

Minority's Right to Religion and UN Standards for its Protection

Hidayat Ur Rehman^{1*}, Muhammad Aqeel Khan², Muhammad Zubair³,
Sadia Khattak⁴

^{1*}Lecturer in Law at Abdul Wali Khan University, Mardan, Pakistan
^{2,3,4}Assistant Professor of Law at Abdul Wali Khan University, Mardan, Pakistan

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ABSTRACT

Minorities could be found everywhere in the world but they did not get proper attention of the United Nations Human Rights drafters for a long time. Even after minorities' specific Human Rights instruments were established, their rights are not properly protected because the implementation mechanism of these instruments is full of lacunae. The paper focuses on minorities' right to freedom of religion in the UN instruments because its denial has brought sufferings to mankind and its protection can bring them peace and security. Before UN Standards on Minorities' Right to Freedom of Religion is discussed, the paper throws light on the definition of minority as the term 'minority' itself is controversial in international law.

KEY WORDS: Minority, Protection, Conventions, Declarations, Definition, Standards, Right, Religion, Freedom, Mechanism, Implementation.

1. INTRODUCTION

Minorities, with their distinct ethnic, linguistic or religious identities which make them different from the rest of population, could be found in all most all the states of the world. Denial and violations of human rights and fundamental freedoms, particularly the right to freedom of religion has been one of the main reasons of wars and the consequent sufferings mankind underwent through because religion or belief is one of the basic conceptions of and about the life for the people who believe in and practice it. Through the freedom of religion and belief the cherished goal of acknowledging the dignity and equality of all individuals can be achieved. It helps in furthering participatory development; lessening the tension among groups and individuals and thus contributes to the attainment of global peace and harmony. The system established by the League of Nation for minorities' protection lost its political expediency and was replaced by United Nations Charter and Universal Declaration of Human Rights [1]. But neither the Charter nor the UDHR has any direct reference to the Rights of Minorities [2]. These instruments were based on the concept of Equality and Non-Discrimination. The idea was that minorities would need no special provisions for their protection, if the Equality and Non-Discrimination principles were properly implemented. However, it did not bear fruit and very soon the need of minority specific instruments was felt. In order to supplement the Equality and Non-Discrimination principles of UN Charter and UDHR instruments were adopted specifically aimed minorities protection. The paper analyses the measures adopted for protection of minorities' right to freedom of religion. But as the right to freedom of religion cannot be effectively exercised unless and until it is complemented by some other rights, the paper also explores them in the UN document to see whether minorities' right to freedom of religion is adequately protected? Before that the paper throws light on the definition of 'minority' as their right to freedom of religion could not be better discussed until it is known that who are they?

2. Who is Minority?

There is no generally accepted and legally binding definition of 'Minority' in international law even the minority specific instruments of UNO failed to offer a definition of "Minority" and according to Oliver De it is one of the major obstacles to the protection of the Rights of Minorities [3]. However, several definitions of "minority" have been proposed by different organization and scholars of international law. But we shall discuss to the definition offered by Special Rapporteur Francesco Capotorti, when he was drafting a study in 1977 for the UN Sub-Commission on the Prevention of Discrimination and Protection of Minorities, because Capotorti's definition is generally regarded as authoritative and the international law scholars have a it. According to him 'minority' is:

*Corresponding Author: Hidayat Ur Rehman, Lecturer in Law at Abdul Wali Khan University, Mardan, Pakistan,
Email: hidayat@awkum.edu.pk

“A group numerically inferior to the rest of the population of a State, in a non-dominant position whose members-being nationals of the State-possess ethnic, religious or linguistic characteristics differing from those of the rest of the population and show, if only implicitly, a sense of solidarity, directed towards preserving their culture, tradition, religion or language” [4].

