

The Identification of Minorities in China

Wang Linzhu*

I. INTRODUCTION	1
II. THE ETHNIC IDENTIFICATION PROJECT	5
A. <i>The First Stage (1950s-1960s)</i>	5
1. The Recognition Criteria	7
2. The Identification Procedure	8
B. <i>The Second Stage (1980s)</i>	10
III. THE CURRENT PRACTICE	11
IV. THE PROBLEMS OF THE CHINESE PRACTICE OF MINORITY IDENTIFICATION	13
A. <i>The Selective Application of Identification Standard</i>	13
B. <i>Creating Internal Divisions inside the Nation</i>	14
C. <i>Differing Treatment Among Ethnic Groups</i>	16
V. INTERNATIONAL OBLIGATIONS OF CHINA IN RELATION TO MINORITY RECOGNITION	17
A. <i>ICESCR</i>	18
B. <i>ICERD</i>	19
VI. CONCLUSION	20

I. INTRODUCTION

It has been argued that China is a unitary multi-ethnic state consisting of fifty-six different groups.¹ Since the Han constitute an absolute majority (more than ninety percent)² of the total population, all

* Ph.D. (Lancaster), LL.M. (Groningen), LL.B. (SUT, China). Lecturer at the School of International Law, Southwest University of Political Science and Law. I am greatly thankful to Dr. James Summers and Dr. Sophia Kopela for their helpful comments, to John Pearson for his assistance, and to the APLPJ Editorial Board and anonymous reviewers. All errors and mistakes remain my own.

¹ E.g. Xianfa [Constitution] Preamble (1982) (China); St. Council, the White Papers: National Minorities Policy and its Practice in China (1999), § 1, *available at* http://www.gov.cn/zwgk/2005-05/26/content_1131.htm (China); Regional Autonomy for Ethnic Minorities in China (2005), § 1, *available at* http://www.gov.cn/zwgk/2005-05/27/content_1585.htm; China's Ethnic Policy and Common Prosperity and Development of All Ethnic Groups (2009), Preface, § 1, *available at* http://www.gov.cn/zwgk/2009-09/27/content_1427930.htm.

² According to the Sixth National Population Census, the Han make up 91.15 percent of the total population. National Bureau of Statistics, *Communiqué of the National Bureau of Statistics of the People's Republic of China (PRC) on Major Figures of the 2010 Population Census (No. 1)*, Nat'l Bureau of Statistics (Apr. 28, 2011), *available at*

other groups are generally referred to as minorities (“*shaoshuminzu*”). According to Chinese law, minorities have the rights to territorial autonomy under the Regional Ethnic Autonomy (“REA”) regime, as well as to other preferential policies respecting financial, technical, social, and cultural affairs.³ The REA regime allows minority groups to set up autonomous agencies, through which they might exercise legislative, financial, and cultural autonomous powers in areas where they live in concentrated communities.⁴ Meanwhile, members of minorities can claim favorable treatment in many aspects, such as civil service recruitment, university admission, and family planning.⁵ Because the prerequisite to

http://www.stats.gov.cn/tjsj/tjgb/rkpcgb/qgrkpcgb/201104/t20110428_30327.html.

³ There are different English translations of the Chinese phrase “*minzuquyuzizhi*.” The National People’s Congress translates it as “Regional National Autonomy,” whereas the usage of “Regional Ethnic Autonomy” can also be found in governmental documents, for example, in the White Papers issued by the State Council. The difference lies in the understanding of the Chinese term “*minzu*.” As far as this article concerns, “Regional Ethnic Autonomy” will be used interchangeably with “Regional National Autonomy.” See also *infra* notes 6 and 9.

Regional Ethnic Autonomy is defined as “ethnic minorities, under the unified state leadership, practice regional autonomy in areas where they live in concentrated communities and set up autonomous agencies for the exercise of the power of autonomy”. According to the Constitution and the Law on Regional Ethnic Autonomy, autonomous agencies can exercise autonomous powers on the matters of legislation, economic development, fiscal and taxation, security, resource exploitation, border trade, education, culture, literature, arts, publishing, broadcasting, and so forth.

MinzuQuyuzizhiFa (民族区域自治法 Law on the Regional Ethnic Autonomy) (promulgated by Nat’l People’s Cong., May 31, 1984, effective Oct. 1, 1984; revised by the Standing Comm. Nat’l People’s Cong., Feb. 28, 2001, effective Feb. 28, 2001), 2001:02 Standing Comm. Nat’l People’s Cong. Gaz. 126 (China) (English translation available at http://www.npc.gov.cn/englishnpc/Law/2007-12/13/content_1383908.htm), Preface, art. 2, 55-66, 69-71 [L.R.E.A.]; GuowuyuanShishi<ZhuanghuaRenminGongheguoMinzuQuyuzizhiFa>RuoganGuiding (国务院实施<中华人民共和国民族区域自治法>若干规定) [Provisions on Implementing the L.R.E.A.] (promulgated by the St. Council, May 11, 2005, effective May 31, 2005), 2005:20 St. Council Gaz., May 19, 2005, at 7 (China), art. 5, 7-12, 14-19.

⁴ L.R.E.A., *id.*, Preface, art. 2, 10-45. See also Xiaohui Wu, *From Assimilation to Autonomy: Realizing Ethnic Minority Rights in China’s National Autonomous Regions*, 13 CHINESE J. INT’L L. 55, 69-73 (2014).

⁵ See, e.g., L.R.E.A., *supra* note 3, art. 22-23, 71; China, Core Document Accompanying the 2nd Report of the People’s Republic of China on its Implementation of International Covenant on Economic, Social and Cultural Rights (ICESCR), June 30, 2010, U.N. Doc. HRI/CORE/CHN/2010, at § II, 30 (Mar. 10, 2011); Comm. on the Elimination of Racial Discrimination (CERD), Rep. of the CERD, GAOR, 51st Sess., SUPP. No.18, Sep. 30, 1996, U.N. Doc. A/51/18 (1996), ¶ 396.

See also COLIN MACKERRAS, CHINA’S MINORITIES: INTEGRATION AND MODERNIZATION IN THE 20TH CENTURY 233-237 (1994); Ao Junmei(敖俊梅), GetiPingdengYihuoQuntiPingdeng: (个体平等, 抑或群体平等: 少数民族高等教育

enjoy such privileges is to be legally classified as a minority, the issue, then, is *who* is able to claim such rights in the Chinese context.

The Chinese term “*minzu*” was reinterpreted in the early twentieth century as the translation of “nation”.⁶ Following the Soviet tradition, “*minzu*” was used as the synonym of “nationality” within the People’s Republic of China (“China”) until the 1990s. After the dissolution of former socialist states, the State Nationality Affairs Commission became the State Ethnic Affairs Commission (“SEAC”)⁷ to avoid any possible

招生政策理论探究)[Individual Equality or Groups Equality: Admission Policy for Minority Students in Chinese Higher Education], 06 TSINGHUA J. OF EDUC. 70, 71 (2006).

⁶ The phrase “*minzu*” in Chinese appears as two separate characters. In regard to ethnicity, “*min*” literally means “people” and “*zu*” equates to lineage/clan. As early as the Zhou dynasty (ca. 1046–256 B.C.), these two terms were used interchangeably, as both defined a group of people living in certain localities who shared common features—blood, history, way of living, customs, and so forth. For example, “*Miao min*” and “*Fei wo zu lei, qi xin bi yi*” (if he is not of our lineage, he is sure to have a different heart). However, it was rare to employ *minzu* together to refer to ethnicities in Chinese Classic literatures.

