Filling the Frame

5th anniversary of the entry into force of the
Framework Convention for the Protection of National Minorities
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The Framework Convention for the Protection of National Minorities within the context of the Council of Europe

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1. Historical significance of the Framework Convention

Since its inception, the Council of Europe has seized the leading role in the development of minority rights standards. The first text in the field was adopted by PACE back in 1957 (Resolution 136 (1957) "Position of national minorities in Europe"). The Assembly adopted resolutions on the issue also in 1958, 1959, 1961.

However, the work of the Council of Europe was of limited effectiveness. The main reason for this was the best formulated by John Packer, who wrote in mid-90s about the main peculiarity of the minority rights concept: neither content nor the holder of these rights were clearly defined. This is why the approach to minority rights remained largely in line with the old concept of minority rights as special privileges which a state might bestow, by its own choice, to some groups – as a rule, under the pressure of a neighbouring kin state. This selective approach, where minority rights were considered, as a matter of fact, beyond the universal fundamental human rights, was characteristic for all old systems of minority protection, including "minority treaties" under the League of Nations. Also within the Council of Europe, attitudes towards different minority situations were crucially dependent on the concrete political context, political strength of the states involved, and effectiveness of lobbying and political bargaining. Lofty rhetoric of minority rights was rarely followed by consistent and legally uniform conclusions and action on particular situations.

Adoption, in the first half of the 90s, of two instruments – the Framework Convention for the Protection of National Minorities and the European Charter for Regional and Minority Languages – marked a beginning of the new stage in minority protection. Entry into force of the Framework Convention, the first ever legally binding instrument on minority rights, has radically changed the situation. Both the adopted text and, particularly, the outstanding work of the Advisory Committee substantially clarified the ever evolving content of minority rights, and – to some extent – also gave, although indirectly, the answer to the question of the right-holder.

2. The content of minority rights

From the practitioner's point of view, the content of minority rights, as enshrined in the Framework Convention, can be briefly summarized as follows.

2.1. Minority rights are ***integral part of fundamental human rights***, and not special privileges which a state might bestow to some groups by its own choice. As such, minority rights must be implemented without any discrimination – that is unjustified and arbitrary distinction.

2.2. Minority rights are understood as ***individual rights*** which, however, may often be enjoyed in community with other individuals. Minority rights are not, in nature, group rights.

2.3. The concept of minority rights is complementary to the fundamental principle of non-discrimination. One could define minority rights as a ***second generation – or second level - of non-discrimination legislation***. Formally equal treatment is

sufficient to ensure equality only in equal situations. The main goal, as formulated by the Framework Convention, is ***full and effective equality***. 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 pretext for non-recognition of minorities and for denial of minority rights.

2.4. The Framework Convention is a legal treaty, not a political declaration. In the meantime, it is ***"a document of principles"***: it offers only basic principles of minority protection that may be implemented differently in different states, according to their concrete situations. Compliance of these concrete methods with the letter and spirit of the 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.

2.5. The key aspect of modern understanding of minority rights is the ***principle of participation of minorities in decision-making*** on the issues directly affecting them. Numerous conditions included into the provisions of the Framework Convention must be interpreted *"in good faith"*: not as pretexts for declining minorities' claims but as an obligation to take into account minorities' views. 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 treated differently or not. It is of crucial importance to ensure that this choice is indeed free, not made under government's pressure, and that indeed no disadvantage results from this choice.

3. Minority Rights: Who is the Right-Holder?

Since minority rights are recognized as integral part of fundamental human rights, they must be implemented without any discrimination. In this view, the approach which was widespread within the Council of Europe until very recently – i.e. distinction between, on the one hand, "traditional" or "historical" minorities, and "migrant minorities", on the other – needs to be seriously re-considered.

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 state parties made declarations upon ratification which define particular groups to enjoy protection under the Convention. These declarations contain either definitions, flowing from the proposal included into the PACE Recommendation 1201 (1993), or the lists of concrete groups residing within the territory of a state party to the Convention, or, in some cases, simply deny the existence of national minorities, in the sense of the Convention, within their territories at all.

