Protection of Minorities and the Prohibition of Discrimination: The Ohrid Framework Agreement

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Abstract

The protection of ethnic, religious and linguistic groups is one of the oldest concerns of international law. Nowadays there is no doubt that the need for protection of minorities under internal and international law has perhaps never been as urgent as in our time. The main aim of this paper is to show that establishing minority rights appears to be one of the more promising approaches to this problem. This is especially important for the Balkan countries where national, ethnic, religious and linguistic minorities, used to be and still are the cause for international and internal state political and even armed conflicts. The Ohrid Framework Agreement is today a classic case of conflict prevention which gave the Republic of Macedonia a chance in 2001 to avoid destructive divisions and to develop as a democracy.

Keywords: System for minority protection, International instruments, Prohibition of discrimination, the Ohrid Framework Agreement.

Introduction

Ever since the end of the Second World War, promoting the respect for, and observance of, human rights and fundamental freedoms everywhere in the world has been a major concern of the international community.
The idea is that the instruments and legal institutions used in the international sphere of human rights should have regard for the specifics of those rights, which constitute an indispensable element of effective protection of minority rights. In regard to minorities and the adequate treatment of persons belonging to minorities, a central issue has been whether this would require 'equal' rights or 'special' rights. The resulting, central question seemed to be whether one needs in addition to the prohibition of discrimination, also 'special' minority rights; or in other words to what extend does the prohibition of discrimination cater for the specific needs of minorities and contributes to an adequate minority protection.
However, until recently, the main burden of minority rights in general international law was borne by Article 27 of the International Covenant on Civil and Political Rights (1966). But, this is a cautious and tentative article which reflects the very limited space that states were prepared to allow minority rights. Namely, the text prompts the following observations:

(1) Rights of minorities may not be universal rights: since the groups may not 'exist' in all states;

(2) The text refers to the rights of persons and not of groups, thus, limiting the community or collective dimension of the rights;

(3) The members of minorities are not described as *having* the rights - rather, the rights 'shall not be denied' them;

(4) The article does not clearly implicate state action or resources to benefit minorities.

In adopting Resolution 47/135 on 18 December 1992, the General Assembly of the United Nations completed an important phase of standard - setting in minority rights: the resolution contains the 'Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities'. The text can be regarded as a new 'international minimum standard' for minority rights, transcending some of the limitations of the Article 27.

In view of the fact that instruments of the Council of Europe and the OSCE are focusing on 'national minorities', while in the United Nations on 'ethnic, religious or linguistic' minorities, it seems important to point out that adjectives 'national' and 'ethnic, religious or linguistic' can be understood as covering more or less the same load. Also, the European Union Treaty of Lisbon includes three major points that warrant consideration in the context of minorities. For one, persons of minorities are for the first time explicitly mentioned in EU primary law.

For another, the Charter of Fundamental Rights (CFR) receives the status as an internationally legally binding document. Thirdly, it is envisaged that the European Union will accede to the European Convention on Human Rights (ECHR). Without doubt, the fundamental pillar of human rights and minority legal protection are the principles of non-discrimination and equality which constitute the basis of all core human rights treaties. They apply to everyone in relation to all human rights and freedoms and prohibit discrimination on the basis of a list of non-exhaustive categories such as race, colour, religion, language, nationality and ethnicity. Through respect for these two principles, the enjoyment of many human rights can be secured, including the right to effective participation in decision-making by minorities.

The Republic of Macedonia was one of the six republics forming the Yugoslav state between 1945 and 1991/2. The consequences in respect of treaty succession of the gradual break-up of the Socialist Federal Republic of Yugoslavia, during the course of 1991 and 1992, were, for the most part, similarly straightforward. Bosnia-Herzegovina, Croatia, Macedonia, and Slovenia all informed the United Nations Secretary -General that they considered themselves bound, by virtue of State succession, to the treaties to which the Social Federal Republic of Yugoslavia had been party. This was subsequently confirmed with respect to all relevant human rights treaties.
The security situation in Macedonia began to deteriorate seriously early in 2001, first with the incidents on the border with Kosovo, than moving into the interior of Macedonia. By the late spring of 2001, the danger of a full-scale civil war in Macedonia was evident. In June 2001, a decision was made in Washington, Brussels and Skopje to appoint a team of negotiators to work full time on the ground to help arrange a negotiated solution to the conflict.

