

The Protection of National Minorities within the Council of Europe: An Analytical Review

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Received:2013/10/26

Accepted:2014/6/14

Abstract

According to the preamble of the Framework Convention for the Protection of National Minorities (which entered into force on February 1, 1998) minority rights are an integral part of fundamental human rights. universal level that taken on great importance in addressing the challenges of minority protection in evolving and increasingly diverse societies. So, this survey has an analytical approach to the protection of minorities within the Council of Europe and for this, especially, focuses on the Framework Convention: namely its content, its rights-holders, and also- the most important point of view- the problems, challenges and tasks that this legally instrument faces with it in practice. One must take into account that the Framework Convention has passed 13 years of its born and the authors aim to analyze its achievements and in the same time, its challenges as well. Thus, we reiterate once more that our method is analytic to examine the topic.

Keywords: National Minorities; Council of Europe; Advisory Committee; Framework Convention; OSCE.

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Introduction

After the Second World War, the idea of the protection of minorities prevailed in 1945–6 that the protection of minorities had failed to pacify the relationships between States (particularly States where national minorities are located and their kin-States), and that it would become unnecessary in the light of the emergence of an international protection of human rights (Simpson, 2001: 227-34). However, there exists since the 1990s an increasing convergence between minority rights and human rights. Minority rights, it is now acknowledged, are human rights. New instruments have been adopted to protect minority rights as such— in particular, the Framework Convention on the Protection of National Minorities, of 1 February

1995¹ and the European Charter for European or Minority Languages, of 5 November 1992, both adopted within the Council of Europe. Remarkably, these instruments follow the model of classical human rights instruments, rather than that of the earlier treaties on minorities: the lesson has apparently been learnt that, in the absence of mechanisms of protection, the most generous clauses on the protection of minority rights will remain a dead letter. In addition, an increasingly voluminous body of jurisprudence has emerged from human rights bodies that protect minorities through human rights such as the right to respect for private life, freedom of religion, the right to education, or the right to property, either alone or in

1 .It must be pointed out that this Framework Convention –which entered into force on 1 February 1998- is the first-ever legally binding multilateral instrument devoted to the protection of national minorities in general and till now it has been ratified by 39 States, in exception to Turkey, France, Andorra and Monaco.

combination with the requirement of non-discrimination. It would hardly be an exaggeration to say that human rights have legitimized and made politically acceptable a revival of minority rights— that minority rights have re-entered the field of international law through the channel of human rights protection (Dinstein and Tabory, 1992; Rehman, 2000); Thornberry, 1991).. Indeed, it is the extension of human rights that has encouraged an increasingly generous reading of ‘minorities’ protected under international law. Minorities are traditionally (although still controversially) defined as “a group of persons who reside on the territory of a State and are citizens thereof, display distinctive ethnic, cultural, religious or linguistic characteristics, are smaller in number than the rest of the population of that State or of a

region of that State, and are motivated by a concern to preserve together that which constitutes their common identity, including their culture, their traditions, their religion or their language¹”. But there has been a tendency, particularly within the Human Rights Committee (in its interpretation of Article 27 of the International Covenant on Civil and Political Rights) and within the Advisory Committee² established

1. See, e.g. Recommendation 1201(1993) adopted by the Parliamentary Assembly of the Council of Europe, proposing the adoption of an additional protocol on the rights of national minorities to the European Convention on Human Rights; F. Capotorti, Study on the Rights of Persons belonging to Ethnic, Religious and Linguistic Minorities (New York: United Nations, 1991), Para. 568; J. Deschenes, ‘Proposal concerning the Definition of the Term “Minority”’, E/CN.4/Sub.2/1985/31, 14 May 1985).

2The Advisory Committee is the independent expert committee responsible for evaluating the implementation of the Framework Convention in State Parties and advising the Committee of Ministers. The results of this evaluation consist in detailed country-specific opinions adopted following a monitoring procedure. This procedure involves the examination of State Reports and other sources of information as well as meetings on the spot with governmental interlocutors, national minority representatives and other relevant actors. The Advisory Committee is composed of 18 independent experts elected and appointed for four years. In accordance with Resolution (97)10 of the Committee of Ministers, members of the Advisory Committee shall have recognized expertise in the

under the Framework Convention for the Protection of National Minorities, to broaden the scope of the provisions protecting minority rights, so as to ensure that 'minority rights' benefit all those under the jurisdiction of the State, who present certain distinct characteristics evolution would result in defining minority rights as human rights, thus in principle to be enjoyed by all, whether or not they are found to belong to a 'minority' under the classical definition of this term. This tendency has been strongly opposed by certain States¹.

field of the protection of national minorities. They shall serve in their individual capacity, shall be independent and impartial and shall be available to serve on the Committee effectively. See: www.coe.int/minorities.

1. Germany, for example, argues that 'the objective of the Framework Convention [for the protection of national minorities] is to protect national minorities; it is not a general human rights instrument for all groups of the population which differ from the majority population in one or several respects (ancestry, race, language, culture, homeland, origin, nationality, creed, religious or political beliefs, sexual preferences, etc.). Rather, the members of the latter groups are protected by the general human rights and if they are nationals by the guaranteed civil rights' (Germany, Third

According to mentioned statements above, this survey seeks to focus on the legally-binding "Framework Convention for the Protection of National Minorities" (that hereinafter called "FCMN") – as the first binding treaty between European States – and its mechanism to protect persons belonging to national minorities within the Europe as a whole. For this, we consider and examine the following issues respectively: 1- The definition of minority ; 2- Historical background and the significance of the FCMN; 3- The nature and content of minority rights; 4- who are the right- holders and beneficiaries; 5- Improvement and Development of minority protection within the Council of Europe: Challenges and Problems?; 6- Kosovo: The Crucial Situation Before COE and finally, the article

State Report, ACFC/SR/III (2009)003, 2009, Para. 8).

will be terminated with a conclusion and some possible recommendations in this regard.

