Organisation des Nations Unies pour l'éducation, la science et la culture

Chaire UNESCO « Mémoire, Cultures et Interculturalité » (France)

Université Catholique de Lyon

ÉTUDES INTERCULTURELLES

Revue d'analyse publiée par la Chaire Unesco de l'Université catholique de Lyon

DOSSIER :

Actes du Séminaire international du 14 février 2013 :

Quelle reconnaissance des minorités ethniques, culturelles et religieuses dans les systèmes régionaux de protection des droits de l'homme ?

- CONFERENCES DE LA CHAIRE

Pour un nouvel humanisme : quels apports des cultures ?

- DEBATS

Les activités jurisprudentielles des systèmes régionaux des droits de l'homme

- TRAVAUX DES ETUDIANTS
- PRESENTATION DE LA CHAIRE

7/2014

PROTECTION OF MINORITIES IN THE EUROPEAN CONTEXT OF HUMAN RIGHTS

Boriss CILEVICS, MP (Latvia)
PACE Committee on Legal Affairs and Human Rights

Accommodation of cultural, linguistic and religious diversity has nowadays become one of the major challenges faced by virtually all European states. *Relevant international standards* are often referred to in debates on the issue. However, does corresponding legal framework indeed exist? What is the substance of the aforementioned standards?

Such factors as increasing mobility, migration, growing number of mixed marriages, as well as return to and restoration of traditional identities by many Europeans, make ideal of *romantic nationalism* - a culturally homogenous state without minorities - impossible in modern Europe. Moreover, it is a dangerous illusion. Even secession inevitably entails emergence of new minorities, as demonstrated, *inter alia*, by the recent example of Kosovo. European Union offers a model of exactly the opposite trend - EU is, as a matter of fact, a quasi-state without a majority.

European states find themselves forced to tackle what can be called a *stability dilemma*. What is the best way to ensure stability and peace within their societies - suppression and assimilation of minorities or rather recognition and respect of minority identities? There are certainly universal principles but hardly universal practical solutions. Modern democracies have to reconcile several conflicting factors. On one hand, diversity is widely recognized as a basic European value. On the other, some level of uniformity is a necessary prerequisite for the nation's unity. A democratic state has to find a proper balance between the two.

Several models of *diversity policies* of nation-states can be singled out. Conservative model pursues homogenization and suppression of diversity : *"one country, one nation, one language, one religion"*. Liberal model is based on the presumption of "cultural neutrality" of a democratic state, similarly to religious neutrality. In practice this means uniformity in public area and recognition of and even support for diversity in private area. Model of multiculturalism advocates recognition and promotion of diversity in both private and public areas.

Relevant international framework includes a wide array of documents of different nature and legal force, in particular, political declarations (adopted at international or regional level), legally binding instruments (conventions and covenants), various recommendations and guidelines, verdicts of international courts, and decisions/opinions of international monitoring bodies on concrete states or individual cases.

The most general and comprehensive approach to the standards on diversity politics is related to the concept of **non-discrimination and equality.** The key importance of this concept is defined by the fact that universality is a cornerstone of modern understanding of human rights. The main instrument in this field at the UN level is the Convention of Elimination of All Forms of Racial Discrimination (CERD). At the European level, somewhat paradoxically, the leading role in elaborating regional standards was assumed by the European Union with its set of equality directives, notably Race Equality Directive 2000/43. EU *acquis* enshrines essential concept of *indirect discrimination,* as well as introduces a procedural principle of *shifting burden of proof*

In the framework of the Council of Europe instruments, the prohibition of discrimination is included in Article 14 of the European Convention of Human Rights (ECHR), however, only with regard to enjoyment of other rights enshrined in ECHR. To expand this overly limited scope of application, additional Protocol No. 12 was adopted in **2000.** This Protocol contains already a general prohibition of discrimination in enjoyment of any right set forth by law. Regrettably, only a minority of the Council of Europe member states have ratified this Protocol so far.

It is essential that interpretation of the notion of non-discrimination has evolved from formally *equal treatment* to much more comprehensive concept of *substantive equality* (or full and effective equality). Equal treatment does not always ensure equality, this is the case only when persons in question are in similar situations. Sometimes different treatment is needed to provide substantive equality. As the European Court of Human Rights put it in the case *Thlimmenos vs Greece* (6/04/2000, No. 34369/97), *"(T)he right not to be discriminated against in the enjoyment of the rights guaranteed under the Convention is also violated when States without an objective and reasonable justification fail to treat differently persons whose situations are significantly different".*

Practical interpretation of this concept is perhaps the most complicated task before national authorities. This problem may emerge in a wide range of areas, including determination of official holidays, official use of languages (in particular, in judiciary where full rights of defendant and equality of parties must be ensured), prescriptions for official uniforms, etc.