On August 13, 2001, President Trajkovski, the international mediators, Special Representative of the EU in Macedonia, Francois Leotard, US Special Envoy James Perdew, and the four political parties of the ―government of unity (VMRO-DPMNE, DPA, PDP and SDUM) signed the Ohrid Framework Agreement (OFA), the basic conflict settlement document.

Some of the basic principles of the Framework agreement are as follows:

- Rejection of the use of violence as a political means, reaffirmation of the sovereignty, integrity and unitary character of the Macedonian state ...;
- Non-discrimination and equitable representation ...;
- Education and use of languages. . .
- Annexes: Constitutional amendments, legislative modifications, implementation and confidence-building measures and final provisions.

1. Two Pillars of an adequate System of Minority protection: Prohibition of Discrimination

It is widely accepted that an adequate system of minority protection is constructed on two pillars, the first which concerns non-discrimination in combination with individual human rights of special relevance for minorities, the second minority special standards aimed at protecting and promoting the right to identity of minorities. The idea that an adequate system of minority protection (in view of substantive equality and identity considerations) would be constructed on these two pillars can actually be traced back to an opinion of the Permanent Court of International Justice, operative during the League of Nations. This thinking has been confirmed by the United Nations and also broadly by the academic literature. Nevertheless, it needs to be acknowledged that this position is not universally accepted. There are indeed still academics and states that argue that an effective protection of the pillar (general human rights) would suffice (hence, discarding the need for the second pillar with 'special' minority rights) In view of fact that to some extent this rejection of the second pillar is related to concerns about these 'special rights', it should be emphasize that minority rights are not situated outside the human rights framework but are considered to be part and parcel of it. The fact that minority rights are component part of the broader human rights framework does not imply that minority rights are necessarily the same as general human rights. Still, the fact that it was felt necessary to add article 27 to the International Covenant on Civil and Political Rights (ICCPR) arguably means that the rights for persons belonging to minorities were considered to go beyond the other, general human rights in the sense that otherwise article 27 would be redundant.

In addition to this redundancy argument, it can also be pointed out that minority rights should be considered as one of several sets of category specific human rights for persons belonging to especially vulnerable groups.
The right to equality and non-discrimination was not easily accepted by the international community. In the 19th and early 20th centuries references to equality and the equitable powers of international arbitral tribunals appeared not infrequently.[1] Progress was made, however, with the Charter of the United Nations. Furthermore, equality has been considered, by the International Court of Justice (ICJ) in the *North Sea Constitutional Shelf Cases*, not simply as a matter of abstract justice but as 'a rule of law that calls for the application of equitable principles'. This jurisprudence was more specifically developed in the *Tunisia – Libya Continental Shelf Case* where the legal concept of equality is held to be 'a general principle directly applicable as law'. Equality as the basis of decision can be applied as a rule of law only in connection with an evaluation of the circumstances relevant in the concrete case. These circumstances can be either facts or legal situations, or combination of both.

To better understand the role of equality in international law, legal doctrine identifies three possible applications of equality: *infra legem*, *praetor legem*, and *contra legem*. The first category is said to refer to the possibility of choosing between several different interpretations of the law. What is gained by terming the need to make choices as 'equal' is less certain – especially if no pretence is made that equality assists in how one makes choice. In the second sense, equality is seen as a gap-filler when the law is silent. For some authors equality *praetor legem* is not acceptable, because, while they believe that gap does exist, they hold that the role of the judge is simply to pronounce a *non liquet*. The third category is that of equality *centra legem* – that is to say, a softening of the application of an applicable norm, for extra-legal reasons. There are an almost infinite number of purposes which courts and writers see equity as fulfilling.

The term racial discrimination for the first time is defined in Article 1(1) of the International Convention on the Elimination of All Forms of Racial Discrimination as 'any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life'. Unlike Article 2(1) of the International Covenant on Civil and Political Rights, which only address distinctions in the enjoyment of the rights recognized by the Covenant, Article 1(1) extends to all human rights and fundamental freedoms, whatever their source may be. Article 1(4) of the Convention on the Elimination of All Forms of Racial Discrimination allows State parties to take 'special measures... for the sole purpose of securing adequate advancement of certain racial or ethnic groups or individuals requiring such protection as may be necessary in order to ensure such groups or individuals equal enjoyment or exercise of human rights and fundamental freedoms..., provided'.

