



## THIRD WORLD APPROACHES to INTERNATIONAL LAW *Review*

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### On the 75<sup>th</sup> Anniversary: Looking Back at the Minority Question in the Making of the UDHR

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#### Introduction

10 December 2023 marked the 75<sup>th</sup> anniversary of adopting the Universal Declaration of Human Rights (UDHR). The Office of the United Nations High Commissioner for Human Rights (OHCHR) [celebrated](#) it as a ‘moment to rekindle the hope of human rights for every person’ and organised an initiative called *Human Rights 75*. The initiative saw almost 300 [pledges](#) from 150 Member States, NGOs, UN entities and businesses on a wide range of human rights issues, such as racial discrimination, gender discrimination, and child rights. India, for instance, in its pledge [observed](#) that ‘[a]bout 75 years ago, India that is Bharat, the most diverse and biggest democratic society, pledged to peacefully deliver political and socio-economic rights to its people emerging from colonialism’ and claimed that it continues to ‘add to that commitment’. The OHCHR highlighted that the *Human Rights 75* initiative ‘reinvigorated the UDHR, showing the ways it meets the needs of our time and advancing its promise of freedom, equality, and justice for *all*.’ While the triumphant and romantic account of the UDHR and the numerous pledges were promising, it felt contradictory to the realities of the world around us.

In August 2019, it was widely reported that almost 2 million residents in Assam, India, were excluded from the [National Register of Citizenship \(NRC\)](#) list, rendering them at risk of statelessness. The main objective of the NRC is to identify and exclude ‘undocumented immigrants’ residing in Assam. Further, in March 2024, the ruling right-wing Bharatiya Janata Party (BJP) government notified the Citizenship Amendment Act of 2019 (CAA) [rules](#), paving the way for

its implementation. The CAA facilitates [expedited Indian citizenship](#) for migrants who entered India 'illegally' on/before 31 December 2014 from Afghanistan, Bangladesh, and Pakistan, provided they belong to the Hindu, Sikh, Buddhist, Jain, Parsi, or Christian communities. These recent changes to citizenship laws and policies have been criticised by human rights activists, scholars and institutions for being [unlawfully discriminatory](#) towards Muslims and are seen as part of the larger effort by the BJP government to [redefine the citizen](#) to fit within its Hindutva ideology and, in the process, marginalise the minority Muslim citizens. The contradiction is quite striking: on the one hand, we find states like India pledging to safeguard the rights of all people; on the other hand, the oppression of minorities and other marginalised groups is writ large in governmental policies and everyday actions.

Minority oppression, as [Shahabuddin](#) shows, has become a defining feature of (postcolonial) states. It is embedded in the making of the postcolonial states, conditioned and supported by international law. Likewise, [Mamdani](#), exploring the roots of ethnic violence in postcolonial societies, shows how the nation-state is a product of European colonialism, built on exclusions and the manufacturing and maintenance of 'permanent minorities'. Western countries, too, are seen increasingly harbouring oppressive tendencies towards minorities, especially towards the non-white 'other' racial and ethnic minority communities. Amidst the ongoing Israel War on Gaza, [reports](#) have revealed an unprecedented surge in minority persecution (especially Muslims) in Western countries.

The 75th anniversary of the UDHR (or primarily the contradiction embodied in romance and despair around its 75 anniversary) prompted me to see it as a moment to redirect our attention to its past, calling for conversations that encompass not only romantic narratives but also critical ones. In this piece, I look back at its drafting history in relation to the minority question. I reflect on states' approaches towards minority safeguards while making the UDHR. I conduct this analysis from the standpoint that looking at the past could help make sense of our present times and understand how minority oppression is not an aberration but rather a by-product of international law.

### **States, Minorities and the Making of the UDHR**

The United Nations General Assembly adopted the UDHR on 10 December 1948. Although legally non-binding, in its 75 years of existence, the UDHR has become the foundation of numerous human rights treaties. The [United Nations](#) describes it as forming part of the International Bill of Human Rights along with the International Covenant on Civil and Political Rights (ICCPR, 1966) and the International Covenant on Economic, Social and Cultural Rights (ICESCR, 1966). Most conventional accounts celebrate the UDHR for its 'universal' character and for setting the standard for international discussion and action on human rights. It

is recognised for bringing about a 'new' hope and a foundational change in the history of human rights. International lawyers consider its provisions as having crystallised into customary international law, while some have even argued that it has elevated, at least in part, to *jus cogens*. It has also become a source of legislation and judicial decisions at the domestic level.

