

# **STATEMENT OF PRINCIPLES ON MINORITY AND GROUP RIGHTS IN SOUTH ASIA<sup>1</sup>**

## **Introduction**

The elaboration of a statement of principles on minority and group rights in South Asia represents one component of a project of the International Centre for Ethnic Studies (ICES) on minority rights and diversity in South Asia. The major aim of this statement is to effectively address minority issues and concerns, which cut across countries in South Asia and enhance regional responses to some of the current weaknesses in constitutional and legislative protection and promotion of minority and group rights in the region.

The process of elaboration of this statement included the preparation of a background paper on the [constitutional and legislative provisions and jurisprudence which protect minority and group rights in Bangladesh, India, Nepal, Pakistan and Sri Lanka, and on the gaps in effective protection](#). The background paper prepared was commented upon and discussed by a number of experts from the region, who made suggestions and comments for input into the statement. Further comments and suggestions on the draft statement of principles were received from an additional number of regional academics and human rights experts. The Statement of Principles was then submitted to the United Nations Sub-Commission Working Group on Minorities at its ninth session in May 2003, for further comments from Governments, NGOs, minorities and academics.

The statement includes each of the principles, an explanation as to its content and scope, an overview of constitutional provisions in Bangladesh, India, Nepal, Pakistan and Sri Lanka, and reference to the major regional and international human rights standards, from which the principle has been drawn. In the absence of regional standards in South Asia, examples have been provided from European instruments and documents, which are the

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most advanced in the field of minority protection. The term “minority” has been used throughout the principles, but rather than restricting this concept, the reference to the term “minority” is understood to encompass all groups within South Asian societies, as detailed at principle 1. Annex A of the document contains the references to international and regional human rights instruments.

This statement of principles may be used as a reference tool for Governments, non-State actors, human rights institutions, NGOs, human rights advocates, and policy makers to draft national legislation, promote legislative reform, undertake advocacy, and influence decisions, policies and programmes to ensure that they focus on the promotion and protection of minority and group rights in South Asia.

## **Preamble**

1. Whereas in South Asia, constitutions have included some provisions relating to the protection of minorities, and guarantee the cultural and social diversities in the respective polities and societies. The ways in which these polities have functioned show that constitutions have not always reflected the realities of the way by which they have functioned, the majoritarian basis of the respective polities, the poor state of the protection mechanisms available in the region, and the low level of the constitutionally acknowledged minority rights;

2. Whereas often the history of majoritarianism seems to suggest that the ideology of majoritarianism still exerts extensive and decisive influence on the conduct of State affairs, and States often think that these are homogeneous polities and societies, and not multi-ethnic and multi-religious compositions, and minorities have not contributed in building these societies. Furthermore, some of these constitutions do not recognise the existence of minorities at all in their texts;

3. Whereas the protection of minority rights is granted in terms of provisions of certain rights as rights of individual citizens, but not specifically as rights of members of minorities, that is group rights, and certain affirmative actions exist mainly as positive discrimination, and rights of minorities are assured only in the form of non-discrimination and equality before the law, which has proved insufficient to guarantee that minorities, who are often disadvantaged by society, may exercise all their human rights without

discrimination and on a basis of equality, and may effectively participate in cultural, religious, social, economic and public life, as well as in decisions which affect them;

4. Whereas minorities remain excluded from decision-making processes in national life, particularly in various levels of administration, formation and function of representative bodies including assemblies, formulation of cultural policies, and significant norms of citizenship, with the consequence that constitutionally and legally provided rights are not implemented in practice, and widespread violations of minority rights and discrimination against particular groups of the population continue on a daily basis, with citizenship having become an impoverished reality. In the countries of the region, sub-group loyalties of people based on caste and sub-caste, clan and tribe being strong “others” are easily excluded, discriminated or neglected. Occurrence of inter-group violence involving minorities based on religion, sect, race, language and ethnic identity is rather common. Many countries do not have institutions of rule of law in place and governance is based on ruler-ruled nexus and is State-centric. Members of minorities, including religious minorities, have been exposed to abuses perpetrated by private persons with the connivance or acquiescence of governments, with the criminal justice system failing in many instances in providing persons belonging to minorities with adequate legal redress for abuses suffered. The operation of the justice system is such that it has not only failed to deliver speedy untainted justice, but has given rise to a pervasive climate of impunity, with perpetrators of violations not having been brought to justice, which is one of the major sources of recurring violence in each of the countries of the region;

5. Whereas States of this region have done very little to remove the root causes of religious and other forms of discrimination, and violations perpetrated against minorities. The orthodoxies of majority religions are not always ready to extend equal rights to the “other” who may be outside the religious/sectarian fold. This situation re-emphasises the need to elevate the national-judicial and legal norms and constitutional jurisprudence in South Asia on equal protection and group rights issues to the standards of regional and international human rights law relating to minorities, that include the UN Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities, the OSCE Framework Convention for the protection of National Minorities, the European Charter on Regional or Minority Languages, the Hague Recommendations Relating to the

Educational Rights of National Minorities, the Lund Recommendations on the Effective Participation of National Minorities in Public Life, and other similar documents;

6. Whereas this situation of discrimination against minorities has aggravated after the tragic events of September 11, 2001, and certain minority communities have been facing systematic discrimination, and in general the weaker groups are suffering as a consequence of structural reforms, withdrawal of social welfare functions of the States, and the situation calling for immediate establishment of regional standards and harmonisation of juridical-legal guarantees of minority rights,

The Statement of Principles on Minorities and Group Rights in South Asia includes the following:

### **Principle 1**

#### **Application of the Principles**

- (a) These principles shall be observed by all States, authorities, public and private organisations, institutions, corporations, NGOs, groups of persons, public officials and private individuals, whether State or non-State actors and irrespective of their legal status;**
- (b) These principles shall apply without distinction to all groups, including, but not limited to, minorities, peoples, nationalities, ethnic groups, castes, tribes, migrant workers, stateless persons, internally displaced persons, refugees, as well as, where appropriate, to each member of such groups;**
- (c) These principles shall apply to all persons and groups, irrespective of any citizenship, disenfranchised or other status;**
- (d) These principles complement international, regional and national standards, norms and principles of human rights, refugee and humanitarian law. They shall not affect more favourable provisions concerning minorities, or the legal regime that may exist in a State or is provided for by relevant bilateral or multilateral agreements, in which case the more favourable provisions shall apply.**

### Annotations

These principles not only apply to States but to all actors within South Asian society, and extend beyond the traditional responsibility of States to promote and protect human rights within their territory, in fulfilment of their obligations under international law. Increasingly, with the erosion of the central role of the State, the rise of nationalism, and the expanding role of non-State actors such as extremists, rebel groups and transnational corporations who have become perpetrators of human rights violations, the respect and promotion of human rights have come to concern all sectors of society.

This principle points to the existence of the diversity of different groups and peoples from a variety of religions, beliefs, linguistic, ethnic and cultural backgrounds in South Asia. The scope of the principles should not be limited to the sometimes restrictive concept of a minority, but should rather apply to all groups within South Asian society, in particular those who are disadvantaged, excluded, marginalized or stateless, or have been disenfranchised. Finally, the principle reiterates that this statement is intended to complement and enhance the effective implementation of international human rights in full respect of individual dignity, tolerance and peaceful coexistence between individuals and groups, and that those provisions at national, regional and international levels which are most favourable to minority protection shall prevail.

### Regional and international standards

With reference to the responsibility of non-State actors, article 4 of the *Convention on the Prevention and Punishment of the Crime of Genocide* (hereafter referred to as the “Genocide Convention”) states that persons committing genocide shall be punished irrespective of “whether they are constitutionally responsible rulers, public officials or private individuals”. In humanitarian law, common article 3 to the *Geneva Conventions and Protocol II* provides protection in situations of non-international armed conflict and binds not only State actors but also all parties to the conflict. Similar language is used in principle 2 of the *Guiding Principles on Internal Displacement*, which stipulates that “These principles shall be observed by all authorities, groups and persons irrespective of their legal status and applied without diverse distinction”.

## **Principle 2**

### **Non-discrimination and affirmative action**

- (1) All individuals shall be protected from discrimination and shall be treated without distinction of any kind, including, but not limited to, on the basis of language, religion, culture, national or social origin, sex, caste, birth, descent, citizenship or other status;**
- (2) all individuals shall be recognised as a person before the law, with full equality before the law, equal protection of the law, and equal benefit from the law;**
- (3) non-discrimination and equality of treatment shall apply in all areas of economic, educational, social, religious, political and cultural life;**
- (4) special protection shall be afforded to persons, particularly women, who may be subject to threats or acts of discrimination, hostility, violence and abuse as a result of their ethnic, cultural, linguistic, religious or other identity;**
- (5) the enactment of laws relating to the crime of genocide and the effective application of laws on hate speech and hate crime shall be promoted;**
- (6) special measures of affirmative action shall be taken in order for persons belonging to minorities to enjoy equal rights with the rest of the population. These shall, however, be discontinued after the objectives for which they were taken have been achieved.**

### **Annotations**

Particular attention needs to be paid to the human rights situation of minorities who are often in a disadvantaged, marginalized and vulnerable position, and are therefore discriminated against, thus requiring special measures to ensure that they benefit from the same rights on a basis of equality with the rest of the population. If no special measures are taken in favour of minorities, the non-dominant sectors of the population may ultimately be required to conform to the dominant groups.