After the introduction of the nation concept in 1903, people started to name traditional groups as the Han *minzu/zu* or Tibetan *minzu/zu*, alongside the *new Chinese nation* (trans. *zhonghuaminzu*). The usage of *minzu* in this sense is confusing, as it represents the Chinese nation on the one hand and refers to its constituent parts on the other. Therefore, how to accurately translate *minzu*, the constituent groups of the Chinese nation, has long been debated. Diverse translations, such as nationality, ethnicity, ethnic group, or *minzu* as it is, have been suggested.

See *Zhongguo de MinzuShibie* (中国的民族识别)[China’s National Identification: the Origins of 56 Nationalities] 1-2 (Huang Guangxue /黄光学 & Shi Lianzhu/施联朱 eds., 2005) (China); *ShangshuYizhu* (尚书译注) [Commentaries to the Book of Documents] 399-400 (Li Min/李民 & Wang Jian/王健 eds., 2004) (China); Yang Bojun (杨伯峻), *ChunqiuZuozhuan Zhu* (春秋左传注)[Commentaries to Spring and Autumn [annals] and Zuo’ Tradition] II 818, (1995); He Shutao (何叔涛), *Dui ErshiShijizaiZhongguoZuiyouYingxing de SandaMinzuDingyi de JianyaoFenxi* (对20世纪在中国最有影响的三大民族定义的简要评析) [Comments on Three Influential Definitions of Nation in the 20th Century China], 04 HEILONGJIANG NAT’L SERIES 14, 15 (2009); Shi Yilong (石奕龙), *Ethnic Group BunengZuoweiMinzu de YingwenDuiyi* (Ethnic Group 不能作为民族的英文对译)[*Minzu Should Not Be Translated as Ethnic Group*], 4 WORLD ETHNO-NATIONAL STUDIES 79, (1999); Jin Binghao (金炳镐) et al., *MinzuyuZuqun: ShiGainiande HubuHaishiDianfu?* (民族与族群: 是概念的互补还是颠覆?) [The Differences and Similarities between Ethnic Group and Minzu?], 2 HEILONGJIANG NAT’L SERIES 4, (2012); Pan Jiao (潘蛟), *ZuqunyMinzuGainian de HubuHaishiDianfu* (族群与民族概念的互补还是颠覆) [On the Differences and Similarities between Ethnic Group and Ethnos], 26:1 J. OF YUNNAN NATIONALITIES UNIV. (SOC. SCI.) 22, (2009).

⁷ Hao Shiyuan (郝时远), *Zhongwen“Minzu”yu“ShaoshuMinzu” de YingyiWenti* (中文民族与少数民族的英译问题) [The English Translation of “Minzu”

political implications deriving from the concept of nationality. In the most recent reports submitted by China to international human rights bodies,⁸ “ethnic minorities” and “regional ethnic autonomy” have replaced the old terms “minority nationalities” and “regional national autonomy”.⁹ Although the term “nationality” is still being used in practice, the official stance seems to prefer “ethnicity” or “ethnic group” as the translation of “*minzu*” in relation to Chinese minorities.¹⁰

Not all non-Han groups in China, however, are “minorities”. Only those who have been officially recognized by the Central Government as “*shaoshuminzu*” could claim minority rights. The minority status of certain ethnic groups was confirmed through the Ethnic Identification Project (“the Project”).¹¹ This identification project took about thirty years to complete, in a period spanning between the 1950s to the 1980s. As a result, groups who identified themselves as a separate ethnicity but failed to acquire the official recognition could not claim minority status and thus were effectively denied minority rights.¹² Generally, “*shaoshuminzu*” is seen as a legal-political concept in relation to Chinese minorities,¹³ which may also have cultural implications.

This paper examines the definition of minorities in China. The

and “*ShaoshuMinzu*”], CHINA ETHNIC NEWS, Mar. 22, 2013, at 5.

⁸ Those international human rights bodies include: Comm. on Economic, Social and Cultural Rights (CESCR), CERD, Comm. on the Elimination of Discrimination against Women, and Comm. on the Rights of the Child.

⁹ China, The 2nd Periodic Report of the PRC under the ICESCR, June 30, 2010, U.N. Doc. E/C.12/CHN/2 (July 6, 2012); China, The 10th, 11th, and 12th Periodic Reports of the PRC under the International Convention on the Elimination of All Forms of Racial Discrimination, June 24, 2008, U.N. Doc. CERD/C/CHN/10-13 (Mar. 24, 2009); China, The 7th and 8th Periodic Reports of the PRC under the Convention on the Elimination of All Forms of Discrimination against Women, Jan. 20, 2012, U.N. Doc. CEDAW/C/CHN/7-8 (Jan. 17, 2013); China, The 3rd and 4th Periodic Reports of the PRC under the Convention on the Rights of the Child, July 16, 2010, U.N. Doc. CRC/C/CHN/3-4 (June 6, 2012).

¹⁰ See Naran Bilik(纳日碧力戈), ‘*Minzu*’*BainianHuimou*(‘民族百年回眸’)[A Historical Review of “*Minzu*”], 02 STUDY OF NATIONALITIES IN GUANGXI 17, 22 (2000); Chen Xinlin(陈心林), *ZuqunLilunyuZhongguo de ZuqunYanjiu*(族群理论与中国的族群研究) [Ethnic Group Theory and Ethnic Groups Research in China], 17:01 NATIONALITIES RESEARCH IN QINGHAI 5, 7 (2006).

¹¹ See *infra* notes 33 and 37.

¹² Barry Sautman, *Ethnic Law and Minority Rights in China: Progress and Constraints*, 21:03 L. & POL’Y 283, 288 (1999); JOSHUA CASTELLINO & ELVIRA REDONDO, MINORITY RIGHTS IN ASIA: A COMPARATIVE LEGAL ANALYSIS 139-40 (2006).

¹³ ZHONGGUO DE MINZUSHIBIE [CHINA’S NATIONAL IDENTIFICATION: THE ORIGINS OF 56 NATIONALITIES], *supra* note 6, at 113; DRU GLADNEY, MUSLIM CHINESE: ETHNIC NATIONALISM IN THE PEOPLE’S REPUBLIC 309 (2nd ed., 1996).

term “minority” is used interchangeably with the Chinese term “*shaoshuminzu*” in this paper. Unless otherwise stated, “minority group(s)” or “minority” refers to a group, which has the constitutional right to regional autonomy in the Chinese context. Firstly, this paper looks at the criteria applied in the minority recognition project and the recognition procedure itself. Then it discusses problems stemming from the recognition project and identifies disparities between the Chinese practice and the international obligations that China has undertaken in the field of minority protection. The paper concludes that a clear and explicit legal definition or identification standard for a minority needs to be applied to all groups without distinction, through which the rights of individuals deemed to identify with one or more groups could be respected.

II. THE ETHNIC IDENTIFICATION PROJECT

A. *The First Stage (1950s-1960s)*

The 1949 Common Program of the Chinese People’s Political Consultative Conference¹⁴ recognized the equal status of all ethnicities in China and provided for regional autonomy where national minorities were concentrated.¹⁵ The 1952 General Program for the Implementation of Regional Ethnic Autonomy further expanded the ethnic territorial autonomy system. It provided autonomous agencies with a wide range of rights on the matters of local economy, finance, and culture.¹⁶ However, when the ethnic territorial autonomy regimes were first established, there had yet to any accurate records made of minority population statistics.

