

SOME CONTROVERSIES IN THE DRAFTING OF THE DECLARATION: A PERSONAL RECOLLECTION

Introduction

It is a pleasure and an honour to speak today in the anniversary year of the Declaration on the Rights of Persons belonging to National or Ethnic, Religious and Linguistic Minorities (the Declaration). The organisers of the Forum were promised not so much an academic paper as a personal reflection on the drafting of the text. The author of this paper was involved in the drafting process as a representative of Minority Rights Group in the 1991 sessions of the Human Rights Commission's open-ended working group on the Declaration – a brief but vivid experience. I will recall the background to the Declaration, comment on the drafting of the text, reflect on where the Declaration stands twenty years on, and illustrate how concepts in the Declaration have been utilised by CERD (Committee on the Elimination of Discrimination) under the Convention on the Elimination of Racial Discrimination (ICERD).

The history of minority rights reaches back to the beginnings of the system of international law. ¹While the League of Nations developed a regime for the protection of 'racial, religious or linguistic' minorities, the initial phases of the era of the UN Charter were not propitious for minority rights. The drafters of the new order drew negative conclusions from the experience of the League. The paradigm of universal human rights for all persons overshadowed the specific interests of minority groups. The early human rights regime was in large measure modernist and assimilationist, with little space allotted for the expression of diverse identities.

The vocation of the early post-1945 age was for self-determination, decolonization, and nation building. Powerful sentiments favoured the simplification of identities; indigenous peoples were subject to similar attempts to 'write them out of the script'. The post-war years were also marked by the development of the system of apartheid in South Africa that presented to the world the spectacle of a dominant white minority oppressing a majority population. The concept of 'prevention of discrimination' flourished, and led to instruments such as the Declaration and Convention on the Elimination of All Forms of Racial Discrimination. The more limited progress of minority rights at UN level was largely represented by Article 27 of the International Covenant on Civil and Political Rights (ICCPR) and the work of the UN Sub-Commission on Prevention of Discrimination and Protection of Minorities. ²

Towards the Declaration

It became clear as decades passed that inattention to the claims of minorities as distinct identities within the larger context of nations and States could not be sustained. The UN General Assembly itself had adopted, on the same day as the Universal Declaration of Human Rights, resolution 217C(III), which proclaimed that

¹ For an overview, see P. Thornberry, *International Law and the Rights of Minorities* (Oxford: Clarendon Press, 1991).

² At its first session in 1947, the term 'prevention of discrimination' was said to refer to 'the prevention of any action which denies to individuals or groups of people equality of treatment which they may wish'; 'protection of minorities' was understood to mean 'the protection of non-dominant groups which, 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' – E/CN.4/52, Section V.

the UN could not 'remain indifferent to the fate of minorities'.³ In 1977, Sub-Commission Special Rapporteur Capotorti produced his Study on the Rights of Persons belonging to Ethnic, Religious and Linguistic Minorities, and suggested that the Sub-Commission consider recommending to its superior organs 'the preparation of a draft declaration on the rights of members of minority groups, within the framework of the principles set forth in Article 27' of the ICCPR.⁴

The Commission on Human Rights decided in 1978 to establish an open-ended working group to advance the Declaration, an initial draft of which was presented by Yugoslavia.⁵ The draft added 'national' to the ethnic, religious and linguistic minorities of Article 27. Drafting progress was slow during the 1980s but moved rapidly in the early 1990s. A complete draft comprising a title, a preamble and nine articles was agreed in 1990.⁶ The second reading of the draft was completed in 1991 at intensive sessions in 1991 that made use of informal drafting groups.⁷ The text was approved by the Commission on Human Rights in March 1992 and transmitted to the General Assembly, which adopted the Declaration by consensus resolution 47/135 of 18 December 1992.

