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REPORT

**"PROTECTION OF MINORITIES IN SERBIA
THROUGH EXTENSIVE CONSTITUTIONAL PROVISIONS
AND MONITORING OF INTERNATIONAL STANDARDS"**

by

**Ms Lidija BASTA-FLEINER
(Professor, Fribourg, Switzerland)**

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Part I: Mapping the Issues

I. 1. International Legal Standards for Minority Protection

- In General
- Minorities in Particular -> Human Rights Approach
- ius cogens principles of minority protection;
- “a limited collective dimension to minority rights”: the problem of definition (Art. 27 ICCPR - “*via media* between rights of individual and full collective rights”); UN Minority Declaration and UN Indigenous Peoples Declaration
- A new shift in the Framework Convention for the Protection of National Minorities: minority rights become *integral part of fundamental* human rights

I. 2. Constitutionalisation of international standards

- a/ the *constitutionalisation of international standards*, especially but not any more only in the human rights sphere - the role of the Council of Europe, as a “constitutional advisor”
- b/ the *internationalisation of constitution-making* through facilitation and mediation in post-conflict situations

I. 3. Effective constitutional protection of minority rights

- Constitutionally laid down, directly effective protection that incorporates international standards of minority protection -> minority rights are fundamental rights, i.e., statutes cannot reduce constitutional scope of minority protection
- positive measures for full and effective equality/additional rights and/or affirmative action
- constitutional complaint
- collective rights – including self-determination?
- no assimilation but integration
- three-fold advantages of a general law on minority protection /consistency and comprehensiveness, legal security, and symbolic message to minorities

Part II: Framework Convention for the Protection of National Minorities (FCNM)

II. 1. In General:

- MR are integral part of fundamental HR and should be implemented without discrimination
- MR are understood as individual and can be enjoyed in community with other individuals
- MR are complementary to the anti-discrimination principle – second level of non-discrimination legislation (positive measures)
- As a legal treaty, the FCNM is a document of legal principles, aimed at achieving full and effective (not only equal protection of laws) equality – differential treatment needed (arts. 4 to 6)
- a different level of protection for different rights
- the key aspect and a foundational right – participation rights coming out of the principle of effective participation in public and economic life (Art. 15 in relation with Art. 4)
- no rights to be directly claimed, exception: Art.3
- political dimension in minority rights introduced by FCNM is a key challenge

II. 2. Participation Rights in Particular

- Art. 15: "The Parties shall create conditions necessary for the effective participation of persons belonging to minorities in cultural, social and economic life and in public affairs, in particular those affecting them.
- Can decentralisation/participation rights deliver what federalism promises? (the ambivalence of Art. 15: a collective-right dimension)
- "FCNM helps for small dispersed minorities, already on the road for assimilation. FCNM is good for the minorities that are not capable of exercising regional autonomy or of sustaining a high degree of institutional completeness". (Kymlicka)

Part III: Serbia. Do Extensive Constitutional Provisions Automatically Mean Effective Constitutional Protection?

III. 1. Background

- Unequal distribution of ethnic groups in Serbia: non-Serb population -> 16.1% and 24 minority groups; AP Vojvodina -> 65.05% Serbs and 34.95% of minorities; central Serbia -> 89.48% Serbs and 10.52 of minorities
- the normative framework has considerably changed since the first State Report on the implementation of the FCNM on the territory of what was then the Federal Republic of Yugoslavia in 2002
- FCNM was ratified 11 May 2001, before FRY became a member-state of the Council of Europe
- *1st monitoring cycle*: ACFC Opinion public 2nd March 2004, Government Comments 29 April 2004, Resolution Committee of Ministers 17 November 2004, Follow-Up Seminar 10 October 2005

III. 2. Constitution of 2006 and the Law on the Protection of Rights and Freedoms of National Minorities (LPRFNM)

III.2.a - Constitutional framework

- Direct implementation of the rights guaranteed by the Constitution
- definition of the purpose of the human rights guarantees
- setting criteria for the limitation of human rights
- explicit banning of discrimination
- definition of a non-discriminatory nature of special/positive measures being taken for the purpose of eliminating discrimination
- guaranteed additional rights comply with international standards
- participation rights more accentuated
- the protection of human and minority rights guaranteed by a constitutional complaint

III.2.b – Minority Rights in the 2006 Constitution

Besides the freedom of national/ethnic identification guaranteed together with other human rights and freedom, “persons belonging to national minorities shall be guaranteed special individual or collective rights in addition to the rights guaranteed to all citizens by the Constitution”:

- Prohibition of discrimination, equality before the law and equal legal protection,
- equality in administering public affairs
- prohibition of forced assimilation
- rights to preservation, promotion and public expression of their national, ethnic, cultural, and religious identity covered by Section II of the FCNM

- In compliance with the Constitution and on a statutory basis, additional rights of members of national minorities may be established by the provincial regulations.

