

Shri V.K. Krishna Menon Memorial Lecture
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*THE RIGHT OF NATIONAL MINORITIES TO SEEK
'SELF-DETERMINATION' UNDER INTERNATIONAL LAW*
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Introduction

Ladies and Gentlemen,

I am grateful for the opportunity to deliver this lecture. Shri V.K. Krishna Menon was one of our finest statesmen and diplomats. During the freedom struggle he actively promoted the cause of Indian Independence in England, by way of his involvement in the 'India League' between 1929 and 1947. In addition to being a prominent lawyer and journalist he also took a keen interest in literary and cultural activities and is widely remembered as a co-founder of the company which publishes the world-famous 'Penguin' and 'Pelican' paperback titles. After independence, he served with distinction as

India's first High Commissioner to the United Kingdom between 1947 and 1952. After that he led several Indian delegations to the United Nations, where he was instrumental in shaping and articulating our country's stand on important issues such as decolonisation, non-alignment and the stronger protection of human rights. He is especially remembered for his defence of India's stand on Kashmir before the UN Security Council. He went on to serve as a member of parliament and was part of the Union cabinet under Jawaharlal Nehru.

It is only fitting that the Krishna Menon Society has been organising these annual lectures in memory of Shri V.K. Krishna Menon. In order to honour the person who played a foundational role in shaping independent India's foreign policy, I thought that it would be appropriate to speak on a pertinent issue in the field of public international law. Shri V.K. Krishna Menon was a passionate proponent of the cause of 'self-determination' for previously colonised nations. However we have seen in recent decades that claims for self-determination have been frequently made to justify unwarranted separatist movements and insurgencies. In many cases there have been confusions created between the domain of minority rights under national laws and the invocation of the 'right to self-determination'. Therefore, it is important to identify the distinctions as well as the zones of intersection between the language of minority rights and that of 'self-determination'.

The understanding of the term 'national minorities' relates to communities identified on the basis of ethnic, linguistic, religious or cultural characteristics. The term 'national minorities' as understood under the UN system does not refer to the rights of indigenous people and a separate regime has been evolved for protecting the latter. Furthermore, the ambit of this term is confined to those individuals recognized as citizens and does not include foreign nationals residing in the state or refugees.

The right to self-determination can be generally understood as the right of a distinct community to choose the nature of its political existence. This clearly includes the choice of seeking statehood, breaking away from an existing state or merging with another independent state. It further includes the right of a minority to choose the form of governance applicable to it. While the idea of 'external' self-determination is identified with the choice of political status, 'internal' self-determination corresponds to the strengthening of the protections given to minorities within a national jurisdiction. These protections could be in the nature of federalism and decentralisation of governance, legal pluralism and the rigorous protection of 'group rights' especially those with religious, linguistic and cultural dimensions. Hence contestations about 'external self-determination' largely lie in the realm of public international law while those pertaining to 'internal self-determination' raise questions about the divergence between international instruments and municipal law.

In this talk, I would like to examine the evolution of minority rights in respect of the parameters laid down in prominent international instruments such as the United Nations Charter, International Covenant on Civil and Political Rights (ICCPR), the Helsinki Final Act and the relevant resolutions and declarations passed by the United Nations General Assembly.¹ Such an inquiry raises several questions about the limits of the ‘right to self-determination’. The first question is whether all minority groups have an inherent right to seek self-determination. In this regard the main point of dispute in the post World War II era is whether the right to self-determination is applicable beyond the context of decolonization? If minorities within contemporary nations do have such a right, should it be considered an ‘absolute’ right or a ‘contingent’ right? What are the justifications for allowing national minorities to secede and if they are allowed to do so how is the same reconciled with widely accepted principles such as respect for the ‘sovereignty and territorial integrity’ of states?