1. The Definition of Minority: A Longish Dilemma

Several definitions of ‘minorities’ or ‘national minorities’ have been proposed within international organizations. Mr. Francesco Capotorti drafted a study in 1977 for the UN Sub-Commission on the Prevention of Discrimination and the Protection of Minorities¹. Mr. Jules Deschenes was charged in 1985 by the same body with the study of the question of the definition of minorities². Although these definitions are not legally binding, they serve as a reference to determine the meaning of the notion of a ‘minority’ in international law.

Indeed, although States are recognized a margin of appreciation in identifying the ‘minorities’ which exist under their jurisdiction, they may not use this margin of appreciation in order to evade their obligations under international law. Thus, international bodies have been led to note that the qualification of ‘minority’ is a matter of fact and not of law³. A group has to be recognized as a ‘minority’ in the sense of international law when it possesses all the characteristics, independent of whether it is recognized as such by national law. In its General Comment on Article 27 ICCPR, the UN Human Rights Committee states: “The existence of an ethnic, religious or linguistic minority in a given State party does not depend upon a decision by that

1. F. Capotorti, Study on the Rights of Persons belonging to Ethnic, Religious and Linguistic Minorities (New York: United Nations, 1991).

2. J. Deschenes, Proposal concerning the Definition of the Term ‘Minority’, E/CN.4/Sub.2/1985/31, 14 May 1985.

3. Permanent Court of International Justice, Advisory opinion regarding Greco-Bulgarian communities, 31 July 1930, P.C.J. Reports, Series B No. 17.

State party but requires to be established by objective criteria.”¹

In the absence of a consensus among states on the definition of a minority, neither the Framework Convention for Protection of National Minorities (called in abbreviation as FCNM), nor any other legally binding international instrument contains such a definition². The Advisory Committee on the Framework Convention recognizes that the states parties have a margin of appreciation to determine the personal scope of application of the FCNM in order to

take the specific circumstances prevailing in their country into account. However, it notes that this margin of appreciation ‘must be exercised in accordance with general principles of international law and the fundamental principles set out in Article 3 of the Framework Convention. In particular, it stresses that the implementation of the Framework Convention should not be a source of arbitrary or unjustified distinctions.’³

It is this latter requirement which is crucial. Where certain specific rights or protections are granted only to groups who are recognized as ‘minorities’, or to individuals under the condition that they are considered members of ‘minorities’, the definition relied upon by the States should not lead to arbitrary

1. Human Rights Committee, General Comment on Article 27 ICCPR, para.5.2. See also the Advisory Committee of the Framework Convention for the Protection of National Minorities: “The applicability of the Framework Convention does not necessarily mean that the authorities should in their domestic legislation and practice use the term “national minority” to describe the group concerned.” (Opinion on Norway, 12 September 2002, ACFC/INF/OP/I (2002)003, para.19); and Parliamentary Assembly of the Council of Europe, Recommendation 1623 (2003), para. 6.

2. See the Explanatory Report of the FCNM: “It was decided to adopt a pragmatic approach, based on the recognition that at this stage, it is impossible to arrive at a definition capable of mustering general support of all Council of Europe member States” (para.12).

3. See, e.g. Opinion on Albania, (ACFC/INF/OP/I(2003)004), 12 September 2002, para.18; Opinion on Croatia, (ACFC/INF/OP/I(2002)003), 6 April 2001, para.15; Opinion on Italy, (ACFC/INF/OP/I(2002)007), 14 September 2001, para.14.

distinctions being introduced, which would be the source of discrimination. For instance, a State defining 'minorities' under its jurisdiction as a group of persons who reside on the territory of a State and are citizens thereof, display distinctive ethnic, cultural, religious or linguistic characteristics, are smaller in number than the rest of the population of that state or of a region of that state, and are motivated by a concern to preserve together that which constitutes their common identity, including their culture, their traditions, their religion or their language, although it would be resorting to a definition which appears dominant in Europe, should not be allowed to rely on that definition to exclude non-citizens from a full range of protections granted to its own nationals, even where these protections contribute to the preservation of 'minority rights'.

As recalled by the UN Committee on the Elimination of Racial Discrimination in its General Recommendation 30 on 'Discrimination against non-citizens', although some fundamental rights 'such as the right to participate in elections, to vote and to stand for election, may be confined to citizens, human rights are, in principle, to be enjoyed by all persons. States parties are under an obligation to guarantee equality between citizens and non-citizens in the enjoyment of these rights to the extent recognized under international law'¹. Nor should such a State be allowed to use such a definition in order to reserve to the category of citizens certain rights, while imposing excessive barriers to the access to nationality for persons who are under its jurisdiction and have

1. General Recommendation 30 adopted at the sixty-fourth session of the Committee on the Elimination of Racial Discrimination (CERD/C/64/Misc.11/rev.3), Para. 5.

strong and permanent links to the State.