Discrimination has been interpreted to “imply any distinction, exclusion, restriction or preference which is based on any ground such as race, colour, ... language, religion, ... national or social origin... birth or other status, and which has the purpose or effect of nullifying or impairing the recognition,

enjoyment or exercise by all persons, on an equal footing, of all rights and freedoms”<sup>2</sup>. Discrimination has been prohibited in a number of international instruments that deal with most, if not all, situations in which minority groups and their individual members may be denied equality of treatment. Important safeguards from which individual members of minorities stand to benefit include recognition as a person before the law, equality before the courts, equality before the law, equal protection of the law, and equal benefit from the law.

This principle, and especially the provision in favour of affirmative action, will contribute to reinforcing constitutional and legislative non-discrimination provisions in South Asia, and enhance the protection of minorities who are often disadvantaged by the State and society, with a view to ensuring that they may exercise all their rights without discrimination and on a basis of equality. Affirmative action, as provided for under principle 2(4) aims at redressing the balance in equality of treatment between minorities and the dominant majority. Provided that the measures have such an aim, and that they seek to do no more than promote this equality, they are not to be considered discriminatory. In a number of South Asian States, the law permits affirmative action, or compensatory discrimination, in favour of minorities. However, in some States, such measures have led to further discrimination and inequality, thereby exacerbating the separate legal status of certain groups, on the basis of having been identified and classified to be granted special measures. It is therefore paramount that a balance be sought between measures of affirmative action and the duration of these measures beyond the achievement of their goal on the one hand, and the fundamental right to equality and equal treatment of both minorities and majorities in society, on the other.

### Constitutional provisions

Article 28 of the *Constitution of Bangladesh* proclaims that “the State shall not discriminate against any citizen on grounds only of religion, race, caste, sex or place of birth”. Article 15 of the *Constitution of India* prohibits any discrimination on the ground of religion, race, caste or place of birth as well as on the basis of disability in access to shops, public restaurants, hotels, or to wells, tanks or bathing places open to the general public on the ground of

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<sup>2</sup> General Comment 18 of the Human Rights Committee on non-discrimination under the International Covenant on Civil and Political Rights, HRI/GEN/1/Rev.2 of 29 March 1996.

race, religion, caste or place of birth. The latter part of article 15 is a corollary to article 17, which abolishes untouchability and provides that the enforcement of any disability arising out of untouchability shall be a criminal offence. Further principles to non-discrimination are provided for in articles 16, 19 and 29 of the Constitution.

At articles 11 (2 and 3) the *Constitution of Nepal* refers to non-discrimination on the grounds of religion, race, caste, tribe or ideological conviction, and protects the untouchables from non-discrimination. The *Constitution of Pakistan* at article 26 bars discrimination on the ground of race, religion, caste, sex, residence or place of birth in respect of access to places of public entertainment or resort. The Objectives Resolution, which was made a substantive part of the Constitution in 1985 by General Ziaul Haq (Article 2-A) treats Muslims and non-Muslims differently. In the case of Muslims, they “shall be enabled to order their lives in the individual and collective spheres in accordance with the teachings and requirements of Islam as set out in the Holy Quran and Sunnah”. With reference to minorities, it says that “adequate provision shall be made for the minorities to profess and practice their religions and develop their cultures”.

Article 12 (2) of the *Constitution of Sri Lanka*, states that discrimination shall be prohibited “... on the grounds of race, religion, language, caste, sex, political opinion, place of birth or any other such grounds”. In *Ramupillai vs Festus Perera* (1991), a Divisional bench of seven judges of the Supreme Court of Sri Lanka was called upon to decide whether the ethnic ration system in promotion to public service violated the principle of equality enunciated in Article 12 of the Constitution. The Court premised that any differentiation made on ethnic grounds per se would be abhorrent and violated the fundamental right of equality. At Article 27 (5) of the Constitution, minority groups are given further protection under the Directive Principles of State Policy which stipulates that the State shall strengthen national unity by promoting cooperation and mutual confidence among all sections of the people of Sri Lanka, including racial, religious and other groups, in order to eliminate discrimination and prejudice. Furthermore, the *Social Disabilities Act No. 21* of 1957, as amended by Act No. 18 of 1971 makes it illegal to impose ‘social disabilities’ on a person by reason of his or her caste, also punishable by imprisonment up to three years with or without a fine for having done so. This Act does not seek to prevent caste-based discrimination in the private or social spheres (despite its terminology). Rather, social disabilities as defined under the Act directly

impact on spheres of equal opportunity and constitute prevention or obstruction of a person from, *inter alia*, admittance to any educational institution; engagement in any lawful employment and activity, entering or being present in any place to which the public have access, other than a place of religious worship, entering or service at a shop, market, fair, hotel, rest house, eating house or restaurant; and being carried as a passenger in any public vehicle or vessel. Furthermore, the Citizenship Act No. 18 of 1948 conferred citizenship by descent on all persons who were born in Sri Lanka and whose father was born in Sri Lanka thus making all the Indian Tamils stateless.

With regard to equality before the law, article 27 of *Constitution of Bangladesh* provides for equality before the law of all its citizens. Article 14 of the *Constitution of India* guarantees equality before the law and the equal protection of laws. The *Constitution of Nepal* at article 11 states that “All citizens shall be equal before the law. No person shall be denied the equal protection of the laws”. According to the *Constitution of Pakistan* at articles 4 and 25, all citizens are equal before the law and are entitled to equal protection of the law. According to the Qisas and Diyat law and the Hudood Ordinances of Pakistan, the evidence of a woman is not equal to that of a man, the evidence of non-Muslims is not admissible in many cases, and non-Muslims can be tried before the Federal Shariat Court but cannot be represented by non-Muslim counsel, and a case under Section 295-C of the Penal Code (the so-called blasphemy law) must be heard by a Muslim judge.

Article 12 (1) of the *Constitution of Sri Lanka* states that “All persons are equal before the law and are entitled to the equal protection of the law” irrespective of race, religion, language, caste, sex, political opinion, place of origin or any one of such grounds. The Supreme Court of Sri Lanka in the case of *Ramupillai vs Minister of Public Administration, Provincial Councils and Home Affairs and others* stated that reverse discrimination on the basis of ethnicity is valid subject to the following conditions: discrimination must be objectively established by evidence or by relevant findings of competent bodies: perceptions and opinions are insufficient. The object of affirmative action is to remedy the present effects of the past discrimination and not to perpetuate fixed quotas. Preferential consideration for victims is preferred to rigid quotas. Remedial action must be short term with appropriate review mechanisms; racial quotas cannot be imposed simply for the purpose of ‘correcting’ an existing racial imbalance, except perhaps where there is serious, chronic and pervasive under-representation or over-representation

to raise a presumption of past discrimination, and; the proposed remedy would be more strictly scrutinised on account of other compelling needs and interests such as efficiency, higher levels of responsibility involved upon promotions and legitimate expectations of employees that merit being rewarded.

On the issue of affirmative action, article 28 (4) of the *Constitution of Bangladesh* states that nothing shall prevent the state from making special provision for the advancement of any backward section of citizens. The *Constitution of India* has prescribed specific affirmative measures with the objective of safeguarding the fundamental human rights of vulnerable and economically disadvantaged sectors of society. In addition, the Constitution allows the State to positively discriminate in favour of backward classes, scheduled castes and scheduled tribes. However, religious minorities in India have been excluded from the benefits of affirmative action under article 16 (4), in spite of the fact that during the framing of the Constitution it was made clear that this provision was incorporated to enable underrepresented religious minorities to secure a fair share in public services. The *Constitution of Pakistan* provides for the improvement of the less developed ethnic groups through measures such as the reservation of seats for various provinces and administrative groups in professional institutions as well as a fixed employment quota<sup>3</sup>.

### Regional and international standards

Article 1 of the *Universal Declaration of Human Rights* states that “All human beings are born free and equal in dignity and rights”, and article 2 of the *International Covenant on Civil and Political Rights* requires States to ensure that the rights in the Covenant are ensured to all individuals within their territory and subject to their jurisdiction “without distinction of any kind, such as ... language, religion, ... national or social origin, ... birth or other status”. With specific reference to minorities, article 4 of the *United Nations Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities* (hereafter referred to as “the Declaration”) and article 4 of the *OSCE Framework Convention for the Protection of National Minorities* (hereafter referred to as the “Framework Convention”) guarantee their right of equality before the law and the equal

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<sup>3</sup> Shaheen Sardar Ali, “The Rights of Ethnic Minorities in Pakistan: A Legal Analysis”, in International Journal on Minority and Group Rights, Kluwer Law International, 1999, p.194

protection of the law. The same article makes specific reference to the adoption of adequate measures “...in order to promote in all areas of economic, social, political and cultural life, full and effective equality between persons belonging to a national minority and those belonging to a majority”.

