MODERN NATION-STATE AND EUROPEAN STANDARDS OF MINORITY RIGHTS

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I. Evolution of the concepts of nation and identity

The concept of a nation-state still remains a cornerstone of the modern world order. However, they both undergo gradual but steady transformation. Growing economic co-operation and integration, globalisation, increasing migration - these are only some of the general trends that contribute to the inevitable growth of cultural diversity, particularly in Europe. The role of the traditional actors - states, IGOs, private entities - permanently changes in modern society. As a result, certain concepts and notions need to be re-considered.

I do not claim to offer any academic analysis of these processes, I shall rather consider them from a practitioner's point of view.

The Council of Europe has played the leading role in the development of minority rights standards, and these standards offer a particular legal framework for handling ethno-cultural diversity.

The permanent difficulty that one has to face when dealing with this issue is the lack of uniform interpretation of basic notions. The concept of a nation is probably the most salient example. Some states (Spain, *inter alia)* define themselves as comprising different nations within a single state, thus interpreting a nation as, first and foremost, a cultural, ethnic and linguistic entity. On the other hand, the name of "United Nations" obviously implies an organisation of sovereign states, regardless of their cultural and ethnic homogeneity - thus, a nation is interpreted as being fully synonymous with a state. In June 2003, PACE decided to prepare a report on the use of the concepts of "nation", "people", and "national minority" in constitutional and legislative texts to clarify the situation. However, achieving a uniform interpretation of these concepts looks too ambitious and unrealistic at the moment, and is not on the agenda so far.

In turn, identity is a very broad concept, apparently related to the concept of nation. In what way is it related? That depends on which definition is chosen for the nation.

The concept of ethno-nation, at one time equivalent to political nation, emerged during the nation-building period in Europe in 17th-18th centuries. This concept, indeed, implied a certain degree of religious, linguistic, and cultural unity, necessary for a nation to become a source of sovereign power instead of a monarch ("from peasants to Frenchmen", "we have made Italy - now we'll make Italians", etc).

However, nowadays states are increasingly losing their "ethnic" nature. In the past in Europe, multicultural states were, as a rule, empires that emerged when strong "ethno-nations" conquered weaker "nations" and annexed "their" territories (or descendants of these empires). Accommodation of cultural diversity without losing territorial integrity of these states could be achieved through territorial arrangements and autonomy. In other words, solutions that more or less met the principles of democracy were sought at the group level. This is where the concept of the "different nations within one state" is rooted. This is why minority rights were often identified as group rights.

Modern trends are fundamentally different. Diversity "descends" to a personal level, and so must do the methods of its accommodation based on multiculturalism. A state consists not of several clearly designated cultural or linguistic communities, but of individuals having a different identity. A nation can no longer be considered as a collection of groups with different cultural characteristics, and seeking a balance between groups (usually with one dominant one) is not sufficient to accommodate diversity. Moreover, each local community is becoming diverse. Even at the level of individuals, cultural diversity emerges: multilingualism and other sorts of multiple identities are becoming widespread.

This is the general context in which the modern concept of minority rights has been developing.

II. The idea of minority rights

The problem of the rights of national minorities was one of the central issues dealt with by the Council of Europe from its inception. However, particular attention has been paid to this issue since the late 80s, when, after the collapse of the Communist system, ethnic conflicts became the main threat to peace and stability in many regions of Central and Eastern Europe.

In the first half of the 90s, the adoption of two documents - the Framework Convention for the Protection of National Minorities and the European Charter for Regional and Minority Languages - marked the beginning of a new stage in the development of minority protection. The significance of these basic instruments can hardly be overestimated. In particular, the Framework Convention has become the first ever legally binding instrument on minority rights.

Somewhat paradoxically, the idea of minority protection appeared in early 17th century - i.e. several centuries earlier than the very concept of human rights. However, the rights of then religious minorities were considered as a sort of special privilege granted, as a rule, as a result of pressure by a more powerful neighbouring state aimed at advocating the interests of certain groups dear to these

states. As a matter of fact, protection of minorities was determined by the relative military strength of neighbouring states. To a certain degree, this was true even for the system of minority protection under the League of Nations. As a matter of fact, this approach was preserved until the establishment of the UN.

