

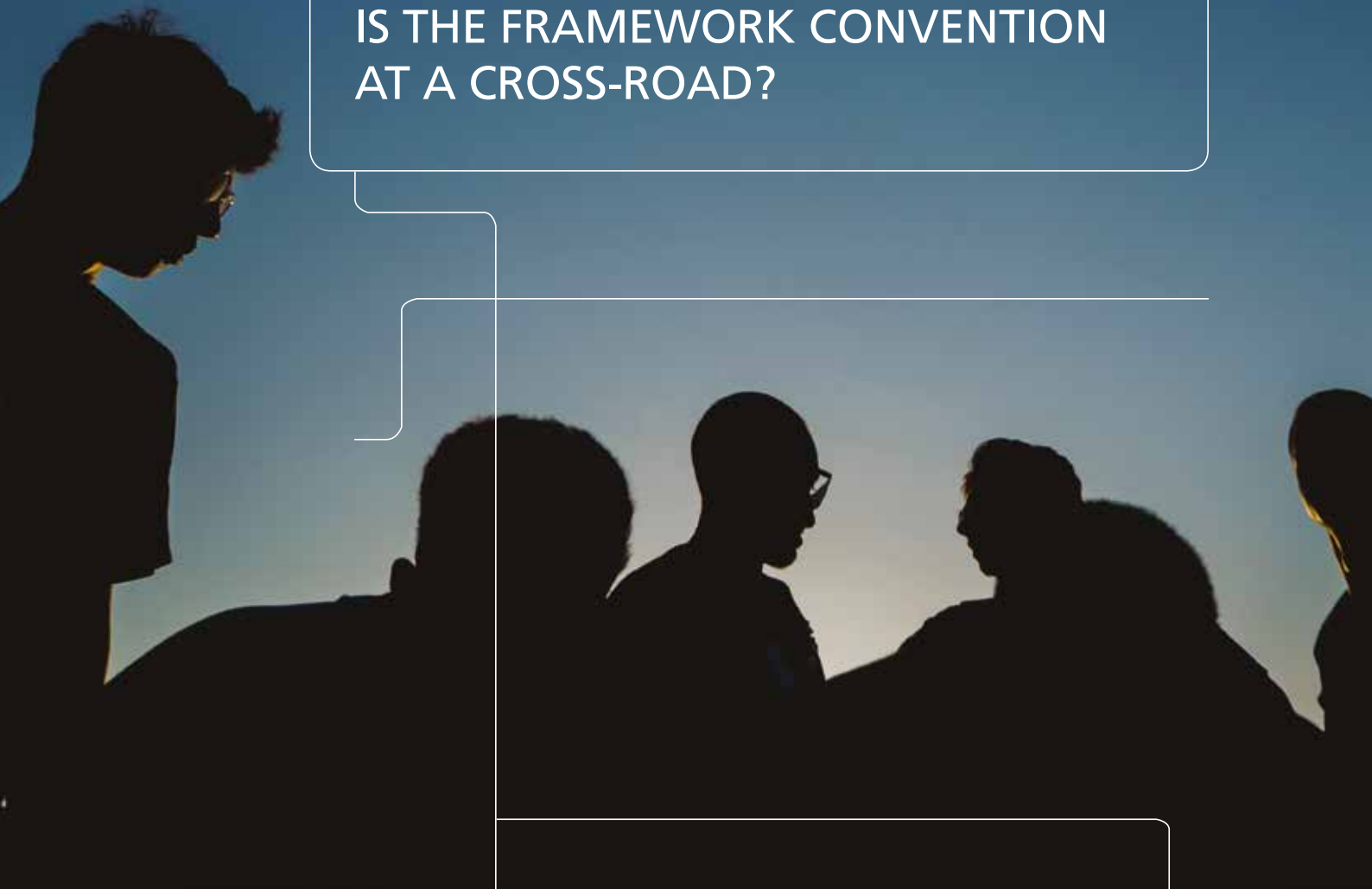
ECMI FCNM IN FOCUS



FCNM

20 YEARS OF DEALING WITH DIVERSITY:

IS THE FRAMEWORK CONVENTION
AT A CROSS-ROAD?





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PREFACE

Whatever our personal weaknesses may be, the nobility of our craft will always be rooted in two commitments, difficult to maintain: the refusal to lie about what one knows and the resistance to oppression.

