

Minority Rights against the State

As examined in the previous chapter, the dialogical concept of minority rights divides group rights into two broad categories: group rights against the *state*, and individual rights against the *minority group*, under both of which rights are further divided into sub-categories. This chapter examines in detail the first limb: group rights against the *state*. As shown in the diagram, such rights are held against the state by *both* the group in question as a collectivity and by the members of the group as individuals. In the case of the group, the rights in question take the form of the group's rights to autonomy and self-determination, the rights to state assistance and appropriate intervention, and very importantly – the right to *external* dialogue. In the case of the group members, such rights take the form of the member's right to cultural belonging, also a right to state assistance and intervention, and also a right to *external* dialogue which is individual in nature. I will demonstrate that under this dialogical account of minority rights, the group's collective rights and the members' individually held rights are not only compatible but also constitute two necessary internal components of the same concept, and that they can and must co-exist in order to bring about just and effective protection. Against the background of international and regional human rights instruments, especially the UN Declaration on the Rights of Indigenous Peoples, particular attention is paid to the notion of 'national interests,' its role in state intervention and especially in marking the boundaries of group autonomy and self-determination.

1 Minority Rights Held by the *Group* against the *State*

(1) *Rights to Self-determination and Autonomy*

This category of group rights contains *all but one* of the traditional group rights claims as categorised by Jacob Levy, and is applicable to national minorities, indigenous peoples, and to a lesser extent, immigrant communities. As already examined in Chapter 2, Levy's non-exhaustive taxonomy of group rights, which is based on types of demands not types of groups, divides group rights claims into eight categories. In the first category are *total exemptions*, which aim at allowing cultural practices that contrast with those of the majority or even infringe upon the majority's legal rules and/or social norms – e.g. using illegal substances in traditional cultural ceremonies, and female genital mutilation.

In the second category are *self-government rights*, which cover a broad range of claims including partial or total control of cultural and public affairs, usually claimed by national minorities. In the third category are the so-called *assistance rights*, which, contrary to the purposes of the claims in the first two categories, demand assistance in overcoming the obstacles to engage in the majority's practices – e.g. preferential educational policies for members of certain cultural and linguistic minorities.

In the fourth category are the so-called 'hard multiculturalist' *enforcement rights, or recognition rights*, a common claim of which is for certain religious or cultural legal codes to be recognised as valid law, even if they conflict with aspects of state law – e.g. Sharia law. In the fifth category are certain *external rules* aimed at restricting the liberty of *non-members* so that the *minority* culture in question can be preserved. This approach is commonly referred to as 'cultural preservationism.' In the sixth category are certain *internal rules* aimed at restricting the freedom of *members* of a minority group so as to, again, preserve the group's distinct characteristics and identity. In the seventh category are *guaranteed representation demands*, which aim at guaranteeing presence and participation of cultural minorities in central and/or regional decision-making bodies. And in the eighth category are the *symbolic demands*, which commonly aim at gaining permission to display minority cultural symbols in public places.

With the exception of indigenous peoples, minority rights are not framed as collective rights in international and regional instruments, though there are enough collective elements in them to suggest that these rights should not only be enjoyed by members of minority groups *individually* but also with the rest of the minority community *collectively*. Jacob's detailed categorisation of groups' rights demands is not reflected exactly in international documents. But it is worthwhile to explore the possibility of injecting this categorisation into international law through, I argue, incorporating them into the new dialogic framework, in the following way.

As seen in the diagram, all except the so-called *assistance rights* (Levy's Category 3), which now fall into the category of 'rights to state assistance and appropriate intervention,' will now fall under the heading 'collective rights to self-determination and autonomy.' A few questions need to be addressed. First, what is the main advantage of so dividing these rights claims? The advantage is that, as shown in the diagram, now there exist two distinct categories of collectively held rights against the state – one contains rights demands for greater autonomy and independence, warranted by cultural distinctiveness; the other invites appropriate intervention in appropriate circumstances. To be explicit, the seven rights claims that demand greater autonomy are: total