Several other questions also arise with respect to the consequences of the exercise of the right of self-determination. Recent events such as the declaration of independence by Kosovo and the breaking away of South Ossetia and Abkhazia from the former Soviet republic of Georgia, has once again brought these questions to the foreground. Besides the intrusion into the territorial

¹ The frame of reference used for this paper is the interpretation given to General Assembly Resolutions 1514 (‘Colonial Declaration’) and 2625 (‘Principles governing the Friendly relations between States’).

integrity of existing nations, the first problem is that of the drawing of acceptable boundaries. Further problems arise in respect of the claims by dispersed populations. Communities belonging to the majority group of a country which reside in minority-dominated areas seeking independence are called 'irredenta'. In many cases such as the one of Kosovo, the protection of the 'irredenta' is a strong argument against allowing the secession of minority-dominated areas. Similar arguments are advanced for the protection of smaller minorities residing within minority-dominated areas – a condition described as 'nesting'. For example the Canadian Supreme Court invoked the rights of the indigenous groups residing in Quebec, as an argument against the demands for secession by that state.²

At the same time it is important to examine the inter-relationship between the ideas of 'external' and 'internal' self-determination. It is argued on one hand that guarantees of protection for minority rights in national laws help in maintaining territorial integrity by preventing the emergence of separatist claims, while others argue that appeasing minorities is the first step towards secession and fragmentation.³

² *Reference Re Secession of Quebec*, (1998) 37 ILM 1342

³ See Diane F. Orentlicher, 'Separation anxiety: International responses to ethno-separatist claims', 23 *Yale Journal of International Law* 1 (1998)

Overview of International Instruments

While the protection of minorities has been a visible component of the law of nations, the embodiment of the same in the UN system can be traced back to the minorities' treaties regime established after the First World War under the aegis of the League of Nations. The Treaty of Versailles was the precursor to the recognition of nations like Poland, Czechoslovakia and Yugoslavia among others which were carved out of the territories of the defeated powers. Woodrow Wilson's exhortation of the right to self-determination being available to all people was seen as the guiding force behind the re-drawing of boundaries in Central and Eastern Europe.⁴ Moreover, the Bolsheviks in Russia also took up the cause of recognizing the right of self-determination of the various distinct communities in the region.

The consequence of this agenda was that the new national boundaries created substantial minority populations in many of the countries. For example, many of the newly recognized Slav majority countries were left with substantial German or Hungarian minorities. People belonging to particular linguistic and cultural communities found themselves dispersed across several countries after the 'Treaty of Versailles'. In such a scenario it was important for a multilateral body like the League of Nations to ensure that the states extended basic protections to their respective minority communities. The

⁴ Woodrow Wilson's promise of giving effect to the right of self-determination for all peoples was heavily criticized as appearing to justify an absolute 'right to secede'. Commentators have reasoned that his invocation created false hope among numerous communities.

modus operandi adopted for the same was not a multilateral agreement, but instead a regime comprising of several declarations and bilateral treaties.⁵ A country would recognize its obligations towards its minorities by way of making declarations or entering into a bilateral treaty with another country with which the particular minority identified itself. In some ways the system sought to operate on the basis of mutual assurances. The substantive rights sought to be protected by such means largely related to the protection of linguistic, cultural and religious practices of the minorities. However, this regime proved to be unviable since it was applied only to the former territories of the defeated powers and not of the victorious allies. By the early 1930's the political scenario in Central and Eastern Europe was highly complicated with countries like Germany criticizing the re-drawing of national boundaries after the peace of Versailles. It was argued that many 'nationalities' across Europe were unjustly denied the right of self-determination while those who aligned with the Allies had done the same.⁶

After the Second World War, the discourse on minority rights took on a more nuanced description with the protection of human rights becoming the foremost consideration, on account of recorded atrocities against ethnic and religious minorities, such as the Holocaust. On the other hand, the right to self-determination as

⁵ See 'Comment on the Minorities regime after the First World War' in Henry J. Steiner and Philip Alston (eds.), *International human rights in context – Law, politics, morals*, 2nd edn. (Oxford: Oxford University Press, 2000) at p. 93-96

⁶ The rhetoric of the Nazis was that the German speaking people dispersed across countries like Austria, Czechoslovakia and Poland were denied the right of self-determination, which was identified with a desire to integrate with the homeland.

enumerated in the United Nations Charter was collectively identified with the 'people' of subject territories such as colonies and conquered territories, rather than distinctive communities who could identify themselves as minorities. The understanding of this right was advanced in the context of the right of the people of a territory to gain independence from foreign rule. Articles 1(2) and 55 of the UN charter deal with the principle of self-determination. While Article 1(2) talks about the right of all people to exercise self-determination, Article 55 lays down the obligation of respecting the same principle in order to maintain peaceful and friendly relations among nations.