III. 2. c – Legal/statutory framework

- The rights of persons belonging to minorities are regulated by a separate law (LPRFNM), adopted at the level of Federal Republic of Yugoslavia February in 2002. After the disintegration of the State Union of Serbia and Montenegro, the LPRFNM is being implemented in Serbia as an additional source of constitutional law.

- Through the institution of acquired rights, the Law prevents limitation or repeal of the rights and freedoms exercised by the persons belonging to national minorities, individually or in a community with other members of their group, until the adoption of this Law. The Law also provides for the adoption of special measures towards equality, especially with regard to Roma national community.

- The Law provides for the establishment of national councils of national minorities as bodies representing national minorities as collective entities. Under the terms of this Law, the national councils of national minorities are partners and consultative bodies of the government, and their members participate in decision-making on questions of importance for national minorities. The national councils can have certain independent competencies in the fields of education, culture and information. Although the Law foresees a statutory regulation, the councils of national minorities and the Council of the Republic of Serbia for National Minorities were founded by a bylaw.

III. 3. Monitoring of International Standards: Major Findings of the 1st FCNM Monitoring Cycle and of the Venice Commission¹

III.3. a – 1st FCNM monitoring cycle

- The Advisory Committee notes with satisfaction that, while the constitutional structures have undergone fundamental changes, the authorities of Serbia and Montenegro have taken decisive steps to protect national minorities in such fields as education and language rights. The Advisory Committee welcomes in particular the adoption of the Union Charter of Human Rights and Minority Rights and Civil Freedoms and the federal Law on the Protection of Rights and Freedoms of National Minorities, which constitute a good basis for the implementation of the Framework Convention and contain promising innovations such as the National Councils of national minorities. It further recognises the commitment of the Ministry for Human and Minority Rights to the implementation of the said laws.

- At the same time, the Advisory Committee notes that a number of shortcomings remain. The Advisory Committee considers that the main problems in the protection of

¹ The monitoring results will be more in depth debated during the Workshop

national minorities in Serbia and Montenegro pertain to the implementation of the relevant norms in practice, which is at times hampered by the limited co-operation between the relevant authorities of the State Union and its constituent states and the lack of clarity as to their relative competences. This needs to be addressed, including through improved co-operation from the side of the Montenegrin authorities and accelerated constitutional reform and institutional stabilisation in Serbia.

- Furthermore, inter-ethnic relations are still seriously affected by the aggressive policies of the past regime and the legacy of the resulting conflicts. Despite marked progress, manifestations of inter-ethnic tension are still reported and the efforts to build tolerance and trust, which have been valuable for example in respect of the Albanian minority in Southern Serbia, need to be expanded further. Also, the Advisory Committee finds that the protection of national minorities should receive greater attention from law-enforcement agencies and that further improvements in the representation of the Bosniac and other national minorities in these agencies as well as within the judiciary should be achieved.

- The Advisory Committee considers that both legislative and practical measures are needed to improve the implementation of the principles of non-discrimination and full and effective equality. In this respect, the serious difficulties faced by displaced and other Roma merit urgent attention including in terms of the adoption and implementation of a comprehensive Roma strategy. These difficulties are particularly apparent in such fields as health, housing and employment as well as in education, where the problem of undue placing of Roma children in schools for persons with mental disabilities needs to be addressed as a matter of high priority.

- The Advisory Committee notes that there are wide variations between regions in terms of efforts taken to protect languages and cultures of national minorities. Whereas in Vojvodina a number of commendable initiatives have been introduced, the situation is considerably less developed, for example, with respect to the protection of the Vlach national minority in North-Eastern Serbia. The Advisory Committee finds that the authorities should undertake more proactive monitoring and other measures to ensure that the relevant legislation, including the pertinent provisions of the federal Law on the Protection of Rights and Freedoms of National Minorities, is consistently implemented. (ACFC Opinion and the 1st CM Resolution on the basis of the ACFC Opinion)

III. 3. b – Venice Commission Opinion on the Constitution of Serbia, 17-18 March, 2007

Article 10 – Language and Script

- According to this Article the Serbian language and the Cyrillic script are in official use. It is striking that, compared to the 1990 Constitution there is a decreased protection of linguistic rights of minorities, as Article 8 of that Constitution expressly provided that the Latin alphabet also “shall be officially used in the manner established by law⁴.” As it appears from the articles 14, 18.2, and 75 to 81 of the Constitution, it is clearly the intention of the drafters to have the rights of minorities protected at constitutional level. It is therefore not clear to the Venice Commission for what reasons the legal protection of the use of the Latin alphabet, which is preferred by most of the minorities, is no longer expressly mentioned in the Constitution. This is the more astonishing as, according to article 20. 2, of the Constitution, the attained level of human and minority rights may not be lowered.