2- The Framework Convention:

It's Historical Significance

Since its inception, the Council of Europe (hereinafter called "COE") has obtained the leading role in the development of minority rights standards. The first text in this field was adopted by the COE's Parliamentary Assembly back in 1957¹. However, the work of the COE was of limited effectiveness. The main reason for this was: neither content nor the holder of these rights was clearly defined. This is why the approach to minority rights remained largely in line with the old concept and notion of minority rights as special privileges which a State might bestow to some groups. This selective approach –where minority

rights were considered- as a matter of fact was characteristic for all old systems of minority protection². Also within the COE, attitudes towards different minority situations were crucially dependent on the real political context, political strength of the States involved and effectiveness of lobbying and political exchanges. In the first half of 1990s, adoption of two important instruments namely, the Framework Convention for the Protection of National Minorities (FCNM) and the European Charter for Regional or Minority Languages, marked a commence of the new stage in minority protection. Entry into force of the Framework Convention (as the first ever legally binding instrument on minority rights) has radically changed the situation. Both instruments and the outstanding work of the Advisory

1. Resolution 136(1957) on the position of national minorities in Europe. Available at: www.coe.int/minorities/html.

2. The prominent example for these old systems are "minority Treaties" under the League of Nations system.

Committee¹ substantially clarified the ever evolving content and notion of minority rights and to some extent gave the answer to the question of the right-holder.

3. What's the Content of Minority Rights?

If we want to examine the content of minority rights as enshrined in the Framework Convention, it is better to say that minority rights are integral part of fundamental human rights² and not be taken into account as special privileges which a State might bestow to some groups by its own choice³. As such, minority rights must be implemented without any discrimination based on sex,

language, race, religion and other similar criteria. Also, minority rights are understood as individual rights which, however, may often be enjoyed in community with other individuals. Of course, it should be noted that minority rights are not, in nature, group rights. The concept of minority rights is complementary to the fundamental principle of non-discrimination. It is possible that one define minority rights as a second generation of none-discrimination legislation. Formally equal treatment is sufficient to ensure equality only in equal situations. The main goal, as formulated by the Framework Convention,⁴ is full and effective equality⁴. Minority rights are to be applied in the situations when different treatment is needed to ensure full and effective equality. Therefore, non-discrimination and equal treatment cannot be used as a

1. Article 26 of the Framework Convention in this field stipulates: "... the Committee of Ministers shall be assisted by an Advisory Committee, the members of which shall have recognized expertise in the field of protection of national minorities. The composition of this Advisory Committee and its procedure shall be determined by the Committee of Ministers ...".

2. See article (1) from section I of the FCNM.

3. Tove H. Malloy, *National Minority Rights in Europe*, ISBN-13: 9780199274437, Published to Oxford Scholarship Online: March 2012.

4. See the preamble of the Framework Convention available at: www.coe.int/minorities.

pretext for non-recognition of minorities and for denial of minority rights. The Framework Convention is a legal treaty, not a political declaration and in fact we can name this instrument as “a document of principles” because it offers only basic principles of minority protection that may be implemented differently in different States, according to their situations and their legal system as a whole. Compliance and accepting of these concrete and tangible methods with the letter and spirit of the Framework Convention is verified through monitoring procedures carried out by competent expert body, and improved using constant dialogue, consultations with all parties involved, and taking into account good practices. There is no doubt that the key aspect of modern understanding of minority rights is the principle of participation of

minorities in decision-making on the issues directly affecting them¹. Numerous and multiple conditions included into the provisions of the Framework Convention must be interpreted in “good faith”², not as pretexts for declining minorities’ claims but as an obligation to take into account minorities’ views. It must be noted that the rights envisaged in the Framework Convention should not be automatically imposed; the persons belonging to minorities must have the right to choose whether to be

1. See Article 15 of Framework Convention as states: “The parties shall create the conditions necessary for the effective participation of persons belonging to national minorities in cultural, social and economic life and in public affairs, in particular those affecting them”. Also See: J.A. Frowein and R. Bank, “The Participation of Minorities in decision-Making Processes”. Expert study submitted on request of the Committee of Experts on Issues Relating to the Protection of National Minorities (DH-MIN) of the Council of Europe by the Max-Planck Institute for Comparative Public Law and International Law, Heidelberg. DH-MIN (2000) 1. (Secretariat of the Framework Convention for the Protection of National Minorities, Strasbourg, 2000).

2. Article 2 of the Framework Convention reads as follows: “The provisions of this Framework Convention shall be applied in good faith”.

treated differently or not¹. It is very important to ensure that this choice is indeed free, not made under government's pressure, and that indeed no disadvantage results from this choice.