As mentioned above, the basic contestation has been on the interpretation of the word 'people'. In order to apply the right of self-determination in the context of decolonization it was argued that 'peoples' refers to groups of human beings who may, or may not, comprise States or nations. This was clearly intended to recognize the rights of colonized people who did not have the status of 'statehood'. The criticism against this interpretation was that the UN charter appeared to facilitate an unrestricted right of secession. The counter-argument was that the right to self-determination applies to the whole population of a territory and cannot be ordinarily attributed to minorities within the same since that would encourage further fragmentation of newly independent states. The UN charter also incorporates references to self-determination in Articles 73 and 76, which place obligations on countries to ensure the protection of minority rights and the development of self-government in non-self

governing territories held under the International trusteeship system.⁷ Some commentators argue that this territorial conception of moving towards self-government implies that the right of self-determination applies to the entire population of a territory and not to minorities within the same.

The idea of the right of self-determination being confined to the context of decolonization was reinforced by General Assembly Resolution 1514 passed in 1960 which is also known as the 'Colonial declaration'.⁸ The declaration acknowledged the irreversibility of decolonization but at the same time also stated that the partial or total disruption of the territorial integrity of a country is incompatible with the principles of the UN Charter. The implication of Resolution 1514 has been that the populations of former colonial territories could claim independence as a whole but minorities residing within them could not invoke any such legal right.

General Assembly Resolution 1541 pertained to Article 73e of the UN Charter which laid down the obligations of states to transmit information to the General Assembly about the progress made in

⁷ The International Trusteeship system established under Chapters XI and XII of the UN Charter replaced the mandate system established by the League of Nations. Countries that administered Non-self governing territories under this system were placed under an obligation to present reports before the General Assembly detailing the status of minority rights in the respective territories.

⁸ Declaration on the granting of independence to colonial countries and peoples, *G.A. Res. 1514 (XV), 1960*

protecting minorities in non-self governing territories.⁹ These obligations relate to the guarantee of minority rights based on the idea of non-discrimination. In respect of facilitating self-determination for the trust territories, the resolution indicated the preferred modes of implementing the same by way of independence, free association or integration with an independent state or the emergence into any other political status freely determined by a people.

The linkages between rights of minorities and self-determination came to be expressly recognized with the passing of General Assembly Resolution 2625 in 1970 that dealt with the principles governing friendly relations between states.¹⁰ The resolution reiterates the need to respect principles like the sovereignty and territorial integrity of states. However, the contentious part was that the protection of sovereignty exists as long as *'independent states conduct themselves in compliance with the principle of self-determination and are thus possessed of a government representing the whole people belonging to the territory without distinction as to race, creed or colour'*. The understanding of such language is that the violation of the territorial integrity of a state can be justified if a particular section of the population is not properly represented by the government. The same can be extended to argue

⁹ Principles which should guide members in determining whether or not an obligation exists to transmit the information called for under Article 73e of the Charter, *G.A. Res. 1541 (XV), 1960*

¹⁰ Declaration on principles of international law concerning friendly relations and co-operation among states in accordance with the Charter of the United Nations, *G.A. Res. 2625 (XXV), 1970*

that the lack of protection for minorities amounts to such a justification. Such an interpretation favours the recognition of a 'right to secession' for minorities if they are being discriminated against within a national legal regime.¹¹ Such an interpretation is evidently problematic but is often read in conjunction with the justification of 'self-determination' on grounds of continuing oppression of minority groups.

The competing claims of the exercise of self-determination by minorities and that of preserving the territorial integrity of independent states have been sought to be reconciled in the form of 'internal' self-determination.¹² The idea of 'internal' self-determination contemplates the idea of substantive equality for persons belonging to minorities within a country by way of protection of individual civil-political rights as well as social, economic and cultural rights. In this regard one may refer to Article 27 of the International Covenant on Civil and Political Rights (ICCPR), which is understood as not only prescribing a duty upon states to tolerate the exercise of minority rights but also a positive duty to enable the same in order to ensure 'equality in fact' as distinguished from 'equality in law'. The said provision reads as follows:

"In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy

¹¹ See generally: Frederic Kirgis Jr., 'The degrees of self-determination in the United Nations era', 88 *American Journal of International Law* 304 (1994)

¹² See Nathaniel Berman, 'But the alternative is despair: European nationalism and the modernists renewal of international law', 106 *Harvard Law Review* 1792 (1993)

their own culture, to profess and practice their own religion, or to use their own language.”

