
COMPARISON BETWEEN THE RIGHT OF PEOPLES TO SELF-DETERMINATION AND MINORITY RIGHTS IN PUBLIC INTERNATIONAL LAW

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I. INTRODUCTION:

To compare and assess the rights of people to self-determination and minority rights under public international law, it is necessary to first identify whether a group qualifies as a people or a minority. Following both rights' historical background and formation, we may see that both share similar characteristics, but their legal standing in public international law is different. According to *Francesco Capotorti*, the subcommittee's special rapporteur on the prevention of discrimination and the protection of minorities,¹ The definition of minority is a group with distinct characteristics, numerical inferiority, non-dominant position, and a group perception of distinctiveness and a desire to preserve that distinctiveness.

Scholars' definitions of "peoples" also include similar criteria. For instance, Yoram Dinstein, argues that "peoplehood" is contingent on two elements: the existence of an ethnic group linked by a common history and the state of mind of the group.² However, we could understand the legal distinction between the two groups stated in the International Covenant on Civil and Political Rights (ICCPR)³ since it is the only legally binding international treaty dedicated to both rights under which the right to self-determination is recognized as a people's rights under Article 1, however, minority rights are recognized as individuals belonging to minorities in states under Article 27 of ICCPR.

This implies that the right to self-determination is a collective right and minority rights are individual rights but with a collective aspect. Therefore, the right to self-

¹ E/CN.4/Sub.2/384/Rev.1, para. 568.

² Yoram Dinstein, *Collective Rights of Peoples and Minorities*, 25 INT'L & COMP. L.Q. 102, 105-11 (1976).

³ International Covenant on Civil and Political Rights (Dec. 19, 1966), 999 U.N.T.S. 171.

determination has both internal as well as external aspects and minority rights only have internal aspects. Modern international law recognizes three collective human rights to people: the right to physical existence, the right to self-determination, and the right to free natural resources. In which the right to self-determination is widely regarded as belonging to "peoples," not "minorities." However, minorities have two collective human rights:⁴ the right to physical existence and the right to maintain a separate identity.⁴

In this essay, I will attempt to explore the legally binding provisions relating to both rights in the ICCPR and examine the comparative legal framework for the right of people to self-determination and minority rights in accordance with international law at the universal level, in terms of their character, the content of the rights, who should exercise those rights, and the enforcement mechanisms available at the universal level.

II. Historic development of the right to self-determination and minority rights:

The historical development of the right to self-determination can be divided into three periods: the age of nationalism (from the late 18th century to World War I), the age of decolonizations (from World War II to the end of the late 20th century), and the post-colonial period (which we are currently in).⁵

In the years leading up to World War I, Both U.S. President Woodrow Wilson and the Bolshevik leader Leon Trotsky voiced strong support for the concept of self-determination as the foundation for a just peace. By claiming that all nations had a right to self-determination in order to exercise their right to construct their own states based on ethnicity, linguistics, history, and cultural heritage. Wilson's original definition of self-determination included self-government. However, with the fall of the three empires during the war, he took a nationalist approach. He claimed that denying nations the right to self-determination could prevent justice and order from existing. In a series of addresses known as the 14 Points address, he described his political vision for the new European order. However, by then self-determination was just a political principle

⁴ Claudia Saladin, Self-Determination, Minority Rights, and Constitutional Accommodation: The Example of the Czech and Slovak Federal Republic, 13 MICH. J. INT'L L. 172 (1991).

⁵ Hannum, H, Rethinking Self-Determination, Virginia Journal of International Law, Vol. 34, No. 1, 1993.

and not accepted as an international norm or right by many states. It was only applied to newly formed States and to the defeated powers after World War I.⁶

In the time between, WW I and II, many self-governing regions declared themselves states mostly in the European region due to territorial boundaries small groups of people got separated from the main group to become minorities in those states. Subsequently, The League of Nations was created and its main purpose was to protect minorities that were separated from the majority of the people due to the territorial changes and formation of new states.⁷

