TOWARD PARTICIPATORY EQUALITY: PROTECTING MINORITY RIGHTS UNDER INTERNATIONAL LAW

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The principal claim made by this Article is that the realization of full and effective equality for all citizens and residents within a multi-ethnic state requires “participatory equality.” Creating a system of participatory equality entails, for most states, making drastic and fundamental changes to the state’s legal system, public spaces, social and economic structures, and funding and space provided for ethnic, cultural, and religious institutions; however, this type of transformation is the only means of respecting human dignity and ensuring peace. This claim is first made as a normative moral claim based on principles of justice and dignity; as this Paper will show, a broad and effective interpretation of international law concerning minority rights supports the same normative claim.

This Article first reviews existing international law and other legal frameworks regarding national minority rights, including discussions of the specific case of indigenous peoples’ rights and the intersection between individual and collective rights. The bulk of the Paper proposes a universal model, building upon existing legal frameworks, for building participatory equality for all members of a society, which requires the full and equal sharing of its resources in three primary domains: the public, the internal, and the historical domain. The need for such a model is all the more so for indigenous and minority groups of substantial size living under systems that cater to a majority based on ethnicity, religion, race or other dominant traits. Only when a nation’s legal system secures the rights of all citizens to share equally in all of these domains can that nation fulfill the purpose of international minority rights legal bodies and deliver substantive equality to majority and minority concerns, both in law and practice.

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It has been a privilege to work on this paper for a conference honoring Professor David Kretzmer. The focus of the Paper was not chosen at random: Minority rights and minority protections have formed an integral part of Professor Kretzmer’s work and activities, and as his former student I have always appreciated his passion and scholarship in this regard. I only hope

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that his scholarship in the field of human rights becomes an integral aspect of study within the profession at every law school.

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1. Introduction

Over the last several decades, the question of the principles and practices required to accommodate minority groups in national systems has become a focal point in international discourse. This phenomenon should come as no surprise, given that ethnic homogeneity within a state is becoming a rarity. In fact, of the more than 191 officially defined states around the globe, over 175 are multi-ethnic. What is more, internal tensions have escalated within nation states worldwide, threatening to endanger stability and peaceful coexistence. In many instances, if not already the case, it may be only a matter of time before these tensions erupt into violent conflicts.

However, the focus on accommodating minority interests has developed not merely from a desire for peace and stability. Universal morals and values grant rights to minority groups that require active protection. Given the ultimate goals of justice, equality and well-being for all human beings, developing a favorable and constructive legal system for the accommodation of racial, ethnic, religious, cultural and linguistic minorities in national and international systems is indispensable.

Arguably, one of the main sources of tension between majority and minority groups the world over is the exclusion—both de jure and de facto—of minority


groups from the centers of power and the public decision-making processes that directly determines their fates. Contemporary political and legal order does not allow, at least as a practical matter, for complete political self-determination for every racial, ethnic or other minority. At the same time, the legitimate interests of minority groups must not be overshadowed by the will of dominant majority groups. Thus, whereas the majority in a democratic state is typically able to freely influence its collective political, social and cultural development, a fair balance must be attained in order to protect the less advantaged group’s interests and identity and, ultimately, avoid inter-group hostility.\(^3\)

History teaches us that equality in theory—or equality “on paper”—is an inadequate means of delivering minority rights and quelling tensions.\(^4\) Therefore, it is not enough to draft a handful of laws and policies with the aim of protecting minorities and engendering tolerance toward them among society. Rather, they must realize full equality in both the private and public spheres. Minority groups must be allocated their appropriate shares in the power structures, institutions, and public spaces that steer and define the current status and future development of the states in which they live.\(^5\)

The principal claim made by this Paper is that the realization of full and effective equality for all residents within a multi-ethnic society cannot mean anything less than “participatory equality.” Creating a system of participatory equality requires, for most states, making drastic and fundamental changes to the state’s legal system, public spaces, social and economic structures, and funding and space provided for cultural and religious institutions; however, this type of “transformation” is the only means of respecting human dignity and delivering peace. This claim is first made as a normative moral claim based on principles of justice and dignity; as this Paper will show, a broad and effective interpretation of international law concerning minority rights supports the same normative claim.

5 See, id. at 1-5. According to Baldwin, Chapman, & Gray: “When minority rights are enshrined in constitutions, and implemented through electoral, justice and education systems before a conflict has the chance to fester, there is a chance that conflict might not occur at all.” Id. at 2.
This Paper develops the theory that achieving participatory equality for all members of a society requires the full and equal sharing of its resources in three primary domains: the public, the internal, and the historical domain. The need for such sharing is all the more so for indigenous groups and minority groups of substantial size living under systems that cater to the majority ethnicity, religion, race or other dominant traits. Only when a nation’s legal system secures the rights of all citizens to share equally in all of these domains can that nation fulfill the purpose of international minority rights legal bodies and deliver substantive equality to majority and minority concerns, both in law and practice.

II. Overview of Legal Protections for Minorities

Over the last half century, a growing interest has emerged in questions of ethnicity and nationality, majority and minority, in large part due to the series of major historical events that took place during that period. The combination of the dramatic developments and changing regimes in Eastern Europe, the shifting focus from the benefit of the whole to individual rights and liberties, the innovation of efficient modes of worldwide transportation and communication, the thrusting open of global markets, and the ensuing demand for cheap labor, spurred immigration at rates yet unseen, along with a new exchange of cultures across continents. This sudden influx of different customs, languages, races and religions has caused the international community to ponder differences and the way that minority groups should be treated by dominant majority populations.\(^6\) International law has followed accordingly, attempting to incorporate the preservation of identity and ethnicity into the rights embodied therein. The main bodies of minority rights protections are discussed below, following a brief overview of the definition of minorities and the history of minority rights.

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A. Defining “Minority”

Prior to commencing a discussion on the history and current state of minority rights developments, it is useful to attempt to define the term “minority” and its various implications. Interestingly, none of the international bodies of minority rights law have offered an express definition of the concept. While it may seem patently clear that a minority is a percentage of a nation that constitutes less than half of its population, the term raises far more complex questions: Does “minority” refer to a numerical weakness within a state alone, or does it extend to minorities within subnational regions (i.e. internal states and provinces), and within international regions? Are the rights stipulated by minority rights conventions, declarations, and other frameworks awarded to the group as a collective, or only to its members as individual rightsholders, or perhaps to both? Does the legitimacy or strength of the minority rights claim increase with the numerical percentage of the population that the minority holds? Does the weight of the claim increase if the minority is indigenous to the land on which the nation now exists? Do minorities have to be citizens of the state in order to hold the full breadth of rights embodied by minority rights laws? Does a member of a minority group or the group as a whole, have to self-identify as such in order to receive protections, or is it enough to be identifiable by objective criteria? And, of course, what qualifications define a minority (i.e. race, religion, language, ethnicity, national origin, or perhaps physical disability, sexuality, gender, age, political view, and so on)?

For the purpose of his study on the Rights of Persons Belonging to Ethnic, Religious and Linguistic Minorities, the Special Rapporteur on Prevention of Discrimination and Protection of Minorities, Mr. Francesco Capotorti, proposed the following interpretation of the term “minority,” with the application of Article 27 of the International Covenant of Civil and Political Rights (ICCPR) in mind:


A group numerically inferior to the rest of the population of a State and in a non-dominant position, whose members—being nationals of the State—possess ethnic, religious or linguistic characteristics differing from those of the rest of the population and show, if only implicitly, a sense of solidarity, directed towards preserving their culture, traditions, religion or language.9

This Paper accepts in principle this definition on the condition the requirement minority group members be nationals of the state. In a state certain minority groups are denied citizenship or have not yet attained it (such as refugees), the state cannot deny minority rights protections based on citizenship. A more appropriate criterion would be “long-term resident of the state” (since tourists and temporary residents should presumably be excluded). This revision is supported by international law subsequent to Article 27: In his 1985 article on “Minorities,” Capotorti himself dropped the requirement that members of the minority be nationals of the state.10 Furthermore, in its General Comment 23 on Article 27, (1994), the U.N. Human Rights Committee remarks that the terms used in Article 27 indicate, inter alia, “that the individuals designed to be protected need not be citizens of the State party.”11

B. The Need for Minority Rights Protections

Kymlicka explains that countries face a choice of pursuing either “integration” or “accommodation” in their approach to minority rights, encouraging assimilation of

9 Id. at ¶ 568. The subjective elements of defining a group as a minority were well described by the Permanent Court of International Justice as early as 1930, when it referred to minorities or communities as:

   a group of persons living in a given country or locality, having a race, religion, language and traditions of their own and united by this identity of race, religion, language and traditions in a sentiment of solidarity, with a view to preserving their traditions, maintaining their form of worship, ensuring the instruction and upbringing of their children in accordance with the spirit and traditions of their race and rendering mutual assistance to each other.


minority groups to the mainstream culture or allowing minority groups to preserve their distinctiveness through separate institutions. Integrative approaches often maintain individual rights while placing less emphasis on collective rights; accommodative approaches tend to support a framework of collective rights. This Article argues that only the accommodative approach can adequately attain the desirable goal of preserving minority culture and identity, since a system of attempted integration and individual rights can leave intact social factors that work to disrupt the culture of minority groups and exclude them from mainstream (and dominant) society.

The failure of the integrative approach can be seen in the situation of the African-American minority within the United States. The United States has famously taken a “melting pot” approach that attempts to integrate all members of its society into a single culture. But the case of African-Americans shows that the state’s official commitment to integration can cover over deeper forms of exclusion and denial of identity, or what is known as “institutionalized racism.” Even though the government grants individual rights to minority citizens, “the epistemological canon of ‘colorblindness’ combines with the ethos of individual choice to preserve America’s racial hierarchy just as surely as did Jim Crow.” As Kymlicka writes, rather than an integrative approach, “a new and more complex model of accommodation will be required for African-Americans.”