Article 12 – Provincial autonomy and local self-government

- Article 12 unusually provides for a right of citizens to provincial autonomy and local self-government. This right is said to limit state power and is only subject to supervision of constitutionality and legality. While this is welcome in principle, it seems regrettable that the content of this right is not made concrete in the Constitution which leaves it nearly entirely to the legislature to define the scope of these rights (cf. the comments on the Preamble above and on Part VII of the Constitution below)

Article 17 – Status of foreign nationals

- This Article states that foreign nationals shall enjoy all rights with the exception of rights reserved to citizens by the Constitution or the law. This should not be misinterpreted as enabling the legislature to reserve any right to citizens, without due justification in the light of the prohibition on discrimination.

General comments

- In sum, nearly 70 Articles are dedicated to fundamental rights, i.e. approximately one third of the 206 Articles of the Constitution. From an international and a comparative perspective this number is quite remarkable, in absolute and in relative terms. It shows that Human Rights form an integral and important part of constitutional law and it makes it clear that attention is paid to this element and basic feature of a democratic society in the sense of European Standards such as the European Convention on Human Rights.

Fundamental principles

- This Chapter contains a large number of mainly very positive provisions. It suffers, however, from excessively complex drafting, which may lead to many issues of interpretation, which may lead to allowing excessive restrictions of fundamental rights. The courts, and in particular the Constitutional Court, will have to remain vigilant and ensure an interpretation in line with the democratic values set forth in the Constitution as well as the international standards to which it makes difference.

Article 18 – Direct implementation of guaranteed rights

- This Article provides welcome provisions on the direct application of constitutional rights, their interpretation and the role of the legislature. In particular, under Article 18.2.2 “the law may prescribe manner of exercising these rights only if explicitly stipulated in the Constitution or necessary to exercise a specific right owing to its nature, whereby the law may not under any circumstances influence the substance of the guaranteed right”. Thus, the legislature may only enact laws in this field if there is an explicit basis in the Constitution. The terms “necessary” and “substance” of a right are common in constitutional texts and legal doctrine on fundamental rights in Europe. According to Article 18.3 “provisions on human and minority rights shall be interpreted to the benefit of promoting values of a democratic society, pursuant to valid international standards in human and minority rights, as well as the practice of international institutions which supervise their implementation.” This provision has to be seen as a positive signal, as a commitment to international and European standards although - from a legal point of view -the wording “to the benefit of promoting values of a democratic society” is rather general. It has to be welcomed that reference is also made to supervisory institutions. From a European perspective this means that above all the case law of the European Court of Human Rights is of highest significance for the interpretation of fundamental rights in the Constitution of Serbia.

Article 20 – Restriction of human and minority rights

- This Article requires a more detailed analysis. Section 1 reads as follows: “Human and minority rights guaranteed by the Constitution may be restricted by the law if the Constitution permits such restriction and for the purpose allowed by the Constitution, to the extent necessary to meet the constitutional purpose of restriction in a democratic society and without encroaching upon the substance of the relevant guaranteed right.” This provision may raise difficult questions and cause problems. In contrast to the restrictions clauses in the ECHR (Articles 8 to 11 ECHR), Article 20 does not bind the restriction of the rights and freedoms to a specific legitimate aim, but to **any** purpose “allowed by the Constitution” without a list of legitimate aims. However, bearing in mind the general interpretation clause and the rest of the wording in Articles 18 and 20, national courts are in the position to interpret the Constitution in conformity with European law, especially with the ECHR. However, it should be made clear, as it is in relation to states of emergency and war (see below para. 92) that some rights (such as those set out in Article 26) are never able to be subject to limitation.

- Article 20.3 defines the principle of proportionality as follows: “When restricting human and minority rights, all state bodies, particularly the courts, shall be obliged to consider the substance of the restricted right, pertinence of restriction, relation of restriction and its purpose and possibility to achieve the purpose of the restriction with less restrictive means.” This paragraph repeats and specifies the prerequisites of Section 1 and of Article

18.2. It would be preferable to put the various types of restriction clauses in a more systematic and clear order. The excessively complicated drafting of these Articles risks leading to many issues of interpretation and the Constitutional Court of Serbia will have to ensure a coherent interpretation, on the basis of the guidelines set forth in Article 18.3.