III. Rights of Peoples to Self-determination in Public International Law:

A. Legal Norms of Right to Self-determination:

In 1966, The first article of the two covenants, the International Covenant of Civil and Political Rights (ICCPR)⁸ and International Covenant of Economic, Social and Cultural Rights (ICESCR)⁹ included a clause similar to Art. 1(2) of the UN charter regarding the right to self-determination, however this time it is added as a right. Therefore, since then it is the only legally binding norm at the universal level to exercise the right to self-determination and was formally recognized as a fundamental human right for all people.¹⁰

Articles 1(2) and 55 of the United Nations (UN) Charter were adopted after World War II, introducing the concept of "self-determination" as a principle but not as a right. This is because of most of the state parties' UN charter where colonial powers were reluctant to acknowledge it as a right because the right entailed a legal obligation that gave a foundation to the "selves" (colonized countries) to claim their right to self-determination.¹¹ Therefore, Art. 1 (2) of the UN charter is not a legally binding norm.

⁶ Hannum, H, Rethinking Self-Determination, Virginia Journal of International Law, Vol. 34, No. 1, 1993.

⁷ Vernon Van Dyke, Self-Determination and Minority Rights, International Studies Quarterly, Volume 13, Issue 3, September 1969, Pages 223–253, <https://doi.org/10.2307/3013530>.

⁸ International Covenant on Civil and Political Rights (Dec. 19, 1966), 999 U.N.T.S. 171.

⁹ The International Covenant on Economic, Social and Cultural Rights, (16 December 1966) U.N.T.s. 993. Available at vol. 993. accessed on 29th June 2023.

¹⁰ Art. 1(2) of International Covenant on Civil and Political Rights (Dec. 19, 1966), 999 U.N.T.S. 171.

¹¹ Vernon Van Dyke, Self-Determination and Minority Rights, International Studies Quarterly, Volume 13, Issue 3, September 1969, Pages 223–253.

Meanwhile, as the former colonies gained independence and joined the UN, the demand for the right to self-determination increased. As a result, the United Nations General Assembly (UNGA) on December 14, 1960, adopted The Declaration of Granting Independence to Colonial Countries and Peoples.¹² which functioned as the primary document to illustrate the right to self-determination. Within a decade the declaration was accepted as customary law by all United Nations members and hence became the legally binding norm at the end of the 19th century. The right of colonial peoples to self-determination is a peremptory norm that places obligations of an erga omnes nature on the entire international community.¹³ However, only colonial people are the subject of the right under this declaration since it is specifically regarding the colonial countries and peoples.

B. Content of the right:

Article 1 of ICCPR, all people have the right to self-determination, by virtue of that right, they are free to choose their political status and to build their economies, societies, and cultural development.¹⁴ The right has internal as well as external aspects and the main contents of the rights are all people have the right to political representation and free use of natural wealth and resources in the internal form, while on the external form, they have rights of declaration of independence and territorial succession, among other rights. However, the external form of right depends on the States, because the problem is the external forms of rights are not applicable within the territory of the existing state, and when people declare independence, their right to self-determination of an external form clashes with the principle of state sovereignty. As a rule, according to Art 103 of the UN Charter, the provisions of the UN Charter prevail over treaty norms, hence Art 2 (1) of the UN Charter,¹⁵ which guarantees the principle of state sovereignty, has supremacy over Art 1 of both the Covenant, ICCPR, and ICESCR. However, there is an exception to this rule, which is the jus cogens norm, which, as a peremptory norm, would prevail over the principle of state sovereignty. This means that if the state

¹² Declaration on the Granting of Independence to Colonial Countries and Peoples, 14 December 1960, General Assembly resolution 1514 (XV).

¹³ Vernon Van Dyke, Self-Determination and Minority Rights, *International Studies Quarterly*, Volume 13, Issue 3, September 1969, Pages. 225.

¹⁴ Art 1 of International Covenant on Civil and Political Rights (Dec. 19, 1966), 999 U.N.T.S. 171.

¹⁵ Art 103 and 2 (1) of the United Nations Charter.

commits serious, extensive, and systematic abuses of human rights, such as genocide, this exception can be invoked and those people could become a holder of the right.

C. Holder of the right:

According to Art 1 of ICCPR, the holders of the rights are all peoples, however, the expression "all peoples" emphasizes that it is a collective right, which means that only "people," not an individual, may exercise it. However, The Human Rights Committee (HRC)¹⁶ has explicitly made it clear through its view and in general comment 23, that claims arising in violation of the right to self-determination cannot be raised and only individual complaints have the right to exercise the jurisdiction of HRC, under Art 1 of the Optional Protocol I of ICCPR.¹⁷ Hence, as a reality, there is no enforcement mechanism at the universal level to exercise the right to self-determination.