4. Who is the Right-Holder?

As noted above, minority rights are recognized as integral part of fundamental human rights, so they must be implemented without any distinction. In this view, the approach which was widespread within the COE until very recently – that is to say distinction between “traditional” or “historical” minorities, and “migrant minorities”- needed to be seriously reconsidered and must be precisely taken into account. Indeed, the scope of application of the Framework Convention remains probably the most complicated and politically

sensitive issue related to its implementation. A number of States Parties made declarations upon ratification which define particular groups to enjoy protection under the Convention. These declarations contain either definition, flowing from the proposal included in Parliamentary Assembly Recommendation 1201 (1993)², or the list of concrete groups residing within the territory of a State Party to the Framework Convention or, in some cases, simply deny the existence of national minorities within their territories at all. However, there are three major problems that related to the scope of application of the Framework Convention and need to be considered and analyzed because if one could understand these challenges precisely, then he will be

1. See Article 3 of the Framework Convention.

2. Parliamentary Assembly Recommendation 1201 (1993) on an additional protocol on the rights of minorities to the European Convention on Human Rights.

able to determine the scope of the issue. So, these triple problems are read as bellow:

First, coherence with the United Nation mechanism of minority protection. All States Parties to the Framework Convention are in the meantime, State Parties to the International Covenant on the Civil and Political Rights (ICCPR), and as such are bound by its famous Article 27 on the rights of minorities. The scope of applicability of this provision is determined by the United Nations Human Rights Committee's General Comment No. 23 (1994). This well known comment explicitly denies the possibility to introduce any restrictions on enjoyment of the rights enshrined in Article 27 of ICCPR. It would be rather unfortunate and also ill-fated if the European standards of minority protection appear to be more

restrictive in nature than the universal standards as mentioned above, Article 27 of ICCPR is anyway binding for all States Parties to the Framework Convention and no one can deny it.

The second problem is of rather legalistic nature. As mentioned before, the Framework Convention considers minority rights as individual rights. In the mean time, the definition included in Recommendation 1201 is worded in terms of group rights – a minority is defined as a group as a whole. This makes practical application of this definition problematic. In practice often a part of persons belonging to a certain minority group has been living in a certain country for centuries, while a substantial number of other members of the same group migrated to the country relatively recently. For instance, 40% of ethnic Russians in Latvia have been

registered as citizens on the basis of the “restored citizenship” concept; what means that their ancestors lived in Latvia for centuries. In the meantime, almost 60% of ethnic Russians arrived in Latvia after the Second World War¹. In this case and also a number of similar cases, the question arises whether it is appropriate to deny the protection under the Framework Convention to a number of individuals who fully qualify even under Recommendation 1201’s definition, solely because other members of the same group arrived to the country later?

Perhaps the most significant and important problem in this field, is directly related to universal nature of fundamental human rights and the principle of non-discrimination.

Minority rights – as integral part of

fundamental human rights – must be implemented without any discrimination. Only the citizenship criterion, indeed, explicitly excluded from the list of prohibited grounds for distinction in a number of international non-discrimination instruments². Any additional preconditions for enjoyment of minority rights give rise to legitimate concerns about violation of the principle of equality of citizens. However, even with regard to the citizenship criteria, an effective approach was suggested by Asbjorn Eide³. He examines the minority rights provisions of the United Nations Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and

1.Reservations and declarations to the Framework Convention as of 30 June 2005, The Republic of Latvia, Declaration contained in the instrument of ratification deposited on 6 June 2005, Para. 4. More information is available at: www.coe.int/minorities.

2.See e.g. Article 1, paragraph 2, of the International Convention on the Elimination of All Forms of Racial Discrimination (1948).

3.Eide, Asbjorn, Working paper prepared for the United Nations Working Group on Minorities, available at: [www.unhcr.org/human rights/minorities](http://www.unhcr.org/human_rights/minorities) and also see: Eide, Asbjorn (1994), *New Approaches to Minority Protection*, London: Minority Rights Group International.

Linguistic Minorities of 1992 on the article-by-article basis, with the aim to analyze where limitation of minority rights merely to citizens would be discriminatory. Clearly, most of the provisions of the Framework Convention should also apply to all persons to minorities, simply because they in fact transpose fundamental principles of equality, freedom of expression, freedom of association and etc., to specific situations.

The experience of the Advisory Committee's work makes us conclude the following. The States, in fact, have a margin of appreciation in respect of determining persons and groups to enjoy protection as national minorities within their territories. However, this right must be exercised in accordance with general principles of non-discrimination, in consultation with those concerned,

and no arbitrary or unjustified distinctions can result from this decision. The evolution of the texts adopted by the Parliamentary Assembly illustrates the same way of thinking. Recommendation 1492 (2000)⁴ still reiterated its position in respect of the definition of a minority proposed by Recommendation 1201 (1993). However, the latest Recommendation 1623 (2003)⁵ no longer refers to Recommendation 1201 (1993) and the need to adopt the definition.

5. Achievements of Minority Protection within the COE: Challenges and Tasks

One of the major tasks on the agenda of the COE is to make the Framework Convention really universal in Europe and legally

4. Parliamentary Assembly Recommendation 1492 (2001) on the rights of national minorities. Available at: www.coe.int.

5. Parliamentary Assembly Recommendation 1623 (2003) on the rights of national minorities. Available at: www.coe.int.

binding for all member States. Although the number of signatures and ratifications quickly exceeded even the most optimistic forecasts, seven signatory States have substantially delayed ratification, and three member States of the COE have not even signed the Convention so far⁶. In a number of recommendations, the Parliamentary Assembly urged all member states to swiftly sign and ratify the Framework Convention, without reservations and declarations. In its recommendation 1492 (2001) it did not hesitate to ask the States which have not signed the Convention, notably Turkey and France, to bring their constitutions into harmony with the European standards in force in order to remove any obstacle to the signature and ratification of the Convention. In the latest Recommendation 1623 (2003), the

