Strasbourg, 17 December 2007

CDL-UDT(2007)020
Engl. only

T-11-2007

EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW
(VENICE COMMISSION)

UNIDEM
Campus Trieste Seminar

"CONCERTED EFFORTS AT THE EUROPEAN LEVEL TO PROTECT ETHNIC, LINGUISTIC AND NATIONAL MINORITIES"

Trieste, Italy
26 to 29 November 2007

REPORT

"COUNCIL OF EUROPE PERSPECTIVE: THE FORMATION OF A LAW ON THE PROTECTION OF NATIONAL MINORITIES AND ITS IMPLEMENTATION"

by

Mr S. BARTOLE
Professor, University of Trieste, Italy
Member of the Venice Commission

We have to start from the acknowledgment of the existence of an international system of the protection of the minorities, which implies the existence of international instruments and specific rights aimed at insuring the implementation of that protection. The Framework Convention for the protection of the national minorities and the European Charter for regional and minority languages are part of this international system. But at the same time, according to art. 1 of the FCNM " the protection of national minorities and of the rights and freedoms of persons belonging to those minorities forms an integral part of the international protection of human rights, and as such falls within the scope of the international cooperation The mentioned international system is an expression of the international concern for the protection of minorities: it means that minority protection is no more considered as an internal affair to be dealt with by the domestic legislation of the States, but that it calls for interventions and interferences of the international community in the States management of the protection. It is clear that the Fall of the Berlin Wall facilitated the development of the institutions aimed at the safeguard of the rights of the minorities, not only because the compliance with the international provisions in the matter has been conditional to the membership of the new European democracies to the supranational institutions such as the Council of Europe and the European Union, but also because many events in the '90s have demonstrated the urgency of the intervention of the international community in this field.

The work of the Council of Europe was facilitated by the previous experience of the OSCE (documents of Copenhagen and Geneva) from which it was possible to draw inspiration in the drafting the FCNM and in promoting the ratification of the Charter for regional and minority languages.

But the history of the mentioned system did not start in the second part of the XX century. It started at the end of the First World War with the Treaties of Peace when the winning States providing for the obligations of the States which lost the war to comply with some specific rules for the protection of the minorities. The new borders of the States after the Peace Treaties left many autoctonous groups inside the new States even if those groups did not have ethnic, linguistic or religious connections with the majority of the population of the States concerned. These groups were defined as "national minorities" and it was realized that they needed a special international protection. But these novelties did not make up a system: the different treaties had different provisions, therefore there was not a coherent and equal treatment of the problem, the results were very confusing, there was the risk of possible discriminations or diversity of treatment, without an effective system for enforcing the States' obligations. Moreover even the identification of the persons belonging of national minorities was difficult: somewhere the public authorities had to deal with the problem, but somewhere the groups themselves pretended to have a say on their membership without taking into account the choices of the persons concerned. Last but not least, the State legislators had some difficulties in accepting the idea of the protection of the minorities as far as it implied the adoption of human rights of the second generation, that is, rights which require positive actions by the public authorities and not only the negative abstention from interfering in the sphere of freedom assigned to the individuals.

These difficulties can explain the reason why – after the Second World War – states decided to avoid the adoption of special provisions aimed at the protection of the minorities and tried to guarantee the rights and interests of them by the extension to the matter of the international instruments providing for the safeguard of the universal human rights and fundamental freedoms. These rights and freedoms were supposed to be sufficient to ensure the protection of the minorities, avoiding the difficulties of the implementation of

special rules, bypassing the practical problems of the definition of the positive actions required by the protection of the minorities and extending to the matter the competence of the international bodies entrusted with the implementation of the universal human rights and freedoms. Therefore the adoption of special international instruments was supposed not to be necessary any more, the ECHR and the ICCPR were seen as the main instruments to be used to deal with the problem.

But it became immediately evident that normative rules needed without positive rules providing for an active intervention of the public authorities, in order to allow an effective policy of protection of the minorities. Some States preferred solving mutual problems in the field by adopting bilateral or multilateral treaties: we can remember the De Gasperi – Gruber Agreement about South Tyrol, the treaty concerning Schleswig Holstein between Germany and Denmark, the Memorandum of London between Italy and Yugoslavia providing for the protection of the Italian minority in Yugoslavia and of the Slovenian minority in Italy. The Treaty of Peace with Austria paid special attention to the national minorities which were and are present in Carinthia, Styria and Burgenland. All these documents required not only the adoption of special measures of protection but also implied positive actions, that is the protection required something more than the compliance with the principle of non discrimination, the gap between them and the majority of the population was to be bypassed through the creation of specific institution aimed to insuring special services for the persons belonging to the minority groups.

Even the application of the general rules for the protection of the universal human rights and fundamental freedoms to the persons belonging to the national minorities was not easy because it was not easy to find an agreement on the definition of the concept of national minorities. Therefore it was difficult to find the way to implement the art. 27 ICCPR and art. 14 ECHR. In the frame of the Council of Europe initiatives were taken to give more concrete content to the protection of the minorities while, at the same time, defining the personal and territorial scope of implementation of the measures provided for by the new rules. But until the Fall of the Wall a solution could not be found. Only the work of the OSCE (ex CSCE) opened the way for a new policy in the Council of Europe, which could start drawing inspiration from the documents of Copenhagen and Geneva. It was decided to devote a special international instrument to the matter and special bodies were established for its preparation. A first decision had to be made choosing the preferable solution between three possible alternatives: an additional protocol to the ECHR, an ad hoc convention with its own implementing machinery, a framework convention. The third alternative was preferred: at the beginning the drafters considered that a framework convention could be implemented only through the adoption of bilateral agreements between the States concerned by the presence of kin minorities on their territories, the framework convention should have stated principles to be implemented according to the specific exigencies of the different situations and on the basis of common choices of the States interested. A protocol was excluded because the opinion was generally shared that it was difficult to draft rules useful for all the different situations and enforceable by the judicial machinery of Strasbourg; the ad hoc convention was refused in some way for non different reasons. But the following developments opened the way to a direct application to the social life of the new Framework convention even in the absence of implementing bilateral or multilateral agreements.

