Minderheitenschutz im Völkerrecht und in der EU

Minority Rights under UN Auspices Reconsidered

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Abstract Deutsch

Der Schutz von Minderheiten war auf Weltebene rechtlich wenig gesichert, als der Internationale Pakt über bürgerliche und politische Rechte in den Jahren von 1948 bis 1966 erarbeitet wurde. Das Endergebnis, Art 27, beschränkte sich auf die Garantie einiger weniger kultureller Rechte. Bemühungen um die Erweiterung dieses engen Anwendungsbereichs führten schließlich zur Annahme einer entsprechenden Resolution durch die Generalversammlung im Jahre 1992 (Res 47/135). Diese Resolution konkretisierte nicht nur die in Art 27 statuierten Rechte, sondern fügte eine Verpflichtung zu aktivem Schutz hinzu und setzte sich auch für politische Rechte von Minderheiten ein. Ursprünglich waren Minderheitsrechte überwiegend als Instrumente zur Sicherung traditioneller gesellschaftlicher Strukturen verstanden worden, die sich nicht leicht mit dem Gleichheitsprinzip vereinbaren lassen, insbesondere in Bezug auf die Stellung der Frau in der Gesellschaft. Bis heute hat sich kein gemeinsames Verständnis des Begriffs der Minderheit herausgebildet. Die vom Menschenrechtsrat seit 2005 eingesetzten Sonderberichterstatte haben sich alle nacheinander für eine dynamische Modernisierung des Begriffs der Minderheit eingesetzt, als Hauptmerkmal Armut und gesellschaftliche Vernachlässigung wählend und damit die Konturen des Begriffs weitgehend verwischend. Durch eine unglückliche Allgemeine Bemerkung zu Art 27 über die Einbeziehung von Menschen mit kurzfristigem Aufenthalt hat der UN-Menschenrechtsausschuss ferner zur Begriffsauflösung beigetragen.

Abstract English

Protection of minorities at universal level found itself in a precarious position when the International Covenant on Civil and Political Rights was drafted from 1948 to 1966. The final outcome, Art 27, confined itself to granting a limited number of cultural freedoms. Efforts to expand this narrow field of application led eventually to the adoption in 1992 by the General Assembly of a Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities (Resolution 47/135). This Resolution not only particularized the rights enshrined in Art 27, but extended their scope by adding a promotional dimension and providing moreover for specific political rights. Originally, in consonance with their European precedents, minority rights were viewed as related to the past, requiring conciliation with the principle of equality, in particular in respect of the position of women in society. To date no common understanding of the concept of minority has been found. The Special Rapporteurs appointed by the Human Rights Council on the topic since 2005 have all attempted to expand the concept, choosing as their main criterion poverty and societal neglect, thus greatly blurring the contours of minority. The Human Rights Committee has intensified the controversy by an unfortunate General Comment.

1. Introduction

When in 1966 a guarantee of minority rights appeared in Art 27 of the International Covenant on Civil and Political Rights (ICCPR) (henceforth in simplified

form: Art 27) this determination of the relevant UN bodies, eventually approved by the General Assembly,[1] was unanimously acclaimed as a groundbreaking step for the re-enforcement of human rights at world-wide level, notwithstanding many reservations because of the relatively poor substance of the provision.[2] Indeed, the sophisticated system of treaties for the protection of minorities, established after World War I within a limited area of countries in Central and Eastern Europe,[3] had broken down after World War II. Minority protection seemed to have come to an end as a recognized device in the arsenal of tools for human rights protection.[4] A renewal of that system was deemed to have become a rather remote prospect. Only at regional level could some elements of minority protection be re-established through bilateral treaties, in particular in the relationship between Italy and Austria.[5] Minorities were not mentioned in the 1948 Universal Declaration of Human Rights (UDHR), and the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD), adopted by the UN General Assembly one year before the ICCPR, confined itself to setting forth individual rights without embedding them in a collective structure, as that was done in Art 27. The rights enunciated in this provision are characterized as rights that may be exercised, by members of a minority, 'in community with the other members of their group'. This combination of an individual with a collective component may be seen either as a substantive extension or, by contrast, a restriction of the relevant rights. The Human Rights Committee (HRCee) has explicitly observed that some of the rights under Art 27 'can only be enjoyed in community with other(s)' persons.[6] Under the ICERD, States parties undertake the obligation to prohibit and eliminate racial discrimination in all its forms (Arts 2–5), but communities characterized by race, colour or descent are not, as such, placed under the protection of that instrument. Thus, an innovative legal construction had entered the legal stage which, understandably, aroused a vivid interest among lawyers. Notwithstanding the emphasis on the collective form of exercise of the stipulated rights, there could be no doubt,

1 Res 2200 A (XXI), 16 December 1966.

2 See the voices collected by Christian Tomuschat, 'Protection of Minorities under Article 27 of the International Covenant on Civil and Political Rights' in Rudolf Bernhardt and others (eds), *Völkerrecht als Rechtsordnung, Internationale Gerichtsbarkeit, Menschenrechte. Festschrift für Hermann Mosler* (Springer 1983) 949, 950 note 5. For a sober report on the drafting history see Louis B. Sohn, 'The Rights of Minorities' in Louis Henkin (ed), *The International Bill of Rights. The Covenant on Civil and Political Rights* (Columbia University Press 1981) 270, 273–74.

3 See Francesco Capotorti, *Study on the Rights of Persons belonging to Ethnic, Religious and Linguistic Minorities* (United Nations 1991) 17–19, paras 92–101; Patrick Thornberry, *International Law and the Rights of Minorities* (Clarendon 1991) 38–52.

4 See, eg, Nigel S Rodley, 'Conceptual Problems in the Protection of Minorities: International Legal Developments', (1995) 17 Human Rights Quarterly 48.

5 Gruber – De Gasperi Agreement, 5 September 1946, 49 UNTS 84. Comments by Peter Hilpold, 'South Tyrol', IX MPEPIL (2012) 329.

6 HRCee, *Klemetti Käkkäläjärvi et al v Finland*, Case 2950/2017, views 2 November 2018.

on the basis of the text, that minorities as such were not acknowledged as true holders of rights.[7]

At the regional level Europe went ahead within the framework of the CSCE (later promoted by name to OSCE)[8] and the political commitments of that system were some years later followed inside the Western European Group by the European Charter on Regional and Minority Languages (ECRML)[9] and the Framework Convention for the Protection of National Minorities (FCNM).[10] Complementary developments took place in favour of indigenous communities where the General Assembly adopted in 2007 a Declaration that went as far as proclaiming an (internal) right of self-determination for such peoples.[11] This demand frightened a couple of countries partly inhabited by 'first nations' so that the Declaration suffered from a significant number of negative votes[12] in addition to 11 abstentions. Accordingly, no conventional instrument for the protection of such peoples is currently in sight.

2. The Relevant Practice

Much has already been written about the UN minority regime under and related to Art 27. Many of its normative aspects have been clarified, and after more than four decades since its entry into force one may be tempted to conclude that it has stood the test of time.[13] Consequently, the question cannot be avoided whether it may be deemed useful to engage in any further inquiries. Several considerations speak in favour of such a fresh look at the substance of Art 27 and its implementation. First of all, the world has changed dramatically over that period. No one can be unaware of the fact that the Socialist Empire has collapsed, bringing with it many new geographic configurations in central and Eastern Europe with all the attendant consequences for the populations concerned: new minorities have emerged.

7 But see the long discussion about the recognition of genuine group rights for Minority by Rodley (n 4) 61–65 and Philip V. Ramaga, (1973) 15 Human Rights Quarterly 575, 579–588. Rejection of personality under international law by Capotorti (n 3) and Athanasios Yupsanis, (2013) 26 Hague Yearbook of International Law 359, 363.

8 Helsinki Final Act 1975, Chapter IV, 3: Co-operation and Exchanges in the Field of Culture: 'The participating States, recognizing the contribution that national minorities or regional cultures can make to co-operation among them in various fields of education, intend, when such minorities or cultures exist within their territory, to facilitate this contribution, taking into account the legitimate interests of their members.'

