25 years after Copenhagen: Key issues in minority protection. *A practitioner's view*

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Minority rights?

"…the international community has declared "rights" and even established procedures through which to pursue respect for these rights without fully or clearly delimiting either the subjects/beneficiaries of the rights or the content of the rights"

John Packer, 1996

The Copenhagen document:
nothing on beneficiaries, a lot on the content.
General points

- (30): context of human rights and democracy, role of NGOs
- (31): non-discrimination and equality
- (32): free choice of belonging, no disadvantage may arise from this choice; prohibition of forced assimilation
- (32.1-6): content of minority rights

The Copenhagen document:
the content of minority rights - private

- (32.1): free use of mother tongue in private and in public
- (32.2): own educational, cultural and religious institutions, organizations or associations
- (32.3): practice of religion, religious educational activities in a mother tongue
- (32.4): contacts among themselves and across frontiers
- (32.5): dissemination and exchange of information in a mother tongue
- (32.6): organizations or associations (repeated), rights enjoyed individually or in community, participation in international organizations

The Copenhagen document:
the content of minority rights - public

- (33): protection of identity
- (34): *adequate opportunities* for instruction of or in mother tongue and its use before public authorities, *in conformity with applicable national legislation*
- (35): effective participation in public affairs; appropriate local or autonomous administrations ...in accordance with the *policies* of the State concerned
- (36): inter-state cooperation, internal dialogue
- (37): limitations: international law, territorial integrity
- (38): commitment to adhere to conventions, including a right of individual complaints
- (39): cooperation in the framework of INGOs

The Copenhagen document:
the content of minority rights

- Acceptance of diversity in private sector, non-interference by states
- “Conditional” recognition of diversity in public sector. Adaptation of governance system: limited, with numerous and rather vaguely defined conditions and reservations
- Generally – reflects liberal approach

Why OSCE?

- Minority-related conflicts seen as the main threat to peace and security in Europe
- Hence, security-based approach rather than implementation of general humanistic principles
- Respect to minority rights as a conflict prevention tool
- Questions:
  - How effective?
  - Whether remain in force when violations are not likely to lead to violent conflicts?

The Framework Convention

- Transformed political commitments into legally binding obligations
- Still – obligations of states parties rather than rights of persons
- Still – *document of principles*
- More precise conditions and restrictions:
  - The exercise of this right shall not entail any financial obligation for the Parties (Art.13)
  - …if those persons so request and where such a request corresponds to a real need, the Parties shall endeavour to ensure, as far as possible, the conditions which would make it possible… (Art.10.2)
  - if there is sufficient demand, the Parties shall endeavour to ensure, as far as possible and within the framework of their education systems, that persons belonging to those minorities have adequate opportunities… (Art.14.2)

1. Evolving content of minority rights

- Before Copenhagen: *special* or *additional* rights, somewhat outside of the general HR framework
- Minority rights were often denied appealing to equality (*eg French "republican model"*)
- Evolution related to the development of the concept of equality and non-discrimination: from *equal treatment* to *substantive equality*
- Equality:
  - When everybody must speak the same language – equal treatment
  - When everybody is entitled to speak his/her mother tongue – ideal, limited by resources. Proportionality test?

1. Evolving content of minority rights

- Crucial: equal treatment can be discriminatory (ECtHR case *Thlimmenos vs Greece*, 2000)
- Modern interpretation of minority rights: when formally equal treatment appears discriminatory, because the persons are in substantially different situations
- FCNM: *full and effective equality* (Art.4)
- EU: *indirect discrimination*

1. Evolving content of minority rights

- Accommodation of diversity in public area:
  - use of minority languages before public authorities
  - use of minority languages in public education system
  - spelling of personal names in minority languages
- Guidelines for application of conditions:
  - AC FCNM – limited, not universal
  - case law – ECtHR, ECJ, UN HRC?
  - no “one size fits all” solution – possible degree of discrepancy in interpretation?

2. Right-holders/beneficiaries

- No attempt to define
- Hardly possible to agree on a definition vs pressing need to act
- Broad agreement on several key elements:
  - Residence in a given state or locality
  - Distinct race, religion, language, traditions
  - Common identity and solidarity, strive to preserve distinct identity
  - Numerical inferiority
  - Sufficient number
  - Non-dominant position
- Disagreement on some additional elements:
  - Loyalty to the state?
  - Goal: to achieve legal and factual equality?
  - Nationality (longstanding and lasting ties?)

2. Right-holders/beneficiaries

- Practical application: who decides, procedure of adjudication?
- FCNM Art.3: every person belonging to a national minority has the right freely to choose to belong or not to belong to such a minority
- FCNM Explanatory report: "…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".
- Objective criteria – what and how to measure?
- ECtHR: Gorzelik *vs Poland Greece* (2004)

2. Right-holders/beneficiaries

- „Traditional" vs „new" minorities (W.Kymlicka's arguments)
- Practical aspects – quantification:
  - when and how a new minority becomes "old"?
  - how long must reside? (Hungary, Poland – 100 years)
  - how many persons belonging to this minority?
- AC FCNM: scope of application
  - 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.