The experience of African-Americans is paralleled by other minority groups that are inadequately protected by a system of individual rights and integration. In order to grant minorities substantial equality, to preserve diversity in a country, and to redress historical wrongs, minority groups should be accommodated rather than made to integrate. In addition, empirical evidence suggests that many non-immigrant minority groups, like indigenous groups and minorities that view the land they live in as a “homeland,” would prefer accommodation rather than integration.

14 Will Kymlicka, A Crossroads in Race Relations, in POLITICS IN THE VERNACULAR, supra note 3, at 177.
15 See KYMLICKA, MULTICULTURAL CITIZENSHIP, supra note 3 at ch. 6.
16 Kymlicka, The Internationalization of Minority Rights, supra note 12.
Given an accommodative approach, a legal regime must take particular care to protect its distinct minority groups. It is the minority group in any given society that is most in need of securing its legal status and special protections in order to assure that its members enjoy the same rights as the majority. Human history shows that minorities are often exposed to significant pressure from majorities to subdue their cultural expression, or even to fully assimilate into the dominant culture. These pressures derive mainly from the labor market, the public bureaucratic system, the political system, consumer forces and the language of mass media. At the same time, the social message transmitted through these pressures denies the minority a sense of belonging and an opportunity to hold an equal stake in society.  

In most multi-ethnic societies, the majority’s social and historical status as the dominant group in society grants it an inherently superior socio-political status to that of the minority—one with which the minority cannot compete. Over time, this paradigm erodes the cultural-national uniqueness of the minority, endangering its collective identity and the rights of its members. Meanwhile, as long as the minority cannot (or chooses not to) exchange its identity for an attempt to “blend in” with the majority, it is likely to be excluded from public arenas. Most significantly, minorities tend to be excluded from the power and decision-making centers of a state, binding their hands in affecting their own futures as well as in participating equally in society’s future as whole.

A central example of majority pressure is the minority’s mother tongue. The majority group typically exerts such pressure unconsciously and unintentionally because taking their language for granted is deeply ingrained in the minds of majority members of a society. For instance, most states have at least one official language; however, the socio-political status of the language, and its use in official public spaces, does not derive merely from its formal status, but from its dominance in daily life.

The majority’s right to use its language, as a substantial segment of the state’s population, must be protected, just as all individual and group rights to cultural, political, and social expression and inclusion must be defended. However, as long as the majority is in an economically, politically and social advantaged position, it will enjoy absolute protection of its language rights because there is a majority consensus.

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17 Thornberry remarks that in many states, the culture, history, and traditions of minority groups are subject to “distorted representations, producing low self-esteem in the groups and negative stereotypes in the wider community.” Patrick Thornberry, *The UN Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities: Background, Analysis, Observations, and an Update*, supra note 2, at 49.
over the dominance of its language. In fact, the majority will enjoy its rights in all spheres of public life automatically, by virtue of the fact that its desires are represented by the will of the majority.  

In contrast, the minority group requires formally articulated, special *de jure* protections of its rights in order to equalize its status to that enjoyed by the majority group *de facto*. It must be emphasized that cultural pressures exerted by the majority and directed toward the minority occur naturally in any society, and it is reasonable to assume that the provisions of a law—however equal it may be—have no power to neutralize these pressures completely, particularly when the majority is a decisive one. At the same time, it is possible to rely on the law to achieve optimal normative protections for the minority and reduce significantly the pressures exerted by the majority. Such pressures will not be alleviated, however, unless the law is cleansed of all bias in favor of the majority. As long as a society’s legal norms contain formal biases in favor of the majority, there will be no chance of achieving substantial equality between the two groups in any society.  

Simultaneously, the socio-political inferiority status of a minority group may render it subject to discrimination by state and private actors, and, in more extreme situations, minorities may experience oppression and persecution. Even in states where discrimination is legally proscribed—such as where equal protection rights are formally expressed in a facially neutral manner to all citizens regardless of race, religion, national origin, or ethnicity—minorities often experience *de facto* discrimination via “distinction, exclusion, restriction or preference [for the majority]” because of the lack of special protections aimed at prohibiting less overt forms of discrimination, those to which minorities are very often subjected.  

In order to fully express the minority group’s desire for substantial equality, and to anchor its equal status in law and practice, a principal question that arises is whether the state intends to formulate a legal foundation that is unifying, collaborative and

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[A] liberal state may not be neutral with respect to the cultures of minorities, especially those in danger of dwindling or even disappearing. The state is obligated to abjure its neutrality, in our view, not for the sake of the good of the majority, but in order to make it possible for members of minority groups to retain their identity.

mutual in nature. A society holding an appropriate fundamental position, and striving toward participatory equality, will view the ultimate objective of the establishment process as creating a basic document—serving as the supreme law of the land—containing a vision for all its members, rather than one that builds a foundation for the history and culture of one group within it while excluding the other. In such a society the legal framework will be based on a bridging narrative, and not on the legacy and aspirations of the majority group alone.

Moreover, in such a society there will be no distinction drawn between the process of drafting the legal framework and its eventual content. The aspiration for a democratic legal system based on the genuine social consent of a state’s citizens requires true and full participation in the decision-making process by all citizens. A successful legislative drafting process requires the facilitation of a public debate that is able to overcome the power differentials between majority and minority groups. The normative socio-political situation in many multi-cultural states perpetuates power gaps between majority and minority citizens, and failure to neutralize them at formulating stage of the legal system will mean negating the basis for any attempt to reach a true consensus reflecting both the majority and minority positions. A legal framework created under imbalance between majority and majority, at best, will be quasi-democratic, as it lacks the consent of a significant proportion of the state’s citizens.  

It is in light of these realities and aspirations that international discourse has arrived at a consensus that minorities necessitate special legal protections in order to avoid oppression, as well as special positive action to allow minorities, as groups and as individuals, to resist pressures to dissolve their unique identities and to achieve substantial, participatory equality.

21 Obviously in such a situation the legitimacy required to establish the basic legal framework is undermined, both at the local level and at the international level. For an in-depth comparative discussion of the important insights arising from the South African experience in establishing a new democratic constitution, see Aeyal Gross, The Constitution Reconciliation and Transitional Justice: Lessons from South Africa and Israel, 20 Stan. J. Int’l L. 47 (2004).

The following section provides an overview of the evolution of that consensus, and the international and regional bodies of international law that obligate states to create formal legal protections appropriate to their particular minorities’ position vis-à-vis the majority.

C. The Development of Minority Rights Legal Frameworks

Although the main thrust of minority rights protections within international and domestic legal systems took place during the last half-century, the concept of ensuring minority protections traces back more than a millennium. Vijapur points out that as early as the 7th Century, the Prophet Mohammad drafted the “Constitution of Medina,” which followed the laws of the Qur’an, including tolerance toward those of other faiths, especially the “people of the book,” or the Bible.23 Under the Constitution of Medina, protected minority groups, particularly Christians and Jews, were allowed to practice their religions and cultures and to self-administer their personal laws.24 It was this notion of freedom of religious expression that inspired the signing of a number of other treaties protecting religious minorities between European nations in the seventeenth and eighteenth centuries.25 Finally, in 1815, the Congress of Vienna was the first to grant protections to a minority group, the Polish minority, on the grounds of ethnicity, rather than religion.26

The end of World War I was in many ways the catalyst for the emergence of an international community that stretched beyond continental boundaries. Most notably, it saw the creation of the League of Nations,27 which would later form the foundation for the United Nations.28 Among other tasks, the League was charged with enforcing the minority rights protections included in many of the peace treaties signed between Eastern European and Balkan states.29 The League was also responsible for setting up the Permanent Court of International Justice (PCIJ), which decided issues of

23 Vijapur, supra note 1, at 368.
24 Id.
25 Id.
26 Id. at 369.
28 U.N. Charter.
29 See Vijapur supra note 1, at 369.
discrimination against minority groups and concluded not only that racial, religious
and linguistic minorities were to be granted all the same rights and treatment under the
law, but also that the determination of “minority” was not to be left to the states and
instead was an objective question of fact to be decided by the international community
via the Court.\textsuperscript{30} Equally significant was the PCIJ’s decision that equality for minority
groups could not be granted merely on the surface, or through the text of laws, but had
to be “effective” and “genuine.”\textsuperscript{31}

The creation of the United Nations in 1945, following World War II, brought the
signing of the U.N. Charter the same year and the Universal Declaration of Human
Rights (UNDR)\textsuperscript{32} in 1948. These documents were significant because of their focus
on individual rights and the principles of equality and non-discrimination, but neither
expressly mentioned minorities. In fact, advocates for collective minority rights
would claim that the focus on individual rights—which would remain for the better
part of the next three decades—lies in conflict with minority aspirations for collective
rights and self-determination.

1. \textit{ICCPR}

In the 1940s the U.N. Sub-Commission on Prevention of Discrimination and
Protection of Minorities was created, but the focus remained on protecting individuals
as members of minority groups, rather than the group as a whole. Even the European
Convention on Human Rights (ECHR), adopted in 1950, only addressed group rights
peripherally via a negative individual right to freedom from discrimination based on
“association with a national minority.”\textsuperscript{33} It was the signing of the ICCPR in 1966 that
first articulated minority rights protections, arguably on both individual and group
bases. The text of Article 27 reads:

\textsuperscript{30} Thornberry, \textit{An Unfinished Story of Minority Rights}, supra note 6, at 53.
\textsuperscript{31} Vijapur, \textit{supra} note 1, at 370.
\textsuperscript{32} Universal Declaration of Human Rights, G.A. Res. 217A(III), art. 13, ¶ 1, U.N. GAOR, 3d Sess.,
\textsuperscript{33} European Convention on the Protection of Human Rights and Fundamental Freedoms, art. 14,
In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practice their own religion, or to use their own language. (emphasis added Y.T.J.)

Similar to the PCIJ’s position, the notion that the existence of minority groups is not a subjective determination to be made by a state was emphasized in the U.N. Human Rights Committee (HRC)’s General Comment 23 on Article 27. Furthermore, despite the negative rights language used in the article, “shall not be denied,” the HRC points to the positive obligations placed on States Parties to actively protect minorities from violations of their rights, both by state and private actors.

