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**EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW**

**(VENICE COMMISSION)**

**NON-CITIZENS AND MINORITY RIGHTS**

**Background information  
and issues for discussion**

## NON-CITIZENS AND MINORITY RIGHTS

### Background

1. The issue of whether and to what extent non-citizens should benefit from the specific minority protection is a long-debated one. The controversial approach to it depends largely on the absence of a legally-binding and even generally accepted definition of “minority”.
2. The limitation to citizenship was first proposed in the 1970s by Professor Capotorti who at that time prepared a study on minority rights for the UN Sub-Commission on Prevention of Discrimination and Protection of Minorities. This proposal was however not accepted by the Sub-Commission.
3. In 1991, the Venice Commission prepared a “Proposal for a European Convention for the Protection of Minorities”, which contained the following definition of “minority”:

“a group which is smaller in number than the rest of the population of a State, whose members, *who are nationals of that State*, have ethnical, religious or linguistic features different from those of the rest of the population, and are guided by the will to safeguard their culture, traditions, religion or language” (see article 2 of the proposal).

4. The Parliamentary Assembly of the Council of Europe later adopted Recommendation 1201 (1993) on an additional protocol on the rights of national minorities to the European Convention on Human Rights, which contained the proposal for an additional protocol to the European Convention on Human Rights. According to its Article 1, the expression “national minority” referred 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;

display distinctive ethnic, cultural, religious or linguistic characteristics;

are sufficiently representative, although smaller in number than the rest of the population of that state or of a region of that state ;

are motivated by a concern to preserve together that which constitutes their common identity, including their culture, their traditions, their religion or their language.”

5. In 1994, the Human Rights Committee of the United Nations, monitoring the implementation of the International Covenant on Civil and Political Rights, pointed out that Article 27 ICCPR<sup>1</sup>, setting out the minority rights, is not limited to citizens:

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<sup>1</sup> : “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”.

“The terms used in article 27 indicate that the persons designed to be protected are those who belong to a group and who share in common a culture, a religion and/or a language. Those 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. (General Comment No. 23 of 8 April 1994, § 5).

### **The works of the Venice Commission’s working group on this matter**

6. In the light of the recent trends and developments in international law of human rights and the recurrent discussions on this subject, upon the initiative of Mr Franz Matscher, a group of members of the Commission (Messrs. Matscher, Malinverni and Van Dijk) decided to carry out further reflection on the opportunity of having a citizenship requirement in the general definition of minorities.

7. Being aware of the importance and delicacy of this matter, the Working Group considered that it would be very valuable to have a brainstorming session on this matter, together with the other main international bodies dealing with minority protection.

8. A meeting was consequently held in Strasbourg on 28 May 2004, which was attended, in addition to the members of the Working Group, by Mr Asbjørn Eide, on behalf of both the Advisory Committee on the Framework Convention for the Protection of National Minorities and the Working Group on Minorities within the UN Sub-Commission on Human Rights; Mr Emyr Lewis, on behalf of the Committee of Experts on the European Charter on Regional or Minority Languages; Ms Danielle Coin, on behalf of the Committee on Legal Affairs and Human Rights of the Parliamentary Assembly of the Council of Europe and Ms Dzenana Hadziomerovic, on behalf of the OSCE High Commissioner on National Minorities.

9. Participants explained the position and experience of their respective bodies (see the written reports which were distributed at the meeting). These positions are roughly summarized hereafter.

### **The Venice Commission**

10. After the Commission gave its definition of “national minority” in 1991, in the opinions which it issued in more recent years show a tendency to abandon the citizenship requirement, although the Commission has not said that such element would be inconsistent with the international rules of minority protection.

### **The Advisory Committee on the Framework Convention for the Protection of National Minorities**

11. In the absence of a definition of “national minorities” in the Framework Convention, Parties to it must examine the personal scope of application to be given to it within their country. They dispose of a certain margin of appreciation in this respect, in order to take the specific circumstances prevailing in their country into account. This margin of appreciation, however,

must be exercised in accordance with the general principles of international law and the fundamental principles set out in Article 3 of the Framework Convention. In particular, the implementation of the Framework Convention should not be a source of arbitrary or unjustified distinctions. With a view to excluding that any such arbitrary or unjustified distinctions be made, the Advisory Committee on the Framework Convention exercises a supervisory role on the personal scope given by each country to the implementation of the Framework Convention.