Hence, a number of minority visitation teams were sent to minority areas from 1950 to 1953, including the Southwest, Northwest, Northeast, and Mid-South.¹⁷ The major tasks of the teams were to convey the

¹⁴ It functioned as the provisional constitution of China from 1949 to 1954.

¹⁵ ZhongguoRenminZhengzhiXieshangHuiyiGongtongGangling (中国人民政治协商会议共同纲领) [The Common Program of the Chinese People’s Political Consultative Conference] (promulgated by the Chinese People’s Political Consultative Conference, Sept. 29, 1949), art. 9, 50-51, available at <http://www.cppcc.gov.cn/2011/09/06/ARTI1315304517625199.shtml>.

¹⁶ ZhonghuaRenminGongheguoMinzuQuyuzizhiShishiGangyao(中华人民共和国民族区域自治实施纲要) [General Program for the Implementation of Regional Ethnic Autonomy] (approved at the 18th meeting of the Central People’s Government Council, signed on Aug. 8, 1952, effective Aug. 9, 1952), available at <http://cpc.people.com.cn/GB/64184/64186/66657/4492831.html>.

¹⁷ The Central Government sent out four ethnic visitation teams (ZhongyangMinzuFangwentuan) and one medical team to minority areas during 1950-1952. Regional teams were also established and sent to visit minorities or to provide medical service in the localities. Little information on the establishment of the teams and their following reports had been made publicly available. It seemed that the main purpose

Chinese Communist Party (“CCP”) greetings and solicitude, to provide a medical and inoculation service, to propagate the Party’s ethnonational policy,¹⁸ and to investigate and collect relevant information on minority groups. In the 1953 national census, over 400 self-reported groups were recorded. This number, however, was apparently too many to be a suitable figure for implementing regional autonomy or a manageable figure for the CCP. Further, the forthcoming National People’s Congress (scheduled in September 1954) only reserved 150 seats for minority representatives, “more than twice the number to which they would be entitled on a proportional basis”.¹⁹ With these issues in mind, an official project of ethnic identification with distinctive Chinese characteristics commenced nationwide after the self-reported census.

Hundreds of ethnologists, linguists, historians, sociologists, and archaeologists were divided into teams to investigate the claims of self-reported groups. It has been suggested that a group of Soviet linguists were also involved in the process.²⁰ The Ethnic Identification Project (*minzushibie*), as Mullaney put it, was: a collective term for a series of Communist-era expeditions wherein ethnologists and linguists set out to determine once and for all the precise ethnonational composition of the country, so that these different groups might be integrated into a

of those teams, as different from investigation teams in the Ethnic Identification Project, was to propagate and collect relevant information. THE EDITORIAL OFFICE OF CHINA’S ETHNIC WORK(《当代中国的民族工作》编辑部), DANGDAI ZHONGGUO MINZU GONGZUO DASHIJI, (当代中国民族工作大事记 1949-1988)[CHRONICLE OF CHINA’S ETHNIC WORK 1949-1988] 10-11, 13, 20, 29-30, 37, 41, (1989) (China).

¹⁸ *Id.*; ZHONGGUO DE MINZUSHIBIE [CHINA’S NATIONAL IDENTIFICATION: THE ORIGINS OF 56 NATIONALITIES], *supra* note 6, at 105.

¹⁹ (选举法) [trans. Election Law] (approved at the 22nd meeting of the Central People’s Government Council, Feb. 11, 1953, effective Mar. 1, 1953), 1953:03 People’s Gov’t. of Anhui Province Gaz., at 13 (China), art. 21, 24; GEORGE MOSELEY, THE CONSOLIDATION OF THE SOUTH CHINA FRONTIER 7 (1973).

It has been pointed out that 178 minority representatives, from thirty different minority groups, attended the First National People’s Congress in September 1954. The representation ratio reached 14.52 percent. THE EDITORIAL OFFICE OF CHINA’S ETHNIC WORK, *supra* note 17, at 56.

²⁰ A group of Soviet linguists were sent to China as a part of the Soviet Advisors Program (1949-1960), with the purpose of assisting China’s socialist construction. See ZHOU MINGLANG, MULTILINGUALISM IN CHINA: THE POLITICS OF WRITING REFORMS FOR MINORITY LANGUAGES 1949-2002 170, 171, 177-79, 187-90 (2003); Fu Maoji(傅懋绩), *Bangzhu Shaoshu Minzu Chuangli, Gaijin he Gaige Wenzigongzuo de Qingkuang he Wenti*(帮助少数民族创立、改进和改革文字工作的情况和问题) [The Work of Assisting Minorities to Create, Improve, and Reform Their Writing System and the Questions Therein], 02 CHINESE SCIENCE BULLETIN 20, 22-24 (1956).

centralized, territorially stable polity.²¹

1. The Recognition Criteria

As in many other aspects, the Chinese ethnic practice had been influenced by the Marxist doctrines.²² Marxists had developed many theories on nationalities, but the most influential definition of nationality in China came from Stalin.²³ According to him, nation could be defined as “a historically constituted, stable community of people, formed on the basis of a common language, territory, economic life, and psychological make-up manifested in a common culture”.²⁴ He observed that the presence of each of the four elements constituted a nation in the epoch of rising capitalism.²⁵

However, minority groups in China experienced uneven socio-economic development. At the time of identification many of them were still in the pre-capitalist stage, living in a primitive, subservient, or feudal system²⁶ and a multitude of minorities were spread over and coexisted on the vast land. A strict application of Stalin’s definition may have ruled out many groups from being classified as *shaoshuminzu*. Mao Zedong then instructed that politically all minority ethnic groups should be treated as *minzu*, regardless of the Soviet orthodox classification of ‘clan/tribe/tribal alliance/nation’, since all ethnic groups were equal in the China.²⁷ Hence,

²¹ THOMAS MULLANEY, *COMING TO TERMS WITH THE NATION—ETHNIC CLASSIFICATION IN MODERN CHINA* 3 (University of California Press, 2nd ed. 2011).

²² See, e.g., ZHONGGUO DE MINZUSHIBIE [CHINA’S NATIONAL IDENTIFICATION: THE ORIGINS OF 56 NATIONALITIES], *supra* note 6, at 76, 78; Fei Xiaotong (费孝通), *Guanyu Woguo Minzu de Shibie Wenti* (关于我国民族的识别问题) [*Ethnic Identification in China*], 01 SOCIAL SCIENCE IN CHINA 147, 154-55 (1980); Lin Yaohua (林耀华), *Zhongguo Xinan Diqu de Minzu Shibie* (中国西南地区的民族识别) [*Ethnic Identification in the Southwest China*], 02 SOCIAL SCIENCE IN YUNNAN 1, 2-3 (1984).

²³ ZHONGGUO DE MINZUSHIBIE [CHINA’S NATIONAL IDENTIFICATION: THE ORIGINS OF 56 NATIONALITIES], *supra* note 6, at 11-25; He Shutao, *supra* note 6, at 16; Qin Naichang (覃乃昌), *Makesi Zhuyi Minzu Lilun Zhongguo hua de Zhongda Shijian* (马克思主义民族理论中国化的重大实践) [*Ethnic Identification: Great Practice of the Localization of Marxist Ethnic Theory in China*], 02 STUDY OF ETHNICS IN GUANGXI 20, 21 (2009).

