



**CONFERENCE:
ENHANCING THE IMPACT OF
THE FRAMEWORK CONVENTION**

9 - 10 October 2008
Palais de l'Europe, Strasbourg

**Potential impact of the Advisory Committee's thematic commentaries
from an NGO's perspective**
Discussant paper prepared by Patrick Yu

The views expressed are those of the author only

Introduction

Professor Asbjorn Eide's paper provides a most comprehensive analysis on ACFC Thematic Commentaries. As a key player in both the UN and the Council of Europe system he captures the issues of the methodology on the current reporting mechanism under various international human rights instruments, particularly praise the innovation of the ACFC in country visit to get the first hand and wider information and issues from government and its agencies, NGOs and independent experts and links to the potential impact of these commentaries. My role today is more focus on the last two parts of Professor Eide's paper, namely the potential impact and conclusion from a NGOs perspective and shared some good practice, as well as bad practice in Northern Ireland regarding minority participation.

I reiterate