Albert Camus

This publication was commissioned by the European Center for Minority Issues in view of the 20th anniversary of the entry into force of the Framework Convention for the Protection of National Minorities (FCNM) in February 2018. It is based on some 20 interviews with persons belonging to national minorities, human rights experts and activists, and government officials who, for the most part, have been closely involved with the FCNM. It offers a selection of experiences and views on the FCNM from across the Council of Europe area, starting with the way the Convention came to existence (Chapter I: The Making of the Convention) to the way it has been perceived and used in different contexts, both at national and multilateral levels (Chapter II: The Lives of the FCNM). Finally, it attempts to highlight the expectations and challenges for the future of the Convention (Chapter III: What can the FCNM Deliver?)

The publication is not meant to cover the great diversity of country-specific experiences with the FCNM from across the Council of Europe area. It only offers some snapshots on the use of the FCNM as an international instrument at different points in time in the last 20 years of its monitoring. The interview format of this publication is also meant to provide space for individual reflection, suggestion, or criticism on the FCNM to be expressed, with the hope that these may usefully serve as a basis for debating the FCNM's future development.

In preparing this publication, I have enjoyed the trust and support of ECMI. I would like to extend my special thanks to Petra Roter, President of the Advisory Committee for her caring attention and insightful thoughts. Both have been precious in shaping its content.

I am grateful to all those personalities who have been willing to join in a conversation about the FCNM and have shared their stories and put forward their views. Some interviewees' reflections may echo or contradict others'. This is perhaps where the added value of such a publication lies: it does not intend to place a judgment on those views but hopes to illuminate, through the questions asked, the motives and key experiences behind people's views. In many respects, this publication allows the skeptical, the doubting, and the supportive commentators of the FCNM meet in a free conversation about national minority protection in Europe today.

Because he mastered so brilliantly the art of conversation, I would like to dedicate this publication to the memory of Frank Steketee. Frank was most involved with the development of the Council of Europe's minority protection system in the 1990s. His creative spirit, enthusiasm, and sense of humor have never ceased to be a source of inspiration.

Stéphanie Marsal
Independent Consultant

FCNM



Stéphanie Marsal is a Human and Minority Rights Consultant who previously worked as Senior Political Advisor to the OSCE High Commissioner on National Minorities. She graduated in Political Science and Human Rights Law from the Institut des Hautes Études Européennes in Strasbourg and studied at the Maxwell School of Citizenship and Public Affairs, Syracuse, USA. She specializes in comparative human and minority rights law, conflict prevention, and good governance. She previously worked for the Council of Europe in different positions, including in the Secretariat of the Framework Convention for the Protection of National Minorities from 2001 to 2008, and more recently the European Commission against Racism and Intolerance (ECRI).



Views from Europe

Letter from Riga

Boriss Cilevičs

Strategically, one should depart from the understanding that minority rights are special rights for special groups but see them in the broader context of fundamental rights. In other words, everybody belongs to a minority, there is no majority at all. This is what accommodation of diversity in society means.

Latvia was a latecomer to ratifying the FCNM. What were the expectations then and what are the main benefits of this ratification in addressing national minorities' issues over the last 10 years for Latvia?

There were no major expectations because Latvia's delay in ratifying was too substantial. It was then clear that the FCNM was ratified in a manner that would allow Latvia to avoid any changes to its legislation. In other words, there would be no new commitments undertaken upon ratification. Unfortunately, this was a serious precedent of bypassing obligations. Formally, Latvia adopted three declarations. One of them defined minorities in line with Capotorti's definition but adding a citizenship criterion. The two other ones were in fact substantive reservations. My position was that such a ratification should not have been accepted by the Council of Europe. These reservations were contrary to the Vienna Convention on the Law of Treaties. As far as I know, there were some discussions on this issue in the Council of Europe but the reservations were eventually accepted. This signaled the next stage of development of the FCNM. The logic behind the acceptance of these reservations was to increase the total number of ratifications of the FCNM. It was argued that it would be better to discuss those minority issues once Latvia is in rather than outside the system of monitoring. This inclusion argument would have been useful provided the FCNM monitoring process delivered some domestic changes. I was skeptical about this.

Hasn't the ACFC monitoring helped in addressing some issues in that period?

