restricted by means of a few controversial considerations. In precise context of Article 27 of the Covenant, the term "minority" may be taken to refer to:

1. A group numerically less to the rest of the population of a State;
2. in a non-dominant position;
3. Whose members-being nationals of the State-possess ethnic, religious or linguistic characteristics differing from those of the rest of the population; and
4. These members show a sense of solidarity towards preserving their culture, traditions, religion or language.

No doubt, the question has so often been complicated by a desire on the part of some Governments to restrict or refine the definition that no minority is recognised as existing in their territory, and that consequently, no international obligation arises for them in relation to, the protection of minorities. But it is hoped that States shall be sincere in their acceptance of the idea of international protection of minorities and show a firm determination to observe the principles enunciated in Article 27 of the UN Covenant on Civil and Political Rights.

Article 27, however, is concerned with minorities characterized by their ethnic origin, religion or language. The main thrust of this provision is to ensure that State authorities do not interfere with the daily life of the minority (it amounts to protection against State measures). The Article guarantees that the minority in question has a right to maintain its own culture, exercises religious practices and use its own language within the minority population, without outside interference. The indigenous communities maintain their claims that the question of the rights and protection of indigenous peoples is closely related to the legal status of minorities as they are in minority in States. The travaux preparatories of Article 27 demonstrates that the question of positive measures was discussed in some detail during the negotiations on the actual wording of Article 27. The prevailing opinion in the UNHRC at that time was that no obligation to provide positive measures, such as building and maintaining special schools for minorities' children, existed. Article 27 recognizes,

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however, that it may be relevant to give minorities preferential treatment. It must be admitted that the scope of Article 27, as has been conceived, is somewhat limited. The main function of the provision is primarily to act as a barrier on State interference with the "internal life" of the particular minority.

The subsequent jurisprudence of UN Human Rights Committee (UNHRC) has not meant a fundamental breakaway from the original intent of the States parties. The UNHRC considered the issue in cases of *Lubicon Lake Band v. Canada*[^61] in 1984 and *Kitok v. Sweden*[^62] in 1985. In these cases, the Committee introduced an interpretation of the concept of culture in Article 27, which implied an extension of this concept to cover traditional economic activities. The Commission also held that: "Article 27 can be said to cater for certain classical human rights problems. Solutions to the specific problems of indigenous populations cannot, however, be said to be exhausted with the adoption of this provision. Subsequent experience and ensuring legal developments bear testimony to that", but the Committee did not overrule the original intentions of the States parties. The Inter American Commission of Human Rights (IACHR) for the Organization of American States (OAS) is the only international body to have formally, through its dictum, addressed the issue whether indigenous peoples have the rights of self-determination. In the context of Miskito Indian complaints of human rights violations by Nicaragua in 1981 and 1982, the IACHR considered whether or not ethnic groups also have additional rights to those set forth in Article 27 of the ICCPR, particularly the rights of self-determination.[^63] The Commission concluded thus:


[^63]: The case is popularly known as *Miskito* Case, case No. 7964 (Nicaragua), see, IACHR Miskito Report, OAS Doc. OEA / Ser. L / V / 11, 66, pp. 78-79.
The present status of international law does recognize observance of the principle of self-determination of peoples, which it considers to be the right of a people to independently choose their form of political organization and to freely establish the means it deems appropriate to bring about their economic, social and cultural development. This does not mean, however, that it recognizes the right to self-determination of any ethnic group as such.

Citing, *inter-alia*, UN General Assembly Resolutions 1514 (XV)\(^64\) and 2625 (XXV)\(^65\) the IACHR went on to note that the exercise of the right of self-determination could never justify disrupting the territorial integrity of a sovereign State. It also reveals from the fact that governments have adopted a negative attitude towards the demands of indigenous peoples for external self-determination. Apart from the fears that if the right is guaranteed to any ethnic or indigenous minority it will give rise to fragmentation and atomization of States leading to anarchy and chaos, the fact that they are very small in many countries in which they live have led States not to concede the right of full blows of self-determination to the indigenous communities in the sense of creating independent statehood or secession. The representative of Australia pointed out thus: "Since aboriginals comprise less than one percent of the total population, are predominantly rural and scattered throughout Australia, and were by tradition organized effectively only into small local limits, their failure to become a political force is not surprising. Political awareness amongst

\(^{64}\) Declaration on the Granting of Independence to Colonial Countries and Peoples, GA Res. 1514 (XV), 15 UN. Doc. A.\('\) 4684 (1960).