With regard to special measures of affirmative action, article 1(4) of the *Convention on the Elimination of All Forms of Racial Discrimination* states that “Special measures taken for the sole purpose of securing adequate advancement of certain racial or ethnic groups or individuals requiring such protection as may be necessary in order to ensure such groups or individuals equal enjoyment or exercise of human rights and fundamental freedoms shall not be deemed racial discrimination, provided, however that such measures do not, as a consequence, lead to the maintenance of separate rights for different racial groups and that they shall not be continued after the objectives for which they were taken have been achieved”. Article 7(2) of the *European Charter for Regional or Minority Languages*, stipulates that “the adoption of special measures in favour of regional or minority languages aimed at promoting equality between the users of the languages and the rest of the population or which take account of their specific conditions is not considered to be an act of discrimination against the users of more widely used languages”.

Principle 2(4) draws upon the language of article 6 of the *Framework Convention*, which states that “The Parties undertake to take appropriate measures to protect persons who may be subject to threats of acts of discrimination, hostility or violence as a result of their ethnic, cultural, linguistic or religious identity”.

### **Principle 3**

#### **Right of minorities to their identity and characteristics**

**The identity and characteristics of minorities shall be respected and promoted. This includes the right:**

- (a) to express, maintain and develop their identity and characteristics, including their religion, language, culture, traditions, customs and heritage. To this end, measures shall be taken to create the necessary conditions for minorities to enjoy this right. Such measures do not apply in cases where practices, whether ethnic, religious, cultural,**

- linguistic or other, are contrary to international and regional standards, norms and principles and/or in violation of national law in the field of human rights, refugee and humanitarian law;**
- (b) to a nationality or equivalent citizenship status guaranteeing the same rights as those afforded to nationals;**
- (c) of every person belonging to a minority to be treated or not to be treated as such and no disadvantage shall result from this choice or from the exercise of the rights, which are connected to that choice.**

### Annotations

The right to identity is paramount to the protection of minorities as it is from such recognition that their protection may be afforded by the State, thereby also facilitating the application of specific measures for the benefit of minorities. The recognition of the identity and characteristics of minorities is very important in the South Asian context as the wide variety of identities and the multiethnic, multireligious and multilinguistic composition of South Asian societies across the region is not sufficiently reflected in constitutional and legislative provisions, nor is the identity of minorities actively promoted. In some countries, certain sectors of the population have not been granted citizenship, and have therefore not been afforded minority protection. Majoritarianism in the region still exerts extensive influence on the conduct of State affairs and dominates the relations between and among groups in society. The right to distinct identity should include community based family laws, provided they are reformed with a view to ensuring gender justice, as in some countries the uniformity of personal laws has become a tool in the hands of those who are pursuing a majoritarian cultural agenda. All minorities within South Asian States should enjoy full protection under the national laws, subject to their conformity with international human rights standards. Recognising the identity and characteristics of minorities also contributes to sharpening the focus on minorities as groups, who are distinct from the majority and dominant sections of the population in South Asian countries.

Principle 2 (c) provides protection to those individuals who may not wish to maintain their separate minority identity and would prefer to assimilate with the majority population, or who may be compelled to embrace membership of a minority against their free choice. This implies that no particular identity can be imposed on a given person or that persons belonging to minorities cannot force a person to belong to, or be expelled from, their

group. Of particular relevance therefore is the freedom for individuals to choose whether they wish to belong or not to a minority or other group and to define their own identities.

### Constitutional provisions

There are few direct references in the Constitutions of South Asian countries that refer to the specific identities and characteristics of minorities. The *Constitution of Bangladesh* does not make any explicit reference to minority identities, though political analysts often refer to Article 28 (4) where reference is made to backward sections of the population. The CHT Peace Accord (1997) in its Article 1 however recognizes the CHT as a Tribal populated region. According to Bangladesh State Principle, the State shall take measures to protect customary laws and culture. Article 29 of the *Constitution of India* refers to minorities as “any section of the citizens ... having a distinct language, script or culture”. Article 16 (4) refers to the “Scheduled Castes and the Scheduled Tribes” as being distinct from the majority, and at article 25, reference is made to religious minorities, such as the Sikh, the Jain and the Buddhists. The *Constitution of Pakistan* formally recognizes only religious minorities, however, at article 28 reference is made to the fact that “... any section of citizens having a distinct language, script or culture shall have the right to preserve and promote the same ...”, which seems to imply at least a tacit recognition of the existence of linguistic and cultural minorities. At article 37 (h) reference is made to non-Muslims, inferring that this group is distinct from the Muslim majority population. Although not specifically identified in the *Constitution of Sri Lanka*, protection is provided to the Tamil minority to which the Constitution refers to at articles 18 to 25 regarding special measures to protect the Tamil language. According to Regulations made under the Holidays Act No. 29 of 1971 as amended, the minority Tamil and Muslim communities in Sri Lanka have the right to practice and enjoy their culture. Days of cultural and religious significance to the Tamils and Muslims are public holidays and they are celebrated at the national level with State patronage. Sri Lanka being a multi-ethnic, multi-religious society, there are certain personal laws which are applicable only to specified ethnic and religious groups which differ from the general laws.

### Regional and international standards

The issue of the recognition of the identity and characteristics of minorities is firmly rooted in international law. The recognition of national, ethnical, racial or religious groups and their right to existence is referred to at article II of the *Genocide Convention*. In many instruments, the protection of the existence and identity of minorities goes beyond mere physical protection to the protection of their religious, cultural and linguistic heritage essential to group identity. Article 1 of the *Declaration* provides for the protection of the “... existence and the national or ethnic, cultural, religious and linguistic identity of minorities”, the encouragement of “... conditions for the promotion of that identity”, and calls for “...appropriate legislative and other measures to achieve those ends”.

With regard to the respect and promotion of the characteristics of minorities, article 4 (2) of the *Declaration* stipulates that “States shall take measures to create favourable conditions to enable persons belonging to minorities to express their characteristics and to develop their culture, language, religion, traditions and customs, except where specific practices are in violation of national law and contrary to international standards”. At article 2 (1) as well as article 27 of the *International Covenant on Civil and Political Rights*, persons belonging to minorities have the right to “... enjoy their own culture, to profess and practice their own religion, and to use their own language in private and in public, freely and without interference or any form of discrimination”. Article 5 of the *Framework Convention* calls on “... Parties to undertake to promote the conditions necessary for persons belonging to national minorities to maintain and develop their culture, and to preserve the essential elements of their identity, namely their religion, language, traditions and cultural heritage”.

With reference to principle 3 (c) regarding the choice of whether to belong to a minority or not, article 3 (2) of the *Declaration* states that “No disadvantage shall result for any person belonging to a minority as the consequence of the exercise or non-exercise of the rights set forth in the present Declaration”. Similar language is to be found at article 3 of the *Framework Convention* which mentions that individuals should have the right to choose whether to be treated as a member of a minority or not.

## **Principle 4**

### **The promotion of diversity and intercultural education**

- 1. Effective measures shall be taken, particularly in the fields of education, culture and the media, with a view to combating prejudices and discrimination, and to promoting tolerance, intercultural dialogue, mutual respect, understanding and cooperation among all groups.**
- 2. Intercultural education shall enable all persons and groups within society to participate in a democratic and pluralistic society. To this end;**
  - (a) compulsory curricula should include the study of history, culture, traditions, customs, languages and practices of minorities and majorities, with a view to encouraging mutual appreciation of differences and similarities between them, and as a means of promoting intercultural understanding;**
  - (b) Intercultural education should be included in compulsory education and should be developed with the active participation of the minorities concerned, and, where appropriate, bodies representing the relevant minorities, so that they can share knowledge and perspectives about their history, culture, traditions, customs, languages and practices.**

### Annotations

South Asian countries are far from being homogeneous cultural, religious, linguistic or ethnic entities. Each country is composed of a mosaic of minorities with a rich diversity of languages, religions, cultures and traditions. The identity and characteristics of minorities, groups and communities need to be recognised, and the linguistic, religious, ethnic and cultural diversity, as well as the diversity of opinion and the shared value systems, which cut across states in the South Asian region should be celebrated. Such diversity is not static as the pattern of the mosaic of societies changes as identities shift and new identities develop. Respect for diversity, tolerance and understanding among all groups in society is an essential prerequisite of a democratic society. There is a need to emphasise the right of all social groups and communities to have their due share ensured by developing policies and promoting the principle of diversity. The aim of this principle is to strengthen social cohesion, to promote tolerance and intercultural dialogue by eliminating barriers between persons belonging to religious, ethnic, cultural and linguistic groups through mutual respect

and understanding, thereby enabling the integration of minorities into society while preserving their distinct identity and characteristics.

In South Asian States, as in many other States, the culture, history and traditions of minority groups may be subject to distorted or false representations, especially in situations of conflict, producing low self-esteem among minorities and negative stereotypes in the wider community. In some countries in South Asia, the concept of intercultural education is unknown. The compulsory curricula tend to include only the belief, culture, history and traditions of the majority community. Intercultural education should therefore aim at, among others, eradicating the distortions and negative stereotypes of the history, culture and religion of communities, especially of the non-dominant groups. Intercultural education allows both minorities and majorities to learn about and appreciate each other in ways which make it possible for them to appreciate each others' cultures as an enrichment of society as a whole. The importance of intercultural education as a means to promote greater tolerance, understanding and respect in minority-majority relations is crucial. Intercultural education aims at highlighting the preservation of the identity of each group in society, accompanied by the acceptance of diversity leading to understanding and tolerance. To this end, intercultural education requires that both the minority and majority learn about each other, about their specific characteristics, their respective histories, as well as about the values of tolerance and pluralism.