Parliamentary Assembly went further and suggested certain practical measures to encourage member States to ratify the Convention without delay. In particular, the Assembly recommended to the Committee of Ministers to consider holding tours de table on signature and ratification of the Framework Convention. Moreover, the Parliamentary Assembly decided that persistent refusal to sign and or ratify the Framework Convention, or to implement its standards, should be the subject of particular attention in the monitoring procedures of the COE. It remains to be seen whether the Committee of Ministers will support the efforts of the Parliamentary Assembly to elevate the status of the Framework Convention within the hierarchy of the COE instruments and to actively promote its ratification by all

6 . These three States are: France, Turkey and Monaco. See: www.coe.int/minorities/fcnm.

member States. Broadening the scope of application of the Framework Convention in line with the principle of non-discrimination is another aspect of making it really universal. One cannot but admit that success in this field is more than limited. Despite the Parliamentary Assembly's repeated calls for States Parties to drop reservations and restrictive declarations, none of them has been revoked so far. In the meantime, the view of the Parliamentary Assembly regarding the reservation which accompanied signature of the Framework Convention by Belgium deserves attention. In its Resolution 1301 (2002)⁷, the Parliamentary assembly expressed its view that this reservation would be considered as a violation of the Vienna Conventions on the Law of Treaties which do not

allow States Parties to enter reservations which defeat purpose and object of the Convention⁸.

Complementing the ongoing dialogue between the Advisory Committee and the States Parties with the legal procedure aiming at more thorough analysis of the compliance of the reservations and declarations entered by States Parties with the purpose and object of the Framework Convention, at the stage when ratification instrument is deposited, might become an important tool to strengthen the Convention's mechanism. This is particularly important at the current stage, when some signatory States – like Latvia – are discussing possible substantial reservations to be made upon anticipated ratification. An ultimate ambitious goal could be

7. Parliamentary Assembly Resolution 1301 (2002) on the protection of minorities in Belgium available at: www.coe.int/minorities.

8. Article 19 (c) of the Vienna Convention states: "A State may formulate a reservation unless: (c) in cases not failing under sub-paragraphs (a) and (b), the reservation is incompatible with the object and purpose of the treaty."

defined as follows: not only ratification, but also fair implementation of the Framework Convention must become a necessary precondition for membership in the COE, as is the case today with the European Convention of Human Rights and its Protocol No.6. The current monitoring procedure of the Framework Convention is legal in nature, but not judicial. Opinions of the advisory Committee are based on careful legal analysis; however, they are not binding on the states Parties. Political backing given to these opinions by the Committee of Ministers remains their main strength. Perfectly and ideally, it is better to strive to make the rights enshrined in the Framework Convention justifiable, in the end of the day. In other words, the persons belonging to minorities should have

an opportunity to invoke these rights before the court.

In fact and frankly, it will not be an easy task in a foreseeable future. Although the European Court of Human Rights does have some relevant jurisprudence⁹, it is of course bound by the provisions of the European Convention of Human Rights, and not by the Framework Convention. Because of the wording of Article 14 of the European Convention on Human Rights, the Court has very limited opportunities to invoke minority rights standards. Some judgments¹⁰ substantially contributed into interpretation of some minority rights. In the meantime, some other judgments¹¹ caused certain dissatisfaction among

9.For example we can refer to commonly quoted “Belgian Linguistic Case” of 1968 at ECHR.

10.Cases like *Sidiropoulos v. Greece* 1998 and *Podkolzing v. Latvia* 2002 at ECHR. Full texts of these judgments are available at: www.ECHR.org/cases.

11.These judgments include: *Chapman v. the United Kingdom*, 2001 and *Gorzelik v. Poland* , 2002 at ECHR.

the defenders of minority rights. This situation will probably change after the Protocol No. 12 to the European Convention on Human Rights has entered into force. Unfortunately, States reluctance to swiftly ratify this protocol gives serious rise for concerns. In the meantime, some interim measures could improve the situation. In particular, the Parliamentary Assembly in its Recommendation 1623(2003), reiterated its proposal to confer on the European Court of Human Rights the power to give Advisory opinions on its interpretation of the Framework Convention. The Court itself, in its opinion, permitted such a possibility.

Another important measure is to encourage the Advisory Committee to consider thematic issues and to comment on them. Both measures, while obviously being far from introducing a real procedure of

individual complaints, would nevertheless facilitate uniform interpretation of the Framework Convention's provisions, and would make consideration of concrete situations and cases more effective.

Another feasible task is to achieve better co-operation and synergy between different COE Bodies dealing with the issues relevant to the protection of minorities. Because of the central role of the Framework Convention in the system of minority protection developed by the COE, any kind of competition is clearly inappropriate.

The task is not an easy one, because the minority protection is a multi-faceted and complex problem. In particular, in the Parliamentary Assembly, at least five different committees deal with various aspects of minority protection¹. The problem

1. These five committees are: The Committee on Legal Affairs and Human Rights; The Committee of Political Affairs; The Committee on Culture, Education and Science; The Committee on

problem is even more urgent in respect of co-ordination of activities of several bodies beyond the Parliamentary Assembly. It is extremely essential to further develop complementarity between the Framework Convention and the European Charter for Regional or Minority Languages, and also between the Advisory Committee and the Charter's Committee of Experts. However, it is necessary and of course essential to develop uniform understanding of minority rights as a genuine part of non-discrimination agenda. It must be noted that the role the Advisory Committee could be institutionalized in the monitoring procedures carried out by the Assembly and the Committee of ministers. This would allow also certain involvement of the Advisory Committee in the States which have not yet ratified the

Framework Convention. At the end and finally, we can say that better co-operation and synergy the COE and other European institutions and organs should be promoted.

