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John P. Humphrey

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Article abstract

Un pays est jugé par la façon dont il traite ses minorités, selon les paroles de Gandhi. L'auteur voit dans le respect de cette « règle de l'égalité » le symbole d'une maturité politique certaine. On n'a qu'à considérer l'histoire des guerres mondiales pour comprendre comment la façon dont on peut traiter certaines minorités peut affecter la paix des nations. L'élaboration du principe « d'autodétermination des peuples » après la guerre implique comme corollaire la protection des peuples minoritaires.

Cette protection peut se faire sur deux plans, soit en cherchant à prévenir la discrimination, soit en élaborant des mesures positives de protection des minorités pour les aider à préserver leur identité. Sous quelles formes peut-on retrouver ces mesures de protection et quel en est l'impact réel, lorsqu'un pays entend davantage assimiler que protéger ses minorités.

C'est à cette question que l'auteur tente de répondre.

Preventing Discrimination and Positive Protection for Minorities : Aspects of International Law

John P. HUMPHREY *

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C'est à cette question que l'auteur tente de répondre.

In an age when majority rule is apt to be considered the ultimate value, it is well to remember that, as the Mahatma Gandhi once said, a country can be judged by the way it treats its minorities. How a country treats its minorities is as good a test as any of its political maturity, tolerance and respect for the rule of equality. But there are other reasons why the way a country treats its minorities is important. President Wilson who, you will remember, wanted an article protecting national minorities in the Covenant of the League of Nations, once said that there is nothing more apt to disturb

* Professeur à la Faculté de droit de l'Université McGill.

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the peace of nations than the treatment that is sometimes meted out to minorities. And well might he have said it, because he knew that the immediate cause of the First World War was the murder of an Austrian archduke by a member of a disaffected minority. We in our generation know that it was the unprecedented persecution of minorities in and by Nazi Germany that prepared the way for the Second World War.

President Wilson was, you will also remember, a great believer in the political principle of the self-determination of peoples which became a kind of *leitmotiv* for the peace settlement after the war. The map of Europe was indeed redrawn in the light of the principle with the result that amongst other things the Austro-Hungarian Empire disappeared. It proved impossible however completely to respect the principle of one people one state one state one people. For however the new map might be drawn there were bound to be minorities within the new states some of which would belong to communities that in different circumstances had previously been majorities. Something needed to be done in the interest of justice and international peace to protect these minorities. It would seem indeed that if the principle of self-determination is worthy of respect, it carries with it the corollary that a people that succeeds in determining its political future has a duty to protect any minorities that remain within its jurisdiction. It was decided in any event that all those countries that had been called into existence by reason of the war, including for example Poland which was as it were resurrected, and countries the territory of which had been increased as well as certain ex-enemy states would be required to enter into treaties with the Allied and Associated Powers under which they would undertake to extend a measure of protection to their racial, religious and linguistic minorities. Other countries assumed similar obligations by declarations made on their admission to the League of Nations. These protections became part of the fundamental law of the states where the minorities resided and were put under the guarantee of the Council of the League of Nations. Thus began the international system for the protection of certain — not all for the system was discriminatory — minorities that operated in Europe in the period between the two wars. Notwithstanding the importance of the system for any study of the protection of minorities and the many lessons that can be learned from it, we do not have the time here to discuss it at any further length. I have mentioned it for two reasons. First because it had two quite different purposes : the prevention of discrimination on grounds of race, religion or language and what I myself call, for want of a better term, the positive protection of minorities, that is to say an obligation assumed by the state to provide certain services for the minority, such as minority schools, in order to help it preserve certain characteristics that distinguish it from the majority of the population or, more simply put, to help the minority preserve its identity.

This difference between the prevention of discrimination and the positive protection of minorities, which is nevertheless fundamental, is not always recognized or even understood. It is sometimes said — and it has been said at the United Nations — that if the human rights of everyone are respected without discrimination, there will be no further need for the protection of minorities. But the proponents of this view — and it is reflected in the Charter of the United Nations — quite forget that certain groups need something more than equality if they are to survive.

The other reason why I have mentioned the League system for the protection of minorities is that while the United Nations could hardly be more committed to the prevention of discrimination than it is and always has been, it never took over the responsibilities of the League in the matter of the positive protection of minorities. It is generally assumed moreover — and the United Nations Secretariat has given its blessing to this — that because of changed circumstances the minorities treaties are no longer in force.