²⁴ JOSEPH STALIN, *MARXISM AND THE NATIONAL QUESTION* 60 (Bruce Franklin ed., Croom Helm London 1973).

²⁵ *Id.* at 65.

²⁶ FEI XIAOTONG (费孝通) & LIN YAOSHUA (林耀华), *ZHONGGUO MINZUXUE DANGQIAN DE RENWU* (中国民族学当前的任务) [THE CURRENT TASK OF ETHNOLOGY IN CHINA] 14-21 (1957).

²⁷ ZHONGGUO DE MINZUSHIBIE [CHINA’S NATIONAL IDENTIFICATION: THE ORIGINS OF 56 NATIONALITIES], *supra* note 6, at 80-81.

in terms of the definition and criteria employed in the Chinese identification project, the official statement was that minorities were identified with flexibilities, in accordance with Stalin's four-element concept of nation and the reality of Chinese ethnonational situation.²⁸ In addition, the will of the categorized was also considered in the identification process.

As a result, minorities were classified pursuant to various criteria with contingency.²⁹ Some identification was based on language. For example, the ethnic classification in Yunnan province was essentially based on linguistic categorization.³⁰ Some identification was made in accordance with history and ancestry origin, such as different Muslim groups in Xinjiang. Groups were also identified on the basis of religious beliefs. The Hui group was simply considered to be the Muslim Han.³¹ Others were recognized on the basis of national consciousness and ancestral heritage. The Manchu, for instance, were typically classified using this perspective. In practice, large groups, geographically or numerically, were very likely to be approved as minorities, whilst small-numbered groups might often be ruled out or incorporated into other minorities.³² The selective application of a set of standards left enough space for the communists to control the identification process for political and/or economic considerations.

2. The Identification Procedure

According to Chinese scholars, the basic identification procedure usually followed five steps. First, the proposed minorities identified themselves. Then the provincial government or the Central Government sent out researchers to investigate and analyze the case. The researchers, normally ethnologists, had to consider two questions during the investigation: was the proposed group a part of Han or was it a minority? If the group belonged to minority, was it a separate minority by itself or was it a part of already recognized minorities?³³ After the completion of

²⁸ See, e.g., *id.* at 87; Fei Xiaotong, *supra* note 22, at 150; Lin Yaohua, *supra* note 22, at 2-3.

²⁹ See, e.g., Chen Xinlin (陈心林), *ZuqunLilunyuZhongguo de MinzuYanjiu* (族群理论与中国的族群研究) [*Ethnicity Theory and the Ethnological Studies in China*], 06 GUIZHOU ETHNIC STUDIES 1, 2 (2005).

³⁰ The ethnic classification in Yunnan province, according to Mullaney, was decided on the basis of linguistic categorization. MULLANEY, *supra* note 21, at 65.

³¹ JUDITH BANISTER, cited in DRU GLADNEY, *MUSLIM CHINESE: ETHNIC NATIONALISM IN THE PEOPLE'S REPUBLIC* 25 (2nd ed., 1996).

³² David Y. H. Wu, *Chinese Minority policy and the meaning of minority culture: the example of Bai in Yunnan*, China, 49:01 HUMAN ORGANIZATION 1, 3 (1990).

³³ Fei Xiaotong, *supra* note 22, at 150.

the investigation, the researchers gave ‘scientific’ recommendations, based on their findings. Next, they would present the findings to the proposed group, demonstrating whether their request of being identified as minority was plausible or not. Finally, the claimants would make the final decision of being a Han, a separate minority, or a part or branch of an existing minority.³⁴

However, Mullaney revealed a different approach, using Yunnan province as the paradigm. According to him, scholars and researchers first developed preliminary recommendations on classifying minorities in Yunnan into two dozen groups by linguistic commonality, based on the taxonomic theories of the Republican period.³⁵ Then they analyzed and located plausible communities with ‘ethnic potentials’ from self-reported groups and persuaded them to accept ‘scientific recommendations’.³⁶ Eventually, over 260 self-identified groups in Yunnan were reduced to twenty-six recognized minorities.

By 1954, before the first National People’s Congress, thirty-eight groups received official recognition. Eleven of these groups, the Mongol, Hui, Tibetan, Uyghur, Miao, Yao, Yi, Korean, Manchu, Li, and Gaoshan (in Taiwan), were the so-called “generally accepted minorities” and thus had no need to be assessed in the Ethnic Identification Project.³⁷ Later, 183 self-reported groups in the 1964 census became another fifteen minorities in the so-called “family of nationalities”.³⁸

Alongside the ethnic identification, a nationwide linguistic research expedition started in order to further assist minorities to create and reform their written languages.³⁹ Meanwhile, an intensive

“Already recognized minorities” here include two types: generally accepted minorities that do not need to be identified, and minorities that have already received the official recognition through the Identification Project. *See infra* note 37.

³⁴ ZHONGGUO DE MINZUSHIBIE [CHINA’S NATIONAL IDENTIFICATION: THE ORIGINS OF 56 NATIONALITIES], *supra* note 6, at 102-03, 169-75; MULLANEY, *supra* note 21, at 42-119; Lin Yaohua, *supra* note 22, at 1-5; FEI XIAOTONG & LIN YAOHUA, *supra* note 26, at 13.

³⁵ MULLANEY, *supra* note 21, at 42-106.

³⁶ *Id.*

³⁷ “Generally accepted minorities” were groups that had been repeatedly mentioned in the Chinese Classic literatures or recorded during the Republican period. They were simply considered to “exist” and thus of no need to be further assessed in the ethnic identification. ZHONGGUO DE MINZUSHIBIE [CHINA’S NATIONAL IDENTIFICATION: THE ORIGINS OF 56 NATIONALITIES], *supra* note 6, at 106.

³⁸ *Id.* at 109; CASTELLINO & REDONDO, *supra* note 12, at 115.

³⁹ Under Chinese law, spoken language and written language are addressed separately as language (*yuyan*) and script (*wenzi*). It was argued that the campaign on the creation and reform of minority scripts was launched by the Central Government as a response to the pressing request of minorities. Different rules had been applied in the

investigation of minority social history was carried out to make sure that each newly identified minority would have its own concise history (*jianshi/jianzhi*) from the official narrative.⁴⁰ Hundreds of books on minority history and language were published following the investigation. Those linguistic and historical materials aimed to enhance the state recognized ethnic structure.

B. *The Second Stage (1980s)*

The Cultural Revolution nearly suspended all ethnological activities. It was not until the late 1970s that the ethnonational work was resumed. Minority individuals who had not expressed their identities (*minzuchengfen*) accurately for whatever reasons in the past acquired a second chance to change ethnic identity.⁴¹ Approximately five million people were involved in the wave of recovering or changing minority status from 1981 to 1989.⁴² As the ethnic identification was primarily completed in the 1950s and the purpose of the new ethnic campaign was to ‘recover or change’ minority identity, the practice in the 1980s seemed to avoid identifying new minorities. The ethnic campaign during this period attempted to absorb and incorporate the proposed groups into already identified minorities through linguistic, territorial, and/or historical ties as much as possible.⁴³ Guizhou province, for example, classified 23

campaign in the 1950s. Some well-established minority scripts underwent improvement or reform, whilst phonetic writing systems (*zhuyinwenzi*), using Roman or Cyrillic alphabets, were proposed for minorities who did not have scripts.