9 ETS No 148, 5 November 1992.

10 ETS No 157, 1 February 1995.

11 Declaration on the Rights of Indigenous Peoples (UNDRIP), UNGA Res 61/295, 13 September 2007.

12 Australia, Canada, New Zealand, United States.

13 For a comprehensive study see Kerstin Henrard, 'Minorities, International Protection' MPIL VIII (2012) 253.

2.1. The Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities

On the specific legal plane, one has to note above all that after a few years the relevant UN bodies decided to deviate from the original pathway by expanding on the legal substance embodied in the text of Art 27. Impelled above all by the former Sub-Commission on Prevention of Discrimination and Prevention of Minorities,[14] in 1992 the General Assembly made an effort to particularize the meaning and scope of Art 27 and at the same time to proceed to a *mise à jour* by adopting 'without vote', ie by consensus, a 'Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities' (hereinafter in simplified form the 'Declaration').[15]

This Declaration did not confine itself to concretizing Art 27 but deliberately went beyond the scope of this key provision of the universal minority regime. In its Preamble it stated explicitly that the drafting process was 'inspired' by Art 27, thus indicating that precise congruity was not intended. The Declaration maintained the basic premise of the minority regime by attributing the rights it sets out to 'persons belonging to minorities', not to minorities as collective entities. But otherwise it introduced fundamental changes. A first modification appears already in the title where, in departure from the text of Art 27, an additional substantive element was added. The Declaration covers not only ethnic, religious and linguistic minorities, but additionally, and even in the first place, 'national' minorities. The term 'national minority' was habitually used within the European systems of minority protection between the two World Wars and was also embraced by the FCNM.[16] Even the learned commentary on the Declaration adopted, as a draft written by Special Rapporteur Asbjorn Eide, by the Working Group on Minorities of the Sub-Commission on the Promotion and Protection of Human Rights before the abolition of the Commission on Human Rights and its replacement of the Human Rights Council, is unable to provide a satisfactory explanation for this change.[17] At first glance, it may seem drastic, but the commentary points out that essentially all minority groups appear to be covered by the three criteria ethnic, religious and linguistic so that the extension of the text would boil down to little else than a ceremonial gesture of recognition of a traditional past.[18] We shall revert to this issue on the subsequent pages.

Additionally, the Declaration makes clear from the very outset (Art 1) that States do not only have the obligation to tolerate the specified minorities and treat

14 See, eg, Resolution 1991/22, 28 August 1991.

15 GA Resolution 47/135, 18 December 1992.

16 N 10. To date (17 November 2022) it has received 39 ratifications while the earlier parallel instrument, the European Charter for Regional and Minority Languages (n 9) has received only 25 ratifications.

17 E/CN.4/Sub.2/AC.5/2005/2, 4 April 2005.

18 Ibid para 6. Surprisingly, the Commentary on the FCNM, ed by Rainer Hofmann and Others (Brill/Nijhoff 2018) refrains from explaining the reasons motivating the drafters to add the qualification 'national' in the title of the FCNM.

them according to the standards applicable to everyone else in the national community concerned, but that they are furthermore duty-bound to protect their existence and identity and to 'encourage conditions for the promotion of that identity'.[19] Thus the thrust of Art 27 was diverted from a classic freedom ('shall not be denied') to be secured against governmental interference to a double-faced guarantee that at the same time imposes on States a burden of assistance, which corresponds to the modern tendency to view in almost every 'negative' fundamental right at the same time some positive entitlements requiring State action.[20] Lastly, the Declaration purports to particularize the substance of the rights guaranteed by Art 27, but does not shy away from significantly expanding its scope by providing in Art 2(3):

> 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 …

The text of Art 27 contains no hint that minorities should enjoy a special political status within the governmental machinery of their State of residence.

The Declaration has decisively impacted the further interpretation and application of Art 27. Indeed, the development of the minority regime has not stopped with the adoption of the Declaration.[21] When in 2005 the Commission on Human Rights decided to activate the international regime of minorities by establishing the post of Independent Expert on Minority Issues, the office holder was explicitly instructed to pursue their work primarily with a view to implementing the rights 'as set out in the Declaration'.[22]

2.2. The Work of the HRCee

Two years later a General Comment (GC) of the HRCee ventured to specify the main features of Art 27 visibly under the influence of the Declaration.[23] Otherwise, the HRCee has not had many opportunities to identify the substance of Art 27. Under the procedure of individual communications of the Optional Protocol to the ICCPR the number of cases has remained fairly limited with a focus on few countries only,[24] and within the framework of the examination of State reports the ob-

19 According to Rodley (n 4) 51, the component of active support was already inherent in Art 27 despite its negative formulation.

20 See, in particular, HRCee, GC No 31[80] (2004), paras 5, 8.

21 On the slow but steady growth of that regime see Peter Hilpold, 'UN Standard Setting in the Field of Minority Rights', 2007 (14) International Journal on Minority and Group Rights 181 ss.

22 Commission on Human Rights, Res 2005/79, 21 April 2005.

23 General Comment No 23 (50), CCPR/C/21/Rev.1/Add.5, 26 April 1994. However, the GC abstains from mentioning the Declaration.

24 *Sandra Lovelace v Canada*, case 24/1977, views 30 July 1980; *Kitok v Sweden*, case 197/1985, views 27 July 1988; *Lubikon Lake Band v Canada*, case 167/1984, views 26 March 1990; *Ballantyne and others v Canada*, cases 359/1989 and 385/1989, views 31 March 1993; *Länsman and Others v Finland*, case 671/1995, views 30 October

servations on the contours of a specific provision of the CCPR remain generally somewhat vague and undetermined.[25] Even less useful are the views expressed under the UPR procedure since the responsible institution, the HRC, is not called upon to make findings on the legal position: the monitoring is left to States alone while the State under review has the last word.

The monitoring mechanism under Art 40 ICCPR should by no means be underrated yet it is obviously designed to supervise the implementation of the ICCPR as a whole, Art 27 being in that context only a small element of all those requiring attention among all the other fundamental principles. By contrast, the monitoring mechanism of the FCNM, where the Advisory Committee (ACFC) is empowered to make comments and recommendations, is focused entirely on the rights of the protected minorities. Accordingly, a much greater density of pronouncements on the substantive contents of the treaty has arisen than with respect to the ICCPR. Under the hands of the ACFC, the FCNM has grown in interpretative extension and specificity, many times being consulted as guidance for the understanding of Art 27.

2.3. The Independent Expert/Special Rapporteurs

Minority rights may be handled in many different procedures, in particular since the opening of the legal framework of the ICCPR through the Declaration. In fact, protection of minorities has become almost a leitmotiv for the entire human rights movement. The different institutions for the protection of human rights have launched various initiatives in order to facilitate a better understanding of the philosophy underlying minority protection. The creation of the post of Independent Expert on Minority Issues (later named Special Rapporteur), to which first the US citizen Gay McDougall was appointed (on 29 July 2005),[26] was one of those initiatives. Two years later, the HRC as the successor of the Commission on Human Rights created the Forum on Minority Issues,[27] a body that meets annually for two days under the guidance of the Independent Expert/Special Rapporteur and which shall reciprocally provide thematic contributions and expertise to the work of the Special Rapporteur.[28] These initiatives are generally driven by a strong impetus to

1996; *Diergaardt and Others v Namibia*, case 760/1997, views 25 July 2000; *Mahuika v New Zealand*, case 547/1993, views 27 October 2000; *Rakhim Mavlonov and Shansiy Sa'di v Uzbekistan*, case 1334/2004, views 19 March 2009; *Poma Poma v Peru*, case 1457/2006, views 27 March 2009; *Klemetti Käkkäläjärvi* (n 6).Critical review of this jurisprudence by Hilpold (n 21) 192–198.

25 See, eg, the concluding observations on the treatment of the Russian minority in Estonia, CCPR/C/EST/CO/4, 18 April 2019, para 38: 'The State party should strengthen legislative and policy measures aimed at addressing effectively the impact of the language policies and practices that may contribute indirectly to unequal treatment of the Russian-speaking minority.'

26 Commission on Human Rights, Res 2005/79, 21 April 2005.

27 HRC Res 6/15, 28 September 2007.

28 The 13th session of the Forum on Minority Issues took place in November 2020, https://www.ohchr.org/EN/HRBodies/HRC/Minority/Pages/Session13.aspx .

bring about improvements for groups that live endangered under precarious conditions. A political tendency prevails. Rarely is a deliberate effort made to draw clear and unmistakable lines. Art 27, because of its fairly general formulations, easily lends itself to wide and expansive interpretations.[29] Social scientists and even lawyers are occasionally so completely focused on their political objectives that they are led to ignore the provisions of the ICCPR as the foundation stone of the minorities regime at the international level.[30]

2.4. Lack of a Specific Conventional Instrument

To date no all-encompassing conventional instrument for the protection of minorities exists. In his latest report, the Special Rapporteur on the issue of minority rights, Fernando de Varennes, suggests that a working group might be established by the HRC with the mandate to examine the suitability of drafting a specialized convention for that purpose.[31] It appears at first glance that the chances for such a development are fairly modest inasmuch as many of the needs felt by minorities can be taken care of by the mechanisms of the ICERD. Inevitably, the question would arise how to distribute the relevant protective functions between the existing framework of the ICERD and the possible mechanisms of a new treaty.