Another approach to diversity policies is of cultural and political rather than legal nature and is based on presumption of the imperative need to preserve cultural diversity. Several UNESCO conventions aimed at preservation of cultural

heritage, as well as numerous EU programmes and projects (in particular, aimed at support of traditional minorities and their languages) can be mentioned in this context. In legal framework of the Council of Europe, the Charter for Regional or Minority Languages is the main instrument of the kind. Although this Charter is often mentioned as one of the human rights instruments, its nature is fundamentally different from other similar conventions, as exactly languages - and not individuals - are right-holders in the meaning of this document. In other words, the Charter protects languages, not human beings.

However, the most popular and best elaborated approach to framing diversity politics is related to the concept of *minority rights.* The first bilateral treaties on protection of minorities date back to 17th century (of course, the notion of national minorities was not yet known then, the treaties dealt with the rights of only religious minorities). A vast array of agreements was adopted after the World War I under the auspices of the League of Nations - the so called *"minority treaties",* a number of multilateral treaties which included provisions on the protection of minorities. These provisions were not universal. Certain commitments with regard to particular minorities were imposed on the states which lost the war, as well as on the newly established states.

In fact, only Article 27 of International Covenant on Civil and Political Rights (ICCPR) adopted in 1966 has become the first universal provision on minority protection of legal nature. This Article was worded in negative terms *("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")* and did not imply any positive obligations of the states.

Numerous violent ethnic conflicts which erupted in the end of the 80s in connection with the collapse of Yugoslavia, the USSR and the Communist system in general, drew increased attention to the need to elaborate some international principles of the treatment of minorities. Therefore, the first comprehensive set of the basic standards of minority protection was elaborated as a conflict prevention effort in the framework of the CSCE (now OSCE) and included into the political declaration - the Copenhagen document of 1990 (Articles 30-40). These standards included, *inter alia:*

- equality and non-discrimination, and special measures to ensure equality if needed;
- belonging to minority as a matter of personal choice, not prescribed by someone from outside;
- free use of minority language in private and in public;
- own educational, cultural and religious institutions of minorities - however, with no financial obligations on the part of states;
- free trans-border contacts;
- the right to impart and receive information in minority language;

- *"adequate opportunities"* to use minority language before public authorities; effective participation in society life.

Besides, in 1992 the OSCE decided to establish a special post of the High Commissioner on National Minorities (HCNM) whose mandate implied *early warning* to prevent conflicts that may endanger peace and stability. HCNM has no right to intervene in ongoing conflicts nor consider individual complaints. His main task was to analyze potential conflict situations and issue confidential recommendations to individual governments. Besides, the HCNM office initiated and supervised elaboration of a number of general recommendations which have become a major source of *soft law :* the Hague recommendations on education (1996), Oslo recommendations on language (1998), Lund recommendations on effective participation (1999), Warsaw recommendations on elections (2001), guidelines on electronic media (2003) and on **policing (2006),** Bolzano recommendations on inter-state relations (2008) and **Ljubljana** guidelines on integration (2012).

Standards of the Copenhagen Document were soon transformed into the legal obligations in the Council of Europe Framework **Convention for the Protection** of National Minorities opened for signature in early **1994. This Convention** has become the first ever specific legally binding instrument on **minority protection.** Its provisions are legal but not judicial - no procedure to consider individual complaints is envisaged, and formally provisions of the Convention cannot be directly invoked to bring an individual case before the court_ However, both the European Court of Human Rights and national courts in several states referred to the provisions of the Framework Convention in their deliberations. The Framework Convention is often called ***"a document of principles"*** - it contains some basic standards which can be reflected in national law using **different methods** and forms, depending on particular situations. Implementation **of the Convention** is monitored by a special expert body - Advisory **Committee which** considers periodic states reports, as well as "shadow reports" submitted by NGOs and information received from other sources.

While the Copenhagen Document and the Framework Convention basically clarified the content of minority rights, the *scope of* their ***application*** remains a rather controversial issue. In other words, it is not easy to unequivocally answer the question - *who is the right-holder?* Somewhat paradoxically, no clear definition of a national minority has been agreed upon, despite intensive and decades-long efforts of experts and consultations of diplomats, notably in the UN Sub-Commission on Prevention of Discrimination and Protection of Minorities, but also in the Council of Europe.