See, e.g., Wang Jun (王均), *MinzuYuwenKexueTaolunhui* (民族语文科学讨论会) [The Scientific Symposium on National Language], 01 CHINESE SCIENCE BULLETIN 96, 96-97 (1956); Fu Maoji, *supra* note 20, at 22-23.

See also GuowuyuanGuanyuGeShaoshuMinzuChuangli he GaigeWenziFang'an de PizhunChengxu he ShiyanFengong de Tongzhi (国务院关于各少数民族创立和改革文字方案的批准程序和实验推行分工的通知) [The Notice on the Official Approval Procedures for Plans for New and Reformed Writing Systems and Division of Responsibilities for Experimental Use] (promulgated by the St. Council, Mar. 10, 1956, effective Mar. 10, 1956), available at <http://fgk.chinalaw.gov.cn/article/fgxwj/195603/19560300277428.shtml>.

⁴⁰ MULLANEY, *supra* note 21, at 124.

⁴¹ ZHONGGUO DE MINZUSHIBIE [CHINA'S NATIONAL IDENTIFICATION: THE ORIGINS OF 56 NATIONALITIES], *supra* note 6, at 111, 116.

⁴² *Id.* at 116; Dai Xiaoming (戴小明), *DangdaiZhongguoShaoshuMinzu de FalüRending* (当代中国少数民族的法律认定) [Legal Recognition of Modern China's Ethnic Minorities], 03 JOURNAL OF THE CENTRAL UNIVERSITY FOR NATIONALITIES (Philosophy and Social Sciences) 48, 52 (2010).

⁴³ ETHNIC AFFAIRS COMM'N OF GUIZHOU PROVINCE, GUIZHOU MINZUGONGZUOWUSHINIAN (贵州民族工作五十年) [FIFTY YEARS OF ETHNIC WORK IN GUIZHOU] 230-32 (1999) (China).

self-reported groups (numbering 900,000) into the Han and other minorities.⁴⁴ Since the Jino group received the official recognition in 1979, no new minority has been identified thereafter.

The dissolution of the USSR and Former Yugoslavia sounded a warning to communist China. The CCP announced the completion of the Ethnic Identification Project to avoid further demands for ethnic identification or alteration, which might cause unrest, though assured that the remaining problems would be handled properly.⁴⁵ The remaining issues could be categorized into two main categories: the unidentified groups and the groups that have been controversially classified into existing ethnic groups.

III. THE CURRENT PRACTICE

Upon the completion of the ethnic identification in the late 1980s, Huang Guangxue, the Vice Director of the SEAC, concluded that the criteria used in the Project to identify a *minzu* included: 1) whether the proposed group fit the characteristics of the Stalinist definition; 2) the majority will of the group, the advantages and disadvantages of future development, and its influence over other groups in similar situation; and

⁴⁴ Among 23 self-reported groups, ethnic status of three groups is still undetermined. The official investigation suggested that the Chuanqing was a part of Han, whilst the Chuanqing group considered themselves as a separate minority. Meanwhile, although the investigation report concluded that the Gejia (Gedou) should be identified as a separate minority, this group did not obtain such a status, as the general guideline was to avoid identifying new minorities. The ethnic belonging of the Caijia group was also contentious. These three groups in Guizhou (numbering 612,780) make up to 95.73 percent of the unidentified population in the 2010 National Census.

E.g., *id.*; ZHONGGUO DE MINZUSHIBIE [CHINA'S NATIONAL IDENTIFICATION: THE ORIGINS OF 56 NATIONALITIES], *supra* note 6, at 116, 185-86; Fei Xiaotong, *supra* note 22, at 151-52; Dai Xiaoming(戴小明) et al., *MinzuShibieyuFalüRending: YiGejiarenRendingGe'an Wei YanjiuYangben*(民族识别与法律认定—以个案为研究样本)[*Ethnic Recognition and Legal Acknowledgement—A Case Study of Gejia*], 38:05 JOURNAL OF MINZU UNIVERSITY OF CHINA (Philosophy and Social Science Edition) 78, 82-83 (2011); Yan Qiyan(严奇岩), *GuizhouWeishibieMinzuRenkou de FenbuTedian he LishiChengyinChengyin*(贵州未识别民族人口的分布特点和历史成因) [*The Historical Causes and Distribution Characteristics of Unidentified Ethnic Groups in Guizhou*], 02 PRIVATE EDUCATION RESEARCH 27, 27-28 (2009); 1-6 Population by Gender and Ethnicity in Provincial Units, in *Tabulation on the 2010 Population Census Book 1*, compiled by the Population Census Office and the Department of Population and Employment Statistics, available at <http://www.stats.gov.cn/tjsj/pcsj/rkpc/6rp/indexch.htm>.

⁴⁵ See *MinzuShibie he GenggaiMinzuChengfenGongzuoyiJibenWancheng*(民族识别和更改民族成分工作已基本完成) [*The Work of Ethnic Identification and the Alteration of Ethnic Identity Have Completed—An Interview with Huang Guangxue, the Vice Director of the SEAC*], 02 CHINA'S ETHNIC GROUPS 16, 16 (1987).

3) the unity of the [Chinese] nation.⁴⁶ In 2005, the CCP rephrased these criteria and suggested a more flexible definition of minority/*shaoshuminzu*, namely:

“...a historically constituted, stable community of people who, in general, share common characteristics of historical origins, mode of production, language, culture, customs, and a sense of solidarity; for some minorities, religion also plays an important role in their formation and development process.”⁴⁷

After a group received the official approval of being a minority, the ethnic status of group members would be registered and confirmed in the Family Book or with a citizen ID card. Outside of the ethnic campaign discussed above, which provided a second chance to recover or change ethnic identity nationwide, one can only acquire minority status from his or her parents.⁴⁸ Parents or foster parents should determine ethnic status of a minor before the age of eighteen, after which he or she is entitled to freely choose an identity according to the ethnic status of one parent.⁴⁹ In case of remarriage, the parent and the stepparent also decide ethnic status of the minor from previous marriage.⁵⁰ The remarriage of the parents, however, will not change the ethnic status of the child from a previous marriage that has reached the age of eighteen.⁵¹ Marriage and adoption between adults would not affect their ethnic status.⁵² No change or alteration of ethnic status is allowed after twenty years of age.⁵³

Hence, the ethnic ‘family’ of the Chinese nation officially comprises fifty-six members. The majority Han and fifty-five minorities, together with a few unidentified groups and some contentious groups,

⁴⁶ *Id.*

⁴⁷ Guanyu Jinyibu Jiaqiang Minzu Gongzuo Jiakuai Shaoshu Minzu he Minzu Diqu Jiingji Shehui Fazhan de Jueding (关于进一步加强民族工作, 加快少数民族和民族地区经济社会发展的决定) [The Decision on Further Strengthening Ethnic Work and Accelerating Economic and Social Development of Minorities and Minority Regions] (promulgated by the CCP Central Comm. and St. Council, May, 2005), cited in He Shutao, *supra* note 6, at 14 (translated by author).

