OSCE and Minorities : Assessment and Prospects

Warsaw 7 - 8 april 2006

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I would like to make some comments on most interesting Prof. Symonides' presentation from the practitioner's point of view. I believe it does make sense to consider separately the issue of a holder of minority rights, on one hand, and the content of these rights, on the other, although these aspects are of course closely interdependent.

Indeed, historically minority rights emerged as the rights of groups. The very concept was born several centuries earlier than the "general" concept of human rights, with its underlying liberal concept of each individual's dignity as a philosophical source of this legal concept. And even up to the end of the last century, the group rights concept indirectly dominated the entire minority rights discourse.

One example of this approach is offered by the famous PACE Recommendation 1201 (1993) where in the definition offered by the Parliamentary Assembly a minority is defined as a group.

Although persistent adherence of the Parliamentary Assembly to the Recommendation 1201 is widely known, and the proposal was re-iterated in a number of further recommendations, I believe that one should not regret about the Committee of Ministers' failure to follow this recommendation. Adoption of the definition of the kind, or even more generally – of any definition, in practice would inevitably result in alignment by the lowest common denominator. In the eyes of everyone involved in minority rights advocacy, the question would arise about practical applicability of a definition. Lack of any clear quantitative criteria and overly broad margin of appreciation would entail, in real life, easy excuses for the denial of recognition of minority as a group, even despite factual presence of many persons belonging to this group.

In fact, the whole history of minority rights is the history of 'mainstreaming' into the general context of human rights – what is, in a sense, simultaneously a transition from group to individual rights. And the provision of the Framework Convention for the protection of national minorities stipulating that minority rights are integral part of fundamental human rights presents a logical conclusion of this centuries long evolution.

Thus, it is not at all evident that attempts to introduce group rights into international law will be productive for the better protection of minorities. Moreover, as a practitioner and acting politician, I often encounter the situations when insisting on

the obsolete approach of the group nature of minority rights appears simply counterproductive for ensuring minority protection in practice.

It should be mentioned also that 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.

"…International law supposes the existence of minorities both in general and of specific types. However, while the existence of human beings and states are "automatic" in international law, the existence of human groups is problematic. Conceptually, international law struggles with the definition of actors beyond the "State"… [While] the catalogue and content of individual human rights has become relatively clear, the specificity of protection for groups, particularly minorities, has remained largely uncertain. Paramount in this uncertainty has been the very definition of "the" or "a minority" to whom any rights may accrue", John Packer wrote back in 1993.

However, also choosing the individual rights approach does not automatically resolve the issue of the holder of minority rights. The citizenship criterion is the one most often used in practice to justify non-recognition of minorities. However, I cannot but strongly disagree with the view expressed by some speakers today that using the citizenship criterion should be accepted as a common approach at the level of customary law. In fact, considerably less than a half of the states parties to the Framework Convention accompanied its ratification with the declarations limiting minority rights merely to citizens. It is true that some more states introduced this criterion at the level of national legislation, nevertheless, this is far from being a common practice.

The Advisory committee in a number of its opinions explicitly advocated extension of the protection under the Framework convention to non-citizens. Even more visibly the same trend in manifested in the work of the OSCE High Commissioner on National Minorities.

In fact, this limitation reflects some anachronistic approach which survived from the "old times" when minority rights were considered beyond the general scope of fundamental human rights. Outside of these historical remnants, it would be difficult to justify why most (in fact, all with probably few exceptions) rights envisaged by the Framework Convention could be denied for permanent resident non-citizens.

It should be also noted that this approach would clearly contradict the position of the UN Human Rights Committee, expressed in its General Comment No.23 (1994) on Article 27 of the International Covenant on Civil and Political Rights.

Finally, practical questions also arise here. In many countries, among persons belonging to the same group, there are both citizens and non-citizens. Is it possible to "filter" these people so that to allow access to the rights envisaged in the Framework convention for the citizens, and in the meantime prevent non-citizens from enjoying the same rights? How could this be done in respect of e.g. access to public information displayed in minority languages, or use of minority languages before

public authorities? The case of implementation of the Framework Convention in Estonia is revealing in this regard: although Estonia did introduce the definition limiting minority rights to citizens, in its report on implementation of the Framework Convention the Estonian government admitted that in practice it was impossible to enforce this limitation, and in fact most if not all rights were accessible for all persons belonging to the group in question (in this case, the Russian-speaking minority).

An effective approach was suggested by A.Eide in his working paper prepared for the UN Working Group on Minorities (1999). A.Eide examined 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: "…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"

Prof. Pawlak told today that we are not talking about new minorities. A simple question arises – but why? Are we engaged in a purely academic exercise, or we are seeking some practical solutions for accommodation of growing diversity of the European societies, recommendations for policy-makers? From the point of view of human rights, the division to "old" and "new" minorities in many cases may appear artificial, if not indeed discriminatory.

Indeed, many articles of the Framework convention do not require more than just non-discrimination when applying basic human rights provisions to the persons belonging to minorities, such as freedom of assembly, freedom of association, etc. Does the restrictive approach to the scope of application of this convention mean that non-citizens can be discriminated in respect of enjoying these rights? Moreover, some seemingly specific provisions – e.g. the right to use minority language in electronic media – also appears universal: according to some recent case-law, freedom of expression covers not only content but also forms and means of imparting and receiving information, including the language of communication.

Evolution of the understanding of discrimination as not only unjustified different treatment but also as equal treatment in the cases when different treatment is needed to ensure full and effective equality was best illustrated by the judgment of the European Court of Human Rights in the landmark Thlimmenos case. Similar approach is reflected also in the concept of indirect discrimination enshrined in the EU "Race Directive" 2000/43. To cut a long story short, not just equal treatment but full and effective equality is the ultimate goal of minority rights.

To conclude, I would suggest the major question related to the evolution of minority rights: can we claim today that minority rights are indeed "genuine" human rights? I am afraid that the positive answer would be still premature at the current stage. The main reason for this is that justiciability of minority rights is still very limited, despite growing remit of relevant case-law. Achieving full justiciability of minority rights should be considered the main task for the future.