- This problem of interpretation is compounded by the fact that in addition to these complex general restriction clauses the Constitution provides for specific conditions of interference in the context of the provisions on different fundamental rights. This legislative approach, which was also the approach of the previous Charter, has the consequence of coexistence of a general provisions and concrete provisions, or to put it otherwise: a coexistence of the ECHR-system (concrete clauses) and the EU-Charter-system (one general restriction clause). The impact of this dual system is not easy to assess in advance. Again, much will depend on the practice of the courts and especially the Constitutional Court will be faced with an important task of ensuring a coherent, human rights friendly interpretation.

Article 22 – Protection of human and minority rights and freedoms

- This Article, which includes the right to address international institutions protecting human rights, deserves a positive assessment. However, the latter right should not be reserved to citizens only.

Chapter 3 – Rights of persons belonging to national minorities

- This Chapter grants additional and special rights to persons belonging to national minorities, which are partly already inherent in the “general” fundamental rights. This Chapter has to be welcomed and is important, bearing in mind the difficulties encountered in the region in the last decades.

Background text for the Lecture:

1. The role of the Council of Europe as a “constitutional advisor”

Two major forms of constitution-making where the international community is involved: the role of international community as “a pouvoir constituant” in the situation of post war conflict transformation (2), and the role that the Council of Europe plays in the constitutional processes of its new member states (3). Constitutional processes aimed at supporting state-building and nation-building as conflict transformation strategies, when facilitated or mediated by the international community, paradigmatically represent an example for a heteronymous supra-national constitution-making. Not only do they tell how eminent the role of the main actors of international politics became; they also point to an epochal turn, the emergence and growing role of a supra-national constitutionalism without a “constitutional demos”.

On the other hand, the Council of Europe as a “constitutional adviser” in most cases plays a positive role. It engages in a dialogue and co-operation with the authorities of states in question, and gives its opinion on a general constitutional issue not specifically related to one state through the resolutions of Parliamentary Resolutions. Under treaty monitoring procedure, for example for the Framework Convention on the Protection of National Minorities (FCNM), the Advisory Committee and the Committee of Ministers support a dialogue between minorities and state authorities. Moreover, its most prominent advisory body, Commission for Democracy through Law, known as Venice Commission assists and advise individual countries in constitutional matters – provides “constitutional first-aid” – upon a request by the states, the Council of Europe’s organs or other international organisations. Nevertheless, the involvement of Council of Europe in constitutional affairs of its members was not always without contradictions and negative reactions from concerned states.

The oldest European organisation promoting democracy and the rule of law principally pursues the involvement of a different nature. The role of the Council of Europe builds on promoting and

sustaining Council of Europe's democratic *acquis* within the ongoing dialogue with concerned states. There is a strong commitment to the rule of law and institutional practices that should reflect respective complexities of democratisation processes in countries in question and give due consideration to power relations embedded in particular institutional forms and the influence of history in shaping institutional structures. Unlike "international constitution-making" which until now made the theme of this paper, similar activities within the Council of Europe often demonstrated a legitimate and sometimes effective involvement of international community in nationally based constitutional politics. As already said, this is a pattern, but there have been significant exceptions to the rule.

Council of Europe has played a role of a major "constitutional reformer" in the constitutional processes of its new member states. Not necessarily backed by a national democratic consensus of concerned states, the positions taken by major CoE bodies (notably Parliamentary Assembly and Venice Commission) and its treaty-monitoring procedure (ACFC) in some cases directly affected and indirectly "intervened" into most sensitive issues of the constitutional design of a given country. That said, it is understandable that the engagement of the Council of Europe as an "indirect constitution maker" sometimes provoked controversial debates and negative reactions by the concerned states.

Here three indicative examples of the opposite sides of the same coin known as "constitutional assistance" of Council of Europe in promoting democracy, human rights and the rule of law:

a/ The PACE Resolution 1735 (2006) on the concept of nation is a far-reaching statement on citizenship and nationhood within a multilateral setting. It is for the first time that an international body argues in favour of multicultural citizenship as a pre-condition to inclusive and participatory democracy. Although severely contested by some states, notably Romania, this resolution undoubtedly marks a turning point in the international standards on constitutional politics in multiethnic states. It addresses a constitutive legitimating principle of nationhood, which in international relations has always represented an undisputed principle of nation-state sovereignty.

b/ Based on the Venice Commission's opinion, the PACE adopted a Resolution 1301/ (2002), on the protection of minorities in Belgium condemning the delay of the ratification of the Framework Convention on the Protection of National Minorities. The reaction of Flemish community was vocal and indeed negative. Profound differences between Flemish and Francophone communities in Belgium over linguistic politics received a new impetus and engaged new arguments in the debate over territoriality vs. personality principle.

c/ Since 1991 the Venice Commission played an active role in drafting the constitutions of the CoE new member states, notably Albania, Georgia and Ukraine. It also provided expertise and assistance in other constitutionally very controversial issues, among others: on the preferential treatment of national minorities by their kin-states (2001), on the Law on referendum for on Independence in Montenegro (2005), and on constitutional reforms in Bosnia and Herzegovina (2006).