### *Constitutional provisions*

There exist almost no references to intercultural education in the constitutions of South Asian countries. There is only an indirect reference in the *Constitution of Sri Lanka*. According to article 27 (5), the Directive Principles of State Policy stipulate that the State shall strengthen national unity by promoting co-operation and mutual confidence among all sections of the people of Sri Lanka, including racial, religious and other groups, in order to eliminate discrimination and prejudice.

### *Regional and international standards*

Article 6 of the *Framework Convention* states that "Parties shall encourage a spirit of tolerance and intercultural dialogue and take effective measures to promote mutual respect and understanding and cooperation among all persons living on their territory, irrespective of those persons' ethnic,

cultural, linguistic or religious identity, in particular in the fields of education, culture and the media”. Article 7 of the *International Convention on the Elimination of All Forms of Racial Discrimination* stipulates that “States parties undertake to adopt immediate and effective measures, particularly in the fields of teaching, education, culture and information, with a view to combating prejudices which lead to racial discrimination and to promoting understanding, tolerance and friendship among national and racial or ethnical groups ...”.

With regard to intercultural education, article 4 (4) of the *Declaration* stipulates that “States should, where appropriate, take measures in the field of education, in order to encourage knowledge of the history, traditions, language and culture of the minorities existing within their territory. Persons belonging to minorities should have adequate opportunities to gain knowledge of the society as a whole”. Article 12 of the *Framework Convention* states that Parties shall, where appropriate, take measures in the field of education and research to foster knowledge of the culture, history, language and religion of their national minorities and of the majority. In this context, the Parties shall, *inter alia*, provide adequate opportunities for teacher training and access to textbooks, and facilitate contacts among students and teachers of different communities. The *Hague Recommendations Regarding the Education Rights of National Minorities* (hereafter referred to as “The Hague Recommendations”) at recommendation 19 provides that “State educational authorities should ensure that the general compulsory curriculum includes the teaching of the histories, cultures and traditions of their respective national minorities”.

## **Principle 5**

### **Right of minorities to freedom of religion**

**Minorities shall enjoy the right to profess, practice, manifest or to adopt their own religion or belief and to establish their own religious institutions, organisations and associations for this purpose. This includes the freedom to:**

- (a) Worship or assemble in connection with a religion or belief, and to establish and maintain places for these purposes;**
- (b) receive or impart instruction in their own religion or belief;**
- (c) change one’s religion or belief;**
- (d) establish training schools for the faithful;**

- (e) teach a religion or belief in places suitable for these purposes;**
- (f) publish and disseminate their own religious materials, in any language or format, including in the minority language;**
- (g) train, appoint, elect or designate by succession appropriate religious leaders called for by their religion or belief;**
- (h) solicit and receive financial and other contributions to finance their own religious activities;**
- (i) establish, manage and maintain their own religious institutions;**
- (j) observe days of rest and celebrate holidays and ceremonies in accordance with the precepts of their own religion or belief.**

### Annotations

The right of minorities to profess, practice and manifest their own religion is of particular relevance in South Asia which is composed of a whole range of religious minorities and groups, and where religious issues and factionalism have come to dominate much of the political discourse, and have sharpened the expression of identity. Some religious minorities may identify themselves solely by their religious identity and its preservation. Others may perceive themselves as an ethnic or linguistic minority where religion is but one distinguishing feature. Furthermore, the nature of most religions is that the believers acknowledge some supernatural being, a revered teacher or Gods, to guide their lives and communities. As such, compromise can be difficult to achieve in balancing competing interests between religious minorities themselves, between minorities and majorities, and between religious minorities and the State. This situation may be exacerbated in countries where the dominant State religion pervades constitutional and legislative provisions, with little regard for the interests of religious minorities, potentially leading to widespread discrimination, tensions and conflict. Pakistan, Bangladesh and Nepal having State religions makes citizens professing other religions suffer from some disadvantages. More specifically, in a number of countries, the majority may disapprove of any individual or group converting from the majority to a minority religion, with anti-conversion sentiments reflected in a number of bills and laws. Apart from increasing anti-conversion legislative pressure, a number of family laws enactments penalise conversion by making those who convert lose the right to the guardianship of minor children. Furthermore, it is important that safeguards be provided for ensuring that freedom of religion be exercised peacefully, especially with regard to the right to receive and use funds, including from abroad for religious purposes.

### Constitutional provisions

Despite the fact that, according to the eighth amendment to the *Constitution of Bangladesh*, Islam is declared as a State religion, article 41 of the Constitution declares that “every citizen has the right to profess, practice or propagate any religion” and “every religious community or denomination has the right to establish, maintain and manage its institutions”. Further provisions of article 41 guarantee an individual’s right to refuse to practice a religion, or to be compelled to be educated in a religion other than his own. Article 25 of the *Constitution of India* guarantees “...freedom of conscience and the right freely to profess, practice and propagate religion”. Similar language is used in the *Constitution of Nepal* at article 19, which states that “Every citizen has the freedom to profess and practise his own religion...”. At article 2 of the *Constitution of Pakistan*, the State declares Islam to be the state religion and the Shariat Enforcement Act of 1991 provides for enforcement of Islamic laws and policies. According to article 227, all laws must be brought in conformity with the injunctions of Islam and no law can be enacted which is repugnant to these injunctions. Article 203 states that any law found repugnant to Islam can be struck down by the religious Federal Shariat Court. Furthermore, article 20 of the Constitution stipulates that “every citizen shall have the right to profess, practice and propagate his religion” and that “every religious denomination and every sect thereof shall have the right to establish, maintain and manage its religious institutions”. Furthermore, religious minorities have the right to receive and impart instruction in their belief at institutions established by them. Despite these provisions, section 298 of the Penal Code for example exclusively targets Ahmadis who are prohibited from preaching their faith. The *Constitution of Sri Lanka*, at article 10 provides that “Every person is entitled to freedom of thought conscience and religion, including the freedom to have or to adopt a religion or belief of his choice” and article 14 (1) (e) grants the freedom of every citizen “... to manifest his religion or belief in worship, observance, practice and teaching”. Article 12 offers equality before the law to all ‘persons’ including aliens. Article 12 (2) prohibits discrimination against any citizen on the ground, *inter alia* of religion or political opinion. Article 12 (3) of the Constitution further provides that “no person shall, on the ground, *inter alia*, of religion be subject to any disability, liability, restriction or condition with regard to access to shops, public restaurants, hotels, places of public entertainment and places of public worship of his own religion”. This article thus ensures that religious institutions of a public character are

accessible equally to all sections and classes of the followers of that particular religion, irrespective of caste. It however provides that a person is entitled to access to a place of public worship only of his own religion. In addition, section 35(1) of the Education Ordinance states that a pupil in a government school should be given instruction in the religion of the parent of each pupil.

With regard to the right to change one's religion or belief, the State of Tamil Nadu and Gujarat in India have enacted laws regulating conversion from one religion to another. A number of Hindu family laws enactments of 1955-56 penalise conversion of Hindus to Christianity or Islam by making them lose the right to the guardianship of minor children, and members of the Scheduled Castes lose all benefits of the State's affirmative action by conversion to Christianity or Islam. In Pakistan, the right to change one's religion is not recognised as a fundamental right. In practice, conversion to Islam is welcomed but a Muslim adopting another religion runs the risk of losing his or her life.

### Regional and international standards

Article 18 of the *Universal Declaration of Human Rights* provides that "everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance". Article 27 of the *International Covenant on Civil and Political Rights* grants persons belonging to religious minorities the right "... to profess and practise their own religion ...". Article 2 of the *Declaration* stipulates that "Persons belonging to national or ethnic, religious and linguistic minorities have the right to ... profess and practice their own religion". Article 8 of the *Framework Convention* states that "Parties undertake to recognise that every person belonging to a national minority has the right to manifest his or her religion or belief and to establish religious institutions, organisations and associations".

Article 1 of the *Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief* and article 18 of the *International Covenant on Civil and Political Rights* provide greater detail as to the content and scope of this right. They stipulate that "...this right shall include freedom to have or to adopt a religion or belief of his choice,

and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching”. Furthermore, “No one shall be subject to coercion which would impair his freedom to have or to adopt a religion or belief of his choice”.