3. The Philosophy of Minority Protection

3.1. Minorities as a Natural Element of Every State?

The conceptual distinction between a majority group of the population and one or several minorities does not constitute a natural feature of every nation. First of all, one can find many nations where even the suggestion that the population is divided into different groups with specific characteristics might be considered an absurdity. Iceland is certainly one of the most homogeneous countries in the world where from time to time some aliens will reside but where there has never been a resident ethnic minority. Moreover, more or less all Icelanders are members of the same church. Therefore, Art 27 is simply inapplicable. In the case of France, the situation may be less clear-cut from a sociological viewpoint, but the French Gov-

29 Special Rapporteur Rita Izsák, 7th Report, A/HRC/34/53, 28 February 2017, para 93, encouraged States 'to be as inclusive as possible when designing protection measures for all disadvantaged minorities'.

30 See, eg, Francesco Palermo, 'Deconstructing Myths', in Roberta Medda-Windischer and Others (eds), *Extending Protection to Migrant Populations in Europe. Old and New Minorities* (Routledge 2019) 16, 23, the Framework Convention for the Protection of National Minorities as the 'as the sole legally binding international document' in the field of minorities. Same view erroneously expressed by Rainer Hofmann and Others, 'Introduction', in Rainer Hofmann and Others (eds), *The Framework Convention for the Protection of National Minorities* (Brill/Nijhoff 2018) 3, 10.

31 Special Rapporteur Fernand de Varennes, Report, A/HRC/43/47, 9 January 2020, para 84.

ernment ratified the ICCPR subject to a reservation regarding Art 27, which it has never withdrawn.[32]

In the case of federal States all component States meet one another on the basis of equality. Numerical superiority or inferiority does not matter. Thus, in Switzerland the Italian-speaking inhabitants of Ticino, although they constitute only 4% of the entire Swiss population, do not constitute a 'minority'. They need no specific legal device lifting them out of a situation of structural disadvantage; their rights are fully guaranteed by the national constitution, which recognizes only one Swiss nation, established in different cantons.[33] In Africa, Ethiopia exists also as a federal State where until recently the belief in the common destiny of the nation seemed to have been the dominant concept so that the legal regime was a living reality also de facto.[34] On the European continent, the Spanish constitutional system of autonomous communities likewise refrains from classifying the members of those communities as members of minorities, even where they have linguistic specificities like the Basques. Thus, the Spanish Government does not recognize Basques, Catalans[35] and Galicians as protected under the European Framework Convention for the Protection of National Minorities.[36]

Many times the concept of national unity prevails despite the absence of such federal or para-federal structures. An ideal situation is present where visibly different ethnic and linguistic groups live together in one nation but where, without any regard for differences of size, all those groups share the view that they form one nation that should not, by introducing alien parameters, artificially be split up into different components. According to Special Rapporteur Fernando de Varennes this is the case, eg, in Botswana.[37] It need not be mentioned specifically that such a vision requires daily support from all members of society.

3.2. Justification of a Minority Regime

Art 27 does not address just any group. Only three minorities are explicitly mentioned, namely ethnic, religious and linguistic minorities, groups that are distinct from the other members of society. Proceeding from the premise of equality and

32 https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-4&chapter=4&clang=_en, reservation No. 8. The reservation is meant to safeguard national unity, see Jean Dhommeaux, 'La France et le droit international des droits de l'homme' in Gérard Cahin and Others (eds), *La France et le droit international* (Pedone 2007) 199, 211.

33 But the Swiss Constitution recognizes Romanche and Italian as minority languages that deserve protection, Art 70(5).

34 Special Rapporteur Gay McDougall, Report, A/HRC/4/9/Add.3, 28 February 2007, paras 5–9.

35 It is impossible within the framework of this essay to delve into the protracted relationship between the Spanish State and Catalonia.

36 https://www.elnacional.cat/en/politics/spain-restrictive-definition-national-minorities-council-europe_560457_102.html.

37 Special Rapporteur Fernando de Varennes, Report, A/HRC/40/64/Add.2, 9 June 2019, para 20.

non-discrimination, any extraordinary status requires explanation and justification.

It is an insight supported by empirical experience, not requiring any special expertise, that human beings of a specific ethnicity that does not essentially accord with the ethnic features of the majority of the population may be exposed to all kinds of disadvantages inflicted upon them by the State machinery of their place of residence or by other members of society. Since this is a fate that can occur to everyone who leaves his or her place of origin the question arises why members of ethnic and linguistic minorities should be endowed with rights that are specially mentioned although they should be enjoyable automatically as a matter of fact. Do States have a special interest in seeing groups living on their soil that have a specific ethnicity maintain this sociological status forever, or at least for a long time until they are absorbed by their societal environment? Normally, States would prefer the outsiders to mix with the life of their place of residence. Such amalgamation makes governing easier. Populations with a high degree of homogeneity do not risk falling apart into sectarian fragments.

On the other hand, ample evidence is available related to specific situations that underline the need for extraordinary support and protection. European history in connection with the two World Wars for instance is full of examples where established communities were placed, as a consequence of the outcome of armed conflict, under the jurisdiction of another State, a State belonging to a victorious alliance or a new State enjoying the support of the victors. Following the break-up of the Soviet Union, similarly many people who had been ordinary citizens of that Empire then found themselves unexpectedly within a State whose preponderant societal environment is determined by a non-Russian culture.[38] It would be extremely unfair under such circumstances not only to press the transferred community into the straightjacket of another nationality but also to deprive them of their usual way of life. Such estrangement could easily delegitimize the decisions on territorial change that were taken beforehand, mostly without the consent of the individuals concerned. Therefore, it seemed to be and still may be a wise decision to guarantee to the people flung into another national universe the continuation of their social environment with its characteristic cultural elements. Maintaining through Art 27 the societal roots appears as a gesture derived from a policy deeply permeated by humane thinking.

In some States, minority protection has become a necessity only in recent decades where a leading nation has become aware of its increased power through the development of modern technologies and its economic consequences. During the 19th century and still largely in the 20th century, ethnic groups distinct from the characteristics of the 'lead' nation could live fairly undisturbed in natural sur-

38 A similar fate occurred to many inhabitants of the former Yugoslavia; see, eg, Asbjorn Eide, 'Ensuring Social and Economic Rights of National Minorities through the Work of the Advisory Committee on the Framework Convention', in Tove H. Malloy and Ugo Caruso (eds), *Minorities, Their Rights, and the Monitoring of the European Framework Convention for the Protection of National Minorities. Essays in Honour of Rainer Hofmann* (Martinus Nijhoff 2013) 43, 45.

roundings according to their own habits and normative concepts. The administrative State of our contemporary epoch does not easily accept such deviations from the ideal of a bureaucratic world placed under unifying centralized rules. Thus, for China the way that Tibetans and the Muslim communities of Uigur ethnicity lead their lives in accordance with their faith has become an anomaly that contrasts with the Government's concept of a powerful unitary State.

3.3. Feasibility of a Truly Universal Regime?

An instrument setting forth human rights to the benefit of every human being, without regard for their race, colour, sex or other structural characteristics, like the two International Covenants, faces undoubtedly a tremendous task since it intends to secure its benefits truly to everyone without exception. Can a New York banker and an inhabitant of Chad ever be in the same position, albeit only in a formal sense? A never-ending dispute has continually accompanied the notion of universal human rights.[39] Since the 1993 Vienna World Conference on Human Rights this debate has come to a close as a matter of principle.[40] Yet it is even more challenging to confer equal benefits to individuals who are addressed as members of specific groups which, over their passage through history, have developed unique features in close connection with their natural surroundings. Accordingly, many times a one-size-fits-all approach does not appear to yield appropriate answers. To frame rules for a country that has one or two minorities on its territory – like Germany with the Sorbs in the Southeast and the Danes at the northern border with Denmark – may appear to be fairly easy. When it comes to larger States with huge numbers of ethnic and linguistic groups general principles will however normally be suitable only as a point of departure. Under the UPR procedure, the Brazilian national report has indicated that the country counts 365 ethnic groups speaking 274 languages.[41] Special Rapporteur Rita Izsák refers, in her report on Nigeria about a visit to the country, to more than 350 ethnic groups with even more languages.[42] Similarly impressive figures are found with regard to Russia. According to the national report under the UPR procedure, the country comprises no less than 190 peoples and ethnic groups.[43] Just the quantity of these groups will not, to the extent that the duty to respect is concerned, place the Russian State before a burden that it cannot shoulder. However, more far-reaching obligations to protect and promote the identity of those groups and their cultural wealth will certainly bring even the Russian Federation close to the limits of its capacity. In any event, it can easily be seen that the rich landscape of minorities all over the

39 Advocating for the concept of universal human rights Christian Tomuschat, *Human Rights. Between Idealism and Realism* (3rd ed OUP 2014) 47–72.