2 - On the Framework Convention for the Protection of National Minorities (FCNM)

The FCNM is the first multilateral treaty which in a form of hard law obliges state parties to treat rights of persons belonging to minorities as fundamental rights, making integral part of the international protection of human rights, and not falling within the reserved domain of States. Second, by declaring full and effective equality a key standard for minority protection, the Convention introduces a second level of anti-discrimination standards that will in many cases imply additional rights for the persons belonging to minorities. Last but not least, Art. 15 of the Convention, which lays down the obligations of State Parties in effectuating participation rights of persons belonging to national minorities, goes much further than Art. 27 of the UN Covenant on Civil and Political Rights. The FCNM recognizes for the first time a political dimension in

minority aspirations, while “avoiding while avoiding “dangerous and radical “aspirations of self-determination.² In the same context, the importance of the participation of national minorities as a part of democratic cohesion and political pluralism has been stressed out in the Recommendation 1492/2001 of the Parliamentary Assembly which recognises that ‘the minority has the responsibility to participate in political and public life of the country in which it lives and to contribute, along with the majority, to the democratic cohesion and pluralism of the states to which it has offered its allegiance”.

2. 1 - Participation as an inclusive concept (covering cultural, public, economic and social life)

Article 15 of the FCNM provides that “the parties shall create the conditions necessary for the effective participation of persons belonging to national minorities in cultural, social and economic life and in public affairs, in particular those affecting them”. Undoubtedly, the importance of Art.15 lies in its scope. It stipulates the necessity for the creation of the conditions by the State Parties needed for the effective participation of national minorities by imposing on States negative as well as positive obligations. On one hand, it implies obligations not to interfere in the cultural and other practices on which minority identity is based and not to hamper their participation in public affairs, in particularly those affecting them. On the other hand, it obliges the States to take measures to support the development of national minorities’ identities and to create conditions for the effective participation of national minorities.

It is clear that Article 15 is a key provision of the Framework Convention, closely or even directly linked to other articles in this international instrument. It is not possible to talk about effective participation without taking into account other rights that State Parties have to guarantee under the Framework Convention. The right of persons belonging to national minorities to be involved in affairs affecting them directly or indirectly touches profoundly upon their identity, traditions and cultural heritage, as well as their active participation in political life, and in consequence presupposes that they can enjoy these rights in a non-discriminatory manner. Ensuring full and effective participation of the persons belonging to national minorities is a necessary precondition for the effective protection of other rights covered by in the Framework Convention.

The nature and comprehensiveness of the FCNM is best reflected in an inclusive concept of participation that the Convention laid down and the Advisory Committee as a monitoring body to advise the Council of Ministers generally embraced in its Opinions.³ It is due to such an overall legal framework for the protection of national minorities that participation rights of persons belonging to minorities have to be regarded as foundational in its nature and as such critically instrumental for the effective protection of other rights which State Parties have to guarantee to the persons belonging to national minorities.

As far as the role of the Advisory Committee (ACFC) is concerned, its primary role is to act as a facilitator in a constructive dialogue between the state authorities and members of national minorities. In its now more than seven years of work the ACFC endorsed the foundational nature and transversal scope of participation rights and interpreted participation as an inclusive, critical standard for democratic governance. It may well be that in this sense the ACFC could have been even more persistent. For example, it is notable that in the 1st monitoring cycle, the

² Cf. also W. Kymlicka, Cultural Rights and Minority Rights: A European Experiment (manuscript).

³ “ In evaluating the adequacy of the measures taken by the Parties to give effect to the principles set out in the framework Convention the Committee of Ministers shall be assisted by an advisory committee, the members of which shall be recognised experts in the field of the protection of national minorities” (Art.26, para.1) The composition of the ACFC and its procedure were established in the Rules of Procedure (1998) and further decisions of the Committee of Ministers relevant to the monitoring procedure.

ACFC did not often make an explicit link between education (under arts. 6 and 12-14) and participation although it often requested the authorities to decide “in consultation with concerned minorities”. On the other hand, already later opinions of the first monitoring cycle show that the ACFC went further in targeting state’s non-compliance with its duties under Art. 15, when it concluded that these reflected a deliberate state policy and saw them as an element of non-democratic governance. Especially in the post-conflict cases of state-reconstruction the ACFC also used the participation argument in order to warn against the “reinforcing ethnic lines as the main pillar of state action”.