In fact, many scholars today concur that an effective reading of the text of the General Comments on Article 27, in the context of the document as a whole, demands that states grant to minority groups and their members both positive and negative, individual and group rights. Article 27, thus, requires states to create special protective measures—from new institutions allowing self-steering, to securing adequate participation in political and public life, to affirmative action programs in the workplace. According to these theories, the positive and negative elements of the right, for instance, to enjoy one’s culture, are inseparable aspects of the same right. If a group possesses the right not to be prevented from practicing its religion, then doesn’t the group necessarily bear the right to actively practice it? Moreover, if Article 27 is to have any noticeable effect on the position of minorities in a given society, and if the ICCPR is to achieve its goal of securing true equality, then Article 27 must be invested with more than a passive interpretation. If no such positive, forceful content is given to it, Article 27 adds nothing to the Covenant. This discussion is all the more important given that the ICCPR legally binds the largest number of states parties of any treaty containing minority rights and arguably has gained the status of customary international law.

34 ICCPR, supra note 7, art. 27.
35 General Comment 23, supra note 11, at ¶ 5.2
36 Id. ¶ 6.1.
37 See the writings of Thornberry, Eide and Capotorti for discussions on the positive rights that must be concluded from the text of the General Comment 23, supra note 11 and the spirit of the Covenant as a whole.
38 Currently, 160 states are party to the Covenant.
2. U.N. Declaration on Minorities

For several decades, the fate of minority rights was determined mostly by Article 27 of the ICCPR. In 1992, in a climate of renewed nationalism evidenced by the breakdown of the Soviet Union and the stirrings of conflict in Yugoslavia, the United Nations adopted by General Assembly consensus the Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities (the Declaration on Minorities).\textsuperscript{39} Although the document is a non-binding instrument, its impact has been significant in guiding the development of new minority rights theories and in reading existing documents, including Article 27. Moreover, the fact that the Declaration represents the first international document to solely address minority rights must not be overlooked.

One of the primary ways that the Declaration on Minorities may be distinguished from previous documents is that it explicitly addresses both collective and individual minority rights. The majority of the rights enshrined by the Declaration are individual rights held by members of minority groups by virtue of their membership, but the paramount rights to exist and to preserve and develop a minority’s identity are held by the group as a collective.\textsuperscript{40} The Declaration also provides a positive articulation of the rights granted—an innovation in international rights documents that perhaps demonstrates a lesson learned from previous documents.

In other words, one of the clearly stated purposes of the Declaration on Minorities, as evidenced by the preamble, is to inspire nations to actively strive to preserve minority cultures and equal rights. The Declaration on Minorities also expresses the new international awareness since the ICCPR and emphasizes that the realization of minority rights is a prerequisite to the creation of a civil society operating under the rule of law. Additionally, in 1995, a U.N. body was established to oversee the realization of the text’s provisions. The Working Group on Minorities met for the sixth time in 2000 and was granted at that meeting an “indefinite” mandate to

\textsuperscript{39} Declaration on the Rights of Persons Belonging to National or Ethnic, Religious or Linguistic Minorities, \textit{supra} note 2.

\textsuperscript{40} It should be noted that although the Declaration on Minorities, \textit{id.}, calls for collective minority rights, it, too, remains silent on the issue of granting minorities “self-determination.” The term has become in many ways an international taboo, not because it, in and of itself, means secession, but because states parties have been fearful that granting the right to groups, rather than non-sovereign nations under colonial control, could have a snowball effect that is yet understood fully.
operate as an oversight, advisory and monitoring body. The specific provisions of the Declaration on Minorities, especially Article 2, which contains its main “bill of rights,” is discussed within the context of the minority rights’ framework advocated by this Paper in Part IV below.

3. The European Framework Convention for the Protection of National Minorities

Whereas the ECHR of 1950, as discussed previously, did not differentiate minority rights from individual human rights granted to all, a minority rights protocol was added to the ECHR and opened to signature by the Committee of Ministers in 1995. Despite the term, “framework,” in its title, the Framework Convention is a legally binding treaty on its European signatories and is supported by an implementation mechanism under the Committee of Ministers.

Like the Declaration on Minorities, the Framework Convention’s mandate consists solely of preserving minority rights and establishing special measures 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.”41 Of course, unlike the Declaration on Minorities, the Framework Convention is a regional, rather than international, body of minority rights protections. Nonetheless, it serves as a source of reference and influence on international minority rights questions and the interpretation of Article 27 of the ICCPR. Its specific provisions are analyzed in relation to the proposed framework in Part IV.

4. Other Related Bodies of Minority Rights Law and the Principle of Non-Discrimination

It should be noted that even without the existence of international legal documents that directly address the status and rights of minorities, established principles of non-discrimination, as well as society’s general goals of peace and stability, maintain

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the protection of minorities. Indeed, minorities as individuals and groups are those who disproportionately experience discrimination in any society. In fact, the rights enshrined in customary international law’s prohibition on racial discrimination found in *jus cogens*, the anti-discrimination provisions of many multi-ethnic states’ constitutions, along with a multiplicity of international treaties, would be sufficient to support the granting of minority rights.

The simple reason for introducing separate documents outlining specific minority rights provisions is that majority groups often fail to acknowledge—even unintentionally—the collective and individual hardships faced by members of national minorities as a result of the majority’s dominance. Additionally, negative rights tend to flow from non-discrimination principles, but positive guarantees are needed in order to preserve the collective rights of minority groups, particularly their identities and the special characteristics of their culture. Therefore, additional legal protections

42 See Capotorti, Study on the Rights of Persons Belonging to Ethnic, Religious and Linguistic Minorities, supra note 8; Thornberry, An Unfinished Story of Minority Rights, supra note 6.

43 *Jus cogens* is a peremptory principle of international rule, rendering it customary international law, from which no derogation is allowed. In Ian Brownlie, Principles of International Law 513 (1979), Brownlie includes the prohibition of racial discrimination among the least controversial examples of *jus cogens*.

44 See, e.g., the Convention on the Prevention and Punishment of Genocide, Dec. 9, 1948, 78 U.N.T.S. 277, entered into force Jan. 12, 1951 [hereinafter Genocide Prevention Convention] granting some minority rights via its national, ethnic, racial and religious criteria (not including linguistic minorities). This convention is also significant in that it defines “genocide” broadly to include cultural, as well as biological and physical harm; in other words, a population does not have to be eliminated in order to have undergone a form of genocide under the Convention. Furthermore, as Vijapur suggests, the right to exist as a group is generally inferred through the Convention. Vijapur, supra note 1, at 373. See also the International Convention on the Elimination of All Forms of Racial Discrimination, Mar. 7, 1966, 660 U.N.T.S. 195 [hereinafter ICERD] (providing special measures for the advancement of racial and ethnic groups); the Convention on the Rights of the Child, art. 30, Nov. 20, 1989, 1577 U.N.T.S. 3 [hereinafter CRC], children of minority and indigenous populations shall not be denied the right to enjoy their culture, practice their religion, or use their own language—similar wording to Article 27 of the ICCPR, supra note 7); International Covenant on Economic, Social, and Cultural Rights, arts. 13-15, Dec. 16, 1966, 993 U.N.T.S. 3 [hereinafter ICESCR] [Articles 13, 14 and 15, and the Committee guidelines on Article 15 requiring states parties to report on the “promotion of cultural identities as a factor of mutual appreciation among individuals, groups, nations and regions as well as promotion of awareness and enjoyment of the cultural heritage of national ethnic groups and minorities of indigenous peoples”]; the 1960 UNESCO Convention against Discrimination in Education, Dec. 14, 1960, entered into force May 22, 1962; and the 1978 UNESCO Declaration on Race and Racial Prejudice, U.N. Doc. E/CN.4/Sub.2/1982/2/Add.1, annex V (1982).

45 See Asbjorn Eide, Minority Protection and World Order: Towards a Framework for Law and Policy, in Universal Minority Rights, supra note 2, at 87, see especially 105.
creating positive obligations on states are required to fully realize minority rights and substantial, meaningful equality.

Some useful examples of states that have enshrined special, positive minority protections in their fundamental laws include South Africa, Northern Ireland, and Canada. These initiatives, among others, lend further support to the inclusion of separate minority rights protections and special measures in states’ legal foundations.

III. The Foundations of Participatory Equality

In Part IV, this Paper proposes a framework for ensuring the full realization of minority rights—one that accommodates the minority group’s collective rights while protecting its members individual rights, based on an effective interpretation of the international bodies of minority rights protections. This framework is built on the theory that the right to equality is an empty right if it lacks “participatory equality.” Before analyzing the specific areas in which minority rights accommodation is particularly required, the next section engages in a brief discussion on participatory equality, collective versus individual rights, indigenous peoples’ rights, and the sources of support for these perspectives.

A. Participatory Equality

Participatory equality is defined as equality of participation in a country’s political, social, and cultural life. It includes particular types of equality like the equal enjoyment of rights, the equal distribution of resources, and equal status overall in

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46 See, e.g., the South African Constitution, particularly art. 31 on Cultural, religious and linguistic communities; the Northern Ireland “Good Friday” or “Belfast” Agreement of 1998; and the several Canadian laws protecting the rights of the French-speaking minority passed over the last few decades. For a discussion of the Northern Ireland experience, see Antony Alcock, From Conflict to Agreement in Northern Ireland: Lessons from Europe, in NORTHERN IRELAND AND THE DIVIDED WORLD: THE NORTHERN IRELAND CONFLICT AND THE GOOD FRIDAY AGREEMENT IN COMPARATIVE PERSPECTIVE 169 (John McGarry ed., 2001); Brian Thompson. Transcending Territory: Towards an Agreed Northern Ireland?, 6 INT’L J. ON MINORITY & GROUP RTS. 235 (1999).

47 See broader discussion at Section IV infra.
a country. Rightly understood, these rights are founded in equality of participation, since minority rights protections remain inadequate as long as they are designed and implemented solely “from above” rather than with the full inclusion of the minority groups themselves. At the core of the theory, as scholars and jurists are coming to recognize,\textsuperscript{48} is the notion that “effective participation”—rather than “token participation”—is not only a right borne by minorities but also the only means of guaranteeing true stability within multi-ethnic societies.