Co-ordination with the OSCE¹ is really complicated and, to some extent, vague. First of all because of different priorities in minority protection set by the two institutions. For several years, the OSCE High Commissioner on National Minorities (called as "HCNM") was considered the most effective mechanism for handling minority related disputes, and this definitely

2. Organization for Security and Co-operation of Europe. The OSCE is the world's largest regional security organization with 56 States from Europe, Central Asia and North America. It offers a forum for political negotiations and decision-making in the fields of early warning, conflict prevention, crisis management and post-conflict rehabilitation, and puts the political will of its participating States into practice through its unique network of field missions. The OSCE has a comprehensive approach to security that encompasses politico-military, economic and environmental, and human aspects. It therefore addresses a wide range of security-related concerns, including arms control, confidence- and security-building measures, human rights, national minorities, democratization, policing strategies, counter-terrorism and economic and environmental activities. For more information see: www.osce.org.

Migration, Refugee and Population and the Monitoring Committee.

was the case. However, the mandate of the HCNM allows intervention not when minority rights are violated, but only when violation of minority rights can trigger violent conflicts. However, this strategy seems that HCNM rarely if ever refers to excellent recommendations¹ elaborated under his office's auspices. Apparently, today the HCNM has different priorities and different tasks formulated by the OSCE. All the more reason for the Council of Europe to take the lead in ensuring standards of minority protection in Europe. More effective co-operation with the sub-regional organization, such as the Council of the Baltic Sea States², the Central

European Initiative³, or even the Commonwealth of Independent States⁴, is also can be on agenda for achieving better protection of minorities. It must be remained that all these organizations have their own instruments and mechanisms for minority protection and synergy

Copenhagen in 1992 as a response to the geopolitical changes that took place in the Baltic Sea region with the end of the Cold War. Since its founding, the CBSS has contributed to ensuring positive developments within the Baltic Sea region and has served as a driving force for multi-lateral co-operation. More information available at: www.cbss.org.

3. The origin of the Central European Initiative lies in the creation of the Quadrangular which was established by Italy, Austria, Hungary and the Socialist Federal Republic of Yugoslavia (SFRY) in Budapest on 11 November 1989 (two days after the fall of the Berlin Wall). Now the CEI counts eighteen Member States. Initially established to build up regional cooperation and to promote complementary development among four countries, the Initiative developed into the largest forum for regional cooperation among countries of Central, Eastern and South Eastern Europe. Furthermore, the extension of its membership has refocused its priorities in helping the transition countries and assisting them in their preparation process for EU membership. For more information see: www.ceinet.org.

4. Commonwealth of Independent States (CIS) was created in December 1991. In the adopted Declaration the participants of the Commonwealth declared their interaction on the basis of sovereign equality. At present the CIS unites: Azerbaijan, Armenia, Belarus, Georgia, Kazakhstan, Kyrgyzstan, Moldova, Russia, Tajikistan, Turkmenistan, Uzbekistan and Ukraine. For detailed information about its structure and other matters refer to: www.cisstat.com/eng/cis.htm

1. Recommendations that have been given by The Hague, Oslo and Lund Universities. Full texts of these recommendations are available at: www.coe.int/minorities ; www.coe.org and also www.unhcr.org/refworld/docid/3dde546e4.html [accessed 17 November 2011].

2. The Council of the Baltic Sea States (CBSS) is an overall political forum for regional intergovernmental cooperation. The members of the Council are the 11 states of the Baltic Sea region as well as the European Commission. The CBSS was established by the region's Foreign Ministers in

with the COE could enhance and improve their effectiveness. However, increased co-operation with the European Union seems to be a priority. In its Recommendation 1623 (2003) the Parliamentary Assembly recommended that the Committee of Ministers take the necessary measures to continue co-operation with the European Union, with a view to achieving common policies in the field, including the ongoing process of enlargement and the evaluation by the European Commission of measures taken by the candidate countries. Normally, we well aware that the European Union does not have its own system of minority protection but in spite of this formal and systemic gap, respect for and protection of minorities have been included and stipulated in the Copenhagen criteria for enlargement. The question is how the compliance of the candidate

States with this criterion is evaluated. The European Union has neither its own instruments, nor institutions, procedures nor experts to conduct a professional analysis.

In the meantime, the principles of the Framework Convention are not completely irrelevant to European Union legislation. Although minority rights are not directly mentioned in the European Union Charter of Fundamental Rights, the Charter contains a non-discrimination clause. If we admit that minority rights are second generation of non-discrimination legislation, they become relevant. So, denial of minority rights, under certain and special circumstances, may qualify as discrimination prohibited by the Charter. Moreover, the concept of indirect discrimination stipulated by the European Union Race Equality

Directive¹ has a lot in common with the Framework Convention's interpretation of minority rights as a means to achieve full and effective equality. Therefore, forthcoming jurisprudence on the Race Equality Directive might open the door to better coherence with the COE standards of minority protection.

6- Kosovo: The Crucial Situation Before COE.

The very special situation of Kosovo within the COE is considered by this organ as a sensitive case and till the presence of UNMIK² the protection of national minorities in this area always remained as a serious agenda for COE. The co-operation of UNMIK and the COE in this regard

has a legal base³ and in addition to this the COE could obtain appropriate achievements and good progress in spite of shortages and existent challenges. It must be pointed out that the Advisory Committee of the Framework Convention has been issued its second opinion on Kosovo which has been adopted on 5 November 2009 and be published on 31 May 2010 by the COE⁴ and explained the situation of this area in detail. Now, according to this opinion we want to analyze it as below.