This understanding of minority rights was abused by Hitler, who used the rights of Sudetien-Germans as a pretext to justify his aggression. Thus, the very idea of minority rights was discredited. As a result, no provisions on minority rights were included in the basic human rights instruments adopted after the WW2 under the auspices of the UN.

Slowly and gradually, the new understanding of minority rights was developing. In fact, only the Framework Convention, in its Article 1, clearly declared that "protection of national minorities and of the rights and freedoms of persons belonging to those minorities forms an integral part of the international protection of human rights". This means, *inter alia*, that minority rights can no longer be considered a sort of special privilege bestowed by a state on a certain group as manifestation of this state's "good will". Minority rights, as an integral part of human rights, are universal, and as such must be ensured without any discrimination.

The Framework Convention defined an ultimate goal of minority protection: achieving full and effective equality between persons belonging to a minority and those belonging to the majority. This clause opened the door to the elaboration of synergy between the concept of minority rights and the principle of non-discrimination, and for the first time in history showed that these two sets of instruments were not contradictory but in fact complementary.

The principle of non-discrimination, the cornerstone of the modern system of human rights protection, demands equal treatment. This very principle is sometimes used to deny recognition of minorities (like e.g. in French "republican model"). However, equal treatment ensures equality only in equal situations. Sometimes it is precisely different treatment that is necessary to ensure full and effective equality. The Framework Convention and the modern concept of human rights in general deal exactly with situations of this kind.

Being "a document of principles", the Framework Convention cannot offer clear and detailed prescriptions on how to implement this or that principle enshrined in its provisions. Moreover, it is highly doubtful that, given the extreme diversity of the minority situations in Europe, the imposition of such prescriptions would be productive. The result - i.e. full and effective equality between the persons belonging to a minority and those belonging to the majority - can be achieved through different models and methods. It is a task of the monitoring bodies to examine whether these models and methods, indeed, correspond to the letter and the spirit of the Framework Convention.

Effective monitoring procedure is based on a legal rather than a political approach but, in the meantime, with the political support of the Committee of Ministers, will become the fastest way to arrive at a universal interpretation of the Framework Convention's provisions - while keeping the wide range of possible methods and procedures of implementation corresponding to the particular situations in different Council of Europe member states.

III. The right to participation: the key to other rights

One area where the universal interpretation of the Framework Convention's provisions must be pursued particularly vigorously is the principle of participation of minorities in decision-making on the issues directly affecting them. Indeed, the ostensibly weak wording of the Convention is very much due to numerous conditions and reservations included in its provisions: "...if those persons so request and where such a request corresponds to a real need..." (Article 10 para. 2), "...when there is a sufficient demand..." (Article 11 para. 3), "...if there is sufficient demand..." (Article 14 para. 2), etc. According to Article 2 of the Convention, these conditions must be applied "in good faith", i.e. not as a pretext for denying minorities' claims but as a necessity to take into account minorities' demands.

Unlike other human rights where the wish of the right-holder is not of crucial importance, and their application must be indeed uniform, minority rights, as a rale, imply a response to practical demand in this or that concrete situation. For example, there is no need to ask a detainee whether he/she does not mind being tortured, or whether he/she insists on having a fair trial - torture is prohibited under any circumstances, and fair trial must be ensured for everybody. On the other hand, according to Article 3 para. 1 of the Framework Convention, every person belonging to a national minority has "the right freely to choose to be treated or not to be treated as such". Thus, all rights envisaged in the Framework Convention should not be automatically imposed - e.g. the persons belonging to minority must have the right to study in minority language only if they really wish so, otherwise this treatment may qualify as segregation.

It is of crucial importance to ensure that the choice is indeed free, not made under any kind of pressure on the part of government, and that indeed "no disadvantage" results "from this choice" (Article 3 para. **1).**

IV. Minority rights: who is the right-holder?

The scope of application of the Framework Convention remains probably the most controversial issue related to the implementation of this instrument. The Convention itself does not determine the right-holder of the protection envisaged by the Convention, and basically each state party may itself determine which groups are covered by the Convention.