The draft Declaration presented in 1978 retains its interest. Key elements of the final Declaration - including rights to existence and identity, non-discrimination and equality, development of culture, education, language and traditions – were all present. Participation 'on an equitable basis' in cultural, social, economic and political life was included. Propaganda against minorities that threatened their right to 'equal expression and development of their own characteristics' was addressed. Areas of inter-State co-operation were identified, and strict respect for the sovereignty, territorial integrity, etc., of the countries in which minorities live was to be ensured. In terms of conceptual difference between the original draft and the final Declaration, it is notable that the description of the holders of rights is not as relentlessly individualised: in the earlier document, while reference is made to 'members of minorities', reference is also made to 'rights of minorities' and to the 'development of minorities as collectivities'.

Some Drafting controversies

The above observation on differences between the two texts serves to introduce some of the 'sticking points' in the 1991 discussions.

The title of the Declaration was subject to contestation, especially over the term 'national minority' - thought by some to be too 'European'. The preamble also generated extensive discussion, proposals, and drafting decisions. Regarding the reference to article 27 of the ICCPR, drafters were presented with a choice between a Declaration 'based on' or 'inspired by' Article 27. The latter was preferred: the Declaration is not therefore tied to the limitations of Article 27. The Declaration is less

³ In resolution 532 B (VI) (1952), the General Assembly expressed the view that 'the prevention of discrimination and the protection of minorities are two of the most important branches of the positive work undertaken by the United Nations'.

⁴ United Nations Publication, Sales No. E.91.XIV.2 (New York, United Nations, 1991), paragraph 617.

⁵ E/CN.4/L.1367/Rev.1. A revised and consolidated draft, E/CN.4/Sub.2/L.734, was prepared by the Chairman-Rapporteur of the Working Group and placed before the Commission in 1981.

⁶ E/CN.4/1990/41.

⁷ Report of the Working Group on the Rights of Persons belonging to National, Ethnic, Religious and Linguistic Minorities, E/CN.4/1991/53, 5 March 1991, and E/CN.4/1992/48, 16 December 1991.

tentatively expressed than Article 27: 'shall not be denied' (the rights) in Article 27 is replaced in the Declaration by 'have the right', and there is no appearance in the Declaration of Article 27's cautious 'in those States in which ... minorities exist'. The preamble is also notable for not restating the language in which many discussions of minorities had been couched: 'the problem of minorities'. The preamble does not 'problematise' minorities but asserts that the protection and promotion of the rights of persons belonging to minorities 'contribute to the political and social stability of States in which they live' - a sea-change in the characterisation of the minority issue.

The author recalls a lively discussion on the preambular paragraph that refers to the work of IGOs and NGOs 'in protecting minorities and in promoting and protecting the rights of persons belonging to minorities' – this aroused the concern that it suggested 'collective rights'.⁸ The paragraph was adopted, and clearly distinguishes 'protection of minorities' (presumably the object of the Declaration as a whole) from description of the holders of rights – 'persons belonging to minorities'.

The spectre of 'collective rights' - however these may have been understood by delegations - animated many of the informal sessions. In the event, the individualistic 'persons belonging to ... minorities' formula runs through the whole of the Declaration, appearing at some twenty-six points in the text. The terms 'protection of minorities' or 'protecting' minorities' appear only sporadically. Article 1 stands out as not repeating the 'persons belonging to' formula, but concentrating on protection of the existence and identity 'of minorities'.

There was little doubt that some of the wording of Article 27 would be retained in the Declaration. Elements of Article 27 appear in Articles 2 and 3 of the Declaration. Article 3, referring to the 'exercise or non-exercise' of minority rights, appears to have been stimulated by concerns about 'group determinism' as opposed to 'individual self-determination'. The concept of autonomy, with its 'collective' implications, does not appear in the final text.⁹

While definitions of 'minority' were proposed at various stages of drafting, there is no such definition in the Declaration. The four descriptors – national, ethnic, religious and linguistic - were enough for most of the delegations, and, taken together, were understood to ensure that the coverage by the Declaration was sufficiently broad.¹⁰ Whispers around the meeting room that a delegation was about to call for a definition alarmed delegates who feared that no Declaration would emerge if the meetings opted to embark upon a (high-minded, futile?) search for a definition. Following the adoption of the draft Declaration in December 1991, one delegation stated that, in its view, '[t]he major deficiency of the Declaration is that it fails to provide a definition of "minorities". This ... may lead to confusion or misinterpretation.'¹¹

The list of rights in the Declaration is brief, though spacious. The inclusion of rights of participation in general, and rights of participation in decision-making, was regarded by many as a great advance. For the general right in 2(2), participation in 'public life' was preferred to 'political life' as the more comprehensive concept.¹² The term

⁸ E/CN.4/1991/53, paragraph 44.