This definition has been criticized on many grounds; for example, the condition of being numerical inferiority for a people to be categorized as minority. Because there have been instances in history that people were in numerical majority but still they were to be considered minority because they were in a non-dominant position [2]; as was the case of Indian people under the British colonial rule in Indian Sub-Continent. As the definition uses the word ‘group’ it can also be questioned as to whether a single person or two can be considered as minority? According to Thornberry the definition is restrictive in a sense that it refers only to ‘minorities by will’, minorities who wish to maintain their distinctive culture, language or religion; and it does not refer to ‘minorities by force’, minorities who want only a guarantee against non-discrimination so that they could be smoothly integrated into mainstream life of the nation [5]. The definition also does not answer the question as do the persons with particular sexual orientations, e.g. gay or lesbian, constitute minority?[6] However, the primary feature of the definition is a combination of both objective and subjective elements in ascertaining a minority group. Objective Criteria would involve factual analysis of a group such as a distinct entity within the State possessing stable ethnic, religious or linguistic characteristics that differ from the rest of the population. Subjective criteria would be found on the basis that there exists a sense of solidarity, directed towards preserving the distinctive characteristics of the group.

3. Minorities’ Right to Profess and Practice their Own Religion

The most important, legally binding and generally accepted article on minorities, which gives them the right, *inter se*, to *profess and practice their own religion*, is Article 27 of International Covenant on Civil and Political Rights (ICCPR) [7], it says 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”

Article 27 of ICCPR is prone to criticism on various grounds; firstly, the words “in those States in which....minorities exist” invite the States to deny the existence of minorities within their boundaries. Secondly, the word “exist” does not clear, rather creates, the ambiguity as to whether the minorities need to be the citizens of the State or not to claim the benefits of the Article. Thirdly, it does not impose any positive obligation on the States; the sole obligation placed on the States is not to deprive the members of the minority group the status they are already enjoying [2]. Fourthly, the rights contained in the article are to be exercised “in community with other members of the group.” It is questioned if the rights under the article can be claimed and exercised by minorities. Human Rights Committee (HRC) cleared these confusions through its General Comment No 23 [8]. It said to determine whether a minority exist in a given State requires subjective and objective criteria; State party decide it by whim. As to the question of whether minority needs to be citizen of the State to claim the rights article 27 of ICCPR? The Committee said that nature of the rights conferred suggests that these rights belong to persons belonging to minorities and such persons may not necessarily be the permanent residents or citizens of State concerned. It also said that a constrictive or repressive approach would render Article 27 meaningless; it should be interpreted with liberal approach as it requires the State to take positive measure for the effective enjoyment of the right conferred by it.

After the stalemate caused by Cold War came to an end the Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities, 1992 [9], meant to cover the lacunas of article 27 of ICCPR, was passed. Right to Profess and Practice their own religion is positively and in strong language guaranteed to minorities by Art 2 (1) of the Declaration, the only UN minority specific instrument, which says that persons belonging to minorities have the right to “practice and profess their own religion....freely and without interference or any form of discrimination.” But right to Profess and Practice their religion is no worth unless and until it is complemented by some other (constituent) rights; the drafters of the Declaration were conscious of it. Therefore, the Declaration ensures to minorities not only the right to practice and profess their religion but other rights also which complement the right to practice and profess the religion.

One of the basic rights of minorities, without which right to practice and profess their religion cannot be effectively exercised, is right to exist and to develop their religious identity. Article 1 (1) of the Declaration the States to protect the physical existence and, amongst other, the religious identity of minorities in their jurisdictions and to promote that identity by encouraging the situations there for. Article 1 (2) imposes positive obligations on the States to adopt appropriate legislative and other measures to this end. Minorities also have

right, according to article 2(3), of effective participation in decision making at national and at proper regional related to them in a way compatible with national laws. For developing their religious identity minorities have right form their own associations [10]; for this purpose they can set up and carry on peaceful contacts with other members of their own group as well as members of other minorities both within their own country and across state borders[11].