Aboriginal is however, increasing rapidly. The final text of the UN Declaration on the Rights of Indigenous Peoples 2007 addresses this issue by adding a new provision, Article 46(1), which states:

Nothing in this Declaration may be interpreted as implying for any State, people, group or person any right to engage in any activity or to perform any act contrary to the Charter of the United Nations or construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States.

It emerges from the above discussion that in principle, those groups which are principally interested in assimilation with the predominant group should also be considered as minorities. But when question arises for special and positive services to these groups then it would become very difficult to recognise every smallest group or a minority. Then in so far as the rendering of positive services and the recognition of special rights is concerned, or distinguished from the realization of the principle of non-discrimination, it may be observed that the term "minority" should normally be applied to groups whose member share a common ethnic origin, language, culture, or religion, and are interested in preserving either their existence as a national community or their particular distinguishing characteristics. However, the validity of the claim of minorities in additional protective measures is a political question normally to be decided on the basis of the merit of each case separately.

III. Status of Minorities under International Law

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International protection of human rights, today an elaborate network of legal norms and mechanisms of implementation; has one of its most noticeable roots in the system for the protection of minorities as it had evolved in Central Europe after the First World War. Thus, the needs of minorities have contributed to opening up that new dimension of international law outside the traditional field of inter-State relationships which Hermann Mosler has so cogently analyzed, namely, the extension of the circle of subjects of international law. Due to the belief that human rights for everyone could replace specific devices for the sole benefit of minorities, for many decades after the Second World War, interest in minority protection was weak. However, new momentum was gained when in 1976 the International Covenant on Civil and Political Rights (CCPR) came into force. According to Article 27 of that instrument, “persons belonging to ... ethnic religious or linguistic minorities” shall not be denied certain freedoms. Being designed to find world-wide acceptance, Article 27 had necessarily to be drafted in a summary manner. Consequently, any attempt exactly to state its scope and meaning encounters considerable difficulties. Not surprisingly, therefore, commentators have criticized Article 27 for the “scantiness” of its substance which indeed contrasts sharply with the wealth of the substantive as well as procedural safeguards laid down in the minority treaties which had been concluded after the First World War. Inspired by above, the General Assembly on December 18, 1992 adopted the Declaration on the Rights of Persons Belonging to National or Ethnic, Religious or Linguistic Minorities.67

A. Status of Minorities under Article 27

Although one may easily agree that Article 27 is a rather succinct provision which raises more problems than it really resolves, its existence alone is noteworthy enough. Indeed, while it is commonly said that at the regional level

more effective and elaborate protection can be and is generally afforded than on a world-wide scale, the contrary is true here. None of the regional treaties or draft instruments deals specifically with the rights of (members of) minorities. The European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) confines itself to listing "association with a national minority as a forbidden ground of discrimination (Article 14), while the American Convention on Human Rights (ACHR)\textsuperscript{68} abstains from even mentioning the word "minority"." The same negative result emerges from a reading of the African Charter of Human and Peoples' Rights". And in spite of its Article X labelled "Rights of Minorities" not even the recent Islamic Universal Declaration of Human Rights changes the general pattern because the substantive scope of that provision is confined to religious minorities under Muslim rule which, as it appears, are thereby enjoined to refrain from applying coercion against their members.

Recently, however, new efforts have been undertaken with a view to improving the status of minorities. A first, though rather modest step was accomplished in 1975 when the Final Act of the Conference on Security and Co-operation in Europe in its "Declaration on Principles Guiding Relations between Participating States" took account of the hardship suffered by national minorities in certain countries by stating what under the regime of the rule of law would be self-evident, namely, that persons belonging to such minorities shall enjoy "equality before the law" and shall be secured "the full opportunity for the actual enjoyment of human rights and fundamental freedoms". Essentially, these propositions come down to a ban against overt or covert discrimination of individuals who do not form part of the majority of the population, and their real significance is additionally affected by the obvious

weakness of the mechanism of implementation. More courageous initiatives have been ultimately started in Western European Political. The Parliamentary Assembly or the Council of Europe, focusing specifically on the language problem, has formulated rather far-reaching proposal in its recommendation 928 (1981) of 7 October 1981. In concrete terms, however, this recommendation constitutes but a suggestion which the Committee of Ministers may take up or may, if not flatly decline, defer *sine die* by transmitting it to a study group of experts. An analogous fate could easily happen to the Community Charter for Regional Languages and Cultures and Charter of Rights of Ethnic Minorities adopted by the European Parliament on 16 October 1981, shortly after the Parliamentary Assembly of the Council of Europe had concluded its deliberations.69