The Helsinki Declaration¹³ made by a group of European nations also enumerated the obligation on part of participating states to respect the rights of persons belonging to national minorities but has been the subject of controversy since one of its constituent principles talks about the right of all people to freely determine their internal and external political status. Principle VIII of the Helsinki Declaration includes the following text:

“By virtue of the principle of equal rights and self-determination of peoples, all people always have the right in full freedom, to determine, when and as they wish, their internal and external political status, without external political interference, and to pursue as they wish their political, economic, social and cultural development.”

The General Assembly passed a declaration in 1992,¹⁴ that reiterated the need to protect and promote the exercise of the rights assured under Article 27 of the ICCPR but omitted the use of contentious words like ‘peoples’ and ‘self-determination’. Instead the text mentions the need to protect the rights of ‘persons belonging to minorities’ and also requires that nothing in the declaration may be construed as permitting any activity contrary to principles like sovereign equality, territorial integrity and political independence of

¹³ The Final Act of the Conference on Security and Co-operation in Europe (‘Helsinki Declaration’), (1975) 14 ILM 1292

¹⁴ Declaration on the rights of persons belonging to national or ethnic, religious and linguistic minorities, G.A. Res. 47/135, 1992

States. Hence, the evolution of international instruments under the UN system is now veering towards a conception of 'internal' self-determination.

The extent of minorities' right to self-determination

Despite a distinct preference for 'internal' self-determination, international instruments do allow scope for the exercise of 'external' self-determination by national minorities under some contingencies. One can proceed with the assumption that national minorities do not have an absolute right of self-determination in keeping with the view that they cannot be identified with the word 'peoples' as used in the UN Charter. An example of such a stance is India's declaration in respect of Article 1 of the ICCPR which affirmed that the right to 'external' self-determination applied only to the people under foreign domination and that it did not apply to sovereign independent states or to a section of the people or nation.

While it is an accepted proposition that the whole population of a territory may exercise the right of self-determination in cases of historical disruptions in the status of the territory such as 'colonial rule' or its' borders being in a transient state, it is further argued that national minorities may do so in cases of continuing oppression. Such oppression may be in the form of denial of political participation, curtailment of group rights and persecution based on group identity. A preliminary problem in allowing the same is in ascertaining the will of a minority to secede from an independent state. The identification of

a minority's will may itself be based on objective criteria such as language, ethnicity, race, religion and cultural practices or on subjective criteria which involves an expression of the will to secede such as a referendum, a popular movement or demands made by political parties representing a national minority. The recognition of a legal right of self-determination becomes problematic because not all members of a minority community identified on the basis of objective criteria may be in favour of exercising such a right.

It may be tenable to argue that outside the context of decolonization, the right of self-determination can be recognized for minorities in circumstances involving oppression or those where the majority itself consents to the same. The existence of oppression or unrepresentative government obviously needs to be proved with reference to a high threshold. It would appear that the justification for self-determination could arise from the denial of political participation, the suppression of linguistic, religious and cultural rights or from state-sponsored repression against the community in question. In this regard the determination of what constitutes oppression or discrimination becomes a highly subjective and politically charged question. For example the perpetration of genocide against minority groups will be readily accepted as a basis for seeking self-determination, whereas the same cannot be considered as a

proportionate response to restrictions on linguistic or religious rights or even restrictions on the activities of political parties that represent minority interests. Grievances of the latter kind are better resolved through strategies such as the use of political dialogue and constitutional litigation.

While colonial rule was readily identified with oppression against the whole population of a territory, the 'Belgian thesis'¹⁵ hinted at the idea of regional discrimination against a minority within a territory. The idea that problems similar to colonialism exist with respect to underdeveloped groups veers towards a radical understanding of self-determination that can be invoked by national minorities as well as indigenous groups. This interpretation comes into direct conflict with the idea of sovereignty not only by way of justifying separatist movements but also by legitimizing intervention by foreign countries in support of the same.

As mentioned earlier, another justification for allowing minorities to exercise self-determination could be that of a state's borders being in a transient state. This logic was advanced in the report of the International Commission of Jurists (ICJ) on the dispute concerning the Aaland Islands in 1920.¹⁶ The Aaland Islands were in the possession of Finland but were mostly populated by Swedish

¹⁵ The 'Belgian thesis' was actually a rhetorical response to the increased international pressure on Belgium to transmit information about the status of progress towards self-governance in the trust territory of Congo.