40 Vienna Declaration and Programme of Action, A/CONF.157/23, 12 July 1993, para 1: 'The universal nature of these rights and freedoms is beyond question.'

41 Brazil, (3rd ed. OUP 2014) 47–72.

41 Brazil, National report, A/HRC/WG.6/27/BRA/1, 27 February 2017, para 58.

42 A/HRC/28/64/Add.2, 5 January 2015, para 2.

43 A/HRC/WG.6/30/RUS/I, 1 March 2018, para 256.

globe will require many differentiated strategies in order to ensure effective implementation. Thus, from the very outset it seems to be illusory to elaborate a body of detailed rules that would be suited to accommodate all the issues and tensions that may arise within a nation in the relationship between a majority and its minorities.

3.4. A Conceptual Contradiction: Special Rights for a Privileged Class of People?

Notwithstanding the preceding observations, the question remains whether lastly it amounts to a contradiction to grant special rights to a particular group of people.[44] Where all persons are treated alike, any food for complaints seems to evaporate. Indeed, where State authorities proceed along this line the ground is largely cleared. One of the main reasons for dissatisfaction among people is everywhere a system that uses its power discriminately, granting favours to friends and members of the official institutions and denying benefits to people considered as political opponents or otherwise as enemies – or simply ignoring the plight of poor people. In fact, it is trivial to state that the programmatic principles of a rules-based constitutional system do not necessarily shape the realities on the ground. In many countries power structures have grown over decades and even centuries, giving rise to powerful elites that are not willing to renounce their undeserved privileges. Generally, minorities suffer where a society is dominated by structural hierarchies.

3.5. Equality and Non-Discrimination vs. Tradition

Yet one also has to acknowledge the reverse side of the concept. To establish equality and non-discrimination can have a devastating effect. Equality and non-discrimination may easily conflict with age-old traditions and may then lead to the extinction of specific cultural identities. In Africa, in particular, fears have been voiced to the effect that many indigenous habits and usages may be swept away because the wisdom of traditional concepts is not understood well any longer by the younger generation that wishes to rationalize societal life to its extremes by making use of the sharp weapon of parliamentary statutes voted by majorities. Obviously the tension between modernism and tradition constitutes a conundrum that cannot easily be overcome and resolved. Respect for traditional patterns of culture lies at the heart of Art 27. There is no need to point out that new is not necessarily better. On the other hand, it cannot be denied that Art 27 also forms part of a normative bloc of modern rationality and humanism that deeply permeates it. The crucial centrality of human rights for societal development has been recognized by the international community first through the adoption of the UDHR and later through its almost unanimous support for the two International Covenants and the ICERD. Originally, in the first years after the foundation of the United Nations, critical voices could contend with a slight degree of plausibility that the

44 See discussion by Rodney (n 4) 49.

doctrine of human rights was primarily a Western concept, largely neglecting the concerns of developing countries.[45] Now that all States have officially embraced the concept of human rights as the guiding orientation mark for public policy such kind of distancing has to a great extent largely lost its moral and intellectual legitimacy, although it must be admitted that 'negative' freedom must be accompanied by efforts to bridge – at least to some extent – the gap between rich and poor people not only domestically, but also among nations.[46] Within this new system of fundamental values, no pattern of ancient traditions can escape scrutiny in light of the yardstick of our time as just described. This means in concrete terms that the traditions protected by Art 27 must all be assessed as to their conformity with the standards that enjoy universal recognition as parameters for acceptable social conduct. This revamping of age-old structures will require a lengthy process since it should not be imposed on the population from above but necessitates the proactive involvement of the people concerned. Family law and inheritance law are among the primary areas that need sober evaluation in particular in respect of equality among men and women.[47]

Numerous practices have not only be condemned by institutions at world level but also within regional frameworks. One of the outstanding breaches of the moral standards embraced by the international community is the age-old habit of female genital mutilation (FGM), imposed upon young girls and women at an age when they are still unable to protect themselves their physical integrity.[48] Similarly shameful are practices of forced early marriage when young girls are still at child's age.[49]. It is comfortable to note that in Africa itself, where FGM is largely practiced, many institutions have resolutely pronounced themselves against this kind of abusive male dominance,[50] followed by the domestic legislation of many countries.[51] The main problem consists of finding acceptance for the idea of de facto enforcing the concept of gender equality, a process in which many times

45 But see the scathing criticism of human rights as an essentially Western ideology by Makau wa Mutua, 'Savages, victims, and saviors: the metaphor of human rights', Harvard International Law Journal 2001 (42) 201, 204–206, 221.

46 One-sided criticism by Samuel Moyn, *Not enough – human rights in an unequal world*, Harvard University Press 2018.

47 For an example of glaring unfairness in inheritance law see CEDAW Committee, *E.S. and S.C. v. Tanzania*, Communication 48/2013, views 13 April 2015, CEDAW/C/60/D/48/2013.

48 See HRC Resolution 44/16, 17 July 2020.

49 See HRC Resolution 41/8, 11 July 2019.

50 See most recently High Court of Kenya, *Kamau* case, 17 March 2021, https://www.kelinkenya.org/wp-content/uploads/2021/03/Ruling-on-case-challenging-the-constitutional-validity-of-the-prohibition-of-Female-Genital-Mutilation-AntThe-Anti-FGM-Act.pdf.

51 The African Court on Human and Peoples' Rights has now declared this legislation to conflict with the principle of equality under the Maputo Protocol, *APDF & IHRDA v Mali*, judgment, 11 May 2018, https://www.ejiltalk.org/african-court-on-human-and-peoples-rights-delivers-landmark-ruling-on-womens-rights-and-the-rights-of-the-child-in-mali/, paras 114–15.

(elderly) women themselves advocate for the maintenance of a system that has brought undescribable suffering upon themselves. Art 27 does not protect such aberrations in societies that close their eyes and brush aside the ugly consequences entailed by FGM.[52]

4. The Concept of Minority

After the bulk of preliminary observations set out above, it is time now to advance to the core of the present reflections. From the very outset, uncertainties surrounded the concept of 'minority'. These uncertainties still persist today.

4.1. Compact Settlement Structure v. Dispersed Minorities

In the document issued by the Secretary-General reproducing the essential features of the drafting process of the ICCPR ('Annotations') just one sentence is devoted to the meaning of 'minority'. This commentary states that agreement had been reached to the effect that it would cover only 'separate or distinct groups, well-defined and long-established on the territory of a State'.[53] This reading was derived from the opening clause which establishes the requirement that Art 27 should apply only to 'States in which ethnic, religious or linguistic minorities exist'. In other words, the guarantee was deemed to be oriented towards the past, designed to protect societal features found as a given demographic structure. Of course it is not self-evident that a treaty intended to provide assistance and support to a specific part of the population of a country should be understood as essentially static, not being able to evolve in accordance with the natural rise and decline of the size of the population within their given societal context.

From the very outset it seemed indeed highly questionable whether the text fragment reported in the 'Annotations' could justify, without any regard for the relevant factual realities, such a restrictive interpretation of Art 27. A minority that lives dispersed in the country concerned may also be 'long-established' because its ancestors may already have lived there in the same way, not tied to any specific place, but having created intimate ties to the country concerned in a less static way, for instance by travelling from town to town in order to sustain their livelihood. The Roma community, until a few years ago commonly called gypsies, comes within that special category. Almost never have they completely mixed with the resident population. But they have always been present in most of Western European and Central European countries with their specific way of life – and no one has ever doubted that they embody the ideal type of a minority. They are the offspring of a particular ethnicity, and linguistically they also stand apart be-

52 Amazingly, Makau Mutua (n 45) 225–27, shows a lot of sympathy for FGM.

53 Annotations on the text of the draft International Covenants on Human Rights, UN doc. A/2929, 1955, 63, para 184.

cause of their idiom which they have never abandoned during the many centuries spent in countries that have rarely embraced them without any reluctance.