⁴⁸ Guanyu Zhongguo Gongmin Queding Minzu Chengfen de Guiding (关于中国公民确定民族成份的规定) [Provisions on the Determination of Ethnic Status of Chinese Citizens] (promulgated by SEAC, St. Council, and Ministry of Pub. Sec., May 10, 1990, SEAC-1990-No.217), *available at* http://zcfgs.seac.gov.cn/art/2012/8/28/art_3433_164529.html.

⁴⁹ *Id.* at art. 3.

⁵⁰ *Id.* at art. 4.

⁵¹ *Id.*

⁵² *Id.* at art. 5.

⁵³ *Id.* at art. 3.

form the Chinese ethnic structure. This fifty-six ethnic-group structure and the fixed ethnic identity model were finally stabilized in the 1990s and founded the basis for the future development of national “knowledge, policies, sentiments, and actions.”⁵⁴ In theory, the ethnic composition and the number of minority population in localities should be a key element in the establishment of autonomous units at different levels.⁵⁵ This is despite the fact that minorities fail to form a population majority in more than seventy percent⁵⁶ of autonomous areas. As such, a confirmed and registered minority status becomes the prerequisite for persons belonging to minorities to claim associated rights.

IV. THE PROBLEMS OF THE CHINESE PRACTICE OF MINORITY IDENTIFICATION

The Ethnic Identification Project is officially described as a scientific work with academic features.⁵⁷ However, it also has a strong political and administrative nature.⁵⁸ This government-led project has significant legal consequences, as only officially recognized minorities can claim minority rights under Chinese law. As the only means by which such rights can be attained, the Project and resultant policies necessitate closer scrutiny.

A. *The Selective Application of Identification Standard*

Firstly, the identification criteria were not unequivocally and consistently applied in the process.⁵⁹ The application of the Stalinist definition was very selective in practice. The Project took a wide range of factors into consideration, including language, culture, customs, mode of production, religion, history, origins, consciousness, and so forth. However, the recognition of a group might result from the emphasis of one or two of these features, whilst the denial could be justified by the lack of

⁵⁴ MULLANEY, *supra* note 21, at 134.

⁵⁵ L.R.E.A., *supra* note 3, art. 12.

⁵⁶ Maria Lundberg and Yong Zhou, *Regional National Autonomy under Challenge: Law, Practice and Recommendations*, 16 INT’L JOURNAL ON MINORITY AND GROUP RIGHTS 269, 304 (2009).

⁵⁷ See, e.g., ZHONGGUO DE MINZUSHIBIE [CHINA’S NATIONAL IDENTIFICATION: THE ORIGINS OF 56 NATIONALITIES], *supra* note 6, at 113; Wang Wenguang (王文光) & You Weiqiong (尤伟琼), *Xinzhongguo Chengli Yilai Yunnan Minzu Shibie de Renshiyu Fansi* (新中国成立以来云南民族识别的认识与反思) [The Identification of Yunnan’s Ethnic Groups Since the Founding of the PRC and Its Enlightenment], 03 JOURNAL OF YUNNAN NATIONALITIES UNIVERSITY (Social Sciences) 10, 10 (2010).

⁵⁸ See *id.*; GLADNEY, *supra* note 13.

⁵⁹ Chen Xinlin, *supra* note 29, at 2.

any.⁶⁰ Many minorities were identified as ‘existing’ simply because the government determined it should. By doing so, the communists could exert a macro-control of the number of minorities, and more importantly, they could divide minority population in a way that fits its political interests in terms of territorial integrity and regional stability. Considering the extensive rights that minorities are entitled to under the regional autonomy regime, the selective application of identification criteria was determined by political reasons.

Second, after a short training program, scholars and researchers were divided into several teams and sent to various areas to work with local governments. The provincial government retained the jurisdiction to report to the Central Government with regard to the ethnic situation within its administrative division. Without any accurate identification standards, the ethnic categorization in reality illustrated a distinctive regional feature.⁶¹ For example, the self-reported ‘Nari’ group that inhabited the shores of the Lugu Lake was identified as the Naxi in Yunnan province, while those in Sichuan province were considered to be the Mongols.⁶² The only difference between the Zhuang in northern Guangxi province and the Buyi in southern Guizhou was the provincial boundary.⁶³ Even within one provincial unit, the recognition varied because of the different application of identification criteria in various localities. One ethnic group in Yunnan, who named themselves as the ‘Buyi’ and shared similar modes of production, language, culture, customs, and religion, was classified into three minorities: the Shui, Buyi, and Zhuang.⁶⁴ A number of cases in the recovery and alteration project of ethnic identity in the 1980s may have revealed such issues.

B. *Creating Internal Divisions inside the Nation*

The fifty-six ethnic-group model and its supporting measures

⁶⁰ See *id.*; CASTELLINO & REDONDO, *supra* note 12, at 139.

⁶¹ See Han Zhongtai(韩忠太), *YizhongZichengSangeMinzu: dui HuangniheYou'anBuyiZuqunMinzuShibie de Zaidiaocha(一种自称三个民族: 对黄泥河右岸布依族群民族识别的再调查)[A Restudy of the Ethnic Identification of the Buyi Ethnic Group on the Right Bank of the Huangni River]*, 29:03 JOURNAL OF YUNNAN NATIONALITIES UNIVERSITY (Social Sciences) 5, 9 (2012).

⁶² STEVAN HARRELL, FIELD STUDIES OF ETHNIC IDENTITY: YI COMMUNITIES OF SOUTHWEST CHINA 268 (BamoAyi & QumoTiexi trans. 2008); Huang Ze(黄泽), *Yunnan WeishibieQuntiYanjiu de ZuqunLilunYiyi(云南未识别群体研究的族群理论意义)[The Significance of the Research about the Unidentified Ethnic Groups in Yunnan]*, 23:02 JOURNAL OF GUANGXI UNIVERSITY FOR NATIONALITIES (Philosophy and Social Science) 26, 28 (2001).

⁶³ See HARRELL, *id.* at 268; see also MULLANEY, *supra* note 21, at 88.

⁶⁴ Han Zhongtai, *supra* note 61, at 5-8.

indeed appear to be effective in regard to incorporating minorities in borderlands into the multiethnic state as the CCP had expected. Nevertheless, the categorization of fifty-six groups also consciously creates group divisions inside the nation in the sense that a minority identity is decided at birth, which is not optional.⁶⁵ Once registered and confirmed by the Family Book or citizen ID card, minority identity becomes the evidence for the entitlement to all minority privileges. The status of being a minority member might foster a sense of difference among the population, since minority division motivates an ethnic distinction. This imbues a sense of belonging, which seems to be in existence relative to other groups rather than to the specific group itself.⁶⁶ Cohen argues that “contemporary ethnicity is the result of intensive interaction between ethnic groupings.”⁶⁷ Gladney also notes that dialogical interactions between groups might lead to the invention of some identities.⁶⁸ The current ethnic divisions potentially create and harden differences among minorities⁶⁹ and in some cases within one minority group. Apart from the Han, the remaining fifty-five groups are distinguishable from each other. An internal ethnic balance would then be achieved.

Without the right to freely identify with one or more groups, the current practice of fixed ethnic identity at birth in a way emphasizes individual connection to a particular group. The consciousness as a group, thus, is enhanced. For those who had little knowledge of *minzu* or group identity in the 1950s, they now identify themselves with minority communities after years of practice. For instance, many minority members in Yunnan had claimed to be of Han descent and denied their affinity with a minority status due to the discrimination against minorities in the history.⁷⁰ Now they adhere to their recognized minority identity to acquire

⁶⁵ Although a change of ethnic status is possible under certain circumstances, ethnic status of an individual in principle can only be determined according to that of the parents or foster parents.