## **Principle 6**

### **Right of minorities to use their own language in private and in public**

- 1. Minorities have the right to use their own language (including their own script) freely, without interference or any form of discrimination, in private and in public, orally, in writing or in any other form. This includes the freedom for minorities to:**
  - (a) Freely express opinions and beliefs and receive and impart information in the minority language across localities, regions and frontiers;**
  - (b) use their language in social, political and cultural gatherings, including in private or public conferences, meetings and assemblies;**
  - (c) use their language for the production and airing of private and public radio and television programmes, and have access to broadcast time in their own language on publicly funded media;**
  - (d) use their language in the creation, development and use of written materials, printed documents, newspapers, magazines, and other materials;**
  - (e) use their own surnames and first names in the minority language, and enjoy official recognition thereof;**
  - (f) post signs, inscriptions, commercial and other information in their own language, which can be displayed visibly to the public, and use traditional local names, street names and other topographical information intended for the public.**
  
- 2. In regions and localities where minorities are present in significant numbers, or if those minorities so request and where such a request corresponds to a real need:**
  - (a) Minorities shall have the right to use their language in relations with administrative authorities at local, regional and national level, as well as contact with public services. Administrative authorities shall take the necessary measures to**

- ensure that public services are provided also in the minority language;**
- (b) Minorities shall have the right to acquire civil documents and certificates both in the official and minority language, and regional and/or local public institutions shall keep the appropriate civil registers also in the minority language.**
- 3. This principle does not in any way affect the status of the official language or languages of the State concerned, nor does it call into question the need for minorities to know or learn the official language.**

Annotations

In South Asia, as elsewhere, language is both a very personal matter closely connected with identity, and an essential tool of social organisation which, in many situations, becomes a matter of public interest. The use of minority language represents one of the principal means by which minorities can assert and preserve their identity, and the use of language bears on numerous aspects of the functioning of South Asian States. Linguistic diversity in South Asia contributes to the richness of society, and its preservation and promotion is testimony to political sensitivity, openness, diversity and pluralism. In some countries, the local authorities do not provide public services in the minority language, nor may minorities have access to civil documents and registers, as well as certificates in their own language. The mere prohibition of discrimination against minorities in the use of their language in private and in public is necessary but insufficient. Special measures need to be taken, and support needs to be provided, to safeguard the rights of linguistic minorities and to preserve and develop minority languages. Furthermore, the right of minorities to use their own language in private and in public involves an obligation on the part of the State to create conditions favourable for the preservation and promotion of the distinct linguistic identity of minorities. This, however, entails a commitment to provide the resources and make the necessary administrative arrangements required to effectively apply this right.

There are many situations in daily life in which it is important for minorities to be able to use their own language, freely and without interference. These may include being able to speak in a minority language at home, as well as with family and friends in public places, use a minority language in social,

political or cultural gatherings, and for the production and airing of radio and television programmes. It also includes producing and disseminating materials and documents in the minority language and the posting of commercial and other signs in public places.

Principle 2 ensures that minorities can exercise their right to use their language before administrative authorities, and in their contacts with public services. This allows them to exercise their rights and fulfill their civic duties in conditions that respect their own modes of expression, improves communication between public authorities and minorities, promotes the minority language in the public domain, and thereby contributes to the richness and cultural wealth of multilingual societies. Specific reference is made to the concentration of a minority group in a region and the expressed wish of minorities to use their language in their relations with the authorities, as this principle calls for special measures to be taken which may entail the allocation of resources, other than those provided by the minorities themselves. With regard to the implementation of this right in the South Asian region, it is important to focus on more adequate constitutional protection of minority languages which implies not only the guarantee of freedom to users of these languages but also involving an obligation of the State to create favourable conditions for the preservation and promotion of the distinct identity of minorities. In this respect, some of the lesser used languages cannot survive without the official support from the State, including measures to maintain and promote such languages.

### Constitutional provisions

Despite the fact that Hindi in the Devanagari script has been declared the official language of India at article 343, the *Constitution of India* has recognised the rights of minorities to use their own language in article 29 which states that “any section of the citizens of India or any part thereof having a distinct language, script or culture of its own shall have the right to conserve the same”. At articles 120 and 210, the Constitution also provides to some extent for the rights of minorities to use their language before the authorities, in that any Member of Parliament or the Legislature may be allowed to use his mother tongue if he cannot adequately express himself in Hindi or in English. In accordance with article 344 of the Constitution, persons representing the different languages specified in the Eighth Schedule of the Constitution, namely, Assamese, Bengali, Gujarati, Hindi, Kannada, Kashmiri, Konkani, Malayalam, Manipuri, Marathi, Oriya, Punjabi,

Sanskrit, Sindhi, Tamil, Telegu, and Urdu, may be appointed by the President to a Commission entrusted with making recommendations to the President regarding the progressive use of the Hindi language for official purposes, the restrictions on the use of the English language, and in particular with regard to any language to be used for official purposes, in proceedings of the High Court, subject, however, to previous consent of the President. To this end, particular attention is to be paid to the claims and interests of persons belonging to the non-Hindi speaking areas.

With reference to the right of minorities to use their own language in their relations with administrative authorities, article 345 of the *Constitution of India* grants the freedom of any state of India to adopt any one or more of the languages in use in that state as the language or languages to be used for all or any of the official purposes of that state. According to article 347, “on a demand being made in that behalf the President may, if he is satisfied that a substantial proportion of the population of a state desire the use of any language spoken by them to be recognised by that state, direct that such language shall also be officially recognised throughout that state or any part thereof for such purpose as he may specify”. However, articles 345, 347 and 350 (A) on the right to use minority languages for specified official or administrative purposes as well as for imparting primary education is discretionary, not mandatory.

According to the *Constitution of Nepal* at article 6 (1), while Nepali is the official language, “All the languages spoken as the mother tongue in the various parts of Nepal are the national languages”. Nevertheless, in accordance to art. 18 (1) of the constitution, each community has “... the right to preserve and promote its language, script and culture”. According to article 28 of the *Constitution of Pakistan*, “... citizens having a distinct language, script or culture shall have the right to preserve and promote the same ...”. Article 14 (1) (f) of the *Constitution of Sri Lanka* grants the freedom to enjoy and promote his culture and the use of his own language. According to article 19 of the Constitution “the National Languages of Sri Lanka shall be Sinhala and Tamil”. Article 20 provides that members of Parliament or of local authorities may discharge their function in either Sinhala or Tamil. Article 22 provides that Sinhala shall be used as the language of administration throughout Sri Lanka but that Tamil “... shall also be used as the language of administration for the maintenance of public records and the transaction of all business by public institutions in the Northern and Eastern Provinces”. In addition, in those areas Tamil may be

used in communications, and transactions, records, documents, and information should be made available in Tamil. Examinations for admission to public service can also be conducted in Sinhala or Tamil. Article 23 provides that legislation shall be enacted and published in Sinhala and Tamil and article 24 states that in the Northern and Eastern Provinces Tamil shall be the language of the courts. The programmes on radio and television and the newspaper coverage are liberally made use of in furthering the interests of a pluralist society. The Sri Lanka Broadcasting Corporation has three distinct services catering for the Sinhala, Tamil and Muslim listeners. The Sri Lanka Rupavahini Corporation runs its TV programmes in Sinhala, Tamil and English. The State and private newspaper companies publish dailies and weeklies in all the three languages.

### Regional and international standards

In accordance to regional and international standards, Article 19 of the *International Covenant on Civil and Political Rights* and article 9 of the *Framework Convention* provides that every person belonging to a national minority is granted the freedom to hold opinions and to receive and impart information and ideas in the minority language, or the language of one's choice, without interference by public authorities and regardless of frontiers. Article 2 (1) of the *Declaration* proclaims the right of persons belonging to national minorities to "use their own language, in private and in public, freely and without interference or any form of discrimination", and article 10 of the *Framework Convention* uses similar wording but adds that minorities can do so "...orally and in writing". More specifically, article 11 of the *Convention* provides for the right to use surnames and first names in the minority language and the right of official recognition thereof, and stipulates that "...minority language signs, inscriptions and other information of a private nature can be displayed visibly to the public". In addition, the right to use one's surname and first names in the minority language and to "...display traditional local names, street names and other topographical indications intended for the public also in the minority language when there is sufficient demand for such indications" should be respected.

As far as the right of minorities to use their own language in relations with the administrative authorities is concerned, article 10 of the *Framework Convention*, and the *Oslo Recommendations Regarding the Linguistic Rights of National Minorities* (hereafter referred to as the "Oslo Recommendations") grant minorities the freedom to use their language in

relations and communications with the administrative authorities. More specifically, the *Oslo Recommendations* at recommendation 13 stipulate that the administrative authorities shall, wherever possible, ensure that public services are provided also in the language of the national minority, and that regional and/or local public institutions shall keep the appropriate civil registers also in the language of the national minority. They further grant persons belonging to a national minority the right to acquire civil documents and certificates both in the official language or languages of the State and in the language of the national minority in question from regional and/or local public institutions, and ensure that elected members of regional and local governmental bodies can also use the language of the national minority during activities relating to these bodies.

With reference to the media, article 9 of the *Framework Convention*, prohibits States from discriminating against minorities in their access to the media, and stipulates that “... the creation and the use of printed media ...” shall not be hindered and that the possibility be granted “... of creating and using their own media” with regard to sound radio and television broadcasting. Additional details are provided in the *Oslo Recommendations*, which state at recommendations 8, 9 and 10 that “Persons belonging to national minorities have the right to establish and maintain their own minority language media”. They should also “... have access to broadcast time in their own language on publicly funded media, and the independent nature of the programming of public and private media in the language(s) of national minorities shall be safeguarded. Public media editorial boards overseeing the content and orientation of programming should be independent and include persons belonging to national minorities serving in their independent capacity”.

## **Principle 7**

### **The right of minorities to be taught their language and have instruction in their language**

- 1. Minorities have the right to be taught their language and to receive instruction in their language. To this end, the following measures may be taken:**
  - (a) to make available kindergarten, pre-school, primary, secondary, university, higher and vocational education in the minority language;**

- (b) to make available a substantial part of primary, secondary and vocational education in the minority language;
- (c) to teach the minority language as part of the curriculum of primary, secondary, university, higher and vocational education.