¹⁶ Report of International Commission of Jurists on legal aspects of the Aaland Islands question, *League of Nations Official journal, Special supplement No. 3 (1920)*

speaking people. The question tackled by the Commission was whether the dispute over the Aaland Islands pertained to Finland's domestic jurisdiction or whether it was an international dispute between Sweden and Finland. The reasoning advanced was that Finland's borders were in a transient state since at that point of time it had recently been subject to the rule of Tsarist Russia and disputes over its borders came under the purview of international law. When the dispute was referred to a panel of Special Rapporteurs¹⁷ under the aegis of the League of Nations, their finding gave due importance to the principle of territorial integrity. Their report favoured the retention of Aaland Islands within Finland subject to guarantees being given for the protection of the Swedish speaking minority. The opinion given in the Aaland Islands dispute has since been cited extensively by those who argue for an absolute right of self-determination as well as those who emphasize the principle of maintaining territorial integrity. On one hand, it is reasoned that former colonies could be described as having transient borders and that the minorities resident within them have a legitimate right to choose their external and internal political status. The opposing stand of course points to the preference for the protection of minorities within the domestic legal framework while upholding the sovereignty of independent states.

Another basis for national minorities to exercise 'external' self-determination is when the majority also consents to the same. An example of the same would be the break-up of the former Soviet

¹⁷ Report of Commission of Rapporteurs on the Aaland Islands question, *League of Nations Doc. B7 21/68/106 (1921)*

Union, where the Kremlin administration allowed non-Russian ethnicities to form independent states within the CIS framework. Another example is that of the ‘Velvet revolution’ in Czechoslovakia where the Czech and Slovak speaking communities agreed to a peaceable division of territory to form two independent states. Yet another example of secession by consent, though not strictly in the context of minority rights would be the independence of Eritrea from Ethiopia. The Ethiopian constitution recognized the right of secession of provincial territories. The secession of Eritrea came only after a long-drawn armed conflict but its independent status is now recognized by Ethiopia.

The idea of ‘secession by consent’ was prominently discussed in the judgment of the Canadian Supreme Court in respect of demands for the secession of Quebec, which has a predominantly French speaking population.¹⁸ The matter was referred to the Court by the Canadian Government in light of a referendum held in 1995 where those demanding independence for Quebec lost the vote by a close margin. The key issues discussed in the judgment are those of the viability of secession under Canadian constitutional law as well as public international law. While the Court’s opinion in respect of international law relied on principles like preserving the territorial integrity of the country and emphasized the continued protection of the substantive rights of the French speaking population, the idea of constitutionalism was also discussed. It was observed that by way of accepting the Federal constitution, Quebec had taken on certain

¹⁸ *Reference Re Secession of Quebec*, (1998) 37 ILM 1342

obligations towards the other provinces and that it could not unilaterally decide to secede. The dictates of constitutionalism prescribed that secession of a particular territory was possible only if there was a consensus among all the provinces after due deliberations.¹⁹ In other words, the Canadian Supreme Court held that the secession of a minority-dominated territory was possible only if the majority consented to the same. The judgment also mentions the obligation of the federal government to safeguard the interests of a smaller minority resident within a minority-dominated area, in this case referring to the indigenous population of Quebec.

Another idea that is discussed in the context of debates about the right to self-determination is the 'Effectivity principle'. It is argued that if a break-away territory has an independent and effectively functioning government, the same should be considered as a valid criterion for the recognition of its sovereignty by other nations. This recognition is understandably a function of political interests on the international stage and cannot be characterised as a legal right. A contentious example of the same is that of the Sahrawi Arab Democratic Republic (SADR), a territory also known as 'Western Sahara' which is otherwise part of Morocco but is recognised as an independent nation by more than 70 nations.²⁰

¹⁹ See Stephen J. Toope, 'Right to secede under constitutional law and public international law- role of international law in Canadian courts', *93 American Journal of International Law* 519 (1999)

²⁰ Refer *Western Sahara case*, (1975) ICJ Reports 12

The conception of 'internal' self-determination

In recent years the idea of Self-determination has been proposed as a key element of the 'theory of democratic entitlement' that accrues to all individuals and groups. This extension has been used to argue in favour of an absolute right of self-determination, under which all distinctive communities should be free to choose their political status. However, this ideal of democratic entitlement should be reconciled with the need to protect the integrity of existing national boundaries. The obvious rationale is that an absolute right of self-determination would create instability by way of unrestricted fragmentation of existing states.