Concerning the holders of the rights under Article 27, no doubts can exist. Protection is not afforded to minority groups as such, but rather to “persons” belonging to minorities. This formulation cannot be viewed just as an accident of drafting. To conceive of minority protection in individualistic terms fits well into the general pattern of the CCPR which, apart from the right of self-determination, addresses itself directly to the individual concerned (“everyone”). In addition during the drafting process delegates engaged in the work on the CCPR were well aware of the divergence between the two conflicting conceptions. The individualistic approach (“persons belonging to ... minorities”) had already been adopted in the very first text, the draft outline of an International Bill of Human Rights prepared by the Division of Human Rights of the UN Secretariat (Article 46). Latter, the USSR attempted to alter this general conceptual line by suggesting that the obligation of States should be framed in such a way as to exist *vis-a-vis* minority communities as such but its

motions were rejected by clear majorities. During the final discussion in the Third Committee of the General Assembly it was expressly noted by the representative of India that the draft article under examination did not apply to "minorities consider as groups". Finally, in legal writings' authors have unanimously acknowledged the specific wording by which the beneficiaries of Article 27 are defined.\textsuperscript{70} In this connection, it has rightly been stressed that using the general label of protection of minorities amounts to an incorrect method of expression which is justifiable only in a broader sense by focusing on the practical efforts of the provision.\textsuperscript{71}

Since it is the relationship tying a person to a minority group which bestows it with the rights under Article 27, it cannot be avoided asking the question what criteria are available to classify a group of persons as a minority. As usual, the Covenant itself does not give any more detailed explanation apart from setting forth that it contemplates only "ethnic, religious or linguistic" minorities. Those qualifications, nonetheless, tend to demonstrate that certainly not each and every group of people may claim to be a' minority. The common characteristic feature of ethnic, religious and linguistic minorities is that they form stable units with a notable degree of historical continuity. To belong to an ethnic or linguistic community is a distinction mark which pervades the entire existence of an individual and cannot easily be changed at will. In the case of religious minorities, the degree of stability is less accentuated, all the less so since according to Article 18 everyone is free to leave the community in which he was born and to join another group of his preference. Nonetheless, it may be assumed that the drafts proceeded from a general conception of religious communities according to which such communities are historical entities which


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their members normally adhere to for their entire life-span. The text itself providing no further clues as to the scope and meaning of the concept of minorities, it is legitimate to turn to -the drafting history in order to elucidate what other criteria should guide the construction of Article 27. In that respect, one has to acknowledge above all that the Third Committee of the General Assembly, where Article 27 got its final approval through a debate on the relevant substantive issues, based its deliberations on UN Doc. A/2929; the annotations on the draft International Covenants on Human Rights”, which aptly summarize the work done at the previous drafting stages, in particular by the Human Rights Commission (HRCion). Concerning the present Article 27 some of the observations contained, therein are extremely clear-cut, leaving no room for doubt. “It was agreed”, says the passage which is relevant here, “that the article should cover only separate or distinct groups, well-defined and long-established on the territory of a State”. This statement, which the annotation relate to the opening clause (“In those States ... exit”) faithfully reflects the proceedings of the HRCion. Indeed, the text on which the HRCion reached agreement, which had been prepared by the Sub-Commission on Prevention of Discrimination and Protection of Minorities had started with words: “Persons belonging .... It was at the insistence of the Chilean delegation that the opening clause was added. Although the earlier version of its amendment had conveyed the underlying idea much more clearly.” its latter streamlining was in no way, intended to detract from its original meaning.72

Consonant with, these views, during the debates held in the Third Committee several speakers declared their full’ support for the basic approach to the concept of minorities as it had been chosen’ by the ‘HRCion; no representative advanced a different understanding of the provision. In addition, delegates from

a number of countries took care to emphasize that the text under review, should not be capable of being invoked by new minorities. It appears, therefore, that the conclusions implicit in the restriction of Article 27 to ethnic, religious and linguistic minorities are fully borne out by the drafting history. Along the same lines, it has been emphasized by the Special Rapporteur of the sub-commission on prevention of Discrimination and Protection of Minorities, Francesco Capotorti, that a minority necessarily pre-supposes stable characteristics which differ sharply from those of the rest of the population.”