⁹ The following proposal emanating from the Minority Rights Group was not adopted: 'Minorities have the right to organize themselves for private and public purposes. Where appropriate, measures for self-management and autonomy in matters internal to minorities may be established' – E/CN.4/1992/48, paragraph 27.

¹⁰ E/CN.4/1991/53, paragraphs 9 and 10.

¹¹ E/CN.4/1992/48, paragraph 95.

¹² *Ibid.*, paragraph 30.

'associations' emerged in 4(4) in preference to 'organizations' and 'institutions', again as the most general referent.¹³ In paragraph 2(5) referring to inter- and intra-minority contacts, the clause on 'contacts across frontiers' in 2(5) appeared threatening to some delegations, which were, we may presume, mollified by the general reference in the paragraph to 'free and peaceful' contacts.

For Article 4, the construction of the text involved a mix of generous and conservative approaches to minority cultures, and caution regarding cultural practices. The discussion of practices 'in violation of national law and contrary to international standards' circulated around practices 'such as female circumcision, polygamy and ritual slaughters.'¹⁴ These discussions were, if I recall correctly, relatively brief. Apart from the FGM reference, gender issues including multiple discrimination against women members of minority groups – a topic of considerable interest to the Minority Forum - did not stimulate extensive comment. The sessions on Article 4 were mostly devoted to issues of culture, history and languages of minorities, largely in line with 'classical' minority protection, though discussion of the situation of religious minorities was muted and of secondary concern.

With regard to the later articles, those on international cooperation were relatively uncontroversial, though the individual/collective dichotomy continued to manifest itself.¹⁵ Article 8 was, however, controversial. The sense that minority rights should not be pushed too far, both in terms of respecting the rights of others (not members of minorities) and as not threatening the territorial integrity, etc., of States, characterised the position of a number of delegates. Arguments to the effect that minority rights are difficult to distinguish from privileges had their influence on the text of Article 8(2) and 8(3). On 8(4), one delegation suggested that the phrase 'political unity' be inserted after the phrase 'political independence' but this was rejected.¹⁶ It does not take much imagination to suggest that the fear of encouraging separatism lay behind some drafting proposals and statements. The projected mainstreaming of the Declaration in Article 9 did not engender a great deal of discussion and was particularly strongly endorsed by NGOs.

The text emerged at a critical juncture in international relations, not far removed from the time of the dissolution of the Soviet Union and Yugoslavia. In terms of human rights, parallel developments at the global level included the emergence of the CRC with its notable Article 30 on indigenous and minority children, and ILO Convention 169 on Indigenous and Tribal Peoples. European organisations also produced key texts though not - by 1992 - a binding convention on minority rights. In other words, minority rights had finally 'returned' to the upper reaches of the international agenda as an urgent concern.

Twenty years on

Twenty years on, some of the issues that sparked controversy in the drafting retain their salience; others are perhaps less pressing. The Declaration is not a 'European' instrument but one intended for global application. We do not have a canonical definition of 'minority' but this has not unduly inhibited the development of minority rights. The concept of self-definition, as opposed to definition by the State, is now better understood. The recognition that identities can be multiple, and that their recognition does not threaten the unity of States, is more broadly accepted. The

¹³ Ibid., paragraph 40.

¹⁴ Ibid., paragraph 21.

¹⁵ Ibid., paragraphs 74 and 75.

¹⁶ Ibid., paragraphs 61 and 64.

issue of collective rights continues to challenge the narrower paradigms of human rights, though the international instruments on indigenous peoples have moved the arguments forward. Leaving aside the question of rights that inhere in the collective or group as such, the enjoyment of human rights in most respects is hardly conceivable on a purely 'individual' basis. Human rights function in social contexts. The interpersonal, communicative nature of language rights is one obvious example: they are subject to collective exercise - and represent much more than the right to a 'private language'!