**2. This principle shall not prejudice the learning of the official language or the teaching of this language.**

Annotations

The right of every person belonging to a minority to learn his or her minority language represents one of the principal means by which minority identity can be asserted and preserved. Although this principle refers to measures to be taken for minorities to be taught their language and have instruction in their language, the nature of these measures will depend on the context of the particular situation, including whether the number of students in part of a territory warrant such measures, there is a demand for such measures, and the State is able to commit the necessary resources to respond to such demands. In cases where the language of the minority is a territorial language traditionally spoken and used by many in the region of the country, pre-school and primary school education should, ideally, be in the child's own language. In regard to non-territorial languages spoken traditionally by a minority within a country, minorities should, as a minimum, have an opportunity to learn their mother tongue. In this regard, minorities have a right, like others, to establish their private institutions, where the minority language is the main language of instruction.

Constitutional provisions

Article 17 (a) of the *Constitution of Bangladesh* provides for a uniform system of education. The CHT Peace Accord (1997) through Article 33, clause B (2) entrusts the three Hill District Councils to provide for primary education in mother tongue, in the CHT region. According to article 350 A of the *Constitution of India*, "It shall be the endeavour of every state and of every local authority within the state to provide adequate facilities for instruction in the mother tongue at the primary stage of education to children belonging to linguistic minority groups, and the President may issue such directions to any state as he considers necessary or proper for securing the provision of such facilities". The *Constitution of Pakistan* provides for a language other than the national language to be taught, but does not provide

for minority languages to be promoted as a medium of instruction. Accordingly, at article 251 (3), “Without prejudice to the status of the national language, a provincial assembly may by law prescribe measures for the teaching, promotion and use of a provincial language in addition to the national language”. According to article 18 (2) of the *Constitution of Nepal*, “each community shall have the right to operate schools up to the primary level in its own mother tongue for imparting education to its children”. Article 21 (1) of the *Constitution of Sri Lanka* provides that a person shall be entitled to be educated in either Sinhala or Tamil, and at university level, the medium of instruction will be Tamil, applicable to students who were educated in Tamil prior to university admission.

### Regional and international standards

Article 4 (3) of the *Declaration* stipulates that “States should take appropriate measures so that, wherever possible, persons belonging to minorities may have adequate opportunities to learn their mother tongue or to have instruction in their mother tongue”. At article 14 of the *Framework Convention*, “The Parties undertake to recognise that every person belonging to a minority has the right to learn his or her minority language”. In the same article, minorities are granted the right to have adequate opportunities for being taught the minority language or for receiving instruction in this language. Specific mention is made that this right shall be implemented without prejudice to the learning of the official language or the teaching in this language. At recommendations 11 to 13 of the *Hague Recommendations* suggestions are made that pre-school, kindergarten and primary school should ideally be taught in the minority language. “In secondary school a substantial part of the curriculum should be taught through the medium of the minority language”. At recommendation 15, “Vocational training in the minority language should be made accessible in specific subjects...” and recommendation 17 suggests that minorities “... should have access to tertiary education in their own language...”.

The most detailed treaty in this respect is the *European Charter for Regional or Minority Languages* which provides, at article 8, a sliding scale regarding the extent to which minorities may be taught their own language and have instruction in their own language. The scale ranges from pre-school education to be made available in minority languages to ensuring that a substantial part of pre-school education is available in the relevant language. It also ranges from making primary, secondary, university education,

continuing education and technical and vocational training available in the minority language to teaching the minority language as part of the curriculum.

## **Principle 8**

### **Right of minorities to establish and manage their own unions, associations and institutions**

**Minorities shall have the right to establish and manage their own unions, non-governmental organisations, associations and institutions, in all fields including education, religion, culture, language, politics and labour, and to associate with any of these at local, national, regional and international levels. To this end:**

- a. any form of discrimination or interference in the establishment and maintenance of such institutions is prohibited;**
- b. minorities shall have the freedom to seek funding for such institutions from the State, local, regional and international sources and from the private sector.**

#### *Annotations*

This principle allows for persons belonging to minorities to set up any union, non-governmental organization, association and institution they may want, and associate with any of these at local, national, regional and international levels. Granting minorities the right to freely associate and to establish and maintain their own institutions contributes to their effective participation in public and political life, and to the maintenance and development of their own identity and characteristics. Such institutions should be established and maintained freely, without interference or discrimination. Minority schools run by minorities themselves are expected to conform to basic national standards applicable to all schools, including rules regarding compulsory schooling, compulsory curricula requirements, and teaching standards, and shall be subjected to normal supervisory standards. Minorities should also have the right to seek sources of funding for these institutions from the budget of the State, local, regional or international sources or the private sector.

### Constitutional provisions

Article 38 of the *Constitution of Bangladesh* provides for every citizen the right to form associations or unions, but it has been qualified and such right is subject to any reasonable restrictions imposed by law in the interests of public order or public health. In accordance with article 30 of the *Constitution of India*, all religious or linguistic minorities "... shall have the right to establish and administer educational institutions of their choice". Furthermore, the Constitution provides for the possibility of the State granting aid to such educational institutions, without discrimination "... against any educational institution on the ground that it is under the management of a minority, whether based on religion or language". In practice, the rights of minority educational institutions under article 30 are subjected to unreasonable restrictions especially in their admissions policy, requiring admission of a certain percentage of non-minority students as obligatory for reasons of national integration, whereas other educational institutions are not required to meet the same criteria and admit a fair number of minority students for the same purpose. Article 12(e) of the *Constitution of Nepal* guarantees freedom "...to form unions and associations, ... to practice any profession or to carry out any occupation, industry or trade". Article 17 of the *Constitution of Pakistan* which grants all citizens the right to form associations, unions and political parties is applicable also to minorities. Article 28 of the Constitution stipulates that "...any section of citizens having a distinct language, script or culture shall have the right to preserve and promote the same and, subject to law, establish institutions for that purpose". According to articles 20 (b), 21 and 22 of the Constitution, religious minorities have the right to establish their own religious and educational institutions. The *Constitution of Sri Lanka* at Article 14 (1) (g), guarantees to every citizen, "the freedom to engage by himself or in association with others in any lawful occupation, profession, trade, business or enterprise". This right is however restricted by article 15 as may be prescribed by law in the interest of national security, public order, or for the purpose of securing due recognition and respect for the rights and freedoms of others. Article 14 (1) (d) guarantees the right of every citizen to form and join a trade union.

### Regional and international standards

Article 13.4 of the *International Covenant on Economic, Social and Cultural Rights* refers to the liberty "... of individuals and bodies to establish and direct educational institutions" and article 6 (b) of the *Declaration on Religious Intolerance* specifies that freedom of religion or belief includes the freedom to "establish and maintain appropriate charitable or humanitarian institutions". Article 2 (4) of the *Declaration* stipulates that "Persons belonging to minorities have the right to establish and maintain their own associations". At article 13 of the *Framework Convention*, "Within the framework of their education systems, the Parties shall recognise that persons belonging to a national minority have the right to set up and to manage their own private educational and training establishments". Recommendation 6 of the *Oslo Recommendations* grants minorities the right "... to establish and manage their own non-governmental organisations, associations and institutions".

## **Principle 9**

### **Effective participation of minorities in public and political life**

- 1. Minorities have the right, irrespective of citizenship or other status, to effectively participate in cultural, social, economic and political life, and in public affairs, in particular in those that affect them directly. This includes the right of minorities:**
  - (a) to be consulted by means of appropriate procedures and through their representative institutions when legislation or administrative measures are being considered which affect them directly;**
  - (b) to be involved in the preparation, implementation and assessment of national and regional programmes and plans which are likely to affect them directly;**
  - (c) to effectively participate in decision-making processes and elected bodies at local, national and regional levels;**
  - (d) to vote and be elected at genuine periodic elections;**
  - (e) to be effectively represented;**
  - (f) to have access to, and hold, public office.**
  
- 2. Minorities have the right to participate in the conduct of public and political affairs, directly or through freely chosen representatives. To this end, the following measures may be taken:**
  - (a) reduced requirement for the registration of political parties;**

- (b) lowered threshold for entering parliament;**
- (c) special representation through reserved seats in parliament, and other elected bodies of the national society;**
- (d) proportional representation;**
- (e) favourable delimitation of constituencies;**
- (f) creation of minority administrative and advisory bodies in particular with regard to education, culture and religion, such as minority parliaments, advisory councils and round tables.**

- 3. The imposition of requirements on minorities to freely exercise their right to effective participation shall be prohibited, except for linguistic requirements necessary to hold public office;**
- 4. Measures which alter the proportions of the population in areas inhabited by minorities with the aim of influencing minority representation in elections or for other political purposes, and/or restrict the rights and freedoms flowing from these principles, are prohibited. Examples of such measures include expropriation, evictions, expulsions or redrawing of electoral boundaries.**

#### Annotations

Effective participation of minorities in cultural, religious, social, economic, public and political life, as well as in decisions that affect them, including in the legislative and administrative sectors, aims at encouraging real equality within society. It represents a shift from mere protection of minorities to guaranteeing representation by all groups. Special measures are often required to facilitate the effective participation, through substantive contribution, of minorities in decision-making. Effective participation is necessary to ensure that minorities are respected, recognised and heard. The most fundamental requirements of this right is to ensure that minorities enjoy the right to non-discrimination, including on the basis of citizenship or other status, as well as to vote and to be elected. However, this is often insufficient to enable minorities to effectively participate, and special measures are required.