Despite the fact the people already have exercised their right to self-determination to establish their own state, all state citizens still retain this right as an internal aspect of the right they are free to make decisions regarding matters pertaining to politics, the economy, social, cultural or the environmental right, etc. They can also change the government by exercising their right to political participation through voting processes, which demonstrates that they continue to possess the right to self-determination. However, people who identify as ethnically distinct do not have access to enforcement mechanisms under public international law. This is because states are unwilling to give such people this opportunity because doing so would go against the principle of state sovereignty.

IV. Minority Right in Public International Law:

A. Legal Norms of the Right:

Article 27 of ICCPR is a *lex specialis* norm exclusively included in a general human rights treaty for the protection of persons belonging to minorities and it is the only legally binding norm for the protection of minorities and indigenous people at the

¹⁶ UN Human Rights Committee (HRC), CCPR General Comment No. 23: Article 27 (Rights of Minorities), 8 April 1994, CCPR/C/21/Rev.1/Add.5.

¹⁷ Art.1 of Optional Protocol to the International Covenant on Civil and Political Rights (Dec. 19, 1966), 999 U.N.T.S. 302.

universal level.¹⁸ However, it does not define the term "minorities," albeit it is qualified through the adjectives used in Art 27, such as ethnic, religious, and linguistic minorities.¹⁹ The same provision has been included in Art 30 of the Convention on the Rights of Child (CRC),²⁰ the only difference is the holders under CRC are children belonging to minorities.

Further, the United Nations Declaration on the Rights of Persons Belonging to National or Ethnic, Religious, and Linguistic Minorities,²¹ which is inspired by Article 27 of the ICCPR is the first document specifically adopted by UNGA for the protection, promotion, and effective implementation of the human rights of persons belonging to minorities. The declaration's fundamental goal is to defend minority rights, contribute to the political and social stability of the states in which minorities live, and develop cordial relations and cooperation among peoples and states. However, it is a soft law and not a legally binding norm at the universal level.

B. Content of the Right:

Article 27 states that where ethnic, religious, or linguistic minorities exist on the territory of a state party, their members shall not be denied the right to enjoy their own culture, profess and practice their own religion, or use their own language in community with the other members of their group.²² This implies that Art. 27 is expressed in negative formulation terms, but nevertheless, it requires states not just to respect minority members' rights to enjoy their culture, but also to create the favorable conditions required to make this feasible.²³ This also indicates that it only applies to states in which ethnic, religious, or linguistic minorities exist, which indirectly

¹⁸ Yupsanis, A. (2013). "Article 27 of the ICCPR Revisited – The Right to Culture as a Normative Source for Minority /Indigenous Participatory Claims in the Case Law of the Human Rights Committee". In Hague Yearbook of International Law. 26. 345-383.

¹⁹ Art 27 of ICCPR.

²⁰ Convention on the Rights of the Child, 20 November 1989, General Assembly resolution 44/25

²¹ Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities, UN General Assembly on 18 December 1992, Resolution No. 47/135.

²² G. Pentassuglia, 'Introduction - Minority Rights, Human Rights: A Review of Basic Concepts, Entitlements and Implementation Procedures under International Law', in Council of Europe (ed.), Mechanisms for the Implementation of Minority Rights (Council of Europe Publishing, Strasbourg, 2004) p. 13.

²³ A. Eide, 'Good Governance, Human Rights, and the Rights of Minorities and Indigenous Peoples', in H.-O. Sano and G. Alfredsson with the collaboration of R. Clapp (eds.), Human Rights and Good Governance: Building Bridges (Martinus Nijhoff Publishers, The Hague / London / New York, 2002) p. 59.

encourages states to deny the presence of minorities in their territories.²⁴ However, HRC in General comment 23, clarifies that Art. 27, is designated to protect the rights of the persons belonging to a group who share a common culture, religion, or language, indicating that the individuals do not have to be citizens of the State party.²⁵ Further, it suggests that although the rights protected by Article 27 are individual rights, it has a collective element because the exercise of right depends on the minority group's ability to preserve its culture, language, or religion²⁶ hence they can be exercised in the community with other members of the group.