It is in this regard that the growing body of international law relating to the protection of human rights becomes important. The protection of 'group rights' as per the provisions of documents like the ICCPR is identified with the idea of 'internal' self-determination. Due emphasis is laid on the protection of the civil-political rights as well as distinctive linguistic, religious or cultural rights of national minorities as opposed to claims for 'external' self-determination.²¹ The interpretation of General Assembly Resolution 2625 in this regard has been that there is no case for exercising 'external' self-determination as long as minorities are given proper representation in governance and there is due protection for group rights. Such representation may be in the form of methods such as reservations in legislative bodies

²¹ See generally: Gregory Fox, 'Self-determination in the post-cold war era: A new internal focus?', *16 Michigan Journal of International Law* 733 (1995)

or by way of constitutional recognition of autonomous governing bodies. The right to political participation would entail that individuals belonging to minorities should be guaranteed the right to vote, the right to stand for public offices and the right to organize themselves by way of associations, unions or political parties.

Hence the embodiment of the idea of 'internal' self-determination could also take place by way of means such as the continuance of personal law regimes for religious minorities and special treatment for minority-run educational and cultural institutions in addition to decentralisation in governance. India is a prominent practitioner of the philosophy of legal pluralism by way of allowing Muslim, Christian, Parsi and Jewish communities to adhere to their respective personal law regimes. Another example of the co-existence of parallel personal law regimes can be found in the state of Israel where separate systems co-exist for Orthodox Jews and Arabs besides the secular law on matters such as marriage, divorce and inheritance.²²

The rights sought to be guaranteed under Article 27 of the ICCPR are referred to as 'Group rights' even though they are vested in individuals, since they are exercised in community with others belonging to the concerned minority community.²³ The key idea

²² See 'Comment on state, religion and personal law in Israel' in Henry J. Steiner and Philip Alston (eds.), *International human rights in context – Law, politics, morals*, 2nd edn. (Oxford: Oxford University Press, 2000) at p. 493-497

²³ The Constitution of India gives several 'Group rights' the status of fundamental rights enforceable by way of writ jurisdiction. For example Article 25 recognises the freedom of

behind guaranteeing ‘group rights’ by way of constitutional and statutory safeguards is that of ensuring ‘non-discrimination’. In assessing the quality of such protection for minorities, a distinction is made between ‘equality in law’ and ‘equality in fact’. While ‘equality in law’ denotes procedural fairness by way of the state’s obligation to tolerate the exercise of minority rights, ‘equality in fact’ refers to a substantive standard of fairness where the state is obliged to facilitate the exercise of minority rights.

One of the most cited texts that illustrate this distinction is the opinion in the matter relating to *Minority Schools in Albania*.²⁴ Albania was a party in the minorities treaties regime instituted under the supervision of the League of Nations after World War I. Under this regime, Albania being a Muslim majority country was bound to guarantee the ‘group rights’ of national minorities such as the Greek Christians. A dispute arose on account of a Constitutional amendment passed in 1933 that reserved education as a function of the state and required the closure of all private schools. It was argued on behalf of the Christian minority of Greek origin that this would curtail the linguistic rights of the community since private schools that offered Greek language instruction would be closed down. The Albanian government argued that the amendment did not discriminate against any minority since the abolition of private schools

individuals to preach and practice a religion of their choice, while Article 26 recognises the right to establish and administer religious and charitable institutions. Similarly Article 29 protects the interests of linguistic minorities in preserving their language while Article 30 provides for the special treatment of minority-run educational institutions.

²⁴ *Minority Schools in Albania* (1935) PCIJ Reports, Series A/B, No. 64

was a general measure applicable to the majority as well as minority of Albanian nationals. The Court decided by a majority of eight votes to three that the abolition of minority run schools was violative of the declaration that Albania had made under the minorities' treaties regime. The majority's decision turned on the distinction between the notions of 'equality in fact' and 'equality in law'. Reference was made to the opinion given in the case of the *German settlers in Poland*,²⁵ and it was observed that while 'equality in law' precludes discrimination of any kind, 'equality in fact' may involve the necessity of differential treatment in order to attain a result which establishes an equilibrium between different situations. It was reasoned that the abolition of private schools would have the effect of depriving the minority of the institutions appropriate to its needs, whereas the majority would continue to have them supplied in the state-run institutions.