A purposive reading of Art 27 leads the observer hence to the conclusion that the understanding manifested during the drafting process cannot be determinative. According to Art 32 of the Vienna Convention on the Law of Treaties the historical background of the drafting process can only serve to dispel any doubts that may remain after resort to the classical methods of interpretation has not yielded sufficiently clear results. Neither the Declaration of 1992 nor the HRCee's GC of 1994 have followed the direction indicated by the *travaux préparatoires*. Here it appears obvious that the principle of protection of minorities, if it is to have any real meaning, must acknowledge the Roma community as a minority, maybe depending on specific local particularities. The Special Rapporteurs of the HRC Gay McDougall[54] and Rita Izsák have, by common accord, but separately, classified Roma as a minority in the sense contemplated by Art 27, not even feeling the need to provide any specific justification for that inference. Special Rapporteur Izsák has even devoted one of her annual reports entirely to the Roma issue, describing the lamentable situation of that minority in precise detail. Her report was entitled 'Comprehensive study of the Human Rights situation of Roma world-wide, with a particular focus on the phenomenon of anti-Gypsysm'.[55] Incentivized was this particular effort by a resolution of the HRC[56] that had invited the Special Rapporteur specifically to engage in such a deep-going study of the conditions of existence of that minority. Through that resolution and the ensuing report of the Special Rapporteur it was definitely confirmed, building upon a pre-existing broad political consensus not only in Europe, but world-wide,[57] that Roma come within the protective purview of Art 27.[58]

An additional element that should not be put aside when considering this issue is the recollection of the merciless persecution and eradication of the Roma community during the rule of the evil Nazi Empire in Europe. A true genocide was planned and committed. Almost 300,000 Roma were carried away to gas chambers or were murdered by mobile firing squads,[59] and it is a fortunate circumstance that nonetheless many tens of thousands survived so that nowadays numerous Roma communities still live above all in Central Europe, not without many difficulties which come regularly to light in proceedings before the Human Rights Committee, the CERDCee and during the interrogation period under the UPR.[60]

54 Report, A/HRC/4/9, 2 February 2007, para 48.
55 A/HRC/29/24, 11 May 2015.
56 Resolution 26/4, 26 June 2014.
57 Commission on Human Rights, Res 1992/65, 4 March 1992.
58 See also resolution of the Commission on Human Rights 1992/65, 4 March 1992.
59 https://en.wikipedia.org/wiki/Romani_genocide: The numbers figuring in Wikipedia reflect numbers given by the Washington Holocaust Memorial Museum. Rightly the Special Rapporteur Izsák recalled the barbaric suffering of the community (n 54) para 19.
60 See for the **Czech Republic**: HRCee, Concluding observations on the 4th periodic report of Czechia, CCPR/C/CZE/CO/4, 6 December 2019, paras 14, 15; CERDCee, Combined observations on the combined 12th and 13th reports of Czechia, CERD/C/

Accordingly the conclusion stands unchallengeable that an itinerant way of life does not hinder the recognition of a group as a minority.

Similar considerations apply to persons suffering discrimination on account of the caste ascribed to them or being prisoners of an inherited system of discrimination from which they cannot escape without assistance from outside. Special Rapporteur Rita Izsák has devoted great attention to these groups, recommending that they should be recognized as minorities though not fully meeting the usual criteria of a minority.[61]

4.2. Nationality of the State of Residence as a Requirement?

The explicit mentioning of 'national' in the Declaration could be deemed to suggest that members of a minority group must possess the nationality of their State of residence in order to be recognized as coming under the protective shield of Art 27. Many different configurations should be taken into consideration. One of the most critical situations is indeed the break-up of States where people who have lost their former nationality of the overarching State entity have not always been automatically welcomed as citizens of the relevant successor State, continuing their existence as undesirable nationals of their former State or being downgraded to statelessness. Many other factual patterns confirm that the criterion of nationality is unable to provide guidance relating to this issue where fundamental aspects of human dignity are at stake. In some countries, one encounters a wide practice of social neglect where the State authorities fail in their fundamental duty to take care of all those who are tied with their very existence to their country of residence, thus reneging on their responsibilities. To create statelessness may even become a deliberate political objective.[62] In many countries, children of disregarded minorities are not registered at birth, remaining therefore unable to exercise their fundamental human rights at any time during their life. Another shameful strategy is the denial of recognition to minorities who have lived in the country concerned for many long decades, from generation to generation. The most blatant example of such abuse is currently the treatment of the Rohingya community in Myanmar,

CZE/CO/12-13, 19 September 2019, paras 15–20; **Hungary**: HRCee, Concluding observations on the 6th periodic report of Hungary, CCPR/C/HUN//CO//6, 9 May 2018, 9 May 2018, para 15; CERDCee, Concluding observations on the combined 18th to 25th reports of the Hungary, CERD/C/HUN//CO/18-25, 6 June 2019, paras 20, 21; **Slovakia**: HRCee. Concluding observations on the 4th periodic report of Slovakia, CCPR/C/SVK/CO/4, 22 November 2016, para 16; CERDCee, Concluding observations on the combined 11th and 12th periodic reports of Slovakia, CERD/C/SVK//CO/11-12, 12 June 2018, paras 9–26.

61 Report, A/HRC/31/56, 28 January 2016, para 20–138.

62 All three Special Rapporteurs of the HRC have devoted lengthy passages in their reports to the problem of statelessness as a result of governmental strategies: Gay McDougall, Report, A/HRC/7/23, 28 February 2008, paras 13–70; Rita Izsák, Report, A/HRC/34/53, January 2017, paras 43–44, 94; Fernando de Varennes, Report, A/HRC/37/66, 16 January 2018, paras 36–40; A/HRC/40/64, 9 January 2019, paras 85–87.

of which large parts were violently expelled to Bangla Desh.[63] And the shameful policies of Nazi Germany, where all persons of Jewish ethnicity, whatever their generation-long existence on German soil, were deprived of their German nationality will never be forgotten. To rely on the criterion of nationality would open the gates for any kind of abusive policies. In the literature on Art 27, today no voices can be heard suggesting that only minorities endowed with the nationality of the State concerned can claim the benefits of Art 27.[64] It may be for this reason that the drafters of the ICCPR abstained from including 'national' minorities in their short list of three groups. The inference is inevitable that to add in the Minorities Declaration of 1992 the criterion of 'national' to the three criteria mentioned in Art 27 itself was not a good idea. It makes sense only if 'national' is meant to indicate that a palpable territorial link to the country of residence is required.

4.3. Immigrants and New Groups as Minorities?

It had been extensively debated during the drafting of the ICCPR whether new citizens, welcomed by a country as immigrants, should be acknowledged as minorities. All those proposals were then rejected.[65] In particular the countries of massive immigration in the Americas feared that such a separate legal status might endanger the bonds of national unity. States attracting immigrants generally endeavour to bring about social integration so that the newcomers would soon become part and parcel of the nation, without reneging on their roots, but establishing firm links of loyalty with their new national surroundings. Indeed, the observable practice has followed this course. Neither in Argentina nor in Brazil or in the United States have the European immigrants of the 19th or the 20th century ever been regarded as minorities according to their origin. The concept of national unity has prevailed. Proudly did Argentina in its first report under the UPR procedure state that immigrants were granted full rights 'by virtue of their condition as human beings'.[66] Such generosity makes most requests for a special status under the minority regime redundant.

In accordance with the intentions of the drafters, Art 27 grants the status of a minority only to three specific groups of people, members of ethnic, religious and linguistic minorities, not to any groups that understand themselves as a minority within their societal environment.[67] Obviously the drafters proceeded from the as-

63 See most recently UN GA Res 75/238, 31 December 2020.

64 In the legal doctrine a high degree of unanimity has been reached in this sense, see Tomuschat (n 2) 960–64; Hilpold, 'Neue Minderheiten im Völkerrecht und im Europarecht', 2004 (42) 80, 81–87; see also comments by the Venice Commission of the Council of Europe, Report on Non-Citizens and Minority Rights (2006), paras 93–95. The opposite view had been defended by Capotorti (n 3) para 568.

65 See Tomuschat (n 2) 961.

66 A/HRC/WG.6/1/ARG/1, 10 March 2008.

67 Special Rapporteur Rita Izsák, Report, A/HRC/34/53, January 2017, para 67, raised the question of the status of lesbian, gay, bisexual and transgender persons, confining herself eventually to encouraging further research on the issue. Reflections on this is-

sumption that new social groups formed by virtue of freedom of association deserved no extraordinary protection. It was already pointed out that the guarantee essentially looks to the past, seeking to preserve and salvage societal structures inherited from earlier generations. For an instrument purporting to protect human rights this backward-looking feature constitutes a kind of anomaly. Human rights always shape the living conditions of the actual generation. Therefore, they need a certain measure of adaptability as stressed many times by the European Court of Human Rights, which constantly interprets the European Convention on Human Rights as a 'living' instrument that should not be understood as being ossified in its original state.[68] The same dynamic method of interpretation has been adopted for the FCNM.[69] Essentially, this consideration leads to the question whether within the UN system under Art 27 and the Declaration 'new' groups, in particular immigrant aliens, are nonetheless conceivable as beneficiaries of minority rights. Germany, for instance, has taken a resolute stance against such extension even of the scope of the FCNM.[70]

The GC of the HRCee on Art 27 seems to have been written with a rather light hand, without regard for the systemic context of the provision and its objectives. The GC states in a straightforward manner that 'migrant workers or even visitors' may invoke Art 27.[71] Obviously, anyone on the territory of a State party to the ICCPR enjoys freedom of association, of assembly and expression, as additionally pointed out by the GC in support of its thesis. But these entitlements are not to be inferred from the guarantees enjoyed by a minority: people staying only for a short period of time for the execution of a commission or visitors who have not established a firm connection with their country of sojourn, do not belong to the social structures of a country inasmuch as their stay is only transitional. No justification could be found for imposing on the national authorities concerned special commitments to take care of such people beyond the measure required by the generally applicable rules of human rights – respect for which is essential and normally satisfies any legitimate needs. One may therefore safely state that the HRCee committed a grave error in attempting to introduce a higher status for a group of persons that remain aliens to their societal surroundings. Freedom rights should never be denied to any group of people, but entitlements to material benefits require specific justification.