The 2nd monitoring cycle started in 2004. In the meantime already twelve opinions were adopted and six MC resolutions passed. The ACFC as a rule pursued a more comprehensive and more contextualized approach in monitoring the scope and effectiveness of participation rights in general, and the role of consultative bodies in particular. It also systematically enquired in the course of its country-visits whether national minorities were involved in the preparations of the state reports and if not this was criticized in the respective opinions. Besides, the ACFC became more active in going to regions and meeting representative of national minorities at a local level. This has progressively become a regular practice.

The major accents basically reflected in the inclusive approach of the ACFC to participation rights are related to the following issues: scope of application (Art.3), equal protection of laws and non-discrimination clauses (Art.4), culture and tolerance (arts.5 and 6), fundamental political freedoms (art 7), education (arts. 12-14). Interestingly enough, it was only in one of the newest opinions that the ACFC for the first time directly related the changes of administrative borders (art 16) to the State Party obligations under Art.15 and thus joined the scholarship argument⁴ on the critical importance of the obligations under Art. 16. for the participation rights.

Again, Art. 15 remains in fact relevant for all other rights covered under the FCNM. To start with, it is clear that the effectiveness of the participation directly relates to the number of those in one country who are protected under the FCNM. In this context, the comments of the ACFC under Article 3 related to the personal scope of application of the Framework Convention are very important for its approach to participation. For instance, the ACFC used the scope of application argument also to reiterate the importance of advisory and consultative mechanisms, saying that certain persons belonging to national minorities should not be excluded a priori from the dialogue because they are not recognized as national minorities under the Framework Convention.

The text will continue by focalising on full and effective equality and non-discrimination as provided in Art. 4. (1), on one side, and political participation in general and consultative bodies regulated by art. 15, on the other side (2).

Both aspects are equally important for social cohesion as a precondition for a good governance of participatory democracy. Indeed, the foundational nature and inclusive scope of participation rights heavily build on the state obligations under Art. 4. of the FCNM.

Full and effective equality means also positive measures

From the very beginning of the monitoring process, the ACFC understood the principles of full and effective equality and of second level of protection against discrimination - as provided for in Art. 4 of the FCNM - to be the cornerstones for the foundational nature and inclusive scope of participation under the FCNM. The ACFC particularly built upon para.2 of the Article 4 of the Framework Convention which explicitly demands from State Parties to engage in

⁴ Y. Ghai, Public Participation and Minorities, Minority Rights Group 2001.

“non/exclusion policy” prohibits discrimination and also calls on State Parties and adopt, where necessary, adequate measures in order to promote, in all areas of economic, social and political and cultural life full and effective equality between persons belonging to a national minority and those belonging to the majority. Throughout its Opinions, the ACFC repeatedly related the broad scope of application of these measures of positive discrimination to participation. Also in this context, the ACFC always underlined that it did not consider positive discrimination as discriminatory. For example, the ACFC saw that some discriminatory situations may be remedied by adopting special measures, such as quotas, to ensure full and effective participation of persons belonging to national minorities in terms of a more significant presence of these minorities in state administrative structures.

In particular, the ACFC often made in its opinions a cross-reference between the effective participation and the equality and non-discrimination principles, in order to address the problem of differences in social and economic situations between certain minorities and the majority. In one case the ACFC concluded that unemployment appears to affect disproportionately persons belonging to national minorities, especially young women and stressed the need to eliminate direct or indirect discrimination in the labour market and enhance the recruitment of qualified persons belonging to national minorities in public service persisted. When coming to the dispute over minority land rights in one of its latest opinions, the ACFC pointed out that both socio-economic and cultural aspects of the problem are directly interrelated with the participation rights of the minority in question. Having said this, it is to be emphasized that the Framework Convention’s provisions recognize both direct and indirect discrimination.

When the ACFC examined the issues related to Article 4 in conjunction with Article 15, it went on observing that Roma are particularly affected by discrimination in social, economic as well as cultural life, especially as regards housing, employment, health and also education. The economic and social exclusion of Roma concerns old as well as new democracies. In one of its opinions, the AC made it clear that the authorities should review institutional means to strengthen the participation of Roma and Sinti in the economic and social life and consider how to set up much more appropriate structures by which they can be regularly consulted in all parts of the State on matters concerning them.