GuanyuZhongguoGongminQuedingMinzuChengfen de Guiding [Provisions on the Determination of Ethnic Status of Chinese Citizens], *supra* note 48, art. 2, 6; *see also* DRU GLADNEY, *DISLOCATING CHINA: REFLECTIONS ON MUSLIMS, MINORITIES, AND OTHER SUBALTERN SUBJECTS* 170 (2004).

⁶⁶ Naran Bilik (纳日碧力戈), *MinzuyuMinzuGainianBianzheng* (民族与民族概念辨正) [*Dialectic of Minzu and the Minzu Concept*], 05 ETHNO-NATIONAL STUDIES 11, 13, 15-16 (1990). Naran Bilik notes that, when many groups coexist, a sense of belonging to one specific group would persist as long as other groups maintain their identities.

⁶⁷ ABNER COHEN, *CUSTOM AND POLITICS IN URBAN AFRICA* 198 (1969).

⁶⁸ GLADNEY, *supra* note 13, at 78.

⁶⁹ *See id.* at 93.

⁷⁰ *See, e.g.*, David Y. H. Wu, *supra* note 32, at 3, 7-11. Bai in Yunnan, as

minority privileges.⁷¹ Another situation involves groups that have already been assimilated at the time of categorization. The fixed ethnic identity constantly highlighted ethnic distinction, and they sought to reconstruct their identities. The recent revival and reconstruction of the Manchu culture serves as a good example of this reality.

It has been argued that “minority groups in contemporary China really do seem to identify themselves more or less in accordance with the *minzu* designations”.⁷² Although the fifty-six ethnic-group model may operate to maintain the ethnic balance inside the nation, the overemphasis of group distinction from each other might lead to an extreme outcome: as minorities are so conscious of the distinctions from the Han and each other, they may seek to secede and establish a state of their own. This would be contrary to the communist conception of national integration and the building of one unified Chinese nation.

C. *Differing Treatment Among Ethnic Groups*

As the formal recognition by the state is the only way to claim minority rights in China, unidentified groups and some groups that have been controversially classified as a part of the Han are excluded from the minority protection regime. The population of unidentified groups is 640,101, 0.048 percent of the total population, according to the 2010 National Census.⁷³ Even among the fifty-five recognized minorities, autonomous rights guaranteed by the REA regime are only available to groups who manage to establish autonomous areas. Those who are scattered outside autonomous areas or throughout the country have no means of realizing such autonomous rights. As for other fundamental rights guaranteed by the Constitution, for example, the right of everyone to culture,⁷⁴ unidentified groups and certain communities of the recognized groups that reside outside autonomous areas may not effectively exercise this right, as the Constitution is not directly enforceable in the courts, unless there is ordinary legislation through which the Constitution is implemented.⁷⁵

demonstrated by David Y. H. Wu, serves as one example.

⁷¹ *Id.*

⁷² MULLANEY, *supra* note 21, at 135. A similar argument could also be found in Gladney’s writing. *See* GLADNEY, *supra* note 13, at 299, 304.

⁷³ 1-6 Population by Gender and Ethnicity in Provincial Units, *supra* note 44.

⁷⁴ Xianfa, *supra* note 1, art. 47.

⁷⁵ ALBERT CHEN, as quoted in YASH GHAI, *HONG KONG’S NEW CONSTITUTIONAL ORDER: THE RESUMPTION OF CHINESE SOVEREIGNTY AND THE BASIC LAW 89* (1999).

At the moment, the most important ordinary legislation in relation to the cultural rights is the Law on Regional Ethnic Autonomy. The Han, minorities outside

V. INTERNATIONAL OBLIGATIONS OF CHINA IN RELATION TO MINORITY RECOGNITION

Suggestions might be made that official identification and fixed ethnic status are necessary in order to avoid abuse of minority privileges and allow the establishment of autonomous units and agencies, through which minorities could pursue political, legislative, and financial autonomy. However, neither official identification nor fixed minority status seems reasonable concerning cultural rights, as culture is not a static concept.⁷⁶ Individual cultural preference and identity may change with circumstances. In addition, although the collective rights of Chinese minorities on legislative and financial affairs under the REA may exclusively derive from the provisions of Chinese law,⁷⁷ both domestic law and international law regulate the exercise of the cultural rights. China has undertaken international obligations to protect and promote cultural rights.⁷⁸

There is no international consensus on the definition of minorities. Almost all the attempts to define a minority encompass objective and subjective criteria: the existence of the group with distinct identity and a sense of solidarity.⁷⁹ Nor does international law have explicit provisions

autonomous areas, and unidentified groups may not be able to claim the constitutional right to culture before the court, considering the nature and applicability of the L.R.E.A.

⁷⁶ See, e.g., CESCR, General Comment 21: Right of Everyone to Take Part in Cultural Life (art. 15, para. 1 (a), of the ICESCR), 43rd Sess., Nov. 2-20, 2009, UN. Doc. E/C.12/GC/21, ¶ 11 (Dec. 21, 2009).

⁷⁷ With certain collective nature, in terms of the right to culture, language, and religion, minority rights in international law are generally formulated from an individualistic perspective.

See International Covenant on Civil and Political Rights (ICCPR), art. 27, opened for signature Dec. 16, 1966, available at <http://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx> (entered into force Mar. 23, 1976); Human Rights Comm. (HRC), General Comment 23: the Rights of Minorities (art. 27), 50th Sess., Apr. 6, 1994, U.N. Doc. CCPR/C/21/Rev.1/Add.5, ¶ 3.1 (Apr. 26, 1994); HRC, General Comment 31: Nature of the General Legal Obligation Imposed on States Parties to the Covenant, 80th Sess., Mar. 29, 2004, U.N. Doc. CCPR/C/21/Rev.1/Add.13, ¶ 9 (May 26, 2004).

⁷⁸ China has ratified, or acceded to, the following instruments on human rights: ICESCR, International Convention on the Elimination of All Forms of Racial Discrimination (ICERD), Convention on the Elimination of All Forms of Discrimination against Women, Convention on the Rights of the Child and two Optional Protocols, Convention on the Rights of Persons with Disabilities, and Convention against Torture and Other Cruel Inhuman or Degrading Treatment or Punishment. China signed the ICCPR in 1998, which has yet to be ratified by the legislature.

⁷⁹ See Special Rapporteur of the Sub-Comm'n on Prevention of Discrimination and Protection of Minorities, *Study on the rights of persons belonging to ethnic, religious and linguistic minorities*, ¶ 568, UN Doc. E/CN.4/Sub.2/384/Rev.1 (1979) (by Francesco

on minority identification. The existence of minorities does not depend upon the decision of the state but should be established by objective criteria or sufficient elements, as the existence of minorities is “a question of fact”, not “a question of law”.⁸⁰ Persons belonging to minorities should also retain the right to choose their own identity.⁸¹ On the other hand, it has been pointed out that the official identification of a minority by the state is essential, as it would facilitate the application of their rights and give the members of the minority a solid basis for effective protection.⁸² Amongst the international conventions that China has ratified or acceded to, International Covenant on Economic, Social and Cultural Rights (“ICESCR”)⁸³ and International Convention on the Elimination of All Forms of Racial Discrimination (“ICERD”)⁸⁴ are of particular relevance to minority identification.