The ACFC Opinions are formulated in diplomatic language. Its monitoring is based on dialogue and no sanction is attached to cases of non-compliance. This is implied by the very nature of this convention, which is formulated in terms of commitments by states rather than rights of persons. This dialogue is attractive when it is carried out seriously, when there is diligence in terms of understanding obligations. However, developments went in another direction, reflecting the general trend in Europe today. Politically, the very long discussions at the Committee of Ministers level were not discussions of substantive issues but a sort of political diplomatic game between Russia and Latvia. This was not helpful. In the end, the Opinion is relevant, the Committee of Ministers resolution may be fine, but few are those who take these documents seriously.

Does this mean that the FCNM would not bring any additional protection to what national minorities had already?

The Convention was ratified when the EU political conditionality was over. Latvia's accession to the EU and NATO was in fact the last time when progress could be achieved. This phase was actually a good test for the implementation of the Copenhagen criteria. The EU adopted this political criterion



with the mention of ‘respect for and protection of national minorities’ but nobody knew what it meant since the EU had neither standards, mechanisms, nor experts. Accession talks were done at the political level, mostly with the government. The parliament was involved quite marginally and civil society played no role whatsoever. Informally, it was presumed that the ratification of the FCNM should be considered as a certification that the situation of national minorities was satisfactory. Eventually, some candidate states could enter without this formal certification. This was the wrong signal: it meant that the EU did not take the issue seriously as they opted for a formal and indirect evaluation, relying on the OSCE and the Council of Europe to a lesser extent. In fact, NATO played a more important role as they formulated their position on the basis of some experts’ opinions. You will recall the problem of the language requirement for parliamentary candidates, the solving of which was seen as a precondition to close the OSCE mission. This was indeed done but these language requirements were reintroduced pretty soon after, although in a different form. And this was accepted by the EU, NATO, and the Council of Europe. As we know, after accession, the political leverage to introduce reforms was lost in the absence of any EU mechanism on minority issues.

The last ACFC Opinion on Latvia was adopted in 2013 and there will be another round of reporting with a common ECRI–FCNM visit planned in autumn 2017. How do you see the monitoring cycle generating a certain level of momentum and what are the expectations regarding this joint visit?

The conclusions of ECRI have usually been more straightforward and more useful than the ACFC Opinions. When it comes to the FCNM, the problem is that I have never heard my colleagues in the parliament nor in the government mentioning the FCNM other than in the context of the monitoring procedure. My impression is that this 2013 Opinion has been read by very few people from the Ministry of Foreign Affairs and some minority activists. Latvia is also a specific case as we don’t have minority rights NGOs anymore and haven’t for several years. In fact, the NGO environment has been completely deserted. Latvia’s accession to the EU was critical for civil society because funding stopped. Some specialized NGOs are now working within EU expert networks; a few NGOs were strong enough to survive while others simply died. Overall, the FCNM is perceived as an instrument adopted for the Council of Europe and is seen as a reporting burden. I made a couple of attempts to bring a few cases to the attention of the Constitutional Court with reference to the FCNM. These were not successfully.

You say that the FCNM is for Strasbourg and has not been internalized domestically. Is it about reaching out on what minority rights is about and raise awareness?

There are some deep disagreements among the political class on the FCNM. Unfortunately, the whole monitoring mechanism allows it to ignore it or bypass it. I would refer to the adoption of the Preamble of Latvia, which is fully in line with the 19th century’s ideas of nation-building: the concept of minority rights is seen as a sort of compensation for not belonging to political decision-making. While the FCNM says that it is a way to ensure equality, to overcome disadvantages. It is therefore very difficult to invoke the FCNM because the Latvian position is that the way to equality is assimilation, at least at the social level. We don’t mind if you speak your language at home, in private, but in the public space, you must behave properly. The recognition of national minorities is seen as an anomaly. In fact, minority rights are perceived as being against human rights and the right of the main ethnic majority to their own country. Of course, minorities will not be expelled but they will be helped to become normal. They will be helped to assimilate. This is an ideology

which is against the FCNM of course but that is getting more and more explicit in Latvia as well as some other countries.

What would your suggestions be to the ACFC to have more impact?

The procedure as it is cannot be improved. Any amendments to the rules will lead to them being weakened. The whole procedure of the FCNM is based on the principle of confidentiality, although this is more a practice than a codified rule. This would need to be re-considered. For example, if you take mainstream media in Latvia and the discourse of the political elite, you will never see the FCNM being referred to. You need to reach out not only to minorities but to the majority and to the government. And this should not be done through public statements but through interviews, discussions, trainings. If I publish in the Latvian media, my piece will be contradicted by many others. A genuine debate cannot be done from inside. It has to come from outside and has to be well organized. If you look at positive developments in Latvia, you will find a remarkable change regarding the attitude toward LGBT people. Public opinion changed drastically because there was substantial external involvement: every representative from the US, the EU, the Council of Europe mentioned LGBT rights in Latvia. There was a lot of work done with young people and for them, LGBT is a non-issue. With minorities, refugees, migrants, it is exactly the opposite. Prejudice is growing.