Contrary to these conventional accounts, a few (critical) legal scholars have shown that the UDHR contained within itself a justification for states' interests, trumping the interests of marginalised groups, such as minorities. As [Mutua](#) argues, though the post-war international human rights regime challenged the concept of absolute state sovereignty, it still 'expects states to police themselves. Only when self-policing fails is the international machinery — at the bilateral and multilateral levels — activated.'<sup>i</sup> In a similar vein, [Otto](#) notes how the UDHR (or the international human mechanism in general) essentialises the modern state as the only means of governance 'in the name of progress, order and freedom'.<sup>ii</sup> Further, the UDHR recognises the individual as the 'sole subject' of human rights, discarding group or collective rights. While it contains a general provision on non-discrimination in the enjoyment of universal human rights, it is without reference to special protection provisions for ethnic, religious, or linguistic minorities. I reflect on the *travaux préparatoires* of the UDHR and show how this absence of special protection provisions for minorities is essentially an outcome of that moment when notions of a 'unified nation-state' and 'territorial integrity' had been reinvigorated in building the 'new' world order.

The UN Commission on Human Rights, constituting representatives from eighteen states, was primarily responsible for negotiating and finalising the draft of the UDHR. Most of these state representatives favoured a general article on 'prevention of discrimination' rather than having a specific protection provision for minorities. I argue that a significant reason for this absence is states' perceiving the minority question as intrinsically connected to state sovereignty. A careful look at the drafting of the UDHR shows that state representatives from both colonial and postcolonial states made increasing efforts to control the minority 'problem'. State-subject relationships were described in different ways to discard the minority 'problem'. For instance, some scholars have shown that the momentum in favour of adding a general article on preventing discrimination instead of special provisions on minority safeguards was led by the 'countries of immigration' such as the United States (US) and the Latin American states.<sup>iii</sup> After the end of the Second World War, these states favoured an assimilationist policy, arguing that minority problems did not exist in their countries. These states argued that they would be '[pursuing a policy of national suicide](#)' if they allowed minorities (seen predominantly as immigrants) to maintain their distinct religious and socio-cultural identities. The minority 'problem', therefore, was addressed by denying the presence of minorities. At the core of this 'problem', as the *travaux* reveal, was the

anxiety of these states that the existence of minorities threatened their territorial integrity. Shahabuddin astutely shows how the 'minority problem' is 'intrinsically connected to the formation of the modern sovereign state itself – both in Europe and beyond'. Likewise, Mamdani argues, 'because the nation-state seeks to homogenise its territory, it is well served by ejecting those who would introduce pluralism.'<sup>iv</sup> Following Shahabuddin and Mamdani's argument helps us see how the existence of minorities posed a challenge to the idea of statehood. Statehood represented (and continues to represent) a 'monolithic' idea of a homogeneous population, where minorities are perceived as the backward ethnic 'other' and a constant threat to the aspirations of the sovereign nation-state.<sup>v</sup>

Likewise, a look at the approach of the coloniser states to the minority question further substantiates this argument. While drafting the UDHR, coloniser states faced significant challenges due to the large-scale displacement of people after the end of the Second World War. The emergence of decolonisation movements across the colonised territories and the consequent displacement of former imperial subjects further complicated this. Coloniser states wanted to elude [responsibility](#) towards their former imperial subjects. The *travaux préparatoires* of the UDHR reveal how it was one such platform where states upheld its sanctity and became the only legitimate means through which the rights of individuals could be claimed. Matters that states considered of utmost importance for preserving their sovereignty were retained within the purview of their domestic jurisdiction, the minority question being one of the most fundamental. For instance, coloniser states such as France favoured an assimilationist policy and reasoned that the UDHR was inappropriate for enshrining provisions on minority safeguards. Rene Cassin, the French representative who was influential in drafting the UDHR, initially [proposed](#) distinguishing between the categories 'citizens' and 'person' in relation to minority protection. Cassin claimed that France 'had always been an immigration country', yet protection claims were proposed for only those considered worthy of 'citizenship' instead of any 'person'. He stressed that a provision on protection of minorities must distinguish between 'persons' and 'citizens of the country'. Only the latter were entitled to protection. Seemingly, limiting protection claims to only 'citizens' would have allowed imperial states like France to avoid responsibility towards their imperial subjects. Besides, creating a distinction between 'citizens' and 'persons' helped normalise 'immigrants' as 'non-citizens' – making them undeserving of the state's protection. However, Cassin took an about-turn and [withdrew](#) his proposed amendment. He no longer favoured including an article on minority safeguards in the UDHR.