The theory of participatory equality also flows from “transformative theory,” which provides both an alternative conceptualization of difference and equality (particularly race equality) and a means of achieving it. Under transformative theory, we develop the idea that protecting minorities and engendering substantial equality is the only means of advancing into a moral, civil society that respects human dignity.\textsuperscript{49} Furthermore, minority-majority equality cannot be achieved by simply paying lip service to minority needs while maintaining a hierarchy in which the majority dominates; rather, true equality in a society that discriminates requires a fundamental transformation from the ground up.\textsuperscript{50} It is not enough, in other words, to pass a handful of progressive laws and assume that minorities have achieved equality. Participatory equality provides a framework for the full restructuring of institutions—from politics and decision-making, to culture, to education to media outlets—and for transforming a multi-ethnic society into one that substantially protects all individual and group rights. The basis of participatory equality is that all citizens share appropriately in the resources, decisions, and progress of the state, and therefore have appropriate influence over their shared futures.\textsuperscript{51}


\textsuperscript{50} Id. at 825.

\textsuperscript{51} Of course, the minority group’s relationship to participation may be a complex one. Some members of minority groups would prefer not to take part in the majority society at all. But the point of enshrining a right of participatory equality is that minorities must be given the opportunity to participate if they choose. Furthermore, there is reason to think that if a group is made to feel included by the majority, members of the group will come to feel more inclined to participate.
In fact, a broad and appropriate reading of Article 27 of the ICCPR, in light of the “object and purpose” of the treaty as a whole, results in the same conclusion. The right to enjoy one’s culture, for instance, cannot be realized when the majority population dictates how, where, when, and with what funding cultural enjoyment will take place. General Comment 23 on Article 27 includes a statement that minorities must be ensured “effective participation” in the decisions which affect them before they may attain the full extent of their rights, particularly in the case of indigenous communities.52

The Framework Convention also includes specific language demanding that states create the necessary means for the “effective participation” of minority groups in “cultural, social and economic life and in public affairs, in particular those affecting them.”53 Additionally, the Declaration on Minorities makes a point of emphasizing a minority’s right to “effectively participate” in all spheres of public life, including decision-making on the national and regional levels.54 The Declaration on Minorities also departs from the general “right to association” provided by many of the other minority and human rights documents discussed above, and stipulates that minorities must be allowed to create and run their own institutions and associations, further amplifying their effective participation and say in and their own lives and their contributions to society.

Additionally, in response to the growing climate of minority rights awareness, in 1998, the High Commissioner on National Minorities of the Organization for Security and Cooperation in Europe (OSCE) called on a group of experts to produce a set of recommendations for conducting inter-ethnic relations within a democratic state. One of the primary foci of the endeavor was on ensuring the effective participation of national minorities in political decision-making processes. Although the Lund Recommendations55 that resulted bear no official status in international law, they are

52 General Comment 23, supra note 11, at ¶ 7. “With regard to the exercise of the cultural rights protected under article 27 … The enjoyment of those rights may require positive legal measures of protection and measures to ensure the effective participation of members of minority communities in decisions which affect them.”
53 Framework Convention, supra note 41, art. 15.
54 See the Declaration on Minorities, supra note 2, ¶¶ 2.2 & 2.3.
anchored in international standards that are binding on the 56 member states either as legal obligations or political commitments.56

It is particularly relevant to our discussion here that the perspective taken by the OSCE is one of ensuring “comprehensive security” and eliminating the root causes of conflict through accommodating minorities. Beginning with its General Principles, the Lund Recommendations state that:

Effective participation of national minorities in public life is an essential component of a peaceful and democratic society. Experience in Europe and elsewhere has shown that, in order to promote such participation, governments often need to establish specific arrangements for national minorities. These Recommendations aim to facilitate the inclusion of minorities within the State and enable minorities to maintain their own identity and characteristics, thereby promoting the good governance and integrity of the State.57

B. Individual and Collective Rights

Before commencing a discussion on the subject of collective rights, it should be emphasized that minority groups have a vital interest in attaining full protection of their members’ individual rights (equal citizenship rights). Individual rights are the universal rights to which every person is entitled by virtue of her citizenship in a state. These rights, generally speaking, are divided into two types. The first is basic liberties, also known as civil and political rights, and includes a citizen’s right to engage in her private life without the unnecessary intervention or disturbance on the part of the state (freedom of expression, association, movement, religion and conscience, and so on), as well as the right to participate in decisions made about the future of the nation (voting, etc.).58 The second type is referred to as “claim rights,” the majority of which belong to the category known as “social, economic and cultural

56 The OSCE’s 56 current member states include the United States, the UK, France, Germany, Russian Federation, Canada, Denmark, Finland, Georgia, Ukraine, Tajikistan, Uzbekistan, Turkmenistan, among others. For a complete list see http://www.osce.org/about/13131.html (last visited Oct. 26, 2008).

57 The Lund Recommendations, supra note 55, at 5, ¶ 1.

58 See ICCPR, supra note 7.
rights,” which assure the citizen basic conditions of existence, including the rights to housing, education, health care, occupation and the like.\textsuperscript{59} Needless to say, the laws in any multi-ethnic state must regard all citizens alike, and rights must be implemented equally: The system may not grant different individual rights to different people based on their membership in a particular group.\textsuperscript{60}

In contrast with individual rights, collective rights derive from group differentiation, distinguishing the minority group from the majority.\textsuperscript{61} Collective rights require initiating special measures to be applied on a permanent basis in order to assure appropriate protection of the unique—and fragile—group identity of the minority group and its collective interests.\textsuperscript{62} These rights depend on the nature of the group and represent an inherent right conferred on the minority community because of its uniqueness.\textsuperscript{63} Their aim is to achieve material equality for the group’s members and to grant them appropriate legal protection, both on individual and collective levels. These rights are the precondition for achieving overall equality between majority and minority groups.

The relationship between individual and collective rights is complex. In some contexts, guaranteeing collective rights is necessary in order to guarantee the enjoyment of full individual rights.\textsuperscript{64} The right to be educated in one’s indigenous language, for

\textsuperscript{59} See ICESCR, supra note 44.

\textsuperscript{60} Equal application of rights will sometimes require initiation of a temporary policy of affirmative (preferential) action, the aim of which is to benefit those suffering from discrimination (in a manner that appears to detract from equality) in order to achieve substantial equality and to close gaps created as a result of such discrimination.

\textsuperscript{61} See General Comment 23 supra note 11, at ¶¶ 6.2 and 9, distinguishing the individual and personal freedoms granted to every person from the minority’s right, in community with its other members, to enjoy and practice its religion, language, and culture, and to preserve and develop its unique “cultural, religious and social identity” (¶ 9).

\textsuperscript{62} See KYMLICKA, MULTICULTURAL CITIZENSHIP, supra note 3, chs. 6-7. See also, KYMLICKA, POLITICS IN THE VERNACULAR, supra note 43.

\textsuperscript{63} See KYMLICKA, MULTICULTURAL CITIZENSHIP, supra note 3,chs. 6-7. See also KYMLICKA, POLITICS IN THE VERNACULAR, supra note 3.

\textsuperscript{64} See Amal Jamal, On the Morality of Arab Collective Rights in Israel, 12 ADALAH NEWSLETTER (2005), available (in English) at http://www.adalah.org/newsletter/eng/apr05/ar2.pdf.

The demand for collective rights does not replace the demand for full citizenship equality, but rather complements it. Collective rights are increasingly viewed as a precondition for guaranteeing individual equality. They entail the demand for self-government in several aspects of [public life] in [a state] such as education, communication, planning, control over resources, social welfare and development.

\textit{Id.} at 1.
example, cannot be enjoyed in any practical sense by an individual if the collective right to self-steering of institutions, such as education, and preserving group identity are not guaranteed. Another example of this phenomenon is the freedom of expression, which cannot be fully realized by an individual member of a minority group if the group is not allowed to create and maintain its own channels of mass media.

On the other hand, tensions may arise between collective and individual rights. Two paradigmatic areas of tension are women’s rights and the situation of a “minority within a minority”: in both areas, granting collective rights to a group raises fears that the group itself will restrict the individual rights of people who fall under its jurisdiction. At an extreme, this tension may mean that when people are seen only as members of a group, they stop being granted individual rights: for example, a government may fail to protect the individual rights of a member of a minority community if it assumes that she falls only under the authority of her minority group’s institutions and associations. Members of communities who are dissidents, less traditional than other members, or in historically disempowered groups like women and children, are particular endangered by this assumption. In such a case, it is imperative to maintain that a member of a minority group bears individual rights no matter what group rights she has. In other words, the collective rights must not “swallow” the individual rights. In order for minority

65 On women’s rights, see Susan M. Okin (with respondents), Is Multiculturalism Bad for Women? (Joshua Cohen, Matthew Howard, & Martha Nussbaum eds., 1999); Ayelet Shachar, Multicultural Jurisdictions: Cultural Differences and Women’s Rights (2001); on minority issues, see Kymlicka, Multicultural Citizenship, supra note 3, at chs. 3 & 5.

66 Will Kymlicka asserts that this balance has been maintained in Western Europe:

the consolidation of robust legal mechanisms for protecting human rights and the development of a human rights culture, generally, have provided guarantees that the accommodation of minority claims to self-government would not result in islands of tyranny in which the basic security or rights of citizens would be in jeopardy.

rights—and participatory equality—to be achieved, both collective and individual rights must be protected.67

There have been some claims that collective rights do not find support in international law.68 However, several of the minority rights documents mentioned above contains provisions that either explicitly or implicitly comport with the notion that minorities are entitled to both collective and individual protections. For instance, the wording of Article 27 of the ICCPR includes the phrase “in community with the other members of their group,” and Article 3 of the Declaration on Minorities explicitly protects minority rights “individually as well as in community with other members of their group.”69 Moreover, an effective reading of the general right to preserve one’s minority identity, enshrined repeatedly in international law, provides an example of a paramount right that loses all meaning if it is not conceived as both an individual and collective right.70

67 Finding the proper balance of collective rights and individual rights in hard cases may defy a clear theoretical solution and depend on a careful analysis of context in particular situations. In order to balance these rights, the nature of both individual and collective rights must be fully described; given this Paper’s contention that collective rights are still not fully described, the question of balancing falls outside the scope of the present project of describing those rights.