Back in 1930, the Permanent Court of International Justice declared that *"Existence of minorities is a question of fact, not of law".* More than 60 years later the first OSCE High Commissioner on National Minorities Max van der Stoel when

asked about the definition of a minority, answered the following: *"I will recognize minority when I meet it".*

A sort of ad hoc definition used by international organizations includes several elements which's necessity is virtually not disputed, such as :

- residence in given state or locality;
- distinct race, religion, language or traditions;
- a group is united by common identity and solidarity and strives to preserve this distinct identity;
- numerical inferiority (less than 50% of population);
- sufficient number of persons belonging to the group;
- non-dominant position (this condition disqualifies from minority protection e.g. white people in the South Africa under apartheid).

A number of other criteria are much more controversial and cause heated debates, in particular, "loyalty to the state" or nationality (citizenship) of a state where minority resides.

UN Human Rights Committee in its General Comment No. 23 in 1994 strongly denied the citizenship requirement as a precondition for enjoying protection under Article 27 of ICCPR : "*... the individuals designed to be protected need not be citizens of the State party... a State party is required... 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".*

Inclusive approach is advocated also by the Advisory Committee of the Framework Convention, though in a less stringent way : *"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".*

However, in practice many states introduced distinctions between "traditional" national minorities and "recent migrants". These differences are well illustrated by various declarations the states made when ratifying the Framework Convention. Some states included in these declarations their own, more restrictive definitions (Austria, Estonia, Switzerland and other). Some added the lists of concrete groups which they considered national minorities in the sense of the Framework Convention (Denmark, Germany, Slovenia and other). Some states regulate the issue at the level of national legislation - in particular, Hungary and

Poland recognize as national minorities only those groups which have been living within their territories for at least 100 years. In the meantime, several states (notably United Kingdom and Russia) strongly defend the most inclusive interpretation of the scope of application of the Framework Convention.

As mentioned above, the protection of minorities, beyond general prohibition of discrimination, is not included in the European Convention of Human Rights. Nevertheless, the Strasbourg Court has considered a number of relevant individual cases, in particular, with regard to the right of minorities to freedom of association (e.g. Sidiropoulos vs Greece, 1998; OMO Ilinden Pirin vs Bulgaria, 2001; Gorzelik vs Poland, 2004) and prohibition of discrimination (the landmark cases are D.H. vs Czech Republic (2007) on segregation of Roma children in public schools and Sejdic and Finci vs Bosnia (2009) on discriminatory effects of power-sharing between ethnic/religious communities).

Modern understanding of the concept of minority rights can be briefly summed up as follows :

1. Minority rights are an **integral part of fundamental human rights.** As such, they are universal and must be implemented without discrimination (i.e. unjustified and arbitrary distinction). Minority rights cannot be considered a sort of special privileges which a state might bestow to some groups - and not to other groups - by the state's own choice.

2. Minority rights are complementary to the fundamental principle of non-discrimination. These provisions are to be applied in the situations where formally equal treatment cannot ensure equality in practice because the persons are in substantially different situations, and **different treatment is needed to ensure full and effective equality.** Therefore, the argument of equal treatment cannot be used as a pretext for denial of minority rights.

3. Minority rights are **individual** rights which, however, may often be enjoyed in community with other individuals. Modern international law does not consider minority rights as, in nature, group rights. (There is only one exception, namely, the rights of indigenous people are defined in relevant documents of the UN and ILO in terms of the rights of a group, in particular, to land and natural resources).

4. 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 specialized expert bodies, and improved by using constant dialogue, consultations with all parties involved, and taking

into account good practices.

5. **Effective participation** of minorities in decision-making on the issues affecting them is the key principle for ensuring respect and protection of minority rights. As a rule, minority rights solutions imply response to practical demand in concrete situations. The persons belonging to minorities must have the right to choose whether to be considered and treated different from the majority or not. It is of crucial importance to ensure that this choice is indeed free, not made under government pressure, and that indeed no disadvantage results from this choice.

6. 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.

Coming back to the definition of possible *diversity policies*, one is to conclude that the choice of these policies is still mainly in the hands of the states. In the meantime, modern international standards impose certain limitations. These standards **restrict conservative policies** in several areas, in a number of cases **prescribe liberal policies** (i.e. recognition and acceptance of diversity in private area), and even sometimes **encourage multicultural policies** (although at the level of political declarations rather than legally binding provisions).

****