In these post-Declaration developments, we sense what has happened is that the classical concern of minority rights with culture, language and education, interfaces with the wider corpus of human rights. It is important that the Declaration refers to protecting the existence as well as the identity of minorities. Threats to the 'existence' of minorities come from many directions: from discrimination against members of minorities across the spectrum of mistreatment up to and including attempts to impoverish, eliminate, or 'ethnically' cleanse them.

Minorities in CERD perspective

CERD practice is revealing on the 'fate' of minority rights. Although the Committee had, in tandem with the development of the contemporary standards on minorities, engaged the issue prior to 1992, the Declaration has produced its effects. While it is not commonly cited in concluding observations, the language and concepts of the Declaration are among factors that condition the Committee's expressions of concern. Even if minorities are not as such referred to in ICERD, they are one of the significant categories, perhaps the major category, of victims of racial discrimination. The Committee constantly requests disaggregated data on minorities and is unimpressed by claims by States parties that they have no minorities under their jurisdiction or that there is no discrimination against them. States are urged, in light of information on their population, to 'recognise' the presence of minorities and indigenous peoples. Membership of a minority is, according to CERD, predicated on self-definition as a first principle. The concept of discrimination is deemed to require that the ethnic characteristics of a group are taken into account in assessing discrimination, and that equality does not always mean uniform or identical treatment. From the opposite angle, distinctions in national legislation between 'national' and 'ethnic' minorities may be interrogated to see if they are pushed so far as to amount to discrimination. Bearing in mind the claimed dissonance in the early UN period between 'prevention of discrimination' and 'protection of minorities', that distinction increasingly appears overstated. As a practical matter, the concepts of non-discrimination and protection of minorities are paired and interlocking contributors to any effective regime of minority protection.

Structural and other 'forms' of discrimination against minorities are identified and addressed in CERD practice. CERD General Recommendation 32 distinguishes special measures/affirmative action from the rights of minorities and indigenous peoples, while forcefully insisting that minorities and indigenous peoples are to benefit from such measures when their situations demand that supportive action be taken.

Hate speech against minorities is also examined by CERD on an all-too-regular basis, as well as the treatment of minorities under anti-terror legislation. Discrimination against women members of minority communities has engendered one general recommendation and countless individual observations as forms of multiple discrimination – or intersectional discrimination – continue to engage the Committee. Recommendations on minority education, languages and cultures

abound in the CERD archives, as do those on minority representation and participation, property, land and citizenship. Attacks on minority religious groups, on their places of worship, sacred sites, their property and personnel, are consistently addressed. The Committee stresses that respect for ethnic, religious and linguistic diversity contributes to the health and well being of societies.

Conclusion and prospects

In conclusion, we may note that, although the Declaration is an exiguous text, thinly populated with rights and obligations, it has continuing potential for expansive implementation and influence. The Declaration carries a positive message and continues to touch vital human concerns. While more extensively formulated minority rights instruments may be envisaged, the minimalist approach of the Declaration, perhaps paradoxically, facilitates its implementation across a wide range of nations and cultures. The Declaration can be responsive to new situations, including situations that were not in sharp focus at the time of drafting. While methodologies of protection are evolving, the international community requires instruments that define and shape what is to be done, who is to be protected and why, whose rights are to be affirmed and where the protective obligations lie. The Declaration is one such instrument.

This morning, we have noted the reaffirmation by the Secretary-General of international commitments to minorities, and the observations of the High Commissioner on the importance of translating commitments and obligations into positive, transformative social change. It is evident from their remarks that in almost any conceivable future scenario, the protection of the rights and interests of minorities will retain its prominence among the critical humanitarian, ethical and practical concerns and challenges of international law.

Twenty years on, we may celebrate the resilience and enduring relevance of the Declaration while also being aware that it is not the only or the last word in minority protection.

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27 November 2012