Three are the main problems concerning the implementation of the Framework Convention. The absence of a definition of the concept of national minorities implies a great deal of uncertainty with regard to the personal scope of application of the protection of the Convention. It is specially unclear whether the persons deserving the protection shall or not

be citizens of the concerned State. Many elements support the idea that the convention protects only citizens: the Capotorti report goes in this way and it was republished by the UN in 1991, the draft protocol initiated by the Parliamentary Assembly of the Council of Europe adopted the same approached and this line was followed also by the initial draft of a convention prepared by the Venice Commission. But we have to keep in mind that the drafters of the protocol were unable to find an agreement on this point and preferred avoiding to introduce in the instrument a definition of the concept of national minorities. At the moment of ratifying the FCNM some States submitted declarations stating that they wanted to restrict the application of the Convention to their citizens only, but other States declared the intention to enlarge the scope of their implementation of the act to the non – citizens, or omitted the submission of any declaration at all. Moreover the practice is very ambiguous: the States do not always follow the line stated in their declarations. Therefore the Advisory Committee for the implementation of the FCNM had to decide its position on the matter. According to its decision the absence of a definition in the instrument means that citizenship is not required for the application of the Convention, the minority rights are part and parcel of the international protection of the human rights and they have to have a general scope of application, at least the provisions of the FCNM which have a general relevance (those providing for the protection of human rights which are included in the ECHR, the principles of tolerance and equality, the right to be treated as a person belonging to a national minority) should be applied to non – citizens even if the concerned States had made a different choice in submitting their declaration. This construction does not exclude in principle the possibility of restricting the scope of application of some minority rights to citizens only, but the choice has to be adopted in compliance with the principles of rationality and proportionality, which means that the States have to avoid unjustified discriminations. The AB is ready to enter in a dialogue with the States to suggest the best solution for the application of this line. The Advisory Committee is not a judicial body and it does not have to power of enforcing its interpretations of the FCNM, but on the basis of the opinions prepared by the Advisory Committee, the Committee of ministers could exercise the full range of its powers in view of a satisfying implementation of the Convention.

This construction was elaborated by the Venice Commission in a document specially devoted to the matter where, taking also into account the practice of the relevant bodies of the UN and of the OSCE, the Commission arrived at the conclusion that according to the principles the restriction of the protection of the minorities to citizens only cannot be accepted any more: citizenship shall not be an element of the definition of the minorities, it may be only a condition for the application of the rules of the protection as far as a justification is present: therefore, certainly political and electoral rights can be guaranteed only to citizens, but in other cases the requirement of a long residence in the territory concerned or the existence of working conditions, for instance, can be easily adopted instead of the citizenship to identify the scope of application of the provisions of the protection.

This solution implies that compliance with the FCNM requires an article-by-article approach, as far as every article can have a specific and different personal scope of application. But this solution is also useful when we have to deal the problem of the direct or indirect application of the FCNM. Because its structure is made up by principles, it apparently could see to require an intermediate legislative internal implementation, even if we take into account the fact that nobody requires any more that the implementation of the convention passes through the negotiation of bilateral or multilateral international agreements between the States concerned. Probably the general international concern for the protection of the minorities excludes relevance of the protection left in the hands of some States only, but definitely in the past it was a generally accepted facet of the legal theory that principles are

rarely able to be directly applied to the social relations. Therefore an answer has to be given to this question: can the provisions of the FCNM be directly enforced in the social relations, or do they need to be implemented by national legislation? As I told, even in this case an approach article by article can be useful. The direct application of the provisions depends on the content and on the structure of the provisions. When they guarantee only a freedom, they can be directly enforced by the authorities and by the judges: we can mention the right freely to choose to be treated or not to be treated as a person belonging to a national minority; the freedoms of peaceful assembly, of associations, of expression, of thought, conscience and religion; the right to manifest one's religion or belief and to establish religious institutions, organisations and associations; the freedom of expression; but also the right to use freely and without interference one's minority language, in private and in public, orally and in writing; the right to learn one's minority language; and – eventually – the right to display in his or her minority language signs, inscriptions and other information of a private nature visible to the public. All the relevant provisions prohibit interferences of the public or private authorities in the exercise of the activities which are guaranteed by the FCNM.

From these conclusions we can draw a consequence: the monitoring of the implementation of the FCNM does not cover only the national legislation of the States concerned, but also the administrative and judicial practices in the matter. This is the reason why the Advisory Committee of the FCNM, which is entrusted with the task of evaluating the States' reports and preparing opinions for the final decisions of the Committee of ministers of the Council of Europe, normally supports its analysis of the States reports with visits in the concerned States. Moreover it provides guidelines for the future legislation implementing the Convention but also suggestions and information for a revision of the existing administrative and judicial practices when what is at stake is not the conformity of the national legislation with the Convention, but its administrative or judicial interpretation. The practice adopted by the AC of entertaining constant relations with the States also in the follow – up of the deliberation of the relevant opinions by the Committee of ministers in order to help the States in the compliance with the guidelines and the suggestions submitted to the States themselves is also very important.