The conclusion just reached should not be understood as an obstacle to reflecting on the wisdom of treating new minority groups like long-established groups

sue also by Hilpold (n 64) 81; Antti Korkeakivi, 'Beyond *Adhocism* – Advancing Minority Rights through the United Nations', in Rainer Hofmann and Others (eds), *The Framework Convention for the Protection of National Minorities. A Commentary* (Brill/Nijhoff 2018) 22, 32–34.

68 See ultimately *S.M. v. Croatia*, App No 60561/14, 25 June 2020, paras 288–292.

69 See Hofmann and Others, 'Introduction' (n 30) 10.

70 'The Framework Convention does not constitute a general human rights instrument for all population groups that differ from the majority population in one or more way,' Fifth report to the Advisory Committee of the FCNM, AFC/SR/V(2019)001, 10.

71 N 16, para 5.2.

once they have consolidated their existence in the new country of residence, having become vital elements of their new social environment.[72] In the European Union, special legislative acts have been adopted since the first steps of the Common Market to accommodate the educational needs of migrant workers and their families.[73]

4.4. Indigenous Peoples

There can be no doubt today, notwithstanding earlier doubts, that indigenous peoples must also be classified as minorities in the sense of Art 27.[74] However, indigenous peoples enjoy a much broader array of rights than 'ordinary' minorities. The UN Declaration on the Rights of Indigenous Peoples, adopted in 2007 by the General Assembly by a large majority of 144 votes,[75] has been widely recognized by States as a guiding normative standard. Yet the resolution is still far from crystallyzing as customary law since the weight of the negative votes of States with large minorities (Australia, Canada, New Zealand, USA) is considerable and cannot be wished away.

4.5. The Definitions Proposed by the Special Rapporteurs

Faced with considerable divergences about the essential criteria identifying a minority, the Special Rapporteurs have set out to provide their own definitions with a view to providing guiding orientation marks.

The first Special Rapporteur (Gay McDougall) put the focus on groups 'that have faced long-term discrimination and disadvantage on the basis of identity as national, ethnic, religious or linguistic groups', adding that she would especially address 'people living in permanent poverty'.[76] No additional criteria were mentioned by her, neither the geographical location of a group nor the length of its stay on the territory of the State concerned. The only condition that she retained was that a group must be numerically inferior to the population as a whole, not being in a dominant position. In a report on her visit to Ethiopia almost the same words were used.[77] For her the economic situation of the relevant group is the decisive criterion. She directs her focus almost exclusively on the material well-being of the persons concerned. Although the focus on the three minorities mentioned in Art 27 is formally and faintly maintained, her reports read essentially as

72 See considerations by Hilpold, 'Neue Minderheiten' (n 64); Eckart Klein, 'Traditional and New Minorities in Germany' in Martin Scheinin and Reetta Toivanen (eds), *Rethinking Non-Discrimination and Minority Rights* (Institute for Human Rights (Abo Akademi University Turku/Abo 2004) 15.

73 EEC Regulation 1612/68.

74 See Tomuschat (n 2) 962–64.

75 N 11.

76 Second Report, A/HRC/4/9, 2 February 2007, paras 21, 50.

77 A/HRC/4/9/Add.3, 28 February 2007, para 4.

a call to alleviate the lamentable situation of all people living under conditions of poverty. Accordingly, she heavily insists on the necessity to include all groups of the population in the targets particularized in the Millennium Development Goals (now: Sustainable Development Goals).[78] Her reports read almost as wishing to convey the idea that any group living under conditions of extreme poverty constitutes a minority.[79]

The subsequent Special Rapporteur, Rita Izsák, refrained from listing objective characteristics of a minority, except from those explicitly set out in Art 27. In harmony with her predecessor, she referred to marginalization and stigma within the dominant majority.[80] Additionally, she emphasized the subjective element of self-identification, supported by the decision to pursue the group identity.[81] Being absorbed by the task of describing in detail in particular the linguistic rights of a minority, she obviously took the view that a description of the basic unity, the group as such, resulted essentially from the needs of the relevant groups so that no 'formal' definition was needed. She also refrained from attaching any importance to the ties with the country of sojourn. The center-point of her interest was the lack of recognition and resources from which most minorities are suffering.

The present Special Rapporteur Fernando de Varennes continued along the route travelled by his predecessors. Feeling the need to be more explicit and detailed than his predecessors, he suggested, without any lengthy explanation, a definition that is fairly broad and extensive, circumventing any controversy about the correctness of the definitional line. Again without any lengthy commentary he suggested to take as a 'working definition' the following:

> 'any group of persons that constitutes less than half of the population in the entire territory of a State whose members share common characteristics of culture, religion or language, or a combination of any of them,' … 'without any requirement of citizenship, residence, official recognition or any other status'.[82]

This is not the opinion of a single expert, standing alone with his particular views. At the end of his last report, the Special Rapporteur formally invited all UN institutions to take note of the working definition conceived of by him as an authoritative interpretation of Art 27 that should henceforth generally guide the work on the rights of minorities.[83] It has not become known that this recommendation has raised any objections. For him, too, the thrust of the guarantee is primarily of an economic character. State authorities should intervene in any situation where a group has suffered structural discrimination and hardship. Thus, the distinction between poor classes of the population and more wealthy classes becomes prevalent. In respect of Brazil, eg, the difference between whites and non-whites was

78 UNGA Res 70/1, 21 October 2015.
79 N 76 para 50.
80 Report, A/HRC/34/53, 28 February 2011, para 66
81 Report, A/HRC/34/53, 28 February 2012, para 65.
82 Third report, A/HRC/43/47, 9 January 2020, paras 69, 70.
83 Ibid para 79.

highlighted. Where wide gaps between different large ethnic groups become visible, the problem must be termed as failure of social justice. The categorization as member of the majority or member of a minority makes little sense. The same is true of persons of African descent in countries like Brazil or the United States. Persons of black colour live dispersed in the population of their countries of residence, without any specific cohesion among themselves, not sharing any cultural specificities except their skin. Fair treatment for them cannot be derived from an article of an international treaty that was intended to address an entirely different situation. For them modern mechanisms for the fight against racism provide the appropriate solutions. The relevant UN bodies, especially under the ICERD, have therefore established such specialized mechanisms with a view to combating inequalities that have emerged as a consequence of the increasing mobility of populations where people from different ethnic backgrounds have mixed.

In other words, although the bridges to the past have not been entirely broken off by the three Special Rapporteurs the lines of demarcation between members of minorities and socially disadvantaged groups in general have been significantly blurred. It remains that a minority must first have come into existence, which is not only a definitional issue but a process that cannot take place over night. Yet de Varennes, like his two predecessors, looks to groups not in their configuration shaped by the past but focuses mainly on their current conditions as they prevail today. It is assumed that governmental authorities have a large discretion as to which groups they recognize as minorities.

In any event, it seems to be highly problematic to abandon the three criteria chosen by Art 27. A perusal of attempts by social scientists to define the concept of minority on the basis of sociological findings leads into a deep quagmire where differentiations are chosen not outright randomly, but are determined mainly by circumstantial subtleties developed by the author concerned.[84] It must not be ignored that the drafters selected their criteria after lengthy debates with well-pondered arguments, acknowledging that in the three classes of minorities objective needs could be perceived and were to be acknowledged in the interest both of the persons concerned and the State of residence. To introduce new classes of minorities is fraught with great risks for the unity of the country concerned. Any further stratification of the population of a country is prone to lead to internal unrest, raising complaints that equality is being infringed. In a free society that allows for freedom of speech and freedom of association groups can articulate their aspirations without needing supplementary assistance in derogation from the standards applicable to all.

84 I can refer above all to Andrea Carlá, 'From security considerations to de-securitizing the discourse on "old" and "new" minorities', in Medda-Windischer (n 30) 156 ss. More aligned with objective legal parameters Reetta Toivanen, 'Beyond legal categories of indigeneity and minority-ness', ibid 65 s.