2. Right-holders/beneficiaries – position of different actors

- UN: inclusive, HRC General comment 23 (1994)
  - *however, in the context of "negative" right enshrined in Art.27 ICCPR*
- EU (particularly EP): restrictive, only "traditional" minorities
- Member states:
  - declarations: "traditional" minorities (Austria, Estonia, Switzerland…)
  - lists (Denmark, Germany, Slovenia…)
  - no minorities (Liechtenstein, Luxembourg, Malta)
  - inclusive approach (UK, Russia…)
- Venice Commission: "5 principles" (2007)
- Civil society: mainly inclusive, with notable exceptions (FUEN)
- PACE: does FCNM apply to all minorities or only „traditional"?

2. Right-holders/beneficiaries – position of PACE: “cyclical” evolution

- Recommendation 1201 (1993):
  - For the purposes of this Convention, the expression "national minority" refers to a group of persons in a state who:
    - - reside on the territory of that state and are citizens thereof;
    - - maintain longstanding, firm and lasting ties with that state;...
- 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.
- Resolution 1985 (2014):
  - The Assembly also recalls the definition of national minorities set out in its Recommendation 1201 (1993) on an additional protocol on the rights of minorities to the European Convention on Human Rights, defining them as “a group of persons in a State who: a. reside on the territory of that State and are citizens thereof; b. maintain longstanding, firm and lasting ties with that State;…”

3. Universality of standards?

- Direct applicability of the OSCE standards
  - only when danger of a conflict, through HCNM
- Ratification of key instruments
  - FCNM
    - 39 ratifications
    - 4 signatories (Belgium, Greece, Iceland, Luxembourg)
    - 4 neither signed nor ratified (Andorra, France, Monaco, Turkey)
  - European Charter for Regional or Minority Languages
    - 25 ratifications
    - 8 signatories
    - 14 neither signed nor ratified
- Not a treaty-based body mechanisms
  - ECRI
  - Commissioner for Human Rights

3. Universality of standards:
justiciability of minority rights?

- Can minority rights be invoked before a court?
- PACE Recommendation 1201 (1993): additional protocol on the rights of national minorities to ECHR?
- Instead – FCNM. *Legal but not judicial*
- No individual complaints
- AC opinion – expert evaluation, CM Resolution – agreed by diplomats
- ECtHR: references to FCNM. Even in cases when a state is a not a party – *Kuharec vs Latvia 2004, Baylac-Ferrer and Suarez vs France 2008*. Does this mean FCNM is binding anyway (a sort of *ius cogens?*) – hardly.

3. Universality of standards:
soft law and monitoring mechanisms

- Political declarations – widespread acceptance, routine rhetoric
- „Soft law" – may be effective (but not necessarily) only if combined with political conditionality
  - accession negotiations (strong)
  - development assistance (weak)
  - Eastern Partnership (?)

3. Universality of standards: political conditionality

- Who and how defines conditions?
  - EU accession: the Copenhagen criteria – interpretation?
    - A success story?
    - Was ratification of FCNM a precondition?
    - In practice – political bargaining with the governments with very limited involvement of opposition and no institutional involvement of civil society
  - Example: closure of the OSCE missions in Estonia and Latvia in 2001. Latvia:
    - Liberalization
      - abolition of language requirements for deputy candidates
      - still, annulment of mandate for insufficient state language proficiency envisaged in the Rules of Procedure. 2011: amended to define implementation mechanism. No attempts to apply in practice so far
      - 2010: similar procedure introduced in the Law on the status of elected members of municipal councils. 2015: first case launched against city councillor in Balvi
    - "Compensatory" tightening: April 2002 - constitutional amendments:
      - only citizens have voting rights in municipal elections
      - working language of municipalities is only Latvian
      - state and municipal institutions reply to persons' applications in Latvian
      - elected MPs swear an oath that includes commitment to defend the only state language

3. Universality of standards:
non-treaty bodies and mechanisms

- Political monitoring (EP, PACE, OSCE PA…): compliance with the HR standards decided by vote of politicians
- OSCE HCNM: rather broad variety of recommended measures i.e. interpretations of standards
- ECRI: scope of monitoring not limited to states parties of certain conventions
- CoE Commissioner for Human Rights
- Common feature: flexible dialogue with limited leverages

4. Interpretation of standards:
case-law

- Relevant bodies:
  - UN HRC (binding to a limited extent)
  - ECtHR
  - ECJ (more after the Lisbon Treaty entry into force?)
- ECtHR : non-discrimination in enjoyment of other rights
  - In education (DH vs Czech Republic, 2007)
  - The right to be elected (Podkolzina vs Latvia, 2002; Sejdic and Finci vs Bosnia, 2009)
  - The right to association (Sidiropoulos vs Greece, 1998; Stankov vs Bulgaria, 2001; Tourkiki Enosi Xanthis vs Greece, 2008…)
  - Freedom of expression - covers also use of minority language in media, though subject to licensing (less explicitly, but still - Radio ABC vs Austria, 1997; "Informationsverein Lentia" vs Austria, 1993)

