

Protection of minorities in the European context of human rights

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Accommodation of cultural diversity:

- *international standards?*
- *legal framework?*

Cultural diversity

- “*Romantic nationalism*”: ideal – culturally homogenous state without minorities
- State without minorities – dangerous illusion
- Even secession – emergence of new minorities (Kosovo)
- Migration
- Mixed marriages
- Return to and restoration of traditional identities
- EU – no majority – *the trend*?

Stability dilemma:

- Suppression and assimilation of minorities?
- Respect and recognition of minority identities?

Conflicting factors in democracy

- Diversity as a basic European value
- Uniformity as a necessary prerequisite for the nation's unity
- Need to find a balance
- Universal principles but hardly universal solutions

Diversity policies of nation-states

- Conservative: homogenization, suppression – *«one country, one nation, one language, one religion»*
- Liberal: *«cultural neutrality»* - *uniformity in public area, diversity in private*
- Multicultural: *diversity recognized and promoted in both private and public area*



International framework

- **Political declarations**
- **Legally binding instruments**
- **Recommendations and guidelines**
- **Verdicts of international courts**
- **Decisions/opinions of international monitoring bodies on individual cases**

Non-discrimination and equality

- Universality as a cornerstone of modern human rights
- UN: CERD
- EU: Race Equality Directive - *indirect discrimination, shifting burden of proof*
- CoE: Art.14 ECHR, Protocol 12

Non-discrimination – interpretation?

- Equal treatment vs substantive equality
- Full and effective equality
- Examples:
 - Religious holidays
 - Language used in judiciary
 - railway workers' uniform

Non-discrimination - key question:

- Does equal treatment ensure equality?
- If yes - *what kind* of equality?
- Sometimes different treatment is needed to provide substantive equality
- - Thlimmenos vs Greece (6/04/2000, No. 34369/97)

Preservation of cultural identity

- UNESCO (cultural heritage)
- EU: programmes and projects (EBLUL, Eurolang, MERCATOR... - traditional minorities/languages)
- CoE: Language Charter

Minority rights

- “Early” bilateral treaties
- “Minority treaties” under League of Nations
- Art.27 ICCPR (1966)
- OSCE: Copenhagen document (1990)
- UN: Declaration... (1992)
- CoE: Framework Convention (1994)

Minority rights: *who is the right-holder?*

- Individual vs group rights?
- Definition of a minority?
- Eligibility?
- Legal vs political criteria

Definition of a minority

- Permanent Court of International Justice (1930):
Existence of minorities is a question of fact, not of law
- UN Sub-Commission on Prevention of Discrimination and Protection of Minorities (1950s):
a number of factors to be taken into account
- Capotorti's definition (1977)
- Deschenes' definition (1985)
- PACE Recommendation 1201 (1993)
- OSCE HCNM van der Stoep:
«I will recognize minority when I meet it»

Definition of a minority: main elements

- Residence in given state or locality
- Distinct race, religion, language, traditions
- United by common identity and solidarity, strive to preserve their distinct identity
- Numerical inferiority
- Sufficient number
- Non-dominant position (*South Africa under apartheid*)
- + Loyalty to the state?
- + Goal: to achieve legal and factual equality?
- + Nationality (*longstanding and lasting ties?*)

UN: CCPR General Comment No. 23, 08/04/1994

- **5.1. The terms ...also indicate that the individuals designed to be protected need not 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.**

FCNM Advisory Committee

- ***Scope of application***: criticisms towards Denmark, Estonia, Germany...
- Generally – consistently advocates inclusive approach:

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 on the one hand Parties have a margin of appreciation in this respect in order to take the specific circumstances prevailing in their country into account, on the other hand this must be exercised in accordance with general principles of international law and the fundamental principles set out in Article 3. In particular, the implementation of the Framework Convention should not be a source of arbitrary or unjustified distinctions.

PACE: Recommendation 1623 (2003):

- the Assembly considers that the states parties do not have an unconditional right to decide which groups within their territories qualify as national minorities in the sense of the Framework Convention. Any decision of the kind must respect the principle of non-discrimination and comply with the letter and spirit of the Framework Convention.

States' position:

- Declarations: “traditional” minorities (Austria, Estonia, Switzerland...)
- Lists (Denmark, Germany, Slovenia...)
- No minorities (Liechtenstein, Luxembourg, Malta)
- National law (Hungary, Poland – 100 years)
- Inclusive approach (UK, Russia...)

Minority rights: UN system

- GA Resolution 217C (1948) *The fate of minorities*
- Discussions on definition
- Convention on the Prevention and Punishment of the Crime of Genocide (1948) – *protection against physical extermination*
- Convention on the Elimination of All Forms of Racial Discrimination (1965) – *equality before the law and in fact, proactive approach*
- UNESCO Convention against Discrimination in Education (1960) – *influence of the US laws on desegregation*
- Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities (1992)

Minority rights in UN system: ICCPR

- Article 2. 1. Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.
- 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.