Arguably, this shift in Cassin's position could, inter alia, be understood by the disagreements occurring internally in France by the end of the 1940s concerning minorities and citizenship policies. While on the one hand, there was a need to enlarge the population and the pool of military recruits, on the other hand,

the end of the two World Wars and later the growth of decolonisation movements across colonised spaces led to substantial changes in immigration, minorities, and citizenship policies.<sup>vi</sup> For states like France, minorities became a 'problem' – a threat to their idea of a homogenous nation-state model. Therefore, recognising minority protection in international law might have been considered a dangerous precedent, which led them to shift their approach and propose only a general provision on non-discrimination. Anghie, for instance, astutely shows how the individualistic structure of human rights leaves minorities with a 'limited vocabulary' to recount systemic oppressions collectively experienced. The principle of non-discrimination, framed within the vocabulary of individual rights, 'conceals systematic cultural subordination of minorities' and excess of state power.<sup>vii</sup>

### **India-Pakistan at the UDHR and the minority question**

An analysis of the newly independent states' participation in the UDHR shows how their pursuit of constructing a nation-state influenced their approach to human rights. The minority question, for instance, posed a significant challenge for the newly independent states such as India and Pakistan. India was on the [cusp](#) of independence when the Commission on Human Rights met for its first session in New York on 27 January 1947. India was one of the eighteen members of the UN Commission on Human Rights, which was primarily responsible for negotiations leading to the adoption of the UDHR. An analysis of the *travaux préparatoires* shows how the notion of the territorial integrity of the nation-state was at the centre of the minority question for India. India participated in the negotiation process leading to the UDHR and contributed to various prominent themes, including women's rights, non-discrimination, secularism, multiculturalism, and the universality of human rights. With centuries of colonial exploitation and the recent experience of the [Partition](#), India was particularly interested in issues of displacement, citizenship, and the treatment of minorities. India's representative navigated these questions quite [strategically](#).

At the cusp of independence, there was a consensus among the ruling elites in India that the Constitution of India must incorporate provisions for minority protection.<sup>viii</sup> The [Advisory Committee](#) on Fundamental Rights, Minorities, and Tribal and Excluded Areas, in its earlier report, recommended several special protection provisions for minorities, such as reserving seats in Cabinets, public services, and representation in joint electorates for minorities. However, India's approach to minorities, both at the domestic level and international level, significantly changed after the Partition. Though the Partition of India was not a population transfer in the technical legal sense, there was a common assumption that Hindus were expected to remain or migrate to India and Muslims were to be settled in Pakistan. The communal violence that ensued following the Partition

and, more essentially, a quest by the ruling elites to 'unite' India and consolidate political power made them sceptical of the question of minority protection. Minorities came to be seen as illicit and dangerous figures – a remnant of an unmodern, uncivilised space having no place within the vision of the nation-state. At its adoption, the Constitution of India, while containing general provisions protecting the cultural and educational interests of linguistic and religious minorities, has no special political safeguards. Political safeguards for religious [minorities](#) were excluded based on the nationalist agenda of the ruling elites, and they made no attempts to look for alternative ways to safeguard religious minorities in terms of political representation. In contrast, the safeguards aimed at protecting 'economically and socially backward classes' such as the Scheduled Castes and Tribes, who are considered Hindus, remained intact. Over the years, several commentators have examined the impact of upper-caste male dominance in Constitutional making. [Studies](#) reveal how 'Brahmins, who formed about 5% of the population, accounted for around a quarter of the total of 407 individuals who served in the [Constituent Assembly] between 1946 and 1949 (it had 307 members in 1949)'. In contemporary India, not much has changed. Political power remains consolidated by upper-caste-class Hindu [males](#).