68 Interestingly, Thornberry suggests that states have been reluctant to read collective minority rights into international law for three main reasons: First, they fear that collective rights will create separate legal entities with authority that could surpass their state and territorial sovereignty. Second, sovereign states worry that collective rights will lead to separatist movements, threatening territorial and social cohesion. Third, Thornberry points to “cultural relativism,” the notion that majority groups worry that allowing minorities autonomy over their lives will give them a carte blanche to oppress women, children, non-believers, political dissenters and the like. (Thornberry notes the irony here, “as if no government ever oppressed its people.”) Thornberry, An Unfinished Story of Minority Rights, supra note 6, at 71.

69 This inclusion is perhaps also in order to ensure that states do not decide that cultural, religious, linguistic and other rights should only be practiced in private or in group forums.

70 In fact, the right to identity as a collective right may be derived from several bodies of international law, including: the UNESCO Constitution, Nov. 16, 1945, 4 U.N.T.S. 275; the Genocide Prevention Convention, supra note 44 (via granting the right to exist as a group), and the U.N. Declaration of Indigenous Rights of Indigenous Peoples, G.A. Res., 61st Sess., 107th & 108th plen. mtg. U.N. Doc, A/61/L.67 (Sept. 2007) [hereinafter Declaration on Indigenous People]. The Draft Declaration on Indigenous Peoples was adopted in 1994 but was never adopted by the General Assembly. Only following decades of negotiations did the General Assembly finally adopt on September 13, 2007. For further discussion on sources of collective rights, see Vijapur, supra note 1, at 375 ff.
C. Differentiated Rights for Indigenous Groups and Other Minorities

A group’s claims for collective rights may vary with the situation of the group. In particular, minority groups that already gained power in their society have weaker claims to special collective rights, while minority groups that have substantial size and indigenous groups have stronger claims.

Minority groups such as members of a small political party, a particular age group, those of a particular physical size, or “perpetual minorities” (those groups that will statistically never constitute the majority, such as homosexuals, disabled persons, etc.), should be granted their full human rights, treated as full and equal citizens, and protected from de jure and de facto discrimination. However, any claims for collective and individual minority rights, based on the preservation of identity, language, and culture, are less founded because these elements of their identities are not comparably endangered. The Minority Rights Group emphasized the disadvantaged position of the group in its definition of minority in the 2007 Report:

a group of people who believe they have a common identity, based on culture/ethnicity, language or religion, which is different from that of a majority group around them. A minority is often, but not always, defined as such with reference to their position within a country, but can also be defined with reference to a wider area (e.g. regional) or narrower area (e.g. by province). What matters is whether the minorities lack power—i.e. the ability to affect the decisions that concern them. It is those minorities that minority rights are designed to protect [emphasis added Y.T.J.].”  

For all groups that lack this ability, the group members’ individual rights to full legal and social equality and participation stand regardless of numerical percentage or origin. But when a group is a “substantial minority,” that is, a group that constitutes a recognizable percentage of the population and/or is indigenous to the land, the group’s collective rights increase exponentially, such as the group’s right for self-administration.

Indigenous minority communities are prime examples of minorities that “lack power.” Today, the most widely accepted definition of an indigenous people is the one given by Jose Martinez-Cobo. His definition is based on four criteria: First, priority in time; second, voluntary perpetuation of cultural uniqueness; third, self-identification as indigenous; and fourth, the experience of subjugation, marginalization, dispossession, exclusion, and discrimination by the dominant population in a society. Indigenous communities are especially entitled to both individual and collective rights: they are protected from discrimination on the basis of their membership in the indigenous group, and must also be allowed to express, preserve and develop their identity, culture, religion, language and other aspects of their unique experience both as individuals and as a group.

Furthermore, the indigeneity of a minority group necessarily strengthens its claim for collective rights, particularly the right to self-steer its institutions, in order to preserve its unique culture and historical ties to the land. In the case of most indigenous minorities, this claim is augmented by the fact that the community is not merely a disadvantaged segment of a nation’s population that requires special attention or aid in order to improve its socio-economic and political status; rather, this is a community with a legacy of living and practicing its culture in the land, whose disadvantaged position derives directly from the introduction of the new government. Thus, having been stripped of rights previously held lends further support to the claim that those rights must not be denied to the indigenous population simply because the population in power has shifted.

Although indigenous rights are often included under the umbrella of minority rights law, separate documents acknowledging the distinct rights of indigenous minorities

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73 Contrary to indigenous minorities, immigrant minorities are generated by the transition of individual immigrants from their native land to another country. It is customary to view this voluntary transfer as a kind of consent by the individual immigrants to integrate and be absorbed into the new society. Some have critiqued granting special indigenous people’s rights because they threaten the sovereignty of the new nation state. However, Jamal argues that while indigeneity “challenges the legitimacy of the colonial state,” it does not justify secession. Rather, the purpose of acknowledging the indigeneity of a minority group is to “secur[e] patterns of shared sovereign accommodation in ways that preserve and enhance indigenous cultural autonomy and territorial groundedness, while guaranteeing an inherent and collective right to self-determination over land, identity and political voice.” See Jamal, supra note 64, particularly at 6. See also General Comment 23, supra note 11, ¶ 3.2.
emerged as early as 1957, when the International Labor Organization (ILO) adopted the first international convention on the rights of indigenous peoples, affirming states’ obligation to respect the indigenous way of life. Later, in 1989 the ILO reconvened to enact Convention 169 on Indigenous and Tribal Peoples in Independent Countries, which reinforced the previous convention, but, most significantly, stipulated that states must involve indigenous populations in the official decisions affecting them and their preserved way of life. Finally, in 1982, the Sub-Commission on Human Rights created the Working Group on Indigenous Populations.

The Declaration on Indigenous People establishes a series of provisions guaranteeing the rights to self-determination and autonomy over indigenous cultural and religious institutions, while preserving the right to fully and effectively participate in the public life of the state free of discrimination. Furthermore, the Declaration on Indigenous People guarantees both individual and collective rights to indigenous peoples to maintain and develop their distinct economic, social and cultural practices. Although it is not binding law, it is monitored by the Working Group and expresses an international intention vis-à-vis indigenous minority groups that was not fully articulated until this year.

International law treats indigenous groups and national minorities as two distinct groups with distinct sets of legal protections; in general, indigenous groups are accorded accommodation rights while national minorities are treated with integrationist strategies. But there are groups that fall under the legal definitions of both categories, and for these groups the protections of both categories are most relevant.

76 Kymlicka, The Internationalization of Minority Rights, supra note 12, at 2-4. For a broader discussion of the differences in international law between indigenous groups and national minorities, see Kymlicka, Theorizing Indigenous Rights, in Politics in the Vernacular, supra note 3, at 120-32.
77 Alternatively, one could follow the approach of Will Kymlicka and argue that international law should simply give all national minorities the same rights currently given to indigenous groups. As Kymlicka points out, the distinction between the two categories is conceptually ambiguous, since both indigenous groups and national minorities are part of the larger category of “homeland minorities,” or groups that “have been historically settled within a particular part of a country for a long period of time and, as a result of that historical settlement, have come to see that part of the country as their historic homeland.” Kymlicka, The Internationalization of Minority Rights, supra note 12, at 5. Because of this commonality, “whatever arguments exist for recognizing the rights of indigenous peoples to self-government also apply to the claims for self-government by other vulnerable and historically disadvantaged homeland groups.” Id. at 7. The present Article retains the distinction between indigenous groups and national minorities because it is central to existing international law, but Kymlicka’s approach deserves further attention.
IV. A Universal Framework for Delivering Individual and Collective Minority Rights

Based on the above principles, the following sections seek to outline three principles of equal allocation that form the foundation of a framework for the delivery of collective rights via an egalitarian legal arrangement: the public domain, the internal domain, and the historical domain. These principles are interrelated and therefore their divisions are not absolute; however, for the sake of clarity, the discussion below will address each principle as a separate entity. It is important to note that the following theoretical framework has in mind “substantial minority” populations, those comprising a recognizable percentage of the population and/or indigenous populations.

A. The Public Domain: Distributive Justice

Guaranteeing full and effective, or participatory, equality to a substantial minority requires first and foremost that the minority share in the public domain by enjoying equal and participatory allocation of all public resources on both a civil-individual and a national-collective basis. This principle is based on the notion that every state essentially assumes the role of “trustee” of the nation’s public assets, for which all citizens are the equally entitled beneficiaries. Therefore, in its capacity as trustee, the state assumes an inherent duty to divide those assets fairly and equally, and this duty must be given explicit and superior legal status within a national legal arrangement. Furthermore, the principle is based on the theory discussed above that collective and individual minority rights simply cannot be fulfilled without guaranteeing a minority group’s effective participation in the public life of a nation, including its effective sharing in the nation’s public resources.

The assets, or public resources, held “in trust” by the state may be divided into five general categories, bearing equal importance: material resources; national symbols; cultural resources; political resources; and, immigration and citizenship.

1. Material Resources

Material resources refer primarily to the national budget and land. These resources must be divided at least proportionally amongst the nation’s groups. However, it
is often the case that minority groups are disproportionately socio-economically disadvantaged and thus may require more than their raw population percentage of the budget. Principles of non-discrimination and equality-in-fact already back the allocation of national budget resources according to the special needs of the minority group, rather than on a strict proportion basis.\(^\text{78}\) Moreover, the principle of inclusion—or at least non-exclusion—finds support in many of the minority rights legal texts, including under the right to exist and the right to preserve one’s identity.\(^\text{79}\) The simple fact is that a minority group’s existence, much less its identity, will not persevere if the group is not granted the resources and support necessary to at least approach the average socio-economic status of the majority.