Three major problems related to the scope of application of the Framework Convention could be singled out.

3.1. First, coherence with the UN mechanism of minority protection. All state parties to the Framework Convention are, in the meantime, state parties to the International Covenant on Civil and Political Rights (ICCPR), and as such are bound by its Art.27 on the rights of minorities. The scope of applicability of this provision is determined by the UN Human Rights Committee's General Comment No.23 (1994). This

comment, as is well known, explicitly denies the possibility to introduce any restrictions on enjoyment of the rights enshrined in Art.27 of ICCPR. It would be rather unfortunate if the European standards of minority protection appear to be more restrictive in nature than the universal standards - the more so that, as mentioned above, Art.27 of ICCPR is anyway binding for all state parties to the Framework Convention.

3.2. The second problem is of rather legalistic nature. As mentioned above, ehe Framework Convention considers minority rights as individual rights. In the meantime, the definition included in the PACE 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, to say the least. 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 example, more than 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 WW2. In this and 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 the Recommendation 1201's definition, solely because other members of the same group arrived to the country later?

3.3. Probably the most important problem 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 criteria is, indeed, explicitly excluded from the list of prohibited grounds for distinction in a number of international non-discrimination instruments (see e.g. Art.1 paragraph 2 of the International Convention on the Elimination of All Forms of Racial Discrimination). Any additional, besides citizenship, 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 A.Eide in his working paper prepared for the UN Working Group on Minorities. A.Eide examines the minority rights provisions of the UN Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities of 1992 on the article-by-article basis, with the aim to analyse where limitation of minority rights merely to citizens would be discriminatory. Obviously, most of the provisions of the Framework Convention should also apply to all persons belonging to minorities, simply because they in fact transpose fundamental principles of equality, freedom of expression, freedom of association, etc to specific situations.

The experience of the Advisory Committee's work makes us conclude the following. The states, indeed, 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 PACE illustrates the same way of thinking. Recommendation 1492 (2001) still reiterated its position in respect of the definition of a minority proposed by the Recommendation 1201 (1993). However, the latest Recommendation 1623 (2003) does not any longer refer to the Recommendation 1201 (1993) and the necessity to adopt the definition.

4. Development of minority protection within the Council of Europe: main problems and tasks

4.1. One of the major tasks on the agenda of the Council Europe is to make the Framework Convention ***really universal in Europe and legally 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 Council of Europe have not even signed the Convention so far.

In a number of recommendations, the PACE urged all member states to swiftly sign and/or ratify the Framework Convention, without reservations and declarations. In its Recommendation 1492 (2001), the PACE did not hesitate to ask the states which have not signed the Convention, notably France and Turkey, 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 PACE went further and suggested certain practical measures to encourage member states to ratify the Convention without delay. In particular, PACE recommended to the Committee of Ministers to consider holding of *tours de table* on signature and ratification of the Framework Convention – similarly to efforts made to encourage early ratification of the Social Charter and the Revised Social Charter. Moreover, the PACE decided that persistent refusal to sign or ratify the Framework Convention, or to implement its standards, should be the subject of particular attention in the monitoring procedures of the Council of Europe.

It remains to be seen whether the Committee of Ministers will support the efforts of the PACE to elevate the status of the Framework Convention within the "hierarchy" of the Council of Europe instruments, and to actively promote its ratification by all 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 PACE more than once called upon state parties to drop reservations and restrictive declarations, none of them has been revoked so far. In the meantime, the view of the PACE in respect of reservation which accompanied signature of the Framework Convention by Belgium deserves attention. In its Resolution 1301 (2002), the PACE expressed its view that this reservation, if upheld upon ratification, would be considered as a violation of the Vienna Conventions on the Law of Treaties which do not allow state parties to enter reservations which defeat purpose and object of the Convention.