5. The Rights Accruing to Minorities

The rights enjoyed by members of minority groups are characterized by Art 27 in a negative way by imposing on States the obligation not to deny those rights. This negative approach should not be seen as a mark of downgrading. The proposition means that the human beings concerned are entitled to live their specific existence as members of the three communities without any hindrance. They are recognized as masters of their own fate, to a great extent free from mandatory restrictions. Rightly, the UN Special Rapporteurs on Minority Issues have recalled that minorities should not exclusively nor primarily rely on State support, with particular emphasis Rita Izsák.[85] They are recognized as actors that are called upon to shape their own future and should in fact do so to show their usefulness for the life of the national community.

Inevitably, when trying to substantiate the normative contents of Art 27, the student is led to the two European Conventions regulating for the area of the Council of Europe the rights of minorities (FCNM and ECRML).[86] In these two instruments, many of the conceivable rights have been particularized and concretized. The dangers inherent in this method are obvious. At world level the wide array of rights set out in the two European conventions has never been fully accepted The two instruments deploy their effects only for a number of European States, and the number of States parties does in no case correspond completely to membership in the Council of Europe. To take inspiration from the two instruments is fully legitimate – but it amounts to a breach of legal logic to contend full congruity.

5.1. The Rights of Ethnic Minorities

The right enjoyed by ethnic communities to enjoy their own culture has an extremely broad scope, which cannot described here in detail. It stands to reason that their survival as a group with a specific identity must be ensured against any attacks. Concomitantly, members of minorities must be given the opportunity to ensure their livelihood through self-chosen work. They must be able to live an ordinary existence like all the other members of the national community. But Art 27 makes further-going requests. First of all, enjoyment of one's own culture comprises a strong environmental aspect since the natural habitat of a group, including its use of land resources, may be determinative for its culture as it has been lived since time immemorial. The HRCee has appropriately acknowledged this component of the cultural identity of a minority.[87] Furthermore, respect for the cultural identity of a minority amounts to a call for tolerance in respect of habits and customs that may seem strange and even repulsive to persons who are not familiar with the par-

85 Report, A/HRC/19/56, 3 January 2012, paras 40–41; A/HRC/29/14, 11 May 2015, para 76: 'Roma must abandon their role as passive victims of discrimination'.

86 See above n 9 and 10.

87 Cases *Lubikon Lake Band* (n 24) para 32.2; *Kitok* (n. 24) paras 9.3–9.5; *Länsman* (n 24) para 10.2; *Diergaardt* (n 24) para 10.6; *Klemetti Käkkäläjärvi* (n 6) para 9.5.

ticular way of life of the relevant minority group. Through the work of the Special Rapporteurs emphasis has been placed on economic reforms for the disadvantaged groups of the population and the fight for consolidated language rights particularly in education.[88]

For every government on whose territory an ethnic minority exists a crucial question arises. Internal harmony between the different groups of the population becomes by necessity an ineluctable political aim. The terms 'assimilation' and 'integration' connote the two distinct pathways that can be followed. In almost all official documents[89] and scholarly writings the authors take a clear stand against the concept of assimilation although it requires a considerable intellectual effort to distinguish the two concepts. The simple fact of living within a social community inevitably entails the consequence that the newcomers adapt to the customs and habits of the majority population in whose midst they are living. A condemnation of assimilation, reasonably understood, could hardly be interpreted as a firewall intended to impede such natural sociological processes. Accordingly, the aversion of assimilation can only mean that no country should attempt to shape its new citizens by pressure or even coercion pursuant to a sample of ideal citizenship, which would be irreconcilable with the concept of human dignity.[90] In fact, where the rights and freedoms of the two Covenants are effectively in force such attacks against human agency are simply inconceivable.

5.2. The Rights of Religious Minorities

The second protected group is constituted by religious minorities for whose benefit Art 27 provides that they are entitled to 'profess and practice their own religion'. This guarantee does not contain any extraordinary elements that are not already covered by Art 18 ICCPR. In fact, Art 18 states explicitly that persons may manifest their religion, either individually or in community with others and in public or in private, manifest their religion or belief in worship, observance, practice and teaching. These formulations are considerably more explicit than the short formula found in Art 27. One therefore has to ask what reasons motivated the drafters to set forth the same substantive proposition another time, specifically for members of a minority. The extensive study by Louis B. Sohn was not able to provide a clear-cut answer.[91] Nor has Antti Korkeakivi in the commentary on the FCNM unearthed any pertinent grounds for the duplication of the guarantee.[92] Yet one distinctive feature should not go unobserved, the lack of a clawback clause in Art 27 while the right to manifest one's belief under Art 18 may be restricted under the

88 Educational strategies will be discussed with regard to linguistic minorities.

89 Commentary on the Minority Declaration (n 30) para 21; UN Forum on Minority Issues, Recommendations 2008–2011, Minorities and the right to education, Core Principles, para 12; FCNM, Art 5(2).

90 In fact, in the Annotations on the drafting process (n 53 para 21) 'assimilation', rated positively, is understood as integration.

91 Sohn (n 2) 285.

92 N 66, 32.

conditions of para 3. However, this lacuna can only be meant to protect the core substance of the specific minority rights under Art 27, not including its many articulations as they impact the operation of the social order.[93]

More complex issues arise as soon as Art 27 is interpreted in the sense of imposing on the State of residence a duty to take proactive measures with a view to promoting and supporting the activities of a minority. As already pointed out, the Declaration of 1992 took this step, which is highly problematic, in particular with regard to religious minorities. According to the general spirit of the ICCPR, religious belief is a private matter, not to be interfered with by State authorities, a principle which is reflected in the constitutional doctrine of many countries. In France and the United States, in particular, the separation between the State authorities and the religious institutions reaches a high level of strictness.[94] It is significant that from all the Special Rapporteurs appointed by the HRC only Rita Iszák wrote a few lines about the duties of States vi-à-vis religious minorities, without going into details, however. In the practice, through the monitoring functions of the HRCee, the CERD and the HRC operating within the framework of the UPR, tensions have many times come to light but generally the outsider is not able to perceive whether the complaints raised were related to religious freedom in general or whether they focused specifically on the treatment of the minorities existing in the country concerned. Since the special (!) protection of minorities depends entirely on the relevant State's acceptance of the ICCPR, even under the UPR procedure the issue of minorities remains essentially outside the scope of the monitoring function. Thus, Saudi Arabia, a non-party to the ICCPR, did not mention at all the issue of protection of minorities in its latest UPR report,[95] which did not prevent another State, Myanmar, to recommend that the country should 'take measures to protect people of religious minorities and ensure their rights to practice their beliefs are being protected'.[96] In the case of Turkey, on the other hand, which is a party to the ICCPR since 2003, a considerable amount of criticism concerning the treatment of non-Muslim religious communities was brought forward both before the HRCee[97] and during the UPR procedure.[98]

In conclusion it may be stated that the inclusion of religious minorities in the purview of Art 27, although useful in a performative perspective, seems to lack any significant value for such communities since their status is well protected un-

93 Doubts by Sohn (n 2) 285. Already in its very first case dealing with Art 27 (*Sandra Lovelace*, n 24) the HRCee specified (para 16) that the rights under Art 27 could be restricted on reasonable grounds (constant jurisprudence).

94 This is not the place for a critical assessment for the constitutional principle of separation of State and religion in different States.

95 A/HRC/WG.6/31/SAU/1, 20 August 2018.

96 A/HRC/40/4, 26 December 2018, para 122.247.

97 HRCee, Concluding observations, CCPR/C/TUR//CO/1, 13 December 2012, paras 9, 21; UPR, Third Cycle, Outcome, A/HRC/44/14, 24 March 2020, paras 45.274 (Lebanon) and 45.275 (Peru).

98 Report of the Working Group, A/HRC/44/14, 24 March 2020, Conclusions and recommendations, paras 264–66.

der Art 18 ICCPR. In particular for States with a truly pluralist structure, a duty of affirmative action in favour of religious communities is easily susceptible of leading into troublesome contradictions.[99] To be sure, such minorities must be protected from attacks against their existence and identity. But it is incumbent on the communities of faithful themselves to sustain and promote their religion.