Furthermore, participatory equality in the material realm includes operating under the principle of distributive and corrective justice, in which minority groups are not only entitled to special allocation of resources because of their right to exist and persist, but also in order to compensate the group for extended past discrimination. Most minority groups around the world have experienced decades or even centuries of discrimination, both \textit{de jure} and \textit{de facto}.\(^\text{80}\) Ensuring equal and effective participation also means that states must help to revive the oppressed minority segments of their populations as a precondition for such participation—transforming the state structure to bring minorities from poverty, discrimination and marginalization into equal ground with the majority. Even General Comment 23 on Article 27 makes clear that although the rights therein are articulated as negative rights, they also obligate states to take positive action to create conditions for realizing them.\(^\text{81}\) Affirmative action programs are only one of many ways to offer disadvantaged minority groups a legitimate opportunity to progress and to fully enjoy the equal distribution of a state’s resources.

Article 5.1 of the Declaration on Minorities stipulates that “national policies and programmes shall be planned and implemented with due regard for the legitimate interests of persons belonging to minorities.” In his Commentary on the Declaration on Minorities, Professor Asbjørn Eide notes that this article should be read to include

\(^{78}\) See the Declaration on Minorities, \textit{supra} note 2, art. 4; the ICCPR, \textit{supra} note 7, art. 2. See also Thornberry, \textit{An Unfinished Story of Minority Rights}, \textit{supra} note 6, at 48.

\(^{79}\) See, \textit{e.g.}, the Declaration on Minorities, \textit{supra} note 2, art.1.1; Framework Convention, \textit{supra} note 41, art. 5; and the Genocide Prevention Convention, \textit{supra} note 44. See also Commentary on the Declaration on Minorities, \textit{supra} note 66, at commentary on Article 1.

\(^{80}\) Jabareen, \textit{supra} note 13, at 513-34.

\(^{81}\) General Comment 23, \textit{supra} note 11, ¶ 6.1.
the distribution of such resources as public health, education, social security, housing, and other public welfare programs.\textsuperscript{82}

Interestingly, in Eide’s Commentary, he emphasizes Article 4.5 of the Declaration on Minorities, granting the right to minorities to “participate fully in the economic progress and development in their country.”\textsuperscript{83} According to Eide, this provision should be read not only to include the negative right to freedom from discrimination in the economic spheres of life, but also the positive obligation on states to integrate minority populations into the processes that determine the society’s future and development. He notes that equal participation in the progress of society is critical to facilitating interaction, integration, and coexistence between majority and minority populations, as well as to ensure that minority traditions are appreciated by society-at-large and not relegated to museum pieces celebrated merely as historical fact.

The equal distribution of land and housing resources also falls under the public domain and material resources in particular. As was mentioned, the Declaration on Minorities clearly states that planning and implementation of settlement and housing policies must be conducted with the minority’s legitimate interests in mind. It seems fairly logical, however, that minority interests usually cannot be represented adequately by the majority group and, therefore, minorities must also be allowed to take a direct and appropriate part in developing these policies. This right is even more critical when it comes to indigenous minority populations, whose existence and identity are conditioned on the group’s physical bond with a specific geographic location.\textsuperscript{84} The Declaration on Indigenous Peoples stipulates that “indigenous peoples have the right to determine and develop priorities and strategies for the development or use of their lands or territories and other resources.”\textsuperscript{85}

In sum, in most states, it is not enough for the government to commit itself to distributing material resources, such as budget and land, without discrimination; the state’s laws must dictate an obligation to distribute these resources equally and with the special needs of minorities considered. More importantly, state laws must require the official input of minority representatives in the decisions made and the respective policies of implementation.

\textsuperscript{82} Commentary on the Declaration on Minorities, supra note 66, commentary on Article 5.1.
\textsuperscript{83} Id. at commentary on Article 4.5.
\textsuperscript{84} See Jamal, supra note 64, for more discussion, especially at 1 & 6.
\textsuperscript{85} The Declaration on Indigenous Peoples, supra note 70, art. 32.1.
2. National Symbols

Achieving participatory equality also requires that states reflect their respect for, and recognition of, the variety of collective historical and cultural experiences of their citizens through their national symbols. Symbols such as the flag and anthem, national ceremonies, and official holidays are emotionally charged public resources and have a special impact on the status of the minority community. Therefore, the state system of symbols must strictly preserve the principles of equality and fairness, and of equal distribution of resources, allocating symbols on a partnership basis. Ideally, these symbols should be neutral and inclusive of all members of society, as well as open to new members.

The right to share in the official symbols that represent the ethos and identity of a state before the rest of the world derives both from the collective right to preserve the minority group’s identity, enshrined in the various declarations and conventions, and the right of a minority group to be free from assimilation into the dominant culture. This latter right is expressly articulated in Article 5 of the Framework Convention and implied by the Declaration on Minorities and the ICCPR, among other bodies of minority rights law.

Under the theory of participatory equality, national symbols must be a neutral and unifying expression of citizenship in the state, rather than a manifestation of the majority experience in the state. Moreover, the claim for the collective right to be included in the national symbols is all the more justified, and crucial, in a state whose

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86 See, e.g., the Framework Convention, supra note 41, art. 5; the Declaration on Minorities, supra note 3, art. 1.1; the ICCPR, supra note 8, art. 27; among others.

87 See Commentary on the Declaration on Minorities, supra note 66, at commentary on Article 1.1, at 2-3, in which he explains how the right to preserve one’s identity innately includes the right to be free from assimilation.

88 A prime example of the feasibility of this idea comes from Canada, where

[O]n one side, the celebration of diversity has become a feature of the country’s very conception of itself, part of the conception of the “nation” that newcomers are invited to join. On the other side, the celebration of shared traditions, history, values and identity represents a decidedly secondary element in the glue that holds the country together.

dominant majority population is actively engaged in preserving its identity—rather than a majority whose symbols are culturally, religiously, or otherwise neutral.\textsuperscript{89} In the former case, the minority’s identity is heavily threatened and thus its preservation must be even more actively secured.

3. Cultural Resources

Inherent in the principles of non-assimilation, and the right of a minority group, individually and collectively, to preserve its identity, is the ability to engage in the group’s distinct cultural practices—from religion, to language, to traditional uses of land, nature and medicines.\textsuperscript{90} This protection has been interpreted to mean both the non-interference of state and private parties in the minority’s cultural practices, and the positive obligation to create the necessary conditions for such practices.\textsuperscript{91} Creating such conditions includes everything from securing national budget allocations for cultural institutions, to legally sanctioning traditional practices (such as fishing and hunting), to accommodating traditional housing and building practices in the state’s planning and zoning policies, to including the minority language in official state documents, institutions and in public spaces.\textsuperscript{92} Fulfilling this right also includes allowing minorities to self-steer many of their religious, cultural and education institutions, which will be further explored under the internal domain in its section below.

\textsuperscript{89} See Jamal, supra note 64, especially at 3.
\textsuperscript{90} See the ICCPR, supra note 7, art. 27; the Declaration on Minorities, supra note 2, art. 1.1; the Framework Convention, supra note 41, art. 5.1; The Declaration on Indigenous Peoples, supra note 70, arts. 11 & 12; CRC, supra note 44, arts. 29 & 30; International Convention on the Protection of the Rights of All Migrant Workers and Their Families, art. 31, Dec. 18, 1990, G.A.Res. 45/158 (annex), \textit{reprinted in} 30 I.L.M. 1521 (1991); ILO No. 169, supra note 75, art. 2(2)(b); as well as in regional instruments such as the OSCE 1990 Copenhagen Human Dimension Conference and the Geneva Meeting of Experts on National Minorities 1991. For an overview of rights concerning a group’s cultural practices, see KYMŁICKA, MULTICULTURAL CITIZENSHIP, supra note 3, at 30-31.
\textsuperscript{91} See General Comment 23, supra note 11, ¶¶ 6.1 & 7; the Declaration on Minorities, supra note 2, art. 2.1; see also Eide Commentary on Article 2.
\textsuperscript{92} Again, Canada provides an example of an implementation of some of these policies: the Canadian government has “provided tangible support in various forms, including financial support for ethnocultural programs; funding for minority language instruction in schools; and affirmative action through the federal government’s employment equity program.” Banting, Courchene, & Seidie, supra note 48, at 651.
Central to virtually every minority group’s unique cultural identity is its language.\(^{93}\) Generating official space for the use of the minority’s language is doubly important where the minority is indigenous to the land. In such a case, equal allocation of the state’s cultural resources demands bilingualism, such that the substantial minority group shares the public view equally. The minority language must be made official in both law and practice in all areas of the public sector including, but not limited to, governmental documents and forms, mass media, courts of law, educational material, universities and university courses, naming of road signs and buildings, recognition of cultural icons, and so forth.\(^{94}\) Ensuring meaningful access to public forums for all of a state’s citizens also means providing public services of equal quality in both the majority and minority languages, rather than simply incorporating the latter as a gesture.\(^{95}\) The bilingual status of English and French enshrined in the Canadian constitution and expressed in practice in Canada today provides a worthy example for this principle.\(^{96}\)

The obligation on states to officially recognize the minority language and incorporate it into public spaces is enshrined in many of the minority rights legal documents.\(^{97}\) When Article 27, and its General Comment 23, are read through the principle of participatory equality, the minority groups’ right to “use their own language,” in the case of an indigenous or substantial minority, can only mean giving

\(^{93}\) See Kymlicka, Multicultural Citizenship, supra note 3, at 111: “one of the most important determinants of whether a culture survives is whether its language is the language of government.”

\(^{94}\) Interestingly, the opposite point was made in the June 20, 2004, session of the Knesset Constitution, Law and Justice Committee concerning “The Jewish State and Minority Rights” in which a Jewish member of the committee, Nissim Zeiev, claimed that “the majority feels that it belongs less to the State when it sees the writing [on signs, etc.] in Arabic.”

\(^{95}\) Such public services include, e.g., public health clinics, national post offices, public modes of transportation, and government offices such as the tax administration, social security, and the ministry of interior.