The legal requirement of a definite historical identity does not exclude diffused ‘minorities from the protection of Article 27. The text of the CCPR does not indicate that additional conditions must be fulfilled. Although frequently minorities will be concentrated in certain, geographical areas, they may also live largely dispersed among the majority of the population. In the case of religious communities this could even be the rule. It should not be over-looked, furthermore, that lack of territorial cohesion between members of a minority may be the direct result of measures of persecution which took place in the past. To exempt the responsible States from observing Article 27 would, in such circumstances, amount to rewarding injustices inflicted upon the aggrieved communities. Likewise, a narrow interpretation would encourage governmental policies designed to displace persons belonging to minorities from their original homes.73

As far as size is concerned first of all the upper limit has to be determined. Without inquiring into every detail of this complex issue, it may be -started quite unequivocally that, contrary to an isolated voice in legal doctrine. A majority can never- constitute a minority in the sense contemplated by Article 27. Indeed, if, as in South Africa; a majority ‘lives in a state of oppression, its

members do not require specific protection. "In order to enjoy their own
culture, the only, need they really have is not to be withheld their basic-
democratic rights as enunciated in Article 25. As soon as the principle "one man
one vote" is secured, the majority may then successfully assert and effectuate.
Its political and cultural aspirations."

In some countries which are made up of different Linguistic communities
organized in autonomous sub-units, be they qualified as States, provinces,
regions or otherwise, the main group’ of the population may be in a minority
position in such sub-units. This is true, for instance, of Canada where the
province of Quebec is largely inhabited by French-speaking Canadians, of
Switzerland and the USSR, where the Russians constitute only a small, though
increasing part of the population in some of the Union Republics. Conflicts are
likely to arise in such circumstances if at the lower level, by virtue of its powers
in matters of education, the sub-unit concerned attempts to enforce school
policies designed to impose the "minority" language as the only admissible
language in public educational institutions, eventually even prohibiting the
establishment of private schools where instruction would be given in the
language dominant at the national level. In the Belgian Linguistic cases, the
European Court of Human Rights had to deal with a situation of that type. The
major bone of contention was the strict separation of Belgium into different
linguistic regions to the effect that public or Government-subsidized education
was made available only in the local language. Although the ECHR, as has
already been pointed out, lacks a specific guarantee for the benefit of minorities,
it is a worthwhile noting that the European Court of Human Rights denied a
right to be taught in one’s own language. In the Court’s view, such a right could
not be derived from the first sentence of Article 2 of the [First Additional]

Protocol to the ECHR which sets forth that “no person shall be denied the right to education”. 75

If one looks at this issue from the standpoint of the aggrieved individual protection seems to be warranted. Language being a constituent part of everyone’s entity, he runs the risk of being structurally alienated from his family if he receives education in a language which is not his by his personal origins. Parents may find that their children, through the medium of another language whose influence they cannot escape, evolve characteristics which open up a gap of mutual misunderstanding. On the other land, starting from the premise . On the other hand, starting the group as such Article 27 should at least concurrently protect one has to acknowledge that the general configuration is quite a different one if the “regional minority” forms part of a national majority. If Article 27 has been conceived of in order for minorities to survive and to preserve their identity, such reasons play no role here. On the contrary, educational language requirements as described above normally serve as a means of protecting the true minority against pressures of assimilation originating from the global majority. Furthermore, individuals, have the possibility to return to those parts of the national territory where their own language is being practiced. To be sure practical obstacles may often prevent returning to the land of one’s mother-tongue. In addition, the general tension between the, principles of national unity and freedom of movement, on the one hand, and territorial linguistic separation, on the other, is all too obvious. But one cannot fail to observe that during the drafting process the difficult problems inherent in the existence of bilingual plurilingual or States with different national communities were never discussed. All references to factual situations to be dealt with concerned true minorities, that is to say, minorities defined by comparison with global population numbers. The present author therefore