In addition, Article 26 of the International Covenant on Civil and Political Rights guarantee that:

> All persons are equal before the law and are entitled without any discrimination to the equal protection of the law.
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> Finally, the International Covenant on Civil and Political Rights contains provision dealing with minority rights:
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> 'In the States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with other members of group, to enjoy their own culture, to profess and practice their own religion, or to use their own language'.

The Council of Europe (CoE) has never ceased to be interested in the minority question, though the idea of elaborating specific legal standards in this field regained momentum only following developments in Eastern Europe throughout the early 1990s. The European Convention on Human Rights (ECHR) and its Protocol No. 12 (not yet in force at the time of writing) do not address minority rights. However, as increasingly suggested by the Strasbourg jurisprudence in such areas as political and religious pluralism, education as well as way of life (the latter aspect, interestingly reflected in the case of *Chapman v. United Kingdom*), such texts and further protocols might generate some form of protection for minorities and their members in relation to their general needs and interests as a result of the functioning of pertinent substantive provisions.

Furthermore, the Parliamentary Assembly has long been most active in attempting to develop minority rights standards. In 1993, it adopted Recommendation 1201 on an additional protocol on the rights of national minorities to the European Convention on Human Rights. Unlike the stringent rights and duties embraced by Recommendation 1201 (1993), the treaty contains programme-type provisions setting out objectives which the parties undertake to pursue. As a result, the provisions are not directly applicable, leaving the parties a measure of discretion in the implementation of the instrument, in view of particular local factors. The Framework Convention of National Minorities (FCNM) builds upon previous texts. The FCNM came into force on 1 March 1998.

Finally, in view of the special importance of the prohibition of discrimination for minorities, it seems self-evident that the broader the reach of the prohibition of discrimination, the better this would be from a minority protection angle. The reach of the prohibition of discrimination is determined by multiple factors, which can be grouped together under the scope *ratione personae* and scope *ratione materiae*. In relation to the former, a distinction should be made between prohibitions of discrimination with an open versus a closed list of prohibition grounds (of discrimination). The grounds of special importance to minorities obviously concern the minority identity features: language, religion and ethnicity, race. It should already be highlighted here the systems with closed grounds can be 'broken' open through the use of 'indirect discrimination', in the sense that a differentiation on a ground which is not covered can be recast as an indirect discrimination on a covered ground. A second dimension of the scope of application *ratione personae* concerns the question whether the prohibition is limited to the public sphere or also enters the private sphere. The scope of application *ratione materiae* is determined by the question whether a prohibition of discrimination is accessory or not. An accessory prohibition of discrimination is limited in that discrimination is only prohibited in relation to the other rights enshrined in that instrument. In case of EU, the prohibition of discrimination (in whatever instrument it is contained) is always limited to the powers and competences conferred upon the Union, and hence cannot have an all encompassing reach.

2. Non-discrimination Legal Provisions in the Republic of Macedonia: OFA and Equitable Representation

The Republic of Macedonia has ratified a large number of international treaties, whereby the country has committed itself to protect persons under its jurisdiction against discrimination (on different grounds). According to the Constitution of the Republic of Macedonia, all international treaties acceded to and ratified in accordance with the Constitution are part of the internal legal order. The principle of equality in the legal system of the Republic of Macedonia is derived from the Constitution. Namely, Article 9 of the Constitution stipulates that 'citizens of the Republic of Macedonia are equal in their freedoms and rights, regardless of sex, race, color of skin, national and social origin, political and religious beliefs, property and social status'.

This constitutional provision, although constituting a sufficient legal basis for adopting additional, more detailed anti-discrimination legislation, has several shortcomings. First of all, it refers only to the citizens of the Republic of Macedonia, thus leaving the aliens and the people without citizenship without any legal protection. In addition, this constitutional provision enumerates only a limited number of grounds of discrimination. Moreover, the list of the enumerated grounds of discrimination is a closed one. Lastly, this constitutional provision does not pertain to legal entities, which on the contrary are listed in the Law on Prevention and Protection against Discrimination. The principle of equitable representation is one of the main pillars of the Ohrid Framework Agreement. The principle of equitable representation aims at realizing the participation of all ethnic communities in the public sphere. Equitable representation of all ethnic communities is a prerequisite for a modern, citizen- oriented and efficient state that promotes the interests of all citizens. Thus when referring to the issue of non majority ethnic community rights and the public administration reform it is indispensible to relate it to the stipulations foreseen in the Ohrid Framework Agreement (OFA).