4. Interpretation of standards:
case-law

- HRC: prohibition of interference in private sphere, even if publicly visible
  - Free use of minority language in outdoor advertising - covered by freedom of expression (Ballantyne, Davidson, McIntyre vs Canada, 1993)
  - Equal access of private minority schools to public funding (Waldman vs Canada, 1996)
- Therefore, case-law strongly confirms the liberal approach

4. Interpretation of standards:
case-law

- Minority rights in public area:
  - use of minority languages before public authorities
    - HRC Diergaardt vs Namibia, 2000 – violation
    - Beyond some clearly defined circumstances (e.g. defendants and witnesses in criminal court) – good will of the authorities
  - use of minority languages in public education system
    - ECtHR "Belgian linguistic case", 1968: no right to public education in minority language
    - ECtHR Cyprus vs Turkey, 2001: violation - no secondary schools
    - "Despite the uncertain references at times to an unqualified "right to education in the mother tongue" – and on other occasions to something as vague as simply "bilingual education" – and no clear guidance of the exact extent to education in a particular language, there are still a few indications as to the extent a minority or indigenous people could claim the use of its language as medium of education" – *Fernand de Varennes, 2015*

4. Interpretation of standards:
case-law

- Minority rights in public area:
  - spelling of personal names in minority languages
    - ECtHR: Kemal Taskin vs Turkey, 2008; Baylac-Ferrer vs France, 2008; Kuharec vs Latvia, 2004; Mentzen vs Latvia, 2004; Bulgakov vs Ukraine, 2007…- either inadmissbile or no violation
    - ECJ: Runevič-Vardyn vs Lithuania, 2011: not in the scope of the Race directive, broad margin of appreciation
    - HRC: Raihman vs Latvia, 2010: violation

4. Interpretation of standards

- Coherence of case-law
- „Forum shopping”?
- International actors - division of labour?
- EU
  - Accession to ECHR?
  - Further development of anti-discrimination acquis?
  - ECJ
  - Own standard-setting: threat of double standards – human/minority rights “for the rich” and “for the poor”?

5. Effective participation

- Substantial element in the Copenhagen document
- Art. 15 FCNM
- Minority rights – „the rights on demand". Crucial to determine real demand (and also real possibilities). FCNM – the same conditionality
- However, "…*in particular those affecting them*" – but not only!
- Minority rights as a higher level of democracy: not only will of a majority, but also accommodation of minority opinions and interests

5. Effective participation

- Range of practical arrangements (e.g. Lund recommendations)
  - Specialized state and municipal bodies
  - Consultative and advisory councils
  - Delegation of powers
  - Special representation
  - Cultural autonomy
  - Subsidiarity, decentralization
  - Territorial autonomy
  - Federalization
  - Power-sharing

5. Effective participation:
consultative bodies

- Great hopes in mid-90s, did not come true
  - Susceptible to manipulation
  - Require high level of diligence (that makes formal arrangements unnecessary)
  - Expert (as alternative to representative) bodies – useful and effective, but have little to do with effective participation

5. Effective participation:
territorial solutions

- Perceived as security risks
  - Most if not all successful separatist attempts in Europe were based on some kind of territorial organization or autonomy

5. Effective participation:
power-sharing

- Mechanism of - or alternative to minority protection?
- Minority-in-minority situations
- Effectiveness in terms of peace-making – at the expense of fundamental human rights (Sejdic-Finci)?

6. Concept of integration

- Become more and more topical in the context of handling immigration
- Social cohesion vs cultural assimilation
- CoE approach:
  - Common values
  - Mastering official language: tool of communication vs more comprehensive concept of a sort of “cultural environment”
  - Non-discrimination and equal opportunities
- Practice: vague criteria

7. Multiculturalism

- Concept borrowed from immigration states
- Certain similarity to power-sharing
- “Failure of multiculturalism” = denial of minority rights?
- Danger: instead of accommodation of diversity, provokes construction of identity (not to be left outside of the system of distribution of resources), “ethnic entrepreneurship”
- Ignores multiple identity?

8. Securitization

- Ambiguity:
  - More attention paid to minority claims
  - Security-based instead of value-based approach
  - Devaluation of standards, favours instrumental solutions
  - Departure from legal standards and litigation
  - “Bad behaviour is rewarded”?

Conclusions

- Need to further develop interpretation of minority rights as the right to equality and non-discrimination. Equality not through elimination of diversity but through different treatment to ensure full and effective equality
- Proper combination of “idealistic” value-based approach with “pragmatic” security-based approach
- Clarification of “parallel” concepts (integration, power-sharing, multiculturalism)
- Need to develop concrete forms of effective participation
- Emphasis on uniform interpretation of the content of minority rights and broad interpretation of the right-holder
- Effective monitoring and sanctions. Coherence of case-law. Justiciability of minority rights