A number of State Parties to the Convention made, upon ratification, declarations stipulating, directly or descriptively, those minorities that would enjoy protection under the Framework Convention. In particular, several countries (Austria, Estonia, Poland, and Switzerland) declared that those persons who are nationals of the corresponding state, and belong to the "traditional" groups which have longstanding ties with the country, should be considered national minorities in the sense of the Framework Convention - basically, in line with the definition included in the PACE Recommendation 1201.

Some other State Parties adopted exhaustive lists of those groups whose members enjoy protection under the Framework Convention: Denmark ("the Framework Convention shall apply to the German minority in South Jutland of the Kingdom of Denmark"); Germany ("National Minorities in the Federal Republic of Germany are the Danes of German citizenship and the members of the Serbian people with German citizenship. The Framework Convention will also be applied to members of the ethnic groups traditionally resident in Germany, the Frisians of German citizenship and the Sinti and Roma of German citizenship"); Slovenia ("the Government of the Republic of Slovenia... declares that these are the autochthonous Italian and Hungarian National Minorities... The provisions of the Framework Convention shall apply also to the members of the Roma community, who live in the Republic of Slovenia"); and Sweden ("The national minorities in Sweden are Sami, Swedish Finns, Tornedalers, Roma and Jews").

Finally, Liechtenstein, Luxembourg, and Malta declared that "no national minorities in the sense of the Framework Convention exist" on their territory.

In its Recommendation 1492, the Assembly asked Member States "to sign and/or ratify as soon as possible and without reservations and declarations the Framework Convention for the Protection of National Minorities, and ask those which have already ratified it to implement it and to revoke their reservations and declarations". However, no declarations have been revoked so far by any State Party.

In the course of the monitoring and evaluation procedures, the Advisory Committee (AC) and the Committee of Ministers have in a number of cases recommended that the States develop a more generous and inclusive approach when deciding about the scope of application of the Framework Convention.

For example, in its Resolution on implementation of the Framework Convention by Denmark, the Committee of Ministers concluded, "the personal scope of application of the Framework Convention merits further consideration by the Government of Denmark with those concerned". The Advisory Committee (AC) in its opinion elaborated the same point with more details: "...the Advisory Committee considers that the personal scope of application of the Framework Convention in Denmark, limited to the German minority in Southern Jutland, has not been satisfactorily addressed. In particular, it notes that persons belonging to groups with long historic ties to Denmark such as Far-Oese and Greenlanders appear to have been excluded *a priori* from protection under the Framework Convention. Similarly, despite the historic presence of Roma in Denmark, they appear to have been *a priori* excluded from the protection of the Convention. This

approach is not compatible with the Framework Convention. Furthermore, the Advisory Committee considers a limited territorial application, leading to the *a priori* exclusion of persons no longer residing in the traditional area of settlement, not to be compatible with the Framework Convention. The Advisory Committee therefore considers that the Danish Government should, in consultation with those concerned, examine the application of the Framework Convention".

In its opinion on Estonia, the AC took a similar attitude towards the declaration made by this State: "The Advisory Committee considers that, bearing in mind the prevailing situation of minorities in Estonia, the above declaration is restrictive in nature. In particular, the citizenship requirement does not appear suited for the existing situation in Estonia, where a substantial proportion of persons belonging to minorities are persons who arrived in Estonia prior to the re-establishment of independence in 1991 and who do not at present have the citizenship of Estonia ... The Advisory Committee notes that in its dialogue with the Government on the implementation of the Framework Convention, the Government agreed to examine also the protection of persons not covered by the said declaration, including non-citizens ... With a view to the foregoing, the Advisory Committee is of the opinion that Estonia should re-examine its approach reflected in the declaration in consultation with those concerned and consider the inclusion of additional persons belonging to minorities, in particular non-citizens, in the application of the Framework Convention".

Similarly, in its opinion on Germany, the AC stated: "The Advisory Committee is of the opinion that it would be possible to consider the inclusion of persons belonging to other groups, including citizens and non-citizens as appropriate, in the application of the Framework Convention on an article-by-article basis. It takes the view that the German authorities should consider this issue in consultation with those concerned at some appropriate time in the future". The reference to article-by-article approach is included in a number of other AC opinions.

Moreover, in some cases the AC and the Committee of Ministers pointed to insufficient implementation of the Framework Convention in respect of some groups even when these groups were not explicitly excluded from the Convention's protection. Thus, although Finland ratified the Convention without declarations, the Committee of Ministers in its Resolution stated: "Further consideration should also be given to the implementation of the Framework Convention in respect of the Russian-speaking population, in particular in the fields of education and media".