Complementing the ongoing dialogue between the Advisory Committee and the state parties with the legal procedure aiming at more thorough analysis of the compliance of the reservations and declarations entered by state 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 – e.g. Latvia - are discussing possible substantial reservations to be made upon anticipated ratification.

An ultimate ambitious goal cold be defined as follows: not only ratification, but also fair implementation of the Framework Convention must become a necessary precondition for membership in the Council of Europe, as is the case today with the European Convention of Human Rights and its 6th Protocol.

4.2. The current monitoring procedure of the Framework Convention is legal in nature, but not judicial. Opinions of the Advisory Committee are based on diligent and careful legal analysis, however, they are not, as such, binding for the state parties. Political backing given to these opinions by the Committee of Ministers remains their main strength.

Ideally, we should strive ***to make the rights enshrined in the Framework Convention justiciable***, 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.

Realistically speaking, it will not be an easy task in a foreseeable future. Although the European Court of Human Rights does have some relevant jurisprudence, besides commonly quoted "Belgian Linguistic Case" of 1968, 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 Art.14 of the ECHR, the Court has very limited opportunities to invoke minority rights standards. Some judgements, in particular on cases of Sidiropoulos v. Greece (1998) or Podkolzina v. Latvia (2002), substantially contributed into interpretation of some minority rights. In the meantime, some other judgements, such as Chapman v.UK (2001) or Gorzelik v. Poland (2002), caused certain dissatisfaction among the defenders of minority rights.

The situation will probably change after the Protocol No.12 to the ECHR has entered into force. Unfortunately, the 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 PACE, in its Recommendation 1623 (2003) reiterated its proposal to confer on the European Court on 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, although without great enthusiasm.

Another important measure, also suggested in the latest PACE Recommendation, is to encourage the Advisory Committee to consider thematic issues and to comment on them.

The 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.

4.3. Another urgent task is to achieve ***better cooperation and synergy between different Council of Europe 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 Council of Europe, any kind of competition is clearly inappropriate.

The task is not an easy one, since indeed minority protection is a multi-faceted problem. In particular, in the PACE, at least five different committees deal with various aspects of minority protection: the Committee on Legal Affairs and Human Rights, the Committee of Political Affairs, the Committee on Culture, Education and Science, the Committee on Migration, Refugees and Population, and – last but not least – the Monitoring committee. Several years ago, a proposal to set up a special sub-committee on national minorities was rejected by the Assembly, exactly because of the fear that such a sub-committee would deprive a number of other committees of the opportunity to handle a number of essential issues within their competence.

The problem is even more urgent in respect of coordination of activities of several bodies beyond the PACE. It is extremely essential to further develop complementarity between the Framework Convention and the European Charter for Regional and Minority Languages, and between the Advisory Committee and the Charter's Committee of Experts (I will not dwell on this issue, since we will have a special relevant presentation today).

I already mentioned the anticipated enhancement of both approaches and procedures as soon as the Protocol No.12 to the ECHR takes effect. However, to make it the case, it is essential to develop uniform understanding of minority rights as a genuine part of non-discrimination agenda.

The current cooperation between the Advisory Committee and the European Commission against Racism and Intolerance (ECRI) seems insufficient and should be strengthened.

The Specialist group on Roma and other bodies dealing specifically with Roma issues could also cooperate more closely with the Advisory Committee. Particularistic approach to the problems of Roma outside of the general context of minority protection can hardly be effective (one could recall recent decision of the PACE to reject a proposal to elaborate a special convention on the rights of the Roma, instead, in its Recommendation 1623 (2003), PACE called on the states parties to pay

particular attention to the possibility for the most vulnerable Roma minorities to fully benefit from the protection envisaged in the Framework Convention).

Finally, the role of the Advisory Committee could be institutionalized in the monitoring procedures carried our by the PACE and the Committee of Ministers. This would allow, *inter alia*, also certain involvement of the Advisory Committee in the states which have not yet ratified the Framework Convention.