One of the key issues of participation of minorities in South Asian States is their representation in all aspects of society. While it is essential that minorities and groups be given opportunities for effective participation, no single formula exists that is appropriate to all minority situations in South

Asia. Forms of participation may therefore require adaptation to the variety of needs and aspirations of different minorities as well as to their size and distribution, and may involve the creation of ethnic, cultural and religious associations and societies, political parties, advisory and decision-making bodies, and minority representation in parliament and other elected bodies within national society.

In many States, minorities may not have the same access to holding public office as the majority or dominant population. Furthermore, in many States, minorities tend to be under-represented in public and political life, as their numbers are lower, implying that they are often outvoted in terms of their representation and their potential for being heard, and cannot elect the number of representatives that reflect the actual percentage of the minority population. In some countries, minorities are persistently under-represented in public and political bodies. In addition, electoral boundaries may be manipulated so that, even when a minority represents a fairly large percentage of the population in a given region, its members are divided between a number of districts restricting their ability to elect even a minimal number of representatives who belong to minorities.

Measures to ensure effective participation of minorities in public and political life may include for example: a minimum number of seats for representatives of minorities in parliament and other elected bodies; proportional representation elections in which seats are allocated according to the vote cast; the lowering of thresholds for minority party representation, thereby allowing minorities to participate in the legislature and other elected bodies; reduced requirements for the registration of a minority party in elections; favourable delimitations of constituencies along minority lines, especially in countries where such minorities may be scattered across the territory, granting adequate opportunities for minority seats; and, the creation of administrative and advisory bodies which may serve advisory functions regarding matters, including policies and programmes, which concern minorities or decisions which affect them.

### Constitutional provisions

Article 29 (3a) of the *Constitution of Bangladesh* empowers the State to make special provision in favour of any backward section of its citizens for the purpose of securing their adequate representation in the service of the Republic. Clause (b) of the same article provides for reserving appointments

relating to any religious or denominational institution to persons of that religion or denomination. The Constitution does not stipulate any reservations for minorities, but three seats are reserved for the three districts of the CHT. The seats are reserved however for the CHT region, not for the Hill people. Article 38 of the Constitution grants “Every citizen the right to form associations or unions”. Article 325 of the *Constitution of India* ensures that no person shall be ineligible for inclusion in the general electoral roll on grounds of religion, race, caste, sex or any of them. Section 125 of the *Representation of Peoples Act* further provides that any persons who in connection with an election promotes or attempts to promote on the grounds of religion, race, caste, community or language feelings of enmity shall be punishable with imprisonment as well as fined. According to article 16 (4) and (4A) of the Constitution, the State may make provisions for the reservation of appointments or posts in favour of any backward class of citizens, Scheduled Castes and Scheduled Tribes, who, in the opinion of the State, are not adequately represented in the services under the state. In the *Mandal* controversy (1992), the Supreme Court affirmed that reservations for ‘Backward Classes’ and ‘Other Backward Classes’ were part of the doctrine of equality and not an exception to it, and that access to government jobs was a salutary form of empowerment for disadvantaged people and those discriminated against with no access to such power<sup>4</sup>.

Article 12 (e) of the *Constitution of Nepal* guarantees freedom to form unions and associations “... to practice any profession or to carry out any occupation, industry or trade”. Article 26 (10) of the Constitution stipulates that “the State shall pursue such a policy which will help promote the interests of the economically and socially backward groups and communities by making special provisions with regard to their ... employment”. Section 4 of the *Civil Liberties Act* prohibits any restrictions against any citizen on the basis of religion, race, sex, caste or any of these, in appointing to civil posts. Article 36 of the *Constitution of Pakistan* stipulates that the State shall safeguard the legitimate rights and interest of minorities including due representation in the federal and provincial services. The minorities have the right to vote for their representatives as well as to participate in the regular election procedure. Article 27 of the Constitution bars discrimination on the basis of race, religion, caste, sex, residence or place of birth in respect of

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<sup>4</sup> R. Dhavan and F. S. Nariman, “The Supreme Court and Group Life: Religious Freedom, Minority Group, and Disadvantaged Communities”, in: B.N. Kirpal et al. (ed.), *Supreme But Not Infallible*, Essays in Honour of the Supreme Court of India, Oxford, Oxford University Press, 2000, p. 271.

appointment in the service of Pakistan and provides for reservation of quotas on the basis of class and territory for the disadvantaged. However, according to article 41, the President of Pakistan must be a Muslim and the oath prescribed for the Prime Minister indicates that he should also be a Muslim. On the basis of their numerical strength, seats in local bodies such as union councils, town committees/municipal committees, municipal corporations, cantonment boards, metropolitan corporations have been reserved for minorities. These seats are filled by elections with the votes of minorities of the area and only persons belonging to minorities can contest elections for these reserved seats. Furthermore, seats have been reserved for religious minorities in the National and Provincial Assemblies and in local councils.

With regard to the representation of minorities in the decision-making bodies, the 17<sup>th</sup> amendment to the *Constitution of Sri Lanka* requires that three members of the Constitutional Council belong to respective minority communities, nominated to represent the interests of minorities. Furthermore, the 14<sup>th</sup> amendment to the Constitution requires the Commissioner of Elections to determine whether the number of members belonging to any community, ethnic or otherwise, elected to Parliament under Article 98 is commensurate with the national population ratio and request the Secretary of such recognised political party or group leader of such independent group in so nominating persons to be elected as Members of Parliament to ensure as far as practicable, that the representation of all communities is commensurate with its national population ratio. In addition, article 99 as amended by the 14<sup>th</sup> amendment provides for Proportional Representation.

### Regional and international standards

Article 25 of the *International Covenant on Civil and Political Rights* stipulates that every citizen shall have the right and the opportunity without distinctions and without unreasonable restrictions “(a) to take part in the conduct of public affairs, directly or through freely chosen representatives”, (b) “to vote and be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors”, (c) “to have access, on general terms of equality, to public service in his country”. Article 2 (2) and (3) of the *Declaration* states that “Persons belonging to minorities have the right to participate effectively in cultural, religious, social, economic and public life” and they 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, in a manner not incompatible with national legislation”. At article 4 (5), States should consider appropriate measures so that persons belonging to minorities may participate fully in the economic progress and development of their country”. Article 5 (1) and (2) states that national policies and programmes as well as programmes of cooperation and assistance among States should be planned with “due regard for the legitimate interests of persons belonging to minorities”. Recommendation 9 of the *Lund Recommendations on the Effective Participation of National Minorities in Public Life* (hereafter referred to as the “Lund Recommendations”), states that the electoral system should facilitate minority representation and influence, and recommendation 6 stipulates that minorities should have an effective voice at central government which may include special representation through a reserved number of seats in parliament, on the courts, and allocated positions on advisory bodies and cabinet, mechanisms to ensure that minority interests are considered within relevant ministries, and that minorities participate in civil service.

Article 15 of the *Framework Convention* provides that “The Parties shall create the conditions necessary for the effective participation of persons belonging to national minorities in cultural, social and economic life and in public affairs, in particular those affecting them”. At article 16 of the Convention, “The Parties shall refrain from measures which alter the proportions of the population in areas inhabited by persons belonging to national minorities and are aimed at restricting the rights and freedoms flowing from the principles enshrined in the present Convention”. According to the explanatory report to the Convention, examples of such measures might include expropriation, evictions and expulsions or redrawing administrative borders with a view to restricting the enjoyment of such rights and freedoms (i.e. gerrymandering).

## **Principle 10**

### **Devolution of power, autonomy and federalism**

- 1. Consideration shall be given to arrangements, which enhance the capacity of minorities to regulate their affairs and take their decisions, in their own interests and in accordance to local conditions.**

- 2. Where minorities are scattered throughout the territory or part thereof, such arrangements may include self-administration on a non-territorial basis by a minority, of matters which are essential to its particular identity.**
- 3. In geographic areas where minorities are concentrated and where they constitute a majority, such arrangements may include:**
  - (a) decentralised or local forms of self-government or autonomous arrangements on a territorial and democratic basis, including consultative, legislative and executive bodies chosen through free and periodic elections without discrimination;**
  - (b) a federal system of government.**

### Annotations

In South Asia, devolution of power, autonomy and federalism may be necessary to ensure effective participation of minorities in decision-making processes both at the State and sub-State level. These arrangements, which affect the political organisation of multicultural States, allow for the accommodation of minorities and a degree of independence of minority communities in managing a substantial share of public affairs under their own responsibility and in their own interests, in accordance to their circumstances at the local level. Different arrangements may be applied to allow for a different degree of independence of minorities in managing their own affairs, and may range from decentralisation in administrative matters, to self-government with certain legislative powers to a virtually independent administrative, legislative and judicial system. A federal system is somewhat different as it is integral to the State structure and in the functioning of the State, in particular as representation is constitutionally guaranteed at all levels of the structure, with the allocation of powers shared between the Centre and the federal entities which all work towards common aims through compromise.