There is nothing in the United Nations Charter about what I have called the positive protection of minorities; nor indeed are minorities even mentioned in the instrument. Nor is there any mention of minorities in the Universal Declaration of Human Rights notwithstanding the fact that the Secretariat draft of this instrument did contain an article based on the League experience that would have required governments to provide racial, religious and linguistic minorities with the kind of facilities, including minority schools, which they must have if they are to preserve those characteristics that distinguish them from the majority of the population. The reasons usually given for the failure of the United Nations to assume any responsibility for the positive protection of minorities, apart from the less than serious one that if the rights of everyone are respected without discrimination, there will be no need to protect minorities, are that the system as it operated under the League was discriminatory — as it indeed was — and that it was abused by the Nazis. But the real reason for the failure of the United Nations to take over any responsibilities in the matter of positive protection was that most if not all states, did not and do not want to help minorities preserve their cultural identity. They want to assimilate them. This was especially true of the United States and other countries of immigration on this side of the Atlantic. And if it was true of the countries represented at the San Francisco Conference in 1945 it is even more true of the present membership of the Organization. In many third world countries, in Africa for example, the population includes a number of racially different tribes speaking different languages. These countries are primarily interested in what in United Nations jargon is called "nation building".

Little wonder therefore that there is no mention of minorities in the United Nations Charter or the Universal Declaration or that there is very little likelihood of the world organization ever sponsoring a programme for their positive protection however much it is concerned with the prevention of certain kinds of discrimination.

Minorities are mentioned however in the Covenant on Civil and Political Rights. "In those states", says article 27 of this convention, "in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practice their their own religion or to use their own language". You will note that article 27 is drafted in purely negative terms and that it imposes no duty on the states parties to perform any service such as the provision of separate schools or the use of minority languages in the courts or legislature. All that it says is that the state shall not erect obstacles that deny members of ethnic, religious or linguistic minorities their right, in community with the other members of their group, to enjoy their own culture, to profess and practice their own religion or to use their own language. That is precisely what our Indian Act did for Indian women who marry non-Indian men. You are all familiar with the case of Sandra Lovelace, the New Brunswick Indian woman who married a non-Indian and because of that lost all her rights in her tribe notwithstanding the fact that under the Act if an Indian man married a non-Indian woman he brought her into his tribe. Mrs. Lovelace took her case to the United Nations Human Rights Committee, which is the implementation body set up by the Covenant on Civil and Political Rights. Strangely enough — and I think wrongly — the Committee did not decide the case on the ground that there was blatant discrimination based on sex, which is of course prohibited by the Covenant. But it did say that the Indian Act denied Mrs. Lovelace her right under article 27 of the Covenant to enjoy her own culture, to profess and practice her religion and to use her own language. Canada was therefore in default under the Covenant. The Indian Act has now been amended.

Still another convention needs to be mentioned in this rapid review of the international law — or perhaps I should say the absence of international law — relating to the positive protection of minorities. It is the Genocide Convention the text of which was approved by the United Nations in 1948. The convention came into force in 1951 and has been ratified by a large number of states including Canada. This convention protects "national, ethnical, racial or religious" groups, including both minorities and majorities, against the worst treatment that can be meted out to them, namely, any of the following acts committed "with intent to destroy in whole or in part"

such a group "as such": killing members of the group; causing serious bodily or mental harm to members of the group; deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; imposing measures intended to prevent births within the group; or forcibly transferring children of the group to another group. It would seem that much of what is called genocide by the media is not genocide as defined by the convention. Under the convention, there must be an intent to destroy a group in whole or in part and as such. The point I really want to make however is that however important this convention may be in the development of an international law of human rights, it imposes no duty on the contracting states to perform any positive service for minorities with a view to helping them preserve their identity.

So much for the positive protection of minorities — or perhaps I should say so little. The prevention of discrimination is quite a different matter. In the case of the positive protection of minorities what the latter want is something more than equality. What they want in the case of the prevention of discrimination is equality. Now whatever else equality may mean, it certainly means that everyone, whether a member of a minority or not, should be protected against arbitrary discrimination on irrelevant grounds. That no-one should be subjected to such treatment is probably the best substantiated rule of the international law of human rights.