\(^{96}\) See Articles 16-23 in the Canadian Charter of Rights and Freedoms. Article 16(1) stipulates generally that “English and French are the official languages of Canada and have equality of status and equal rights and privileges as to their use in all institutions of the parliament and government of Canada.” In the 1970s and 80s, Canada undertook a comprehensive conversion to bilingualism, including all governmental and public service authorities. See Joseph Eliot Magnet, The Official Languages of Canada (Y. Blais ed., 1995); compare to the status of Hebrew and Arabic in Israel: Ilan Saban & Muhammad Amara, The Status of Arabic in Israel: Reflections on the Power of Law to Produce Social Change, 36 ISR. L. REV. 5 (2002).

\(^{97}\) See, e.g., the Framework Convention, supra note 41, arts. 10 & 11; the Declaration on Minorities, supra note 2, art. 4; ICCPR, supra note 7, art. 27.
the language at the very least some legal status such that it is part of the government system, public spaces, and education system. Language is so fundamental to any substantial minority’s identity that anything short of this arrangement subjects the minority to the will of the majority and contributes to a process of assimilation.

Additionally, minority children must be guaranteed the right to learn their language in order to preserve this element of their identity for generations to come. Where necessary, children must also be allowed to receive their education in their mother tongue. This latter right is expressly enshrined in Article 4.3 of the Declaration on Minorities.

It must be emphasized, however, that the purpose of teaching the minority language is not only to benefit members of the minority group and to help them gain a more equal position in society. In fact, Professor Eide interprets the Declaration on Minorities as placing a reciprocal duty on minority populations to endeavor to learn the majority language. In an ideal situation, pupils of both groups within the state’s population learn the other’s language, thereby promoting understanding between majority and minority populations, particularly amongst future generations. True integration of minorities, in which both majorities and minorities participate in each other’s culture to some extent, depends on education. So multicultural and intercultural education for both majority and minority must take the utmost precedence in a state’s education curricula where there is a substantial minority presence. This type of education requires significant interaction, and as language is at the center of interaction between people, bilingualism is a precursor to true integration, effective participation, and full equality.

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98 See, e.g., General Comment 23 supra note 11, at ¶ 5.3.
99 See Thornberry, An Unfinished Story of Minority Rights, supra note 6, at 64.
100 See Commentary on the Declaration on Minorities, supra note 66, at commentary on Articles 2.2. & 4.3.
101 On the importance of education for civic integration, see Will Kymlicka, Education for Citizenship, in Politics in the Vernacular, supra note 3, at 293.
102 This requirement is found in the Declaration on Minorities, supra note 2, art. 4.4, as well as in the ICERCD, supra note 44, art. 7, and CRC, supra note 44 art. 29.
4. Political Resources

One of the central ways in which states must guarantee the collective right to participatory equality—and minority groups themselves may monitor and ensure the continued realization of this right—is through effective and equal sharing in the political resources in a state, namely the decision-making processes. In order for political resources to be adequately shared, representation of the substantial minority group in all civic institutions and decision-making bodies must be effective, authentic and (at least) proportionate. In other words, representation must amount to more than a “token” presence of minority group representatives, both in numbers and in effective power. The purpose of appropriate representation of a minority group is to assure their full democratic participation as a whole in the state’s administrative functions and in determining the content and principles of social justice implemented within it, both in the present and the future. The object is furthermore to grant minorities a meaningful say in determining the conditions and regulations affecting their lives.\(^\text{104}\)

Furthermore, the majority of public institutions—especially those including senior management positions—must institute mechanisms of consultation with members of the minority group leadership in order to guarantee that representatives in these institutions truly represent the interests of the minority public.\(^\text{105}\) As minority representatives in public institutions will almost always constitute a numerical minority, and therefore will often find themselves on the losing side, meaningful influence must be awarded to minority representatives in voting bodies. Such influence may be enabled by granting a “veto” right to the minority representatives as part of the decision-making process on matters that have a profound impact on the population.\(^\text{106}\)

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\(^{104}\) Young, Inclusion and Democracy, \textit{supra} note 48. For a discussion of the importance of group representation see Kymlcka, \textit{Multicultural Citizenship, supra} note 3, at ch. 7 (“Ensuring a Voice for Minorities.”) For recommendations of other strategies to increase minority representation in the Canadian context, see Banting, Courchene, & Seidle, \textit{supra} note 48, at 676-79.

\(^{105}\) See \textit{id.} at 143: “the right to self-government in certain areas does seem to entail the right to representation on any bodies which can intrude on those areas.”

Additionally, it may be necessary in many states to incorporate such arrangements into the body of superior legislation, such as a constitution. The appropriate schematic for the creation of such a legal arrangement must include substantial input by the minority group, leaving all issues open to deliberation and appeal. Likewise, no single group or individual may be deemed to hold a monopoly on truth, or justice, or on the definition of the common good that all citizens of a state aspire to entrench in its fundamental legal bodies.

Although Article 27 of the ICCPR does not provide, at least expressly, for participatory equality and meaningful representation, an effective reading of the document, taken as a whole, results in the conclusion that its “object and purpose” are lost if the minority population is not given the means to influence its own outcome. In fact, General Comment 23 on Article 27, paragraph 7, states that: “The enjoyment of [cultural] rights may require positive legal measures of protection and measures to ensure the effective participation of members of minority communities in decisions which affect them.”

The Framework Convention and Declaration on Minorities include similar provisions, with the latter expressing the notion of effective participation in more detail. In Professor Eide’s Commentary on the Declaration on Minorities, he notes that the Declaration must be read as requiring states to create arrangements allowing the minority voice to be heard adequately. Such arrangements range from a “veto” power (described above), to a federalist system granting authority based on regional divisions. What is more, granting authority to smaller regional and local bodies, in which minorities may constitute at least their actual percentage of the overall population, if not more, will help ensure that minority interests are not overlooked on a national basis.

107 The Framework Convention, supra note 40, art. 4.2; the Declaration on Minorities, supra note 2, arts. 1-7.
108 Additionally, the Declaration on Minorities, supra note 2, arts. 1.2, 2.2, 2.3, 4.5 and others, stipulates that states must enact special measures to ensure the full participation of minorities in public life. Professor Eide notes that it is essential that the state consult with minority representatives in deciding what those appropriate measures will entail. See Commentary on the Declaration on Minorities, supra note 66 at commentary on Articles 1.2, 5.2, 6, & 7 require that the legitimate interests of minorities be adequately considered not only within national decisions, but also in the realm of international cooperation and relations, with the intent of promoting understanding and confidence among the minority at both the national and international levels.
109 See Commentary on the Declaration on Minorities, supra note 66, at commentary on Articles 2.2. & 2.3.
110 See KYMLICKA, MULTICULTURAL CITIZENSHIP, supra note 3, at 137–38.
The Lund Recommendations, too, speak directly to this point. In fact, of the four parts of the Recommendations, Part II is dedicated to (and entitled) “participation in decision-making.” The Recommendations were guided by the “fundamental logic” that “good governance” and the principle of “subsidiarity” (taking decisions in consideration and with the participation of those affected) lead to policies that reflect the will of the entire population and therefore ensure stability and cohesion within a state.111

Moreover, one need not look to minority rights law to conclude that a basic prerequisite to achieving justice and equality is the full and effective participation of all members of society. Granting special representation rights to minority groups does not deny any representation rights to the majority; rather it distributes effectively the political resources of the nation and begins to address the society’s automatic assumptions and preferences. When a state’s de jure and de facto rules of political participation are skewed toward the majority, no set of facially equal participation rules will ever guarantee participatory equality; only such special representation arrangements can help to engender effective participation and repair the long-standing discrimination and disenfranchisement of the minority group.

5. Immigration and Citizenship

The rights to immigrate into a state and to obtain the full breadth of rights and privileges of citizenship are one of any state’s primary resources. Levying immigration and citizenship quotas expresses the state’s strength, and it must exercise this strength fairly, justly and equally. The principles of non-discrimination enshrined in multiple bodies of international human rights law prohibit defining immigration and citizenship requirements based on racial, ethnic, religious, or other innate personal characteristics. Likewise, the same principles preclude assigning different citizenship rights based on such criteria, and they gain even more weight when the minority affected is indigenous to the land. Furthermore, for many of the world’s minority groups, the unequal distribution of this resource denies their basic rights to choose their marriage partners and to reunite with family members presently in other countries. Such

fundamental rights are guaranteed by many international conventions, including the ICCPR, ICESR and the ECHR.\textsuperscript{112}

Moreover, immigration and citizenship rights are not confined to legal definitions and regulations, but also directly impact an individual or group’s experience of “belonging” in a state. When the majority defines “citizenship”—i.e., the national character, general will, and public interest—solely according to its own considerations, it necessarily excludes the legitimate interests and character of the minority. Such exclusion denies minorities their due investment in the state, and thus betrays participatory equality. This exclusion can cause lowered self-esteem and lower performance among the minority, and it may even lead to civil unrest and instability. Participatory equality, therefore, must include the equal sharing in the state’s immigration and citizenship resources.