Last but not least, during its country visits the ACFC as a rule was not provided with reliable and adequate statistical data regarding the participation of various national minorities, including Roma, in economic and social life, which in fact made it more difficult for the state authorities to monitor the problems and take appropriate policy measures in order to improve and remedy this situation. The ACFC therefore repeatedly raised the issue of the lack of data and recommended in its opinions to the State Parties to try to identify appropriate ways and means of collecting adequate data.

Participation in public affairs

Let me continue by expounding on major accents the ACFC has developed in its opinions regarding participation in public affairs, i.e., political participation in general and advisory and consultative mechanisms in particular.

To start with, one could say that throughout all its opinions the ACFC never “got tired” and never gave up stressing the importance of a dialogue between the state and minority organisations, the reason being that the ACFC has always understood consultation as a stepping stone, but definitely not already a form of full participation. In many cases the ACFC encouraged the authorities to make this step forward and give appropriate effect to the opinion and proposals of the minority representatives. In fact, the ACFC has always looked upon consultative mechanisms as a major term of reference to measure both the scope and the effectiveness of the participation rights in a given country.

In its Opinions, the ACFC insisted on the establishment of quality dialogue on issues pertaining to national minorities which should be maintained on a regular and frequent basis. In this context, the ACFC pointed out that a consultative mechanism could make a valuable contribution to ensuring such a dialogue between national minorities and the relevant authorities, especially there where the minorities are not as such guaranteed representation in parliaments and executive bodies at both national and lower levels.

The procedure for designating a minority representative in the consultative bodies was often and rightly addressed by the ACFC as critically important for the participation of national minorities in public affairs. In cases where not all organisations representing individual minorities are members of such consultative bodies, the ACFC stressed that a direct dialogue should be maintained with these organisations in order to accommodate their specific concerns. Thus, the ACFC gave due attention also to the “representativeness” of the minorities’ representatives, understanding ‘inclusive’ approach on the membership of the consultative bodies as a need that all national minorities, including numerically smaller national minorities should be represented in the advisory bodies. Moreover, the ACFC always understood consultative mechanisms as one of major terms of reference to measure both the scope and the effectiveness of the participation rights guaranteed by State Parties under Art. 15. of the FCNM.

The ACFC also aimed finding out as much as it was possible about the real influence of the minorities’ representatives on the decision-making. Moreover, a look into the opinions of the 2nd monitoring cycle show that the issue of a real impact the minorities have on the public affairs decision affecting has been given more attention.

Furthermore, the ACFC also invoked in one case the role of consultative bodies in distributing subsidies awarded by the Government to various national minorities to support their cultural life. In another, it noticed the positive role of the minority consultative body which provides a fine example of good co-operation between the federal authorities and the regional ones for the benefit of national minorities. The ACFC also held in one case that the authorities could consider to establish a forum for a regular dialogue at the local and regional level where there appears to be a need to increase open and constructive dialogue on the questions concerning the protection of national minorities.

Although no territorial autonomy can be invoked as the obligation for State Parties under the FCNM, decentralised and local forms of government were often referred to as an important factor in facilitating the dialogue and therefore creating necessary conditions for effective participation of persons belonging to national minorities at all levels. More specifically, local autonomy was a matter of consistent focus for the ACFC; functional autonomy for indigenous peoples was also commended. In other words, in its inclusive interpretation of participation, the ACFC also addressed the issues of state organisation in general and constitutional design of consultation system in particular. On the other hand, as often rightly pointed out, there is no unique type of consultative arrangement which would suit all countries. However, the effective functioning of the consultative bodies will always strongly depend on a support by the state authorities and interest they generate within the minority communities. Furthermore, the decentralisation did not always prove beneficial for the national minorities, especially due to the lack of financial means provided to the local authorities in sustaining new competencies. In one of its Opinions the ACFC therefore emphasized that the impact on participation can be gauged from the actual powers available to local authorities and considered that the necessary resources will be allocated so that the reform can be fully effective in practice. In the same time, it stressed out that the decentralization process should not dispense central authorities of their overall responsibility regarding the participation of persons belonging to national minorities. For the sake of balance, one should point out that the ACFC had positive views in cases of some well known traditional autonomy arrangements as undoubtedly contributing to the effective participation of the individuals concerned in cultural, social and economic life and public affairs.

Conclusions and Outlook

Generally, later opinions of the ACFC are more demanding in terms of information needed and more specified when assessing the effectiveness of participation in public affairs. The ACFC was already concrete enough in proposing measures to promote effective participation in public affairs, however, not yet in terms of embracing a fully consistent approach. Furthermore, the ACFC as a rule also targeted the legislation on political parties and the language requirements in public services, understanding both as major indicators about a general attitude and policy of the State Party towards public participation of minorities.