75 Ibid.
concludes that Article 27 does not address itself to the issue of regional minorities.76

Further reflection shows that, indeed, protective needs differ fundamentally from each other. Within the framework of the nation-State which has crystallized as the creation of a leading cultural and linguistic group, ethnic and linguistic minorities have to struggle to maintain a continuous, daily fight against being totally drawn into the melting pot. By contrast, as far as pluri-national (pluri-ethnic, plury-linguistic) States like Canada, Switzerland or the USSR with one preponderant component are concerned, the crucial problem is to strike a balance between the requirements of national unity, on one hand, and ethnic and cultural diversity on the other. The delicate equilibrium existing in such States needs institutional safeguards in order to resist the prevailing majority culture which inevitably has a dominant impact on every kind of organized State activity. In such circumstances, territorial unity reflected in the school language may be an indispensable means of safeguarding the minority against erosion by the outside pressures to which it is permanently exposed.” It would, at any rate, be a somewhat amazing result if minority protection could be undermined in the name of minority rights.77

The conclusion which has emerged in the course or the above considerations, namely, that the concept of minority cannot be defined in the abstract, without any regard to the substantive rights granted by Article 27, finds a further confirmation when one examines the question as to whether a lower limit exists. Does the minority need to be composed of a certain minimum member of persons in order to be respected as such? The question would be extremely

pertinent if Article 27 would require States to take positive steps designed to ensure the existence and the well-being of minorities. If, on the other hand, Article 27 contains mainly a negative obligation in the sense that governments are obligated to refrain from interfering with the culture, religion and language of minority groups, a definition becomes almost superfluous. States would then not be charged with burdens to be measured also in budgetary terms, but would mainly be required to let minority communities develop their own characteristics. Essentially, sheer passivity would then be sufficient to comply with Article 27. A closer examination of the problem shall, therefore, be deferred.

B. Status of Minorities under the Declaration on the Rights of Persons Belonging to National or Ethnic, Religious or Linguistic Minorities 1992

(i) The Declaration

As stated above the Convention on Civil and Political Rights under Article 27 provided binding law on the rights of persons belonging to minorities. However, the scope and ambit of the rights are not clear in the Article 27. To elaborate the scope and ambit of the rights of minorities the United Nations General Assembly adopted the Declaration on the Rights of Persons Belonging to National or Ethnic, Religious or Linguistic Minorities 1992.\textsuperscript{78} UN member States adopted unanimously the declaration, an acknowledgment that a gap existed in minority rights protection. The declaration established that States have an obligation to acknowledge and promote the rights of minorities to enjoy their own cultures and identities, to profess and practice their own religions and use their own languages. The declaration ushered in a new era for minority rights. It sets essential standards for protection and offers guidance to States as

\textsuperscript{78} General Assembly Resolution 47/135, dated December 18, 1992.
they seek to realize the human rights of minorities. The declaration consisting of
nine Articles stated the following rights to such persons:

1. The existence and the national or ethnic, cultural, religious and linguistic
   identity of minorities are to be protected within their respecting territories
   by laws and measures.79

2. Persons belonging to minorities have the right to enjoy their own culture,
   to profess and practise their own religion, and to use their own
   language.80

3. Persons belonging to minorities have the right to participate effectively in
   cultural, religious, social, economic and public life.81

4. Persons belonging to minorities have the right to participate effectively in
decisions on the national and, where appropriate, regional level
concerning the minority to which they belong or the regions in which
they live, in a manner not incompatible with national legislation.82

5. Persons belonging to minorities have the right to establish and maintain
   their own associations.83

6. Persons belonging to minorities have the right to establish and maintain,
   without any discrimination, free and peaceful contacts with other
   members of their group and with persons belonging to other minorities.84

7. Minorities may exercise their rights individually as well as in community
   with other members of their group, without any discrimination.85

79 Declaration on the Rights of Persons Belonging to National or Ethnic, Religious or Linguistic
80 Ibid., Article 2, Paragraph 1.
81 Ibid., Article 2, Paragraph 2.
82 Ibid., Article 2, Paragraph 3.
83 Ibid., Article 2, Paragraph 4.
84 Ibid., Article 2, Paragraph 5.
85 Ibid., Article 3.
8. States should consider appropriate measures so that persons belonging to minorities may participate fully in the economic progress and development in their country.\textsuperscript{86}