B. The Internal Domain: Self-Administration

In order for substantial minority groups to achieve full participatory equality, states must also establish legal protections of the group’s right to steer and conduct its own affairs within the realms of culture, religion, education, mass media, local governance, urban planning and public assistance programs.\textsuperscript{113} The basic justification for self-administration and autonomy over such institutions is the fundamental right of all minority groups to preserve their unique identity and to develop and “enjoy” their culture, as enshrined in all the major bodies of minority rights law.\textsuperscript{114} The underlying assumption is that only the minority group understands its own cultural needs, practices and sensitivities enough to effectively administer the institutions that require such awareness. Furthermore, entrusting minorities with self-control over these affairs provides a decent safeguard against the loss of identity through assimilation, either

\textsuperscript{112} The ICCPR, supra note 8, arts. 17, 23, & 24; Articles 10 and 23 of the ICESR; European Convention for the Protection of Human Rights and Fundamental Freedoms, supra note 33, arts. 8 & 12.


through a willful policy or one that inadvertently has such an effect. For instance, in the field of education, self-steering would mean that minority educators and administrators would be given the authority to dictate the curricular content, priorities, and foci, including the ability to teach the minority group’s unique history and to set the school calendar to accommodate holidays and other cultural needs.115

Neither Article 27 of the ICCPR nor the Declaration on Minorities explicitly provide for minority control over the internal domain, or cultural autonomy. However, General Comment 23 on Article 27 expresses, particularly in paragraph 3.2, the concept that minorities must be allowed to use land and other state resources in their traditional manner. Furthermore, the Declaration on Minorities contains several provisions allowing minorities to establish their own institutions, from religious, to cultural, to educational.116 More importantly, a broad and effective reading of these documents, with the principle of effective participation in mind, results in only one conclusion: For ethnic minorities to fully and effectively enjoy, maintain and develop their own culture, they must be guaranteed some minimum level of cultural autonomy.117

What is more, the Declaration on Indigenous Peoples, adopted in 2007, patently recognizes the need for indigenous minority groups to steer their own institutions. Article 3 grants indigenous minorities the right to “self-determination,” and Article 4 continues to declare that “indigenous peoples, in exercising their right to self-determination, have the right to autonomy or self-government in matters relating to their internal and local affairs, as well as ways and means for financing their autonomous functions.” Article 14 grants indigenous peoples the right to establish and run their own educational systems in their own languages and “in a manner appropriate to their cultural methods of teaching and learning.”118 It should be noted that Article 5

116 The Declaration on Minorities, supra note 2, art. 2.4.
117 Thornberry has rightly made it clear that there is a clear connection between effective participation, on the one hand, and autonomy, on the other. “Effective participation through local and national organization may”, as he explains, “necessitate the creation of autonomies to achieve the Declaration’s standard.” Thornberry, An Unfinished Story of Minority Rights, supra note 6, at 43.
118 It should be noted that the right to such self-determination was neither intended, nor may it be interpreted, as granting indigenous minorities the right to secede from the nation under whose sovereignty they live. See General Comment 23, supra note 11, at ¶ 3.1. As Professor Eide comments, the right to independence is not found in minority rights, but rather comes from a different set of rules and norms. Commentary on the Declaration on Minorities, supra note 66, at commentary on Article 8.4.
clarifies that the right of indigenous peoples to maintain their own “political, legal, economic, social and cultural institutions,” does not affect their right to participate fully and effectively in the same institutions of the state at large.

The Lund Recommendations also speak directly to the right to self-govern minority institutions, devoting all of Part III to “Self-Governance.” Paragraphs 19 and 20 of the Recommendations advocate decentralization of central government affairs, particularly in areas better administered by the population affected. In fact, the Recommendations go so far as to suggest that minorities be given control over specific government functions, including planning, local policing, housing, health care, taxation, tourism and public transport.119

Minorities must also be given the ability to control and maintain their interactions and connections to minorities of the same ethnic, religious, cultural or other background residing in other nations. The Declaration on Minorities and the Declaration on Indigenous Peoples both unequivocally grant the right to minorities to establish connections with populations in other countries with whom they share such ties.120

Once again, the guiding principle behind this right is the general right of minorities to preserve, maintain and develop their identity and culture. In many states, it is in the majority’s interest to prevent such contacts, usually out of the state’s desire to preserve national cohesion, but also in some cases in order to deemphasize the minority identity in favor of the majority, occasionally supported by national security concerns. Such isolation must not be tolerated. Participatory equality requires guaranteeing the ability of minorities to explore and develop their identities across state and regional lines.121

In sum, granting cultural self-administration to minorities not only ensures that minority culture and identity will be properly preserved, but it also helps to secure the minority’s position in society and prevent it from being disregarded, intentionally or otherwise, by the majority. Furthermore, it avoids discrimination in the delivery of services to the minority.

120 The Declaration on Minorities, supra note 2, arts. 1.1, 2.5, & 4; Declaration on Indigenous People, supra note 70, art. 36.
121 It should go without saying that minorities—just like the majority population—must not use their institutions or connections outside the state for unlawful purposes. However, it is neither morally nor legally justifiable to prevent such internal or external contacts and gatherings based on the fear of illegal activities or sabotage. Taking such an approach disproportionately toward minorities constitutes unlawful discrimination.
It must be remembered, however, that the goal of self-administration is cultural preservation and development, and not mere segregation. Fostering self-steering might have the undesired effect of encouraging a minority group to increase its desire for full territorial independence (in cases where this is feasible), potentially leading to increasing tensions between the communities. Both majority and minority populations must be careful to strike the proper balance between separate and integrated institutions such that interaction—an essential element of participatory equality—is maintained. The political and cultural institutions that are shared by the groups should be strengthened even as minority groups get the authority to steer themselves. If the state and shared culture are seen as neutral among groups rather than biased towards the majority, this may contribute to stability and progress in intergroup relations rather than leading to tensions and violence.\footnote{See Kymlicka, The New Debate Over Minority Rights, in Politics in the Vernacular, supra note 3, at 17-38, 36: “We could predict, then, that recognizing minority rights would actually strengthen solidarity and promote political stability, by removing the barriers and exclusions which prevent minorities from wholeheartedly embracing political institutions.”}

C. The Historical Domain: Corrective Justice

The third principle that must guide the assurance of collective rights to any substantial minority group, particularly one that is indigenous to the region,\footnote{Jamal notes that even in cases where the indigenous population is itself guilty of previous misappropriation of the prior population, the claim to the historical domain remains justified. Jamal, supra note 64, at 3. See in this context the ruling of the Australian court in Mabo v. Queensland [No. 2]. 175 CLR 1, 82: “The nation as a whole would remain diminished until there is an acknowledgement of, and retreat from, those past injustices.”} is that of corrective justice and a fair stake in the historical domain.\footnote{See generally, Working Paper: Prevention of Discrimination and Protection of Indigenous Peoples and Minorities: Indigenous Peoples and Their Relationship to Land, U.N. Doc. E/CN.4/Sub.2/AC.4/1996/2 (June 10, 1996) (prepared by Erica-Irene A. Daes). For an acknowledgement of the role of history in claims of self-determination, see Kymlicka, Multicultural Citizenship, supra note 4, at 117: “If incorporation was involuntary (e.g. colonization), then the national minority might have a claim of self-determination under international law.” See also, S. James Anaya, Indigenous Peoples, in INTERNATIONAL LAW 95-215 (2d ed. 2004). For further reading, see Martha Minow, Historical Justice, in A Companion to Contemporary Political Philosophy 621 (Robert Goodin, Philip Pettit, & Thomas Pogge eds., 2nd ed. 2007).} In the case of many minority populations, this entails an official recognition within the legal and state structures of the distinct collective identity of the minority, as well as developing mechanisms to
address past injustices that continue to affect the group. Depending on the state, such recognition may require everything from incorporating the minority’s history into educational curricula, presenting public television programs educating the nation on the minority’s past and present experiences, and even generating an official historical apology and paying reparations in the name of all past governments for the injustice and systematic discrimination levied on the minority group. In the case of states with internally displaced populations—those indigenous minority populations who were disenfranchised from their land—the state must endeavor to return the minorities to their original communities and compensate them for their losses. Additionally, some states may only be able to fully resolve the historical wounds of the minority through bilateral deliberations, either under the framework of a permanent internal arrangement between the two parties to the conflict, or via a broader regional peace agreement—addressing all pending historical issues (such as refugees and borders).

The Declaration on Minorities addresses this point in Article 4.4 with regard to education. The Declaration calls on states to encourage the acknowledgement and education of the minority history, culture, and language. It also demands the reverse, minorities receive “adequate opportunities” to understand and learn about the majority society. Only then may the majority and minority populations share equally in the historical domain. Professor Eide notes the importance of exchanging historical experiences between majority and minority to bolstering confidence among the minority, as well as eliminating discrimination against it by the majority.

Without such measures, the overall equality and true participation realized by any substantial minority group that has suffered past discrimination will remain incomplete. A minority that has experienced past discrimination must be allowed to own that collective experience before historical wounds will heal and the community will progress, together with the majority population, toward the development of a just, fair and equal society. Moreover, the nation’s stability depends on the extent to

\[125\] It is important to recognize that compensation alone, rather than returning land, cannot satisfy the demands of corrective justice because it ignores the importance of the land itself and the population’s ties to it. In cases where the state would have to displace new populations in order to return the land, it must be made clear to the minority that all feasible efforts were made to return as much of the land as possible in addition to the compensation given for loss of its use and the psychological damages caused by the disenfranchisement.

\[126\] Commentary on the Declaration on Minorities, supra note 66, at commentary on Article 4.4. Eide notes that the same concern is expressed in Article 7 of the ICERD (supra note 44) and Article 29 of the CRC (supra note 44).
which it vests the minority population with an equal share in its historical resources and collective experiences.

V. Conclusion

Ensuring collective and individual minority rights requires both true, participatory equality and full inclusion of all of a state’s citizens. Although not every principle detailed in the framework provided in the previous chapter is articulated by the body of minority rights law, an effective and appropriate reading of the texts demands nothing less than the collective and individual rights outlined here. States’ obligations to existing minority law should be extended to be obligations to adhere to the principles articulated here. One should note that as the decades pass, and new human rights and minority rights documents are drafted, they are increasingly enshrined with the principles described in the proposed framework. One must hope that subsequent minority rights treaties will include these requirements in detail and will represent binding law on the states parties.

In the meantime, the international community must refuse to support any state that attempts to accommodate minority rights under a strict reading of the laws alone, without restructuring its institutions and legal framework on equal, participatory, and collective grounds. If a legal system does not meet this standard, the international legal community should put pressure to change on it. Though the process of reaching the optimal level of participation and inclusion might necessitate some painful concessions for majority populations—particularly those deeply invested in preserving their own unique identity—the end results will positively impact the entire state, as the state will benefit from the full realization of its social and human capital. We must, therefore, encourage states to look not to the letter of the law in deciding whether it is satisfied, but rather to the spirit, or “object and purpose,” of accommodating minorities in divided societies: the stability of nations, and the realization of a just, fair, equal and civil society.