12. The Advisory Committee has expressed the view that it is important to address the issue of citizenship on an article-by-article basis rather than making it a general requirement for the application of laws on national minorities (see for example Opinion on Germany, Article 3, §18; Opinion on Serbia and Montenegro, Article 3, §§ 23, 24).

### **The Committee of Experts of the European Charter on Regional or Minority Languages**

13. For a language (whether territorial or non-territorial) to gain protection by the European Charter of Regional or Minority Languages in a particular state, it must be traditionally used by **nationals of that state**. The Charter is silent as to whether a non-national of a particular State is entitled to any rights or benefits pursuant to the implementation of the Charter by that State. The basic premise of the Charter would suggest that the answer to these questions must be yes, since it is **languages** that are protected. This is reinforced by those provisions of the Charter (Article 7(1)(i) and Article 14) which relate to promoting relations between speakers of Regional or Minority Languages across national boundaries.

### **The Parliamentary Assembly of the Council of Europe**

14. While the PACE has so far consistently relied on the citizenship criterion, Recommendation 1623 (2003) on rights of national minorities adopted on 29 September 2003 reminds states parties to the Framework Convention that “they 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”, and consequently calls on “those states parties which have ratified the framework convention but have made declarations or reservations, to drop them in order to exclude arbitrary and unjustified distinctions, as well as the non-recognition of certain minorities “.

15. In the explanatory memorandum attached to Recommendation 1623, the rapporteur Boris Cilevics stressed that the scope of application of the Framework Convention should be coherent with the UN mechanism of minority protection. All state parties to the Framework Convention are, in the meantime, state parties to the International Covenant on Civil and Political Rights (ICCPR), and as such are bound by its Article 27. He concluded that: “It would be rather unfortunate if the European standards of minority protection appear to be more restrictive in nature than the universal standards, the more so that, as mentioned above, Article 27 of ICCPR is anyway binding for all state parties to the Framework Convention”.

### **The OSCE High Commissioner on National Minorities**

16. The OSCE High Commissioner on National Minorities, based on the principle that human rights are universal, considers that there are very few rights, including the rights of minorities specifically, which are in any way connected to the content of citizenship – the clear permissible

exception being certain political participatory rights (to vote and stand for office, ICCPR Article 25), and the right to return to one's country (ICCPR 12.4) which may (though not necessarily should) be reserved for citizens under international human rights law. The Commissioner is thus of the view that there is no legitimate basis upon which to make an a priori distinction between citizens and non-citizens in terms of their equal enjoyment of human rights, and that any exceptions to the equality principle must be narrowly construed.

### **The issues to be discussed**

17. There appears to be consensus amongst the participants that the requirement of citizenship should therefore not be included in the provision dealing generally with the scope of application of minority protection instruments: it should instead be contained only in those provisions dealing with issues where citizenship is essential.

18. It is proposed that the following issues be discussed within the sub-commission:

- What specific minority rights should be reserved to citizens only? (certain political participatory rights, right to return to one's country. Others?)
- What element/s should be used instead of the citizenship one? (long-standing lawful residence?)
- Is it possible to elaborate guidelines in this respect so as to avoid that arbitrary or unreasonable distinctions are made by States? What would these guidelines be? Would it be possible/useful to elaborate them together or in consultation with the other international bodies dealing with minority protection?

### **An international forum on national minorities**

19. The meeting of 28 May 2004 has proved very useful. It has allowed the members of the working group to be acquainted with the position of other international bodies dealing with minority protection and to hold a very fruitful exchange of views. It seems very valuable to have other occasions to exchange views and experiences in the future.

20. It would seem useful therefore to set up an "international forum" for discussing minority issues amongst all major international bodies dealing with minority protection.