Thus, the analysis of the ongoing monitoring procedure clearly reveals that both the AC and the Committee of Ministers do not consider that State Parties have an unconditional right to decide which groups within their territories qualify as national minorities in the sense of the Framework Convention. The AC's attitude is clearly reflected in the following points included in a number of issued opinions *(inter alia,* the opinions on Germany and Estonia quoted above): "The Advisory Committee underlines that in the absence of a definition in the Framework Convention itself, the Parties must examine the personal scope of application to be given to the Framework Convention within their country... Whereas the Advisory Committee notes on the one hand that Parties have a margin of appreciation in this

respect in order to take the specific circumstances prevailing in their country into account, it notes on the other hand that this must be exercised in accordance with general principles of international law and the fundamental principles set out in Article 3. In particular, it stresses that the implementation of the Framework Convention should not be a source of arbitrary or unjustified distinctions. For this reason the Advisory Committee considers that it is part of its duty to examine the personal scope given to the implementation of the Framework Convention in order to verify that no arbitrary or unjustified distinctions have been made. Furthermore, it considers that it must verify the proper application of the fundamental principles set out in Article 3".

In this view, it is essential that the text of the Framework Convention itself does not contain such concepts as "traditional", "historical", or "new" minorities. However, some provisions of the Convention contain wording like "in areas inhabited by persons belonging to national minorities traditionally or in substantial numbers..." (e.g. Article 10 para. 2), i.e. mention these two prerequisites as alternatives. The only exception is Article 11 para. 3, where "traditionally" is used in addition to "substantial" ("In areas traditionally inhabited by substantial numbers of persons belonging to a national minority..."). However, in this case this condition is justified, since this paragraph speaks about displaying "traditional local names" and other topographical information in the minority language.

Article 3 of the Framework Convention states: "Every person belonging to a national minority shall have the right freely to choose to be treated or not to be treated as such, and no disadvantage shall result from this choice or from the exercise of the rights which are connected to that choice". However, it remains unclear what individuals are considered as belonging to national minorities, i.e. who is entitled to this choice. The Explanatory Report only says, "this para, does not imply a right for an individual to choose arbitrarily to belong to any national minority. The individual's subjective choice is inseparably linked to objective criteria relevant to the person's identity". In the meantime, nothing is said about the nature of these "objective criteria", and about the procedure of and the authority over verification of compliance with these criteria.

V. Minority rights and (il)legitimate restrictions

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

First, its 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 Article 27: "In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language". The scope of applicability of this provision is determined by the UN Human Rights Committee's General Comment No. 23 of 8 April 1994. This comment explicitly denies the possibility to introduce any restrictions on enjoyment of the rights enshrined in Article 27 of ICCPR: "The terms used in Article 27 indicate that the persons

designed to be protected are those who belong to a group and who share a common culture, a religion and/or a language. Those terms also indicate that the individuals designed to be protected do not need to be citizens of the State Party. In this regard, the obligations deriving from Article 2.1 are also relevant, since a State party is required under that article to ensure that the rights protected under the Covenant are available to all individuals within its territory and subject to its jurisdiction, except rights which are expressly made to apply to citizens, for example, political rights under Article 25. A State party may not, therefore, restrict the rights under Article 27 to its citizens alone... Just as they do not need to be nationals or citizens, they do not need to be permanent residents. Thus, migrant workers or even visitors in a State party constituting such minorities are entitled not to be denied the exercise of those rights... The existence of an ethnic, religious or linguistic minority in a given State party does not depend upon a decision by that State party but requires to be established by objective criteria".

It would be rather unfortunate if the European standards of minority protection appear to be more restrictive in nature than the universal standards, even more so when, as mentioned above, Article 27 of ICCPR is in any event binding on all State Parties to the Framework Convention.

The second problem is of a rather legalistic nature. The Framework Convention considers minority rights as individual rights which may be enjoyed in community with other individuals belonging to the same group. In the meantime, the definition included in the Assembly Recommendation 1201, is worded in terms of group rights - i.e. a minority is defined as "a group of persons in a State". This makes practical application of this definition problematic. In practice often a part of the 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 has 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, which means that their ancestors lived in Latvia for centuries. Almost 60% of ethnic Russians arrived in Latvia after the Second World War. 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 under the Recommendation 1201's definition, solely on the basis that other members of the same group arrived to the country later?