It has been said of the United Nations Charter that references to human rights run through it like a golden thread. The same can be said of its references to discrimination; for in nearly every place where it mentions the promotion of respect for human rights and fundamental freedoms the words "without distinction as to race, sex, language or religion" immediately follow. The Universal Declaration of Human Rights, the two United Nations covenants, the European Convention for the Protection of Human Rights and Fundamental Freedoms, the Inter-American Convention on Human Rights, the United Nations Convention on the Elimination of All Forms of Racial Discrimination, the Convention on the Political Rights of Women, the Convention on the Elimination of Discrimination against Women, the Unesco Convention on Discrimination in Education, the International Labour Organization Convention concerning Discrimination in Respect of Employment and Occupation and many other conventions and declarations all prohibit discrimination on stated grounds. It is more than probable moreover that all forms of arbitrary discrimination on irrelevant grounds are now prohibited by the customary law of nations; and the principle may even be part of the *jus cogens* — those rules of international law, that is to say, which are *erga omnes* and therefore basic in the interpretation and application of international law.

Not only are rules prohibiting discrimination now firmly imbedded in international law, there are few if any matters with which the international community has been more concerned since the Second World War than the prevention of at least one kind of discrimination, which is racial discrimination. There has been less interest in certain other kinds of discrimination including discrimination based on political opinion.

You will find good definitions of discrimination in the International Convention on the Elimination of All Forms of Racial Discrimination, the Convention on Discrimination against Women and the Unesco Convention on Discrimination in Education. All of these conventions relate to discrimination in particular fields. Paraphrasing them we can define discrimination in more general terms as any distinction, exclusion, restriction or preference based on a prohibited ground that has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life.

You will have noted that the list of prohibited grounds of discrimination in the United Nations Charter is a closed list: race, sex, language and religion. When however the Universal Declaration was adopted in 1948, this list was not only expanded but it became open-ended — in the sense that the list of prohibited grounds is not exhaustive. "Everyone is entitled", says article 2 of the Declaration, "to all the rights and freedoms set forth in this Declaration without distinction of any kind such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status". You will have noted the phrase "without distinction of any kind such as" and the words "or other status". The lists of prohibited grounds contained in the two covenants, the European Convention and the Inter-American Convention are also open-ended. We can, I think, therefore concluded that international law prohibits any arbitrary discrimination based on grounds that are irrelevant in the particular circumstances.

It is also true, on my reading in any event — and perhaps I am now impinging on Professor Beaudoin's jurisdiction — that the list of prohibited grounds of discrimination contained in article 15 of the new Canadian Charter of Rights and Freedoms is also open-ended. "Every individual is" says the article, "equal before and under the law and has the right to the equal protection and benefit of the law — Professor Beaudoin can perhaps tell us what those words mean — without discrimination and, in particular, without discrimination based on race, national or ethnic origin, religion, sex, age or mental or physical disability". You will have noted the words "in particular". We can thank the drafters of the Charter for having included

those two words, because otherwise Canadians would not be constitutionally protected against discrimination based on a number of grounds not specifically mentioned in the Charter, including a number of grounds mentioned in international instruments to which Canada is a party. They include language, an internationally prohibited ground of discrimination so important that it is mentioned over and over again in the United Nations Charter, and political and other opinion, a prohibited ground mentioned in some of the other international treaties to which Canada is a party and which is of course an essential part of the democratic process. It would take us too far if I were even to mention the other respects in which our new Charter does not reflect our international obligations in the matter of human rights. One would think that the drafters of the Charter were unaware of the fact that there is such a thing as an international law of human rights and that Canada is bound by its rules. Here is an officially bilingual country that is a member of the United Nations the constitution of which prohibits discrimination on grounds of language. With great fanfare we adopt a Charter of Rights and Freedoms the purpose of which to enshrine the protection of human rights in our constitution. One of the articles enunciates the principle of equality and lists certain prohibited grounds of discrimination. But the list does not include language which is one of the four prohibited grounds of discrimination listed in the United Nations Charter. Why? I can think of only one reason. When Canadians begin to talk about language they usually go completely hay-wire.