However, problems can arise if some 'Group rights' are given a sacrosanct status, especially those cultural practices of minorities which trample on individual rights recognised within the domestic legal system.²⁶ The larger argument is that autonomy schemes such as the continuance of distinct personal laws frustrate a major objective of the human rights movement, that being of assuring that

²⁵ *German Settlers in Poland*, (1923) PCIJ Reports, Series B, No. 6

²⁶ The *Shah Bano* case proved to be a flashpoint in this regard. The Supreme Court held that the Muslim law on maintenance was discriminatory and applied the law on maintenance contained in the Code of Criminal Procedure in the particular case. This led to widespread protests by the Indian Muslim community and the effect of the judgment was undone by means of a Central legislation. See *Mohammed Ahmed Khan v. Shah Bano Begum*, (1985) 2 SCC 556

societies remain open to challenge, internal dialogue and change. Formal legal protections for discriminatory practices reinforce the natural tendencies of a minority's members to look inward.²⁷

It may be deduced that the exercise of internal self-determination is seen as an effective compromise between a state and a minority, in the interest of maintaining the territorial integrity of the state. However, the problem that remains is that in some circumstances the exercise of internal self-determination can be a precursor to the attainment of external self-determination.

Problems arising out of the re-drawing of national boundaries

While it may be tenable to say that the validity of claims for 'self-determination' by national minorities is contingent on factors like continuing oppression or successful negotiations with the majority, there is also a need to consider the consequences of the exercise of the same. If a national minority does secede, the first question relates to the territorial extent of the same. One approach is to assert that the areas dominated by the particular minority should be allowed to break away. In this regard the application of the doctrine of 'Uti Possidetis' has been very controversial. This doctrine finds its origins in Roman Law and entails that the boundaries of newly independent states should correspond to administrative or provincial boundaries that existed under previous regimes.

²⁷ See Henry Steiner, 'Ideals and Counter-ideals in the struggle over autonomy regimes for minorities', *66 Notre Dame Law Review* 1539 (1991)

'Uti possidetis' was used in respect of decolonization in Latin America and Africa, where most of the 'paper boundaries' drawn under the colonial powers were transformed into international boundaries. It must be remembered that the native populations in most parts of Latin America and Africa were organized on the basis of ethnic or tribal loyalty and the territorial conception of political existence became prominent only in the colonial period. The division of territory among the colonial powers did not correspond to the actual distribution of populations by way of ethnic, tribal, linguistic, religious or cultural characteristics. The justification for retaining colonial boundaries was that the re-drawing of boundaries based on the actual location and distribution of various ethnicities would jeopardize international stability.²⁸ Instead, the empirical experience in many African nations has been that the imposition of these 'paper boundaries' has itself been a prominent cause of instability and conflict, since populations with the same ethnic or tribal affiliations found themselves dispersed across several newly independent nation states. This has only provoked numerous separatist movements where the ethnic minority in one country often receives political and military support from neighbouring countries. Thus the application of 'Uti possidetis' is often argued as the root cause for the never-ending cycle of civil wars in many African nations.²⁹

²⁸ See Marti Koskenniemi, 'National self-determination today: Problems of legal theory and practice', *43 International and Comparative Law Quarterly* 241 (1994)

²⁹ See: Steven R. Ratner, 'Drawing a better line: Uti possidetis and the borders of new states', *90 American Journal of International Law* 590 (1996)

Another line of theoretical criticism is that if the doctrine of 'Uti possidetis' is accepted as a norm for identifying the borders of new states, then the very creation of federal divisions in any country lays the seeds for future fragmentation. This idea gained prominence with the division of the former Socialist Republic of Yugoslavia in the early 1990's which was followed by armed conflict in several of the newly created states.³⁰ The key cause of conflict was the existence of dispersed populations ('irredenta') i.e. Serbian communities resident in the various territories demanding integration with the residual republic of Yugoslavia that consisted of Serbia and Montenegro. The complications arose when break-away states like Croatia and Bosnia-Herzegovina began to be recognised by other nations.³¹ At this stage, the Yugoslavian army gave active support to Serbian militia in waging war against the Croats in Croatia and against the Muslims in Bosnia-Herzegovina. It was vehemently argued that the problem lay in the fact that the division of Former Yugoslavia was based on the administrative divisions created under Marshall Tito's regime. The former provincial divisions clearly did not account for the actual distribution of population by way of ethnicity. Furthermore, the demographic distribution changes with the continuous transfer of populations within a nation. In this case, the calls for a 'Greater Serbia' were clearly inconsistent with the idea of allowing the former