It is not at all evident that attempts to introduce group rights into international law will be productive for the better protection of minorities. It should be mentioned that the absence of recognised group rights nowadays does not prevent international institutions, notably the European Court of Human Rights, from dealing with different aspects of the problem. The concept of minority rights as individual rights enshrined in the Framework Convention seems to have proven its effectiveness.

Finally, the third, and probably the most important problem, is related to universal nature of fundamental human rights and the principle of non-discrimination. Minority rights, as an integral part of fundamental human rights, must be implemented without any discrimination. In this view, any criteria beyond the citizenship requirement might look dubious. While citizenship is, indeed, explicitly excluded from the list of prohibited grounds for distinction in a number of international non-discrimination instruments (see e.g. Article 1 para. 2 of the International Convention on the Elimination of All Forms of Racial Discrimination), any additional, apart from citizenship, preconditions for enjoyment of minority rights give rise to legitimate concerns about a possible violation of the principle of equality of citizens.

With regard to the citizenship criteria, an effective approach was suggested by Asbjorn Eide, Chairman of the UN Working Group on Minorities and one of the world's leading experts in the field, 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 of analysing where limitation of minority rights of citizens would be discriminatory: "...Many, if not most, human rights apply to everyone, not only citizens, but there are some important rights which can be claimed only by citizens... With regard to minority rights it is difficult to make a general conclusion; a detailed analysis is required".

As a matter of fact, PACE decided to pursue a similar strategy in its Recommendation 1492: "The Assembly recognises that immigrant populations whose members are citizens of the state in which they reside constitute special categories of minorities, and recommends that a specific Council of Europe instrument should be applied to them".

Apparently, one will ultimately have to admit that enjoyment of minority rights of only a political nature (such as participation in political life, voting in national elections, etc.) might be restricted for non-citizens. As to other fundamental rights, they should be stipulated according to the Framework Convention, in accordance with the principle of non-discrimination. In any case, only synergy between various approaches in the field of non-discrimination and preservation of identity can ensure effective response to the major modern challenge of accommodation of growing ethno-cultural diversity.

VI. Conclusions

To sum up the modern approach to minority rights and its impact on the concept of nation-state:

1. Minority rights are an integral part of fundamental human rights, and as such must be implemented without any discrimination (i.e. unjustified and arbitrary distinction). Minority rights are not special privileges which a state might bestow to some groups by the state's own choice.

2. The concept of minority rights is complementary to the fundamental principle of non-discrimination. It is to be applied in situations where different treatment is needed to ensure full and effective equality. Non-discrimination and equal treatment cannot be used as a pretext for non-recognition of minorities and for denial of minority rights

3. Minority rights are understood as individual rights which may often be enjoyed in community with other individuals. Minority rights are not, in nature, group rights. Accommodation of ethno-cultural diversity through territorial arrangements and autonomy may appear insufficient, multiculturalism must descend to individual level.

4. Major international instruments offer only basic principles of minority protection that may be implemented differently in different states, according to their particularities and in concrete situations. Compliance of these concrete methods with the letter and spirit of the basic instruments is checked through monitoring procedures carried out by specialised expert bodies, and improved by using constant dialogue, consultations with all parties involved, and taking into account good practices.

5. The key aspect of the modern understanding of minority rights is the principle of participation of minorities in decision-making on the issues directly affecting them. Numerous conditions and reservations included in the provisions of the Framework Convention must be interpreted in good faith, i.e. not as a pretext for denying minorities' claims but as a necessity to take into account minorities' demands. As a rule, minority rights imply a response to a real demand in concrete situations. 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 equally, according to the letter of the Convention. It is of crucial importance to ensure that the choice is indeed free, not made under government pressure, and that indeed no disadvantage results from this choice.

6. Although states have a margin of appreciation in respect of determining the persons and groups that will enjoy protection as national minorities within their territories, this right must be exercised in accordance with the general principles of non-discrimination, in consultation with those concerned, and no arbitrary or unjustified distinctions may result from that decision.