Interestingly enough, until today, the ACFC remained somehow reluctant to use explicitly on the term “policies” when in fact criticising the problems which were obviously backed by a state policy behind. So, in one of its opinion, the ACFC established that “there has been a gradual tendency towards fewer opportunities available to (persons belonging to national minorities) to participate in political life”. The same goes for some other opinions where the ACFC cautiously decided not to make explicit whether he referred to the problems as those of practice or those of policy. My understanding is that the thematic work on participation which is currently going on within the ACFC would make a good basis to fill in this gap and thus properly target the effectiveness of participation of persons belonging to minorities in cultural, social and economic life and in public affairs.

In a nutshell: The work of the ACFC in “filling the frame” of the FCNM and giving more legal substance to its respective provisions has also built on forceful and inspirational commentaries given by prominent experts in the field. In this context the PA Recommendation 1735 (2006) on the concept of nation should also be recalled. It notes, inter alia, that “the general trend of the nation state’s evolution is towards its transformation, depending on the case, from, a purely ethnic or ethnocentric state into a civic state and from, a purely civic state into multicultural state. My understanding is that this far-reaching statement on the concept of nation within a multilateral setting is in the same line with the conviction of the ACFC that participation rights are indeed the proper way towards multicultural citizenship.⁵ Namely, it is only with inclusive and participatory democracy, for which also the FCNM provides a legal frame, that peace and stability can be guaranteed in multicultural societies, not only within the border-lines of State Parties but also region wide.

The task of this text was to revisit the achievements and remaining challenges in the monitoring results the ACFC as a “treaty body” has achieved in more than seven years since its foundation. The Committee addressed the implementation of the FCNM as “an unfinished story of human rights” and understood its task as that of discovering and further developing meanings in the human rights canon in terms of minority protection.

The text particularly focused on the participation rights for the following reasons. First, participation rights lead directly to legitimacy issues in terms of the minority status, since they introduce the integration of minorities through co-governance as a critical standard for good governance and democracy in multicultural setting. Given the legal nature of the FCNM, it is understandable that the ACFC could not directly tackle and develop on this issue, but the opinions nonetheless often reflected this problem: the State should not be construed in a way that would result in the structural exclusion of minority communities from public life. Secondly, more than any other article in the FCNM, Art. 15 reveals a structural ambiguity between the individual nature of minority rights and its viability only through the group enjoyment. The Explanatory Report on the FCNM explicitly says that this multilateral treaty “does not imply the

⁵ More on the citizenship and human rights in multicultural societies in L. Basta Fleiner, **Fédéralisme, multiculturalisme et droits humains : le principal défi pour les politiques post-moderne**, in M. Borghi, P.Meyer-Bisch (éd), **Société civile et indivisibilité des droit de l’homme**, Editions Universitaires, Fribourg (CH), 2000, pp. 179-189.

recognition of collective rights” but places the emphasis instead “on the protection of persons belonging to national minorities, who may exercise their rights individually and in community with others”. In other words, it is the participation rights which should mediate between individual and a group.

In consequence, the key-question to lead towards major conclusions should read as follows: Has the AC confirmed the foundational nature of participation rights, and has it sufficiently built upon and developed the inclusiveness backing the concept of participation rights?

Here, it is worth reminding that the inclusiveness of participation rights of persons belonging to national minorities can be understood in two ways: a/ in terms of the scope of rights, b/ in terms of a constitutive nature of a given state construction which should accommodate and further improve inclusiveness as a major principle of effective, legitimate multicultural societies. The letter message still waits to be more explicitly communicated by the ACFC in its future monitoring work. Namely, the first cycle opinions as well as the first eleven opinions of the second monitoring cycle adopted until March 2006 provide more than a good ground for the ACFC to engage into further interpretative possibilities of the “effectiveness” of political participation. On the other hand, the same cannot be said for another major formulation in Art 15 concerning participation in public affairs, i.e. “in particular those affecting them”. The Explanatory Report is indeed specific in numbering conditions for the effective participation, but does not say much on how “public affairs” should be understood. This fact significantly affects the standards for monitoring the effectiveness of the democratic integration of national minorities into a given constitutional design. Although the Explanatory Reports remains pretty silent on this issue, my understanding would be that the formulation “in particular those affecting them” should be interpreted as further enforcing the demand on “effectiveness” of participation. Here the ACFC is far from having developed enough on the interpretative potentials of the latter indicator. However, for the sake of argument, one has to say that such an approach would inevitably engage the AC in a more general debate and clear position on what “public affairs particularly affecting them” exactly mean. Put differently: The issues would be about the *nature* of the status and the role of national minorities within a given constitutional design (human rights accommodation only, personal and/or territorial autonomy accommodation, integrationists or power sharing model).