(ii) \textbf{Legal Force of the Declaration}

Now the question arises whether the Declaration on the Rights of Persons Belonging to National or Ethnic, Religious or Linguistic Minorities 1992 have any legal force as it is a mere declaration unlike the Article 27 of the Convention on Civil and Political Rights 1966. The Statute of the International Court of Justice (ICJ) enumerates the sources of international law as treaties, custom, general principles of law recognized by civilized nations, judicial decisions and juristic work on international law. Another source added under the modern international law is the resolutions and determinations/declarations of international organs or institutions. Whereas the first three are the law-creating processes, the others are the means for the determination of alleged rules of international law. In the case of law creating process, the emphasis lies on the forms by which any particular rule of international law is created. This is being done through the law-determining agencies (manifested in the form of other sources as judicial decisions or juristic writings), which verify an alleged rule.

Those rules of international law which fall under the category of law creating processes are considered to be ‘hard law’ and others in the category of ‘soft law’ since they cannot be classified as full-fledged rules of international law like custom, treaties or general principles of law. They have their set mechanism for coming into force as a full-fledged rule of law and they are binding and enforceable against a state.\textsuperscript{86} There is always a set procedure for its enforceability

\textsuperscript{86} Ibid., Article 4, Paragraph 5.
and compliance. If any violation of the rule takes place, the consequences will ensue there from. For example, the International Covenant on Civil and Political Rights, and the International Covenant on Economic, Social and Cultural Rights, 1966, there is a set machinery for monitoring the compliance of a state-party under these Covenants, i.e., Human Rights Committee under the Covenant on Civil and Political Rights, and Committee on Economic, Social and Cultural Rights. There is no such mechanism existing under the different declarations on human rights, though there is the UN Human Rights Commission whose main task is of standard-setting in human rights and spreading the culture of human rights and not of monitoring.

Declarations are mere evidence of practices and usages and unless they go through the process of law-making as of custom, treaty or generalized principles of law, they lack the binding force of the rule of law. Nevertheless, they fulfil to a great extent the criteria to be termed as law.\(^8^7\) They are increasingly becoming important in the development of international law. New rules of international law are initiated through declarations, determinations or decisions of the international organizations, which subsequently crystallize into the binding rules of law.

The UN General Assembly, since its inception in 1945, has adopted about 7000 resolutions/declarations, on areas as wide as from human rights to consumer’s rights. These declarations resolutions, though are not legally enforceable or binding \textit{per se}, can spell out, and to some extent, elaborate existing customary rules or contribute to the rapid formation of new ones. In this sense, they have great evidentiary value and proved to be very valuable when it comes to the interpretation of the provisions of the Charter or developing new law for maiden areas.

\(^8^7\) Van Hoof, \textit{Rethinking the Sources of International Law}, pp. 183-189 (1983).
These resolutions/declarations have also been accorded considerable weightage by the international judicial tribunals, as evidence of state practice underlying a customary rule. The International Court of Justice (ICJ) had relied heavily on the General Assembly Declaration on Friendly Relations and Cooperation among States\textsuperscript{88} in the \textit{Nicaragua case}\textsuperscript{89} for the law on the use of force and intervention under international law. The UN declaration on right of self determination and rights of people of non-self governing territories (Resolutions 1514 (xv) and 1541 (xv) of 1960) was made applicable in \textit{Western Sahara Case}\textsuperscript{90} and \textit{Namibia Case}.\textsuperscript{91} A significant number of these declarations have culminated into conventions on the same subject-matter, such as the 1963 Declaration on the Elimination of All Forms of Racial Discrimination led to the adoption of the 1965 Convention on the Elimination of All Forms of Racial Discrimination, or the Convention on the Elimination of All Forms of Discrimination against Women, 1979, which followed the 1966 Declaration on the same subject matter.