4.4. Finally, better ***synergy between the Council of Europe and other European institutions*** should be promoted.

Coordination with the OSCE is really complicated – 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 (HCNM) was considered the most effective mechanism for handling minority related disputes, and this definitely was the case. However, the mandate of the HCNM allows intervention not when minority rights are violated, but only when violations of minority rights can, in the Commissioner's view, trigger violent conflicts.

Despite this, in late 90s, the former Commissioner van der Stoel increasingly resorted to legal arguments in his dialogue with the OSCE member states. However, this strategy seems to be already the past nowadays. Moreover, it seems that HCNM, in his dialogue with the states, rarely if ever refers to excellent Recommendations (The Hague, Oslo and Lund ones) elaborated under his office's auspices. Apparently, today the HCNM has different priorities and different tasks formulated by the OSCE. The more so the Council of Europe must take the lead in ensuring standards of minority protection in Europe.

More effective cooperation with the sub-regional organizations, such as the Council of the Baltic Sea States, the Central European Initiative, or even the Commonwealth of Independent States, is also on the agenda. All these organizations have their own instruments and/or mechanisms for minority protection, and synergy with the Council of Europe could enhance their effectiveness.

However, increased cooperation with the European Union seems to be a priority. In its Recommendation 1623 (2003), PACE 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.

The European Union does not have its own system of minority protection. However, "respect for and protection of minorities" have been included into the Copenhagen criteria for enlargement. The question is how the compliance of the candidate states with this criterion is evaluated. The EU has neither own instruments, nor institutions, procedures and experts to conduct a professional analysis.

Two answers to parliamentary questions related to interpretation of the Copenhagen criteria of minority protection, given by two members of the European Commission, well illustrate the situation. In May 2001, Commissioner Reding wrote that "In assessing progress made by the candidate countries with regard to this criterion, the Commission devotes particular attention to the respect for, and the implementation of, the various principles laid down in the Council of Europe Framework Convention for the Protection of National Minorities". In March 2002, Commissioner Verheugen, although also referring to the Framework Convention, stated that all accession states met the criterion in question, despite Latvia had not even ratified the Framework Convention.

One should wonder how the European Commission could arrive at this conclusion while the genuine monitoring procedure of implementation of the Convention could not even begin. Although the European Commission in its regular reports has occasionally drawn upon the Advisory Committee's opinions, the evaluation is often degenerated into pure political bargaining. This undoubtedly undermines the whole mechanism of the Framework Convention and diminishes its significance, thus paying lip service to minority protection in Europe. The Council of Europe might play much more important role in this process, the more so that the both organizations have experience of effective cooperation in implementation of pertinent projects in recent past.

In the meantime, principles of the Framework Convention are not completely irrelevant to the EU legislation. Although minority rights are not directly mentioned in the EU Charter of Fundamental Rights, the Charter contains a non-discrimination clause. If we admit that minority rights are, in nature, second generation of non-discrimination legislation, they become relevant: denial of minority rights, under certain circumstances, may qualify as discrimination prohibited by the Charter.

Moreover, the concept of indirect discrimination stipulated by the EU Race Equality Directive 2000/43/EC ("an apparently neutral provision, criterion or practice [which] would put persons of a racial 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") 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 Council of Europe standards of minority protection.

5. Conclusions

I believe we have good reasons to be proud of the Council of Europe's contribution into the development of minority protection. For the first time in history, not political statements, not states' or minorities' propaganda efforts and lobbying, but only professional and impartial legal analysis conducted by the competent bodies of the Council of Europe, gives us an objective evaluation of the respect for minority rights in this or that country.

Accommodation of growing ethnocultural diversity in the European societies is one of the biggest challenges the Council of Europe faces nowadays. Our main task is to facilitate constructive dialogue between the Council of Europe competent bodies and all parties concerned, both governments and minorities. This dialogue, based on mutual respect, tolerance, co-operation, and effective participation of the minorities 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.