³⁰ For a background on the conflict following the division of Former Yugoslavia see Vesna Pesic, 'Serbian Nationalism and the Origins of the Yugoslav Crisis', *United States Institute of Peace*, April 1996, Texts sourced from <<http://www.usip.org>>

³¹ Refer: Conference on Yugoslavia Arbitration Commission: Opinions on questions arising from the dissolution of Yugoslavia ('Badinter Arbitration Commission'), (1992) 31 *ILM* 1494

provinces to transform themselves into independent nation states. The claims of the Yugoslav government were also based on the idea of protecting the Serbian populations which had become minorities in the new states of Croatia, Slovenia and Bosnia-Herzegovina.

The problem of drawing boundaries for territories seeking independence cannot be consistently addressed with a principle like 'Uti possidetis'. However, even a subjective determination of borders can be problematic. An example of the same is the partition of British India into Hindu-majority India and Muslim-majority Pakistan. There were substantial 'minorities' created on either side of the Radcliffe line and we are all aware of how the cross-migration of populations led to a widespread communal conflagration. In the 1950's, independent India made a clear departure from the doctrine of 'Uti Possidetis' with the reorganisation of states primarily on linguistic lines.

Concluding remarks

To summarise what I have said so far, the main contestation has been whether international law provides for an 'absolute' or a 'contingent' right to self-determination for national minorities. The favoured interpretation has been that the right to self-determination articulated in the UN charter applies to the whole population of occupied territories and not to particular individuals or communities. This confinement to the context of decolonization was sought to be made amply clear by the UN General Assembly Resolution 1514

passed in 1960. However, arguments were made to show that in some circumstances conditions similar to colonialism may be prevalent in respect of the continuing oppression of minority communities within an independent state.

With the passing of UN General Assembly Resolution 2625 in 1970, a contingent legal right to self-determination emerged where it could be proved that minorities were being oppressed or denied basic rights enumerated under the international bill of rights. However, the resolution also emphasized the need to respect the sovereignty and territorial integrity of independent states. The extent of oppression that can justify deviations from these principles by way of secession by a minority is entirely a political question and cannot be reduced to objective legal standards.

In the post-cold war era, the division of the former Soviet Union showed that self-determination could be exercised with the consent of the majority, by means of negotiations and compromise. However, the more plausible route towards reconciling the idea of self-determination with that of preserving the territorial integrity of existing states is that of 'internal' self-determination. This approach finds substantiation in the international law relating to protection of human rights. The principles governing the same are enumerated in the ICCPR which emphasize the obligation on States to guarantee rights of political participation as well as those pertaining to the exercise of the distinctive linguistic, religious or cultural rights of minorities. The qualitative standard for the same is to aspire for 'equality in fact'

which can be used to justify 'positive discrimination' in favour of minorities.

While examining the basis for the minorities' right to exercise self-determination is one side of the problem, the international legal regime also has to contend with the implications of the re-drawing of national boundaries. Though the doctrine of 'Uti possidetis' was widely applied in the context of decolonization, the same has been problematic in many ways. The transformation of older colonial or administrative divisions into international borders prompts problems such as 'irredentist' claims and questions relating to the protection of smaller minorities within the new borders.

In conclusion, even if one accepts a contingent right on part of national minorities to exercise self-determination, it is in the interest of promoting international peace and stability to shift the emphasis to the quality of protections for minorities within the framework of national laws. The larger issue boils down to whether heterogeneous groups can co-exist within existing national boundaries and resolve their differences through peaceful and constitutional means. Shri Krishna Menon was a firm believer in the importance of conducting a public dialogue to resolve differences and I hope that all those present here also agree with the same philosophy. I would like to thank the Krishna Menon Memorial Society for giving me this opportunity and I would like to thank everyone present here for their kind consideration and attention today.