The declarations/resolutions are collective pronouncements of states and manifest strong evidence of state practice and helps in the formulation of new rules of international law. But their persuasive or evidentiary or precedential value depends upon numerous factors, viz., the language and the pattern of voting in their adoption and the statements made by members nations at the time of their adoption and subsequently.\textsuperscript{92} If a declaration/resolution is framed in precise language, it will carry a considerable weight. Resolutions adopted unanimously or near unanimously or by consensus (not accompanied by

\textsuperscript{88} Res. 2625 (xxv) of 24 Oct. 1970.
\textsuperscript{90} ICJ Rep. (1975) p. 12.
\textsuperscript{91} ICJ Rep. (1971) p. 16.
reservations) would lead to the emergence of customary rule. They may be in the nature of quasi-judicial determination. Abstention from voting by important nations for their implementation or adoption may affect their enforceability. They may set the standards for states, which can follow them in their practice and thus would subsequently crystallize into a customary rule of international law, binding on states.

Repetition or recitation of a resolution/declaration in subsequent resolutions/declaration adds further weight and helps in the formation of a new rule. Repetition demonstrates continuity, consistency and uniformity of states conduct and practice in conformity with the rules stated therein. This may lead to formulation of the "instant customary international law."93 The subsequent conduct of a state after the adoption of the declaration/resolution, is similarly important in the formulation of a new rule. The subsequent conduct provides it with the requisite evidentiary value to mould it into a customary rule, by giving it the requisite opinio juris for the creation of the rule. This opinio juris will be evidenced in the statements made by states prior or after the adoption of the resolution or later as an explanation. The state practice is particularly relevant where the resolutions are in the nature of de lege ferenda. In the case of resolution in the nature of lex lata, the state practice enhances its normative effect. Nevertheless, the gestation period for the emergence of a customary rule is less in case of resolution than in the case of traditional process of customs formation, because the states' will has already been manifested in the adoption of the declaration.

In the South West Africa Cases, Judge Tanaka, in his dissenting opinion, remarked:

93 The term has been coined by B. Cheng, 5 Indian Journal International Law 23 (1965).
Of Course, we cannot admit that individual resolutions, declarations, judgements, decisions, etc. have binding force upon the members of the organization. What is required for customary international law is the repetition of the same practice; accordingly, in this case resolutions, declarations, etc... This collective, cumulative and organic process of custom generation can be characterized as the middle way between legislation by convention and the traditional process of custom making, and can be seen to have an important role from the viewpoint of the development of international law.94

Strictly speaking, the resolutions of the General Assembly are not binding as such and the United Nations Charter does not envisage this. However, with the tremendous horizontal and vertical expansion of international law, and keeping in view the present day status of international law, it is difficult to deny the effective legislative force behind these resolutions, which manifest the consensus of nations on particular rules. The movement relating to the protection of the rights of persons belonging to minorities has so far remained only through the different declarations of the General Assembly and other foras. Unlike declarations on many other subjects, the specific declaration persons belonging to minorities, 1992 has not so far concretized into a convention, i.e. the 'hard law'. Whether it has crystallised into a customary rule has to be seen from the state practice. By adopting it as a convention would increase the accountability of the states-parties to it, who would be required to comply with the norms set in the convention to protect the rights of persons belonging to minorities. The convention would have its monitoring and reporting system as indicated under the convention. Once a state becomes a party, it has to comply with its provisions! For example, the Convention on the Elimination of all

Forms of Discrimination against Women, 1979 has been ratified by India in July 1993. India is required to submit regular reports to the Committee on Women's Convention at a regular interval of four years, after the submission of its first report within one year from the date of becoming the party to the Convention. Unless reservations are permitted and sought, the state-parties are mandated to carry out their obligations under the Convention in full.

Thus, under conventions, there are better prospects for ensuring the rights. But conventions are not the only mode to protect the rights of a particular section of the humanity. The very movement for the protection of human rights started with the Universal Declaration of Human Rights, 1948, though the UN Charter, which is a convention, contained ample references to the protection of human rights, viz. Articles 1(3), 13, 55, 56, 62 and 72, beside the Preamble. The Universal Declaration elucidated these Charter provisions and defined expressly certain human rights and fundamental freedoms which need to be protected. The Declaration became the trend-setter in the movement for 'the protection of human rights, even though it is non-mandatory in nature. It has emerged into a rule of customary international law. All the UN instruments on human rights are measured in the context of the Universal Declaration and the states are primarily measuring themselves against the Universal Declaration for their record on the protection of human rights. Hence, a Declaration, though considered to be a 'soft-law', may nevertheless result into a 'hard-law', and a violation of the standards therein may call for serious public rebuke by international community.