A. ICESCR

Article 2 of the ICESCR requires the State Parties to ensure that the rights guaranteed in the Covenant “will be exercised without discrimination of any kind as to race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.”⁸⁵ The enjoyment of economic, social and cultural rights (“ESCR”) without discrimination entails an immediate obligation to eliminate all forms of discrimination.⁸⁶ In China, the exclusion of unidentified groups from exercising minority rights and different treatment between minorities with autonomous agencies and minorities without them contravene this

Capotorti) [Capotorti Report]; PATRICK THORBERRY, *INT’L LAW AND THE RIGHT OF MINORITIES* 164-67 (2001); THOMAS MUSGRAVE, *SELF-DETERMINATION AND NATIONAL MINORITIES* 169 (2002).

⁸⁰ Greco-Bulgarian Communities, Advisory Opinion, 1930 P.C.I.J. (ser. B) No.17, at 22; HRC, General Comment 23, ¶ 5.2; Capotorti Report, *id.* ¶ 61.

⁸¹ See, e.g., CESCR, General Comment 21, ¶¶ 15, 55(b); CERD, General Recommendation 08 concerning the Interpretation and Application of art.1, ¶¶ 1 and 4 of the Convention, 38th Sess., 1990, U.N. Doc. A/45/18 (Aug. 22, 1990); CERD, General Recommendation 32 the Meaning and Scope of Special Measures, 75th Sess., Aug. 3-28, 2009, U.N. Doc. CERD/C/GC/32, ¶ 34 (Sep. 24, 2009).

⁸² Capotorti Report, *supra* note 79, ¶ 62.

⁸³ China ratified the ICESCR in 2001.

⁸⁴ China acceded to the ICERD in 1981.

⁸⁵ ICESCR, art. 2, opened for signature Dec. 16, 1966 (entered into force Jan. 3, 1976), available at <http://www.ohchr.org/EN/ProfessionalInterest/Pages/cescr.aspx>.

⁸⁶ CESCR, General Comment 20: Non-discrimination in Economic, Social and Cultural Rights, 42nd Sess., May 4-22, 2009, U.N. Doc. E/C.12/GC/20, ¶ 7, (July 2, 2009); MANISULI SSENYONJO, *ECONOMIC, SOCIAL AND CULTURAL RIGHTS IN INT’L LAW* 60, 85-86 (2009).

provision.

Article 15 states that “the States Parties to the present Covenant recognize the right of everyone...to take part in cultural life...”⁸⁷ Despite the fact that this Article recognizes the right of ‘everyone’ to culture, it is relevant in the Chinese context for minority protection as it provides minorities the basis to claim the rights guaranteed by international law. Culture, according to the Committee on ESCR, is a broad, inclusive, and evolving concept, which encompasses almost every aspect of life.⁸⁸ ‘To take part in’ or ‘participate’ in cultural life includes, in particular, the right of everyone, including minorities, “to choose his or her own identity, to identify or not with one or several communities”.⁸⁹ The minimum core obligations entailed in the Article also require the State Parties to respect the right of everyone to self-identification.⁹⁰ Thus, besides the right “to conserve, promote and develop their own culture,”⁹¹ minorities should also have the right to identify or not to identify themselves with one or more communities and to change that choice.⁹² The Chinese provisions on the determination of ethnic status may constitute a breach.

B. ICERD

Under the core principle of non-discrimination, the Convention concerning Racial Discrimination requires the uniform application of legislation and governmental actions to all groups, regardless of the racial or ethnic groupings within the territory.⁹³ The selective application of identification criteria, which leads to the recognition of some and refusal to recognize others, may breach this prohibition.⁹⁴ In particular, the identification of an individual as belonging to a minority group, and thus the beneficiary of special measures, “should be based on self-identification by the individual concerned”, unless a significant justification exists to permit action to the contrary.⁹⁵

Therefore, the Chinese practice of minority identification discussed above would not conform to its obligations under the ICESR and ICERD. The authoritative practice of identifying minorities in China needs to be

⁸⁷ ICESCR, art. 15.

⁸⁸ See, e.g., CESCR, General Comment 21, ¶¶ 11-13.

⁸⁹ *Id.* ¶ 15.

⁹⁰ *Id.* ¶ 55(b).

⁹¹ *Id.* ¶ 32.

⁹² *Id.* ¶¶ 15, 55(b).

⁹³ CERD, General Recommendation 24 concerning art.1 of the Convention, 55th Sess., 1999, U.N. Doc. A/54/18, ¶ 2 (Aug. 27, 1999).

⁹⁴ *Id.* ¶ 3.

⁹⁵ CERD, General Recommendation 08; General Recommendation 32, ¶ 34.

changed and reformed to equally protect and promote the rights of all ethnic groups without distinction. Even though the communists might prefer a minority definition based on objective criteria, the application of such criteria should be unequivocal and declaratory, and the right of the individuals to identify themselves with one or more groups upheld.

VI. CONCLUSION

Through the Ethnic Identification Project, over 400 self-reported groups were officially classified into fifty-five minorities, a comparatively manageable number. The Project, in essence, is a political and authoritative activity, dividing the minority population in a way that fits the political interests of the CCP. This government-led Project, however, has significant legal consequences: recognizing which group is entitled to minority rights under Chinese law.

The flexible and inconsistent application of a number of identification standards has led to differing treatment of ethnic groups, with some self-identified groups being recognized and others not. The nature of the implementation regime under the REA also causes disparities between minorities with autonomous agencies and minorities that have yet to establish their own autonomous areas. Meanwhile, the fixed-ethnic-identity imposed creates internal divisions among ethnic groups and fosters ethnic consciousness of minorities as distinguishable from the Han, although this minority consciousness does not necessarily imply worse relations with them.⁹⁶ This practice does not facilitate the integration of minorities into a unified multiethnic nation,⁹⁷ nor does it fulfill China's obligations under international human rights conventions.

Measures should be undertaken, in the light of cultural rights, to ensure all minorities are subject to the equal protection of the law. A clear and explicit legal definition of minorities is necessary if the Chinese Government insists on maintaining the identification criteria, and it must in turn be applied to all groups equally. Individual members concerned should have the liberty to identify themselves with one or several groups, and more importantly are able to access effective remedies in the form of

⁹⁶ MACKERRAS, *supra* note 5, at 267.

⁹⁷ The Chinese Government has repeatedly argued that China is the state of the Chinese nation, a unified multiethnic nation and it is the Chinese people who enjoy the right to self-determination.

See, e.g., Xianfa, *supra* note 1, Preamble; St. Council, the White Papers: National Minorities Policy and its Practice in China (1999), *supra* note 1, § I; China's Ethnic Policy and Common Prosperity and Development of All Ethnic Groups (2009), *supra* note 1, Preface; China, The Initial Report of the PRC under the ICESCR, June 27, 2003, U.N. Doc. E/1990/5/Add.59, at 5-6, ¶ 6 (Mar. 4, 2004); the Second Periodic Report of the PRC under the ICESCR, June 30, 2010, U.N. Doc. E/C.12/CHN/2, at 5 (July 2, 2010).

legal and administrative procedures in order to maintain the validity of any system imposed.