At the drafting of the UDHR, India's approach changed with its change in status from a colonial to a sovereign state. Initially, India favoured adding protection provisions for minority groups. India's representative, Hansa Mehta, [emphasised](#) that 'effort should be made to define in precise legal terminology the terms "discrimination" and "minority"'. Mehta was critical of the forceful assimilation of minorities and suggested incorporating specific safeguards for protecting the minorities against the 'dangers of assimilation'. However, by the [Third Session](#) (24 May - 18 June 1948), held less than a year after India's independence, India's representative altered its position and took a similar stand to the imperial countries. During this session, India's representative, along with the representative of the United Kingdom, proposed a [joint amendment](#) and called for omitting the provision of minority protection altogether from the UDHR. This shift in India's approach can be understood from other events around this period. A few months after the Partition, in January 1948, India referred the [Kashmir](#) territorial dispute with Pakistan to the United Nations [Security Council](#). Pakistan had made [counterclaims](#) against India and accused India of genocide against Muslim citizens. While Pakistan entered the UDHR discussion only in October 1948 during the Third Committee of the General Assembly, it actively participated in other international forums. In these forums, Pakistan frequently accused India of committing genocide against minority Muslim citizens and criticised India's laws and policies, claiming them to be discriminatory against minorities. For instance, Pakistan's representative, Shaista S Ikramullah, during the consideration of the

Draft Convention on Genocide by the Sixth Committee (September 1948), spoke in favour of retaining cultural genocide in the Convention and [emphasised that](#):

her country took a special interest in the question. It was not a merely academic interest; it had been aroused by acts of genocide directed against a particular group of the Indian population, the Muslims... In India, thirty-five million Muslims were currently living under conditions of terror. Their existence as a separate cultural group was threatened.

India's representative at the Sixth Committee, M.C. Setalvad, speaking against the inclusion of cultural genocide and responding to Pakistan's claim, [expressed](#) that 'the protection of the cultural rights of group are not related to the idea of genocide...The protection of the cultural rights of a group should be guaranteed not by the convention on genocide but by the declaration of human rights.' However, when it came to protecting the rights of minorities in the UDHR, India endorsed the view of the imperial powers. Mehta, who in her earlier statements supported minority safeguards and was firmly against forceful assimilation, felt that granting special rights to minorities was unwanted. [To quote Mehta](#), 'human rights were to be enjoyed equally by all'. Hence, special rights for minorities seemed 'unnecessary'. At the UDHR, therefore, India tried to bring the minority question within the purview of a general non-discrimination approach, which was available for all, irrespective of belonging to a minority or majority group. This transition regarding minority safeguards corresponded closely to the shifts occurring at the domestic level, where the minority 'problem' was tackled by assimilation with the majority. The ruling elites of 'independent' India, therefore, hoped to solve the minority 'problem' by assimilating them within the broad spectrum of non-discrimination provisions.

India's approach was slightly altered when the [Third Committee](#) of the General Assembly (30 September - 7 December 1948) considered the UDHR draft. The USSR representative had resubmitted its version of the minority rights article, which proposed to recognise the cultural rights of both the majorities and minorities. USSR's representative criticised the failure of consensus on the rights of minorities and highlighted that the colonial powers had '[succeeded in securing the rejection](#)' of minority safeguards, though it was protected in the original draft. Its representative further [articulated](#) that the resubmission 'concerned all persons without exception, whether they belonged to a majority or a minority of the population'. Following the USSR's intervention to protect minorities within a general framework, we see India's representative supporting the USSR proposal. Hansa Mehta referred to the Partition of India in this context and [stated](#) that:

India faced difficulties with regard to its own minorities, the most conspicuous example being the Partition of the country on religious grounds. However, it

hoped to solve those difficulties on the basis of the USSR policy of political integration with cultural independence.

Although the *travaux* provide no further explanation as to why India revised its approach following the USSR's intervention, perhaps it is helpful to contextualise that during this period, the USSR was one of the most vigorous opponents of the European colonial powers which widely [supported](#) decolonisation and national liberation struggles. Further, the USSR's revised version was extended to the safeguarding of both minorities and majorities. In one of her [interviews](#), Mehta mentioned how she gained insights from being at the fundamental rights committee of India's constituent assembly and could compare the Constitution's fundamental rights with that of the UDHR. Both in the Constitution and the UDHR, India leaned towards acknowledging the cultural peculiarity of minorities but counterproductively believed in the 'political integration' of minorities within the nation-state.