However, Art 27 does not contain a limitation clause but it does not mean it is an absolute right, it is limited by other rights: such as the right to equality and non-discrimination (Art. 2 and 26 ICCPR), the right to equality between men and women (Art. 3 ICCPR), right to life (Art. 6 ICCPR), prohibition to disseminate propaganda for war or advocate racial or religious hatred (Art. 20 ICCPR), freedom of movement and residence (Art. 12 ICCPR).

C. **Holder of minority rights:**

Article 27 of ICCPR provides rights to persons belonging to minorities which "exist" in a State party. This merely indicates that the holders of the rights are those who belong to certain minorities; nevertheless, the provision does not mention citizens, therefore they do not have to be nationals or citizens, nor do they have to be permanent residents. As a result, migrants or even visitors to a State party that includes such a minority have the right not to be denied the enjoyment of their rights provided under Art 27 of ICCPR.²⁷ As we can see, the clause does not pertain to 'citizens' as in Article 25 (right to participate in public affairs), but to 'persons' as in Articles 26 (equality before the law) and 14 (equality before the courts). As a result, Article 27 confers a 'human' rather

²⁴ K. Antonopoulos, 'Issues of Minority Rights' Protection under the Light of Former Yugoslavia's Dissolution', 21 Hellenic Review of European Law (2001) p. 79.

²⁵ UN Human Rights Committee (HRC), CCPR General Comment No. 23: Article 27 (Rights of Minorities), 8 April 1994, CCPR/C/21/Rev.1/Add.5.

²⁶ General comment 23, supra 21 and F. Lenzerini, 'Intangible Cultural Heritage: The Living Culture of Peoples', 22 European Journal of International Law (2011) p. 115.

²⁷ Human Rights Committee, General Comment No 23: The Rights of Minorities (Art. 27), UN Doc. CCPR / C / 21 / Rev. 1 / Add.5, 8 April 1994, Para 5.2.

than a 'citizen's' right.²⁸

Furthermore, regarding the meanings that the use of the term “exist” may imply, the HRC rejected the notion that the wording relates to a long and established minority,' adding that "it is not relevant to determine the degree of permanence that the term 'exist' connotes."²⁹ It means every human being belonging to a minority group could be the holder of the rights.

V. Short legal analysis of both provisions:

The main similarities between people's right to self-determination and minority rights is both have similar characteristics such as ethnicity, language, religion, and culture and both are seeking protection to preserve their uniqueness at separate levels under public International law. However, in reality, the right to self-determination was only available to the colonial states, and since it is declared a peremptory norm it does not really exist. However, the differences between the right of peoples to self-determination and minority rights are, First, The right to self-determination is provided under Art 1 and has internal and external aspects, and minority rights are stated under 27 of ICCPR and have only internal aspects. Secondly, Minority rights are individual rights with a collective aspect but can only be exercised internally and the right to self-determination is a collective right that can be exercised internally and externally under special circumstances. However, there is no enforcement mechanism to exercise the external right to self-determination. Thirdly, the subjects to the right to self-determination are the citizens of the state, and for minorities, it is not necessary to have citizenship and every person belonging to the minority is the holder of the right. However, special ties with territory regarding the right to self-determination is a settled principle but regarding minority rights, it is a contagious issue in modern international law.

VI. Conclusion:

In conclusion, Public international law does not provide a specific legal norm to

²⁸ R. Wolfrum, 'The Emergence of "New Minorities" as a Result of Migration', in C. Brölmann, R. Lefeber and M. Zieck (eds.), *Peoples and Minorities in International Law* (Martinus Nijhoff Publishers, Dordrecht / Boston / London, 1993) p. 161.

²⁹ Human Rights Committee, General Comment No 23: The Rights of Minorities (Art. 27), UN Doc. CCPR / C / 21 / Rev. 1 / Add.5, 8 April 1994, Para 5.2.

minorities to access the right of self-determination but in case of severe, systematic violation of human rights or in case of jus cogens norms such as Genocide, a minority group can become a people and ask for a declaration of independence or separate state with condition that the group should comply with UN requirements to become a state.

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