Right to practice and profess one's religion can be effectively exercised when one is not discriminated against. This is the reason that Articles 2(1), 2(2), 2(5), and 4. (1) Of the Declaration on Minorities suggest that there shall be no discrimination against minorities on the basis of religion or belief. Similarly Articles 29 and 30 of Convention on the Rights of Children, 1989, [12] both read together give the impression that persons belonging to minorities have the right to get their children educated in accordance with their own religious instructions. UN provisions which though do not specifically speak about minorities but still protect their right to religion are: Article 18 and 26 of ICCPR. The former provides for the right to freedom of thought, conscience and religion which shall include the freedom to have or to adopt any religion or belief of one's choice and to manifest it in worship, observance, practice and teaching either individually or in community with other and in public or private. However, the right to manifest one's religion or belief is not absolute. According to sub-article 3 of article 18 it may be subject to such limitations as are prescribed by law and are necessary for the protection of "public safety, order, health, or morals or the fundamental rights and freedoms of others"[13]. Article 26 ensures to minority equality before law and equal protection of law. It also prohibits any discrimination and guarantees them equal and effective protection against any type of discrimination.

Declaration on the Elimination of All Forms of Intolerance and Discrimination Based on Religion and Belief (1981),[14] which was adopted for the purpose of preventing and combating discrimination on the ground of religion and belief [15], not only proclaims, *inter alia*, the right to freedom of thought, conscience and religion for all people, including minorities, it also defines intolerance and discrimination based on religion or belief as "any distinction, exclusion, restriction or preference, based on religion or belief and having as its purpose or as its effect nullification or impairment of the recognition, enjoyment or exercise of human rights and fundamental freedoms on an equal basis"[16].

Articles 1, 55 and 56 of UN Charter read together and Article 2 and 18 of Universal Declaration of Human Rights are the other manifestations of international comity's effort to protect minorities' right to religion and belief through its equality and non-discrimination clauses. Similarly, Convention on the Prevention and Punishment of the Crime of Genocide, 1948 protects the right to life and physical existence, as said earlier a right without which the right to freedom of religion and belief is meaningless, of all people, including minorities, through its equality clauses. In the like way Convention against Discrimination in Education, 1960, which prohibits the State parties from discrimination in education on the grounds, *inter se*, of religion; and obliges the State parties to conform their existing discriminatory policies, if any, in accordance with the Convention is another example of an instrument which is not minority specific but still protects minorities' right to education; a right which complements the right to practice and profess their religion, through its equality and non-discrimination clauses.

4. Implementation of Minorities' Right to Religion

Before implementation of minorities' right to religion and belief at UN could be discussed it needs to be reminded that different treaties contain mechanism that prescribes the procedure of treaty implementation and monitoring. However, as far as the declarations are concerned they are not legally binding and therefore have no mechanism of implementation and monitoring [17]. As we do not see any minority-specific treaty, our discussion shall, therefore, emphasis on the implementation mechanism of ICCPR. However, other measure taken by UN for implementation and monitoring of minorities to right to freedom of religion will also come under discussion.

(4-A) Implementation Mechanism of ICCPR

ICCPR has the following mechanism to implement and monitor, amongst other, minorities' right to religion.

(i) Reporting Procedure to Human Rights Committee

Human Rights Committee (HRC) has the duty to monitor the implementation of ICCPR by its State parties. State parties are bound to submit, through the Secretary-General, initial, supplementary and periodical reports Committee indicating the factors and difficulties, if any, in Covenant's implementation. Committee, after the reports submitted by the State parties, expresses its concluding observations and general comments and its report to the States Parties as it thinks appropriate. It may also submit its report to the Economic and Social Council (ECOSOC) [18]. Reporting procedure, it needs to be pointed out, is the principal implementation

mechanism and the only compulsory procedure. However, it has been observed that State reports are often and incomplete, not providing complete and required information [2].