Since the adoption of the Advisory Committee's first Opinion in November 2005, efforts have been made to improve the legislative framework by adopting new legislation pertaining to minority

1.European Union Race Equality Directive 2000/43/EC in this regard states: "an apparently neutral provision, criterion or practice which would put persons of a racial or ethnic or ethnic origin at a particular disadvantage compared with other persons, unless that provision, criterion or practice is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary".

2.United Nation Interim Administration Mission in Kosovo.

3Report Submitted By the United Nations Interim Administration Mission in Kosovo pursuant to Article 2.2 Agreement Between UNMIK and COE related to the Framework Convention For the Protection of National Minorities, 02 June 2005, Strasbourg.

4ACFC/OP/II(2009)004, Strasbourg, 31 May 2010.

protection. Steps should nonetheless be taken and financial resources allocated to ensure that the existing legislation is fully and effectively implemented. Moreover, serious shortcomings in access to justice and domestic remedies of persons belonging to minority communities need to be addressed as a matter of priority. Inter-ethnic relations, in particular between persons belonging to the Serbian and Albanian communities, remain tense. Separate education systems¹ and increasingly apparent language barriers aggravate the existing ethnic divisions. Resolute action needs to be taken to improve inter-ethnic dialogue and build trust among persons belonging to all communities, with a particular emphasis on overcoming linguistic divisions and encouraging inter-

ethnic activities among young persons. In spite of some activities implemented to promote inter-ethnic dialogue, including specific action by the police, more efforts need to be made to combat effectively ethnically and religiously motivated crimes. There is also a need to pursue the work on the reconstruction of damaged Serbian Orthodox religious sites. An Integration Strategy for Roma², Ashkali and Egyptians has been devised with a view to improving the situation of these persons in a number of areas. The Strategy needs to be implemented fully and effectively in practice. The fact that no appropriate solution has been found so far for those living in the lead-contaminated camps in Northern Kosovo is a serious source of concern. Notwithstanding projects initiated to facilitate the reintegration

1.Sjur Bergan and Hilligje van't Land, *Speaking across borders: the role of higher education in furthering intercultural dialogue*, ISBN 978-92-871-6941-9, 2010.

2.The Council of Europe: *Protecting the rights of Roma*, Factsheets Roma, COE Publications, 2011.

of returnees, further efforts are needed to ensure adequate conditions for safe and sustainable return. Positive initiatives in the field of minority education have been taken. Particular attention needs to be paid to provide a balanced and pluralistic environment to history teaching. Moreover, opportunities for persons belonging to minority communities to learn the official languages in minority schools should be expanded. There is a need to identify further ways to ensure the effective participation of persons belonging to minority communities in socio-economic life, including in the economic development, the privatization processes and the return of property¹. Their representation in public services should also be improved.

Conclusion

Undoubtedly, everyone acknowledges that COE has a prominent role and contribution into the development and enhancement of minority protection and has taken appropriate measures in this field, that the Framework Convention is the most important and valuable successes that entered into force by 1 February 1998. It must be noted, once more again, that this instrument is the ever legally binding treaty among universal and regional instruments. With its scope, the Framework Convention contain the major and specific rights of minorities and in addition to this, it has considered some supervisory mechanisms to protect their rights. Another important point in this regard is that, for the first time in history, not political statements, not States or minorities propaganda efforts and lobbying, but only professional and impartial legal

1 .Venice Commission, The participation of minorities in public life, COE Publications, ISBN 978-92-871-6940-2, 2011.

analysis conducted by the competent bodies of the COE, gives us an objective evaluation of the respect for minority rights in this or that country.

The other and of course the final point: Accommodating the growing ethno cultural diversity in the European societies is one of the biggest problems and challenges the COE faces nowadays. But what is the main task to overcome this challenge? Certainly, the main task is to facilitate constructive dialogue between the COE competent bodies and all parties concerned, is the only way how to find, in each country, concrete solutions, in compliance with the general principles of minority rights which are an integral part of fundamental human rights.

References

[1] A. W. B. Simpson, (2001). *Human Rights and the End of Empire*, Oxford University Press.

[2] Y. Dinstein and M. Tabory, (1992). *The Protection of Minorities and Human Rights*, Leiden: Martinus Nijhoff.

[3] J. Rehman, (2000). *The Weaknesses in the International Protection of Minority Rights*, The Hague: Kluwer Law International.

[4] P. Thornberry, (1991). *International Law and the Rights of Minorities*, Oxford: Clarendon Press.

[5] F. Capotorti, (1991). *Study on the Rights of Persons Belonging to Ethnic, Religious and Linguistic Minorities*, New York: United Nations.

[6] J. Deschenes, (1985). "Proposal Concerning the Definition of the Term "Minority", E/CN.4/Sub.2/1985/31, 14 May 1985.

[7] J.A. Frowein and R. Bank, (2000) "The Participation of Minorities in Decision-Making Processes". Expert study submitted on request of the Committee of Experts on Issues Relating to the Protection of National Minorities (DH-MIN) of the Council of Europe by the Max-Plank Institute for Comparative Public Law and International Law, Heidelberg. DH-MIN (2000).