5.3. The Rights of Linguistic Minorities

The right to use one's own language in private and in public is clearly protected by Art 27 to the benefit of members of a minority, not only within the intimacy of the minority. This proposition, however, does no put an end to all the issues raised by a linguistic régime for a State: it establishes only a minimum guarantee. Two main issues remain open, the choice of official languages for State authorities, administrative agencies and judicial bodies in their relationship with members of minorities, and the language regime for educational institutions. The relevant rules must be framed in such a way that the survival of the community concerned is ensured beyond the day. If a minority language is not taught in public schools, the succeeding generations would not be enabled to speak their own language as inherited from their ancestors. States are therefore obligated to establish a sophisticated school system to satisfy the needs of a minority in their complex structure. Its members not only need to be taught (partially) in their traditional language, they must also be put in a position to become proficient in the language of the majority population. Members of minorities are not meant to live an idyllic life in isolation, they must be empowered to be able to ensure their livelihood within the nation to which they belong.

The Special Rapporteurs have made great efforts to suggest well-balanced formulae for the requisite compromise strategies required to satisfy both the needs of linguistic minorities and the needs of the majority population. Art 27 sets forth only the basic principles. Applicable domestic regimes can only be designed at national level. The suggestions of the Special Rapporteurs go very far – which is acceptable to the extent that these suggestions are indeed conceived of as no more than proposals without any binding effect.[100] In the context of this essay no statements can be made as to where the separation line between the international and the domestic space of jurisdiction should run. Appropriate solutions can only be found in consideration of all the relevant circumstances. A great amount of toler-

99 See on this dilemma Kristin Henrard, 'A Critical Appraisal of the Margin of Appreciation Left to States Pertaining to "Church-State Relations" under the Jurisprudence of the European Court of Human Rights', in id, *The Interrelationship between the Right to Identity of Minorities and Their Socio-Economic Participation* (Martinus Nijhoff 2013) 229, 243–44.

100 See in particular the second report of Special Rapporteur Rita Izsák, A/HRC/22/49, 31 December 2012; Fernando de Varennes, Report, A/HRC/43/47, 9 January 2020, paras 31 ss. In *views of 25 July 2000*, *Diergaardt v. Namibia*, case C/69/D/760/1997 (n 24), the HRCee took a stand on rupture of communication between members of a minority and State authorities by denial to use their own language.

ance is required on both sides. Attempts by the majority to eliminate the minority language(s) or totally marginalize them would clearly infringe Art 27. On the other hand, members of minority groups cannot insist, let alone for reasons of practicability, that their language(s) should be recognized as equivalent at all levels of the governmental hierarchies. Izsák's report provides a vast array of options. The hard core requires specification through case law – which will be very rare.

5.4. Political Rights

Political rights of minorities are not mentioned in Art 27. They were introduced in 1992 as a political postulate by the Declaration (Art 2(3)). The Declaration goes even further than the 1995 European Framework Convention, which confines itself to requiring 'effective participation ... in public affairs' (Art 15).[101] One can easily admit that minorities need a stable political framework in order to be able to prosper and become independent of cyclical moods of society in their countries of residence. Special Rapporteur Gay McDougall has engaged herself with great vigour for the participatory rights of members of minorities. In one key statement she wrote, in harmony with Art 2(3) of the Declaration:

> minorities have a right to participate effectively in decision-making on local or national issues and development plans that affect them or the regions in which they live. Support for participation, such as through reserved seats in governance or dedicated consultative institutions, should be prioritized.[102]

She continued elaborating on the participation of minorities by writing de facto a comprehensive manual on democratic constitutionalism with minority participation.[103] Essentially, she wishes to include the substance of Art 42 of the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families in the general legal regime of minorities – an attempt which cannot be successful since the Convention has to date only be ratified by a rather limited groups of countries (58).

In its most recent views on minority rights under Art 27 the HRCee has however gone one step further in elaborating on the political rights of the Sami population in Finland, where it opined that Art 27 contains a substantial political component regarding the Sami Parliament,[104] which has been established by Finnish legislation, ie under domestic law. The HRCee ventured to evaluate controversial measures of the Finnish authorities in the light of Art 27 in conjunction with Art 25 ICCPR, even making a reference to Art 1 ICCPR,[105] in derogation from its established jurisprudence that Art 1 and Art 27 ICCPR must be kept separate, Art 27

101 On the meaning and scope of this concept see Joseph Marko, 'Five Years After: Continuing Reflections on the Thematic Commentary on Effective Participation. The Interplay between Equality and Participation', in *Essays Hofmann* (n 38) 97.
102 Second Report, A/HRC/4/9, 2 February 2007, para 105 (d).
103 Fifth Report, A/HRC/13/23, 7 January 2010.
104 *Klemetti Käkkäläjärvi* (n 6).
105 Ibid para 9.14.

not sanctioning a right of self-determination.[106] The holdings of the HRCee are understandable as a reflection of the view that the Sami people enjoy a privileged position as an indigenous people. However, they cannot be deemed to be applicable to any minority under Art 27.

5.5. A Unitary Concept?

A final look at the concept of minority is meant to clarify whether a common denominator can be found for the groups whose identity has been discussed in the foregoing. From the very outset, the three Special Rapporteurs were compelled to define their stand vis-à-vis that issue which seemed to constitute an insoluble conundrum. Reading their reports with heightened attention one cannot avoid the impression that for them, leaving religious minorities apart, the most significant trigger for the application of Art 27 is in the last analysis the poverty of a given community. Almost any of such communities is classified under Art 27 although the legal reasoning should proceed in the opposite direction: It must first be found out whether a minority group exists before purporting to clarify whether it has been negatively affected within a State's social environment. In a formal sense, the Special Rapporteurs consistently relate the inequalities found to one of the three minorities protected under Art 27. But the observer has great difficulties to recognize that all the disadvantaged group mentioned in the reports constitute true minorities in the original sense of the provision. The reports tend to suggest that any gravely disadvantaged group constitutes a minority. In the dynamic world of today, such groups may emerge rapidly as a consequence of economic turbulences entailing particularly loss of jobs with ensuing poverty for the families concerned in a specific region.

It stands to reason, on the other hand, that specific demands on governmental authorities for help and assistance become easily unrealistic if the relevant groups cannot be identified with precision. In the case of individuals it can be ascertained according to the methods of a modern administration whether a claimant belongs to the class of indigent people. Communities characterized by discrimination lack such a distinct identity. A factor of great uncertainty is constituted by the principle of self-identification that is generally acknowledged as indispensable. More far-reaching demands to grant some kind of political autonomy require an even firmer basis. Only minorities that possess a clearly recognizable personal structure could possibly become an actor able to assume specific functions within the framework of political institutions. Such grants require the most careful reflection. To establish a specific community as an autonomous entity may harm those who do not come to enjoy the additional rights and may therefore violate the democratic principle of equal rights for all citizens. These are matters of constitutional policy where a nation must find a well-balanced political system in accordance with its peculiar national traditions. Undoubtedly every nation has the right to grant the minorities on its soil special rights to participate in the political decision-making process.

106 *Lubikon Lake Band* case (n 24) para 32.1.

The Special Rapporteurs have in their reports provided detailed descriptions of countries where the nation as a whole has accepted such a complex structure and lives happily with it. All this, however, has little to do directly with Art 27, which does not provide for autonomy of minorities.

6. Conclusions

The meaning and scope of Art 27 has been amply discussed for more than half a century. Originally, authors were generally intent on identifying the true sense of the guarantee for the benefit of a limited number of minorities. The General Comment of the HRCee of 1994 still pursued that objective. The Minority Declaration of 1992, however, had already marked a turning point by bringing about a fundamental change in particular by postulating specific political rights for minorities and by emphasizing the positive duties of States vis-à-vis them. Since that time, the tendency has been to expand and strengthen the rights of minorities. Close contact with Art 27 was no longer considered a stringent necessity. The wish to improve the situation of minorities became the driving force. Accordingly, the recommendations made by the Special Rapporteurs constitute today an inextricable mixture of propositions based on positive law and policy guidelines.

Art 27 does not mention a right of participation in political decision-making processes.[107] The adoption of the Declaration in 1992 was a dramatic change of thrust. Art 27 had been conceived of with a conservative intention, guaranteeing to the three selected minorities the right to live peacefully as outsiders within their national communities. Now political aspirations, promoted particularly by the HRC's Special Rapporteurs, aim to enhance their status not to full autonomy, but to a hierarchical level where their voice must be heard in all matters of direct (or even indirect) relevance to them. Interpretative caution suggests that this specific articulation of minority rights cannot be considered a legally binding inference from Art 27. This means that the doors to the political debate have been flung wide open. The minority regime, as promoted by the UN bodies engaged in the matter, has widely transgressed its firm legal province. Thus more room has been opened for in-depth reflection on a regime that sits on the borderline between respect for the cultural specificities of some groups and presumed threats to national unity. The observer may express the hope that good reason will eventually prevail. From a political perspective, the doors to the future should never be closed.

107 The model for this demand is Art 42 of the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, 18 December 1990, 2220 UNTS 3. The Convention has only a limited number of 58 States parties.

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