Such arrangements imply the sharing of power between the Centre and its parts, while preserving the unity of States, with the sub-unit granted a certain degree of authority, which cannot be overruled or restricted by the Centre. These arrangements should therefore be established by legislation or preferably by the Constitution. Furthermore, a prerequisite for an efficient functioning of any of such arrangements is the provision of sufficient

resources, either through financial support from central government or from the income of the minority groups themselves.

Special attention needs to be paid to the fact that territorial arrangements may only benefit the minority group concerned, and not those persons living in the same territory but who do not belong to the said minority. This situation of a minority within a minority may lead to added disparities between groups as well as to widespread discrimination and even repression in some cases. Arrangements therefore need to ensure that the autonomous entities respect and promote human rights, including minority rights.

### Constitutional provisions

Article 1 of the Bangladesh constitution stipulates Bangladesh to be a unitary state. The CHT Peace Accord (1997) in its section B provides for the formation of three Hill District Councils, while Section C provides for the formation of a Regional Council (RC). The Hill District Councils (HDC) have been given substantial economic and administrative powers for the region. The RC will supervise and coordinate the general administration, law and order and development activities of the three district councils, as well as the administration of tribal law and the dispensation of social justice. The *Constitution of India* provides for the subdivision of India into federal entities generally according to linguistic lines. According to article 1 of the *Constitution of Pakistan*, the country is a federal republic divided into four provinces, in addition to which there are, among others, the Provincially Administered Tribal Areas and the Federally Administered Tribal Areas, the inhabitants of which are mostly Pukhtun and Baluch. The *Constitution of Sri Lanka* in Article 2 defines the 'Democratic Socialist Republic of Sri Lanka' as a 'unitary state'. However, with the introduction of the following laws, the powers of the central government were devolved in the following bodies: the 13<sup>th</sup> Amendment to the Constitution (November 1987), and the *Provincial Councils Act No 42* of 1987, Provincial Councils were established in Sri Lanka for every province. The said Provincial Councils were also given power, *inter alia*, to enact statutes applicable to the Province (Constitution Article 154 G). *Provincial Councils Elections Act No 2* of 1988 provide for the conduct of elections in the Provincial Councils; article 154P of the 13<sup>th</sup> amendment to the Constitution and *High Court of the Provinces (Special Provisions) Act No 19* of 1990 further established Provincial High Courts with power to exercise, subject to any law, appellate revisionary jurisdiction in respect of orders from the Magistrates Courts,

Primary Courts, Labour Tribunals, Commissioner of Agrarian Services, and; Pradeshiya Sabhas were established by *Predeshiya Sabha Act No 15* of 1987. Municipal Councils and Urban Councils Acts established Municipal and Urban Councils and the *Local Authorities Elections Act* provides for elections to the Local Authorities.

### Regional and international standards

As for regional and international standards, the *Lund Recommendations*, at recommendation 14 states that “effective participation of minorities in public life may call for non-territorial or territorial arrangements of self-governance or a combination thereof”. At recommendation 24, reference is made to “additional dispute resolution mechanisms, such as negotiation, fact finding, mediation, arbitration, an ombudsman for national minorities, and special commissions, which can serve as focal points and mechanisms for the resolution of grievances about governance issues”. Paragraph 35 of the *Document of the Copenhagen Meeting of the CSCE* makes reference to the possibility of creating an environment that would be conducive to the participation of national minorities in public affairs, in their own language, by establishing “appropriate local or autonomous administrations corresponding to the specific historical and territorial circumstances of minorities in accordance with the policies of the State concerned”. Article 3 of the *European Charter of Local Self-Government*, states that “Local self-government denotes the right and the ability of local authorities, within the limits of the law, to regulate and manage a substantial share of public affairs under their own responsibility and in the interests of the local population”. Article 9 of the Charter provides that “Local authorities shall be entitled, within national economic policy, to adequate financial resources of their own, of which they may dispose freely within the framework of their powers”.

### Principle 11

#### Effective implementation and redress

- 1. Institutions shall be established, and where they exist, strengthened, with the mandate to effectively implement these principles and other rights relevant to minorities, address violations of minority rights and provide the necessary redress. These may include national**

**institutions such as human rights commissions, commissioners, and ombudspersons. In particular, these institutions shall:**

- (a) be accessible to all and their procedures shall be facilitated to provide easy access for minorities;**
- (b) be independent and autonomous and dedicated to upholding democracy, human rights, the rule of law, and diversity;**
- (c) provide redress including effective remedies that allow for the implementation of minority rights, sanctioning of perpetrators of violations, and compensation for the victims.**

- 2. Minorities have the right to effective remedy and compensation for violations of their rights, and, to this end, shall have easy access to all courts and tribunals, as well as to conciliation, mediation and dispute resolution mechanisms, including through legal assistance;**
  
- 4. Minorities shall have easy access to regional and international tribunals, as well as to the United Nations treaty bodies and complaints procedures.**

#### Annotations

Human rights acquire real meaning for minorities when the public authorities of the State establish mechanisms to ensure that the rights guaranteed in international conventions and declarations or in domestic legislation, are effectively implemented and protected. In many States, normal procedures are complex, costly and slow and may therefore not be easily accessible to minorities. When confronted with violations of their rights, minorities must often overcome significant obstacles in order to access the judicial system and other domestic human rights protection mechanisms. Furthermore, in some cases, the judicial process may be ineffective in addressing violations of minority rights and granting redress and compensation. One of the challenges is to effectively enforce legal and other provisions relating to minorities and ensure that the rights of minorities are translated into reality at the national level. It may therefore be useful to consider, as a complement to judicial procedures, the establishment and strengthening of independent national institutions, which are usually able to provide quicker and less expensive recourses and are as such more accessible to minorities. When domestic remedies for violations have been exhausted, concerns can be brought to the attention of United Nations mechanisms and procedures.

In South Asia, the constitutional and legal guarantees to protect the rights of minorities remain all too often unfulfilled. Violations of the rights of minorities are a common feature, with widespread discrimination based on caste, race, religion and ethnic origin. Some of the institutions, which have been established to safeguard the rights of minorities, have limited powers and functions, and have proved ineffective in protecting minorities. In many countries of the region, the electoral system is systematically undermined and the judiciary and legal profession inspire little confidence, resulting in few cases involving minorities being brought before the courts, and the few cases that are prosecuted are being delayed for years. Many violations fail to be investigated, perpetrators have not been brought to justice, and redress and compensation remain unattainable.

### *Constitutional provisions*

At article 350, the *Constitution of India* stipulates that “Every person shall be entitled to submit a representation for the redress of any grievance to any officer, or authority of the Union or a state in any of the languages used in the Union or in the state, as the case may be”. Article 350B provides for a “... Special Officer for linguistic minorities to be appointed by the President” who shall have the duty to “... investigate all matters relating to the safeguards provided for linguistic minorities under this constitution and report to the President”.

Furthermore, a number of South Asian countries have established human rights institutions, which aim to promote and protect the rights of minorities and to address violations and injustices. These include, among others: the Bangladesh Human Rights Commission; the National Commission for Scheduled Castes and Scheduled Tribes, the National Human Rights Commission and the National Commission for Minorities of India, the National Human Rights Commission of Nepal; the Human Rights Commission and the Official Languages Commission and the ombudsman of Sri Lanka, and; ombudsmen at the centre and the provinces in Pakistan. Their mandates and responsibilities vary, but generally they are responsible for conciliating, monitoring, investigating and advising the Government on human rights, including minority rights, and usually have the power to recommend and mediate.

### *Regional and international standards*

Article 6 of the *Convention on the Elimination of All Forms of Racial Discrimination* declares that “States Parties shall assure to everyone within their jurisdiction effective protection and remedies, through the competent national tribunals and other State institutions against any acts of racial discrimination which violate his human rights and fundamental freedoms contrary to this Convention ...”. According to the *Oslo Recommendations*, at recommendation 16, “States in which persons belonging to national minorities live should ensure that these persons have, in addition to appropriate judicial recourses, access to independent national institutions such as ombudspersons or human rights commissions, in cases where they feel that their linguistic rights have been violated”.

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## **ANNEX A**

### **REFERENCES TO INTERNATIONAL AND REGIONAL HUMAN RIGHTS INSTRUMENTS**

**(in order of appearance in the document)**

Convention on the Prevention and Punishment of the Crime of Genocide (UN)

Guiding Principles on Internal Displacement (UN)

Geneva Conventions and Additional Protocol II (UN)

Universal Declaration of Human Rights (UN)

International Covenant on Civil and Political Rights (UN)

Declaration on the Rights Of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities (UN)

Framework Convention for the Protection of National Minorities (OSCE)

Convention on the Elimination of All Forms of Racial Discrimination (UN)

European Charter for Regional or Minority Languages (Council of Europe)

Hague Recommendations Regarding the Education Rights of National Minorities (Foundation on Inter-Ethnic Relations)

Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief (UN)

Oslo Recommendations Regarding the Linguistic Rights of National Minorities (Foundation on Inter-Ethnic Relations)

Lund Recommendations on the Effective Participation of National Minorities in Public Life (Foundation on Inter-Ethnic Relations)

Document of the Copenhagen meeting of the Conference on the Human Dimension of the CSCE (now OSCE)

European Charter of Local Self-Government (Council of Europe)