(ii) Inter-State Complaint Procedure

Second mode of implementing ICCPR is the inter-state complaint procedure. Article 41 of ICCPR gives the HRC competence to entertain inter-state complaints. However, this mechanism is optional; the State which lodges the complaint and the State against whom the complaint is being lodged must have made a declaration that they recognized the competence of HRC to receive and consider such complaints [19]. If the State 'Y' considers that State 'Z' violates the provisions of the Covenant, it can bring the matter to its notice; State 'Z' must reply within three months. If the matter is not resolved within six months, either State may bring the matter before HRC. If the Committee thinks that all the local remedies have been exhausted, it shall try to resolve friendly the matter through its good offices. The Committee, within a period of twelve months, after it received the complaint, shall produce the written report. If the matter is solved friendly, HRC shall confine its report to a brief description of facts and the solution reached. If it could not be solved friendly, the Committee shall confine its report to a concise statement of facts, the written and oral submission of the State Parties.

According to Article 42, if the friendly solution is not reached under Article 41, the Committee, with the consent of the both the States may appoint a five member ad hoc Conciliation Commission. The Commission shall report its finding to the Chairman within twelve months after it received the matter. If the matter is not solved, then the Commission's report must state the facts, submission of the parties and its views on how an amicable solution to the matter could be reached. The Commission can also make recommendation to the parties which are not binding on them. In both the cases the Commission shall refer the matter to the General Assembly. The inter-state complaint procedure has been criticized on many grounds; mainly that procedure is complex and cumbersome; that states, for political and diplomatic reasons, often hesitate to challenge each other and that the procedure is not used till.

(iii) Individual Complaints

Individual Complaints is the third mechanism for implementation of ICCPR. First Optional Protocol to ICCPR [20] gives HRC power to examine the individual complaints against the State for violation of the rights [21]. Individual communications are to be sent to the Office of the High Commissioner of Human Rights (OHCHR). Before the submission of communication, the individual must prove that he/she has exhausted all the domestic remedies. After the communication is received by OHCHR a summary of the communication is forwarded to the Special Rapporteur on new communications, a member of the Committee. If in the opinion of Special Rapporteur the communication fulfills the preliminary admissibility requirements, it may be registered. After registration the communication is sent to the state concerned and the state has to reply within six months to which the complainant has to respond within two month. After it, the communication is forwarded to a five member Working Group of HRC. If the Working Group did not declare unanimously the Communication as admissible then whole Committee shall consider its admissibility. If the Communication is admissible, it is considered on merit after consultation with the State party and the complainant. The Committee formulates its opinion on the basis of all written information brought before it by the State concerned and complainant. HRC transmits its views to the State Party and the complainant; however its views are not legally binding but carry only moral and political responsibilities. The lack of compliance with HRC's views on behalf of the State is a serious concern.

(iv) General Comments

As the text of ICCPR is brief and concise and invites diverse interpretations [22], therefore, besides the above mentioned procedures HRC is also entitled to provide General Comments which are non-country specific and relate to various provisions of the ICCPR [23]. The overall object of General Comments is to promote an effective implementation of the Covenant by making available the experience of the Committee to the State Parties; to bring into the notice of the State Parties the insufficiencies disclosed by a heavy number of reports; to give suggestions for improving the reporting procedure; to make clear the requirements of the Convention; and to innervate the activities of State Parties and International Organizations to better protect and promote the human rights [24]. It needs to be pointed out that though General Comments are non-country specific it has considerably developed the jurisprudence on international civil and political rights including the right to religion.

(5) Other mechanisms for Implementation of Minorities' Right to Religion

Besides the ICCPR's implementation mechanism, there are other bodies acting under the auspices United for promoting and protecting the rights of minorities including their right to freedom of religion. It is pertinent to briefly discuss those bodies and their role and functions for the promotion and protection of minorities' rights.