- [8] Eide, Asbjorn (1994), *New Approaches to Minority Protection*, London: Minority Rights Group International.
- [9] Alexander H. E. Morawa, (2005). *Mechanisms for the Implementation of Minority Rights*, ISBN 92-871-5499-6.
- [10] Gaetano Pentassuglia, (2002). *Minorities in International Law*, , ISBN : 92-871-4773-6.
- [11] *National Minority Standards - A Compilation of OSCE and Council of Europe Texts*, (2007) ISBN 978-92-871-6220-5.
- [12] Oxford Commentaries on International Law. The Rights of Minorities. A Commentary on the European Framework Convention for the Protection of National Minorities, edited by Marc Weller (2005), Oxford University Press, ISBN 0-19-927858.
- [13] G.A. Alfredsson, (2000). "A Frame with an incomplete painting, comparison of the Framework Convention for the Protection of National Minorities with International Standards and monitoring procedures", 7 *International Journal on Minority and Group Rights*, pp.291.
- [14] R.Hofmann, (2001). "Protecting the Rights of National Minorities in Europe. First experience with the Council of Europe Framework Convention for the Protection of National Minorities", 44 *German Yearbook of International Law*, 237.
- [15] P.Thronbory, "The Framework Convention on National Minorities: a provisional appraisal and a memory of the Baltic States", (2002) 2 *Baltic Yearbook of International Law*, 127.
- [16] Framework Convention for the Protection of National Minorities- Collected Texts, (6th .edition), ISBN 978-92-871-6725-5 (December 2010).
- [17] Huber, Josef, *Intercultural Competence for all - Preparation for Living in a Heterogeneous World*, ISBN 978-92-871-7356-0, 2012.
- [18] Shaping language rights – Commentary on the European Charter for Regional or minority Languages in light of the Committee of Experts' evaluation (Regional or minority Languages, No.9), COE Publications, ISBN 978-92-871-7216-7, 2012.
- [19] The Council of Europe: Protecting the rights of Roma, Factsheets Roma, COE Publications, 2011.

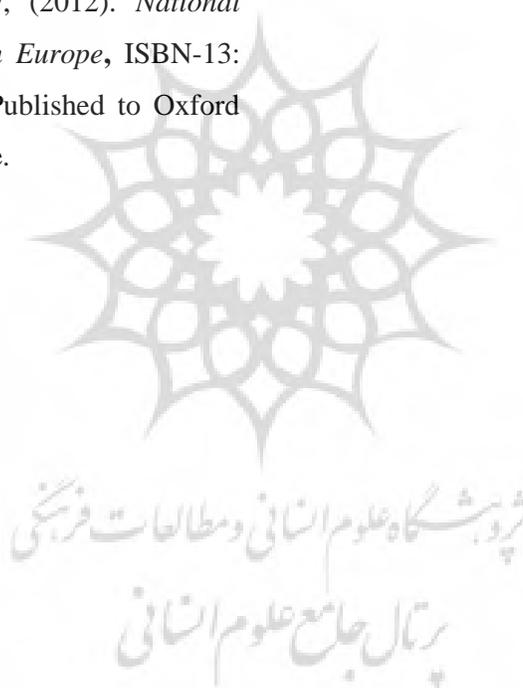
[20] Sjur Bergan and Hilligje van't Land,
*Speaking Across Borders: the Role of
Higher Education in Furthering
Intercultural Dialogue*, ISBN 978-92-
871-6941-9, 2010.

[21] Venice Commission, (2011) *The
Participation of Minorities in Public
Life*, COE Publications, ISBN 978-92-
871-6940-2.

[22] Tove H. Malloy, (2012). *National
Minority Rights in Europe*, ISBN-13:
9780199274437, Published to Oxford
Scholarship Online.

Official Websites:

- 1- www.coe.int/minorities
- 2- www.ohchr.org
- 3- www.osce.org
- 4- www.ECHR.org/cases
- 5- www.cbss.org
- 6- www.ceinet.org
- 7- www.un.org
- 8- www.bayefsky.com



حفاظت از اقلیت های ملی در شورای اروپا: بررسی تحلیلی

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تاریخ پذیرش: ۱۳۹۳/۰۳/۲۴

تاریخ دریافت: ۱۳۹۲/۰۸/۰۴

به گواهی مقدمه کنوانسیون کادر ۱۹۹۸ ناظر به حمایت از حقوق اقلیتها، حقوق دسته اخیر جزء حقوق بنیادین بشری محسوب می شود. این سند که در صدد حمایت از حقوق اقلیتها در جوامع مختلف به شمار می رود هم در سطح جهانی و هم در سطح منطقه ای یک معاهده بین المللی لازم الاجرا به شمار می آید. بعد از گذشت ۱۳ سال از عمر معاهده، طبیعی است که تدوین کنندگان آن یافته ها و چالش های اساسی اجرای کنوانسیون را مورد بررسی قرار دهند. با توجه به مفاد این پیمان، در این نوشتار در صدد بیان دیدگاه مقایسه ای حمایت از اقلیتها، محتوای کنوانسیون، صاحبان حق و رویه های موجود توأم با چالش های پیش رو مورد بررسی و تجزیه و تحلیل قرار خواهد گرفت.

واژگان کلیدی: اقلیت های ملی، شورای اروپا، کمیته مشورتی، کنوانسیون سازمان، سازمان امنیت و همکاری.

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