### Coda

India's altered vote made no difference to the final text of the UDHR. At the General Assembly, state representatives were significantly divided on the minority question as it became intertwined with questions of territorial autonomy, self-determination, and colonialism.<sup>ix</sup> Plausibly, bringing questions of colonialism and self-government into the minority rights discussion made states (especially imperial states) more suspicious of the implications of such protection provisions. As a result, minority rights were not ultimately featured in the UDHR.

For third-world leaders, decolonisation as a movement meant not just the elimination of colonial domination but also the reimagining of a world order that is just and equitable. At the same time, the [transition](#) from colonial to decolonial was possible only within the confines of the nation-state form. This condition set limits on the range of political possibilities for decolonial worldmaking.<sup>x</sup> Minorities came to be seen as a relic of the past, having no place in the postcolonial 'modern' 'developed' state. It led third-world leaders of that period to reinforce the nation-state's majoritarian ideas on minorities. As Shahabuddin puts it, the making of homogenous national states defined in terms of colonial boundaries made minorities 'the leftovers of the state-making process'.<sup>xi</sup> The exclusion of minorities was constantly [reproduced](#) through the invocation and application of international law doctrines, concepts and institutional frameworks. Perceived in this way, the UDHR was one of the many platforms where postcolonial states like India prioritised protecting their sovereignty over the protection of minorities. As for the former coloniser states, the question of minorities was interconnected to the experiences of the two Wars and the rising decolonisation movement. Thus, no

matter which side one belonged to, minorities essentially became a 'problem' that threatened the 'unity' of the nation-state and needed 'fixing'.

The UDHR drafting process is a telling example of how both the postcolonial and coloniser states participated in international forums and established their authority on issues considered intrinsically related to state sovereignty. Paradoxically, the UDHR, which (most) international lawyers hail as a landmark moment for setting the standards for 'freedom, equality, and justice for *all*', did not enshrine safeguards for groups such as minorities, leaving them devoid of a language within the liberal human rights framework to narrate and claim protection against their perpetual persecution by states. The drafting of the UDHR reflects that moment – the moment of postwar and postcolonial – when states and their representatives preserved and upheld the sanctity of the nation-state, and the interests of the minorities were sidelined. This 75-year-old episode aids us in reflecting on the ongoing and persistent minority oppression in postcolonial and other states.

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## ENDNOTES

i Makau Mutua, *Human Rights Standards: Hegemony, Law, and Politics* (State University of New York, 2016) 12.

ii Dianne Otto, 'Rethinking Universals: Opening Transformative Possibilities in International Human Rights Law' (1997) 18 *Australian Year Book of International Law* 1, at 28.

iii See for instance, Patrick Thornberry, *International Law and The Rights of Minorities* (OUP, 1991) 122.

iv Mahmood Mamdani, *Neither Settler nor Native: The Making and Unmaking of Permanent Minorities* (HUP, 2020) 4.

v Mohammad Shahabuddin, *Minorities and the Making of Postcolonial States in International Law* (CUP 2021) 160.

vi Sandra Mantu, *Contingent Citizenship: The Law and Practice of Citizenship Deprivation in International, European and National Perspectives* (Brill, 2015) 236-238. See also, Claire Zalc (Translated by Catherine Porter) *Denaturalized: How Thousands Lost Their Citizenship and Lives in Vichy France* (HUP 2020).

vii Antony Anghie, 'Human Rights and Cultural Identity: New Hope for Ethnic Peace', (1992) 33 *Harvard International Law Journal* 341, at 352.

viii Shahabuddin (2021) 66.

ix Johannes Morsink, 'Cultural Genocide, the Universal Declaration, and Minority Rights' (1999) 21:4 *Human Rights Quarterly* 1009, at 1046.

x Adom Getachew, *Worldmaking After Empire: The Rise and Fall of Self-Determination* (PUP 2019) 4.

xi Shahabuddin (2021) 137.