(i) High Commissioner for Human Rights

High Commissioner for Human Rights, a post established in 1993 by UN General Assembly, is charged with the task, inter alia, of promoting the implementation of the rights contained in the Declaration of Rights of Persons belonging to Minorities [25]. For this end a three-pronged program has been established: to promote and implement the rights contained in the Declaration; to cooperate with other bodies and organs of UN; to engage in dialogues with the Governments and other parties concerned with minority issues. The High Commissioner discusses the problems and possible solutions to minorities' related issues and encourages implementation of the Declaration in his visits to different countries and dialogues with their governments. He or she also provides guidance to other UN bodies for the protection of minorities' rights [26]. For example, it called on government of Sudan "to repeal all legislation that discriminates on the grounds of gender or religion, to protect the religious identity of minority groups and to embark on a comprehensive reform of the justice system in compliance with international standards," after a Sudanese woman was sentenced to death for apostasy in May, 2014 because she married with a Christian man; her marriage with Christian man was construed by government authorities as "publically renouncing Islam" [27].

(ii) Working Group on Minorities

In 1995, a five-member group on Minorities of the Sub-Commission for the Prevention of Discrimination and Protection of Minorities was established, initially for three years of period. The Objects of the Working Group are: to Review the promotion and practical realization of the Declaration on Minorities; to examine possible solutions to problems concerning minorities, including the promotion of mutual understanding between and among the minorities and the Governments; to recommend further measures, as appropriate, for promoting and protecting the rights of persons belonging to minorities [28].

Working Group, being the forum for dialogue, provided a framework in which the governments, scholars and minorities assembled for discussing their problems and the probable solutions to them. It also acted as a mechanism to arrive at peaceful solutions to the problems of minorities [22].

(iii) Forum on Minority Issues and Independent Expert on Minority:

In accordance with the Commission on Human Rights Resolution 2005/79 Independent Expert on Minority was appointed for, inter se, promotion and implementation of the Declaration on Minorities. For this purpose the Independent Expert on Minority is required to consult the governments and take into consideration the international standards and national legislation regarding minorities [29]. His/her role was further extended in 2008 to: guide the work of the Forum on Minority Issues and submit annual reports about his/her work to the Human Rights Council, including its recommendations on how to better implement the rights of persons belonging to minorities [30]. The Forum on Minority Issues was set up in 2007 in order to replace the Working Group on Minorities [31]. Functions of the forum are: to promote dialogue and cooperation on minorities issues, to provide assistance to the Independent Expert on Minorities and to identify and analyze practices, challenges and initiatives for implementing the Declaration on Minorities.

Conclusion

Minority, especially religious, has been a difficult issue for international law to cope with because international law deals through the medium of State and minorities generally have no *locus standi*. International law has been very cautious to deal with minorities as minorities' rights might pose threats to the States' sovereignty and integrity. Article 27 of ICCPR has been the main UN provision on minorities but it needs to be reformed in the light of criticism on it. HRC could not protect the rights of minorities to the extent it was expected to; delayed reporting or non-reporting by the State parties hamper HRC from fulfilling its objective i.e. protection of minorities' rights. HRC has not heard any case of religious minority under Article 27 of ICCPR. However, a number of cases have been brought before it in respect of Articles 18 and 26. UN Declaration on Minorities has been a positive step but it is just a General Assembly Resolution and its impact on international law is not clear; it needs to be converted to a binding treaty. So is the case of Declaration on the Elimination of All Forms of Intolerance and Discrimination Based on Religion and Belief; it prohibits the intolerance and discrimination on the basis of religion in all its forms and manifestations but for better protection of minorities, it needs to be converted in a Convention.

As far as the implementation is concerned even the legally binding ICCPR, let alone to talk about the Declarations, becomes the victim of international politics, diplomatic relations and State interests as pointed Reporting procedure and Inter-State Complaint Procedure. Individual Complaint Mechanism is an encouraging but it should be made compulsory for all the State Parties and a judicial flavour should be added. In this regard European Court of Human Rights could be set as a model.

Similarly the authority and functions of High Commission for Human Rights, Independent Expert of Minority and the Forum on Minority should be increased. But before this is done, the Declaration on Minority and Declaration against Discrimination needs to be converted into Conventions.

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