A suggestion was made to create a fund for supporting minority participation. Would you say that this would help?

It would be useful but in my view, it is not realistic. In the early days, the preparation of shadow reports was done with the support of Minority Rights Group (MRG). MRG’s focus has now changed. One can see that the reporting system does not provide a proper balance between state reports and shadow reports anymore. It would be helpful to have some specific programs to continue working with civil society on the FCNM. This could be done through joint programs with the EU as the EU’s interest in helping on those issues remains.

In its latest thematic commentary, the ACFC argued that the FCNM is a living instrument and that adjustments are needed to make minority rights relevant to societies that have been notably transformed by migration. Some historical communities as well as some in government feel that this may open up the scope of application of the FCNM and therefore jeopardize the system of minority protection in place. How do you see this debate in Latvia and what are your views on this issue?

The context is different. The fear of asylum seekers and refugees is widespread. There are very few people who can handle these issues. There is a lack of public debates. In fact, the public discourse is evasive on these issues and it is usually preferred not to mention minority issues. If minority issues are mentioned, it is done in the League of Nations style. The concept of national minority rights was developed under the League of Nations. It is an obsolete concept. The real issue is to consider minority rights as part of the non-discrimination concept and to consider the FCNM as an equality instrument not a special rights instrument. I am aware that there is strong resistance to this from different sides including from the traditional organizations of minorities. I don’t think that positive measures are needed with the exception of some cases like the Roma population. The principle of reasonable accommodation should be sufficient. Actually, the idea of proportionality is already in the FCNM when you look at Articles 10, 11, and 14 of the Framework Convention.



If we have a general context of non-discrimination that would make it easier based on the demand and resources; it can be applied to those who want to preserve or restore their identity. In my view, this is also a late Soviet concept to have identity restored as almost a physical characteristic when it was still in passports. The non-discrimination concept is complex but it is developing fast. One technical advantage is that the EU is very much behind it and it has better developed regulations on non-discrimination. In the Council of Europe, Protocol No 12 is not well ratified and there is no positive trend in this respect since no new ratifications have been registered in the last ten years. It is true that the EU directives are very cumbersome and bureaucratic but they are expanding, starting with gender and labor relations and now covering racial equality. The Race Equality Directive is in fact promising: while nationality is excluded, language is not.

Eventually, you would need more cooperation between the Council of Europe and the EU on the issue of non-discrimination. Strategically, one should depart from the understanding that minority rights are special rights for special groups but see them in the broader context of fundamental rights. In other words, everybody belongs to a minority, there is no majority at all. This is what accommodation of diversity in society means. Mainstreaming minority rights is perhaps the only way that we can keep the protection working.

As a member of the Parliamentary Assembly of the Council of Europe, you have been working on promoting the ratification of the FCNM. What was your experience and what progress do you see in discussing national minority rights in those countries which have not yet ratified the FCNM?

We should not be dogmatic. We should also be creative enough. Discussion should focus on substance, not formalities. My experience is that discussions with Greece were difficult. There is a high degree of intolerance, also stemming from the role of the Orthodox Church. In France, the discussion revolves around terminology issues. There is a denial of the concept of minorities that is contrary to the French understanding of equality. However, the substance of minority rights can be compatible with this concept. We should frame it in different terms. This is the main problem of the Council of Europe, that it brings up concepts but does not understand the substance that is behind them. The traditional scheme with a definition of a national minority is not needed. What we need is a definition of equality.

Boriss Cilevičs worked as a computer scientist and since the late 1980s led human rights NGOs before being elected to the Latvian Parliament in 1998. In addition to his role in the Latvian Parliament, Cilevičs has been serving as member of the Latvian delegation to the Parliamentary Assembly of the Council of Europe (PACE) since 1999. He is currently the chairperson of the Committee on the Election of Judges to the European Court of Human Rights, a member of the Committee on Equality and Non-Discrimination. He was the first chairman of the then newly established Sub-Committee on the Rights of Minorities (2005–07) and has been PACE rapporteur on several aspects of minority protection. Cilevičs is the author of numerous publications and reports on human rights.