The principle of equitable representation corresponds to a shared belief in European countries that a pluralist and democratic society should not only respect the ethnic, cultural, linguistic and religious identity of each person belonging to a minority community, but also create appropriate conditions enabling them to participate in public life. Diversity should be a source and a factor, not of division, but of enrichment for each society. Minority participation and integration in public affairs is not a new challenge for Macedonia; one example is the ratification of the Council of Europe Framework Convention for the Protection of National Minorities in 1997.

Equitable representation policies can be considered also as part of more general efforts of the Macedonian Governments to combat ethnic discrimination in the labor market. However, progress in the public sector before the OFA was non-significant. Finally, The respect for democracy, rule of law and respect for ethnic communities is the glue that holds the EU together. It is an essential criterion of the accession process. OFA makes a core part of the EU's political criteria for the Republic of Macedonia. Implementation of the OFA needs to be maintained in a constructive spirit of consensus and overall inter-community relations should and can be improved.

Conclusion

The right not to be discriminated against is paramount in protecting the rights of persons belonging to minorities in all regions of the world. Minorities everywhere experience direct and indirect, *de jure* and *de facto* discrimination in their daily lives. Non-discrimination and equality before the law are two of the basic principles of international human rights law. The principle of nondiscrimination prohibits any distinction, exclusion, restriction or preference which has the purpose or effect of impairing or nullifying the recognition, enjoyment or exercise by all persons, on an equal footing, of all rights and freedoms. There is no requirement to demonstrate discriminatory intent. The phrase 'purpose or effect' refers to legislation and/or policies which may be textually neutral but are interpreted in a manner that result in discrimination. International human rights law prohibits both direct and indirect discrimination.

In its general recommendation No. 32 (2009), the Committee on the Elimination of Racial Discrimination provided further guidance on the scope of the principle of non-discrimination under article 1 (1) of the Convention and, more importantly, the meaning of "special measures". The Committee specified that "the list of human rights to which the principle applies under the Convention is not closed and extends to any field of human rights regulated by the public authorities in the State party […] to address racial discrimination 'by any persons, group or organization'."It is important to note that the Committee, in its general recommendation, also specified that "special measures should not be confused with specific rights pertaining to certain categories of person or community, such as, for example the rights of persons belonging to minorities to enjoy their own culture, profess and practice their own religion and use their own language […]. Such rights are permanent rights, recognized as such in human rights instruments, including those adopted in the context of the United Nations and its agencies. States parties should carefully observe distinctions between special measures and permanent human rights in their law and practice. The distinction between special measures and permanent rights implies that those entitled to permanent rights may also enjoy the benefits of special measures."

Moreover, the Committee on Economic, Social and Cultural Rights adopted general comment No. 21 (2009) on the right of everyone to take part in cultural life, which entails an obligation on States parties to recognize, respect and protect minority cultures as an essential component of the identity of the States themselves. The need to ensure that minorities are treated equally and enjoy human rights and fundamental freedoms without discrimination of any kind was reiterated by the Durban Review Conference, which in its Outcome Document "urges States to bolster measures to eliminate the barriers and to broaden access to opportunities for greater and more meaningful participation by […] persons belonging to national or ethnic, religious and linguistic minorities in the political, economic, social and cultural spheres of society".

Finally, OFA was concluded 10 years ago and it has changed in essence Macedonia, especially its interethnic relations. OFA and the Amendments to the Constitution which followed changed the official state policy towards ethnic groups living in Macedonia. In fact, from a policy of discrimination and a policy which promoted values of only one ethnic group, with a tendency of assimilation, Republic of Macedonia has become a state which guarantees equality and integration, achieved with the respect of the cultural characteristics of all ethnic groups. In fact, from a policy of discrimination and a policy which promoted values of only one ethnic group, with a tendency of assimilation, Republic of Macedonia has become a state which guarantees equality and integration, achieved with the respect of the cultural characteristics of all ethnic groups.OFA with its values guarantees genuine equality in Macedonia, not by imposing the values of one ethnic group upon the others, but allowing and tolerating the use of elements of identity of other ethnic groups, such as the language, religion, education, national symbols, culture and other elements of identity. In other words, OFA advances the civil concept of the country, but taking into consideration the needs and cultural elements of non-majority communities living in Macedonia.

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