Minority rights in UN system: individual complaints

- Lovelace vs Canada (1977), Kitok vs Sweden (1985), Lansman vs Finland (1994) – rights of indigenous peoples
- Guesdon vs France (1986) – right to use minority language in court
- Ballantine vs Canada (1993) - right to use minority language in public ads
- Waldman vs Canada (1999) – public funding for private minority schools
- Dirgaardt vs Namibia (2000) – use of minority language before public authorities
- Ignatane vs Latvia (1999) – language requirements for deputy candidates
- Raihman vs Latvia (2010) – transformation of names originally in minority languages

OSCE: minority rights a a tool for conflict prevention

- **The Copenhagen document, 1990, art.30-40:**
- Equality and non-discrimination. Special measures to ensure equality
- Belonging to minority – a matter of personal choice
- Free use of minority language in private and in public
- Own educational, cultural and religious institutions – *no financial obligations on the part of states*
- Free trans-border contacts
- Right to impart and receive information in minority language
- “Adequate opportunities” to use minority language before public authorities
- Effective participation in society life

OSCE: High Commissioner on national minorities

- Mandate (1992): *early warning* to prevent conflicts that may endanger peace and stability
- Has no right to intervene in ongoing conflicts
- No individual complaints procedure
- Confidential recommendations to individual member states

OSCE: HCNM recommendations: *soft law*

- 1996: The Hague recommendations (education)
- 1998: Oslo recommendations (language)
- 1999: Lund recommendations (effective participation)
- 2001: Warsaw recommendations (elections)
- 2003: guidelines on electronic media
- 2006: guidelines on policing
- 2008: Bolzano recommendations (inter-state relations)

Council of Europe: ECHR

■ ARTICLE 14

Prohibition of discrimination

The enjoyment of the *rights and freedoms set forth in this Convention* shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, **association with a national minority**, property, birth or other status.

Council of Europe: ECHR 12th protocol

ARTICLE 1

General prohibition of discrimination

1. The enjoyment of *any right set forth by law* shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, **association with a national minority**, property, birth or other status.
2. No one shall be discriminated against *by any public authority* on any ground such as those mentioned in paragraph 1.

Verdicts of the ECtHR

- “Belgian linguistic case” (1968) – *use of minority languages in education*
- Buckley (1996), Chapman (2001)... vs UK – *traditional lifestyle of Roma*
- Sidiropoulos vs Greece (1998) – *registration of minority NGO*
- Thlimmenos vs Greece (2000) – *equal treatment may be discriminatory*
- OMO Ilinden Pirin vs Bulgaria (2001) - *registration of minority NGO*
- Podkolzina vs Latvia (2002) – *language requirements for MP candidates*
- Gorzelik vs Poland (2004) - *registration of minority political party*
- D.H. vs Czech Republic (2007) – *segregation in education*
- Sejdic and Finci vs Bosnia (2009) – *power-sharing between ethnic/religious communities*

Council of Europe: Charter for Regional or Minority Languages

- Protection of *languages*, not rights of individuals
- *À la carte* approach
- Monitoring mechanism

Council of Europe: Framework Convention for the Protection of National Minorities

- First specific legally binding instrument on minority protection
- Provisions of the OSCE Copenhagen document (political declaration) transformed into legal commitments
- Legal but not judicial
- “*A document of principles*”
- Monitoring mechanism
- The role of NGOs
- No individual complaints procedure – the idea of additional protocol?
- 39 members states ratified, 4 signed, 4 neither signed nor ratified

Conclusions: modern understanding of minority rights

- Minority rights are an integral part of fundamental human rights
- Must be implemented without 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

Conclusions: modern understanding of minority rights

- Complementary to the fundamental principle of non-discrimination - to be applied in the situations where **different treatment is needed to ensure full and effective equality**
- Therefore, equal treatment cannot be used as a pretext for denial of minority rights

Conclusions: modern understanding of minority rights

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

Conclusions: modern understanding of minority rights

- Major international instruments offer only basic principles that may be implemented differently in different states according to their specificities
- Compliance of these concrete solutions with the letter and spirit of the basic instruments is examined 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

Conclusions: modern understanding of minority rights

- The key – **effective participation** of minorities in decision-making on the issues affecting them
- As a rule, minority rights solutions imply response to real demand in concrete situations
- The persons belonging to minorities must have the right to choose whether to be treated differently or not
- Crucial: to ensure that the choice is indeed free, not made under government pressure, and that indeed no disadvantage results from this choice

Conclusions: modern understanding of minority rights

- States have a margin of appreciation in respect of determining the persons and groups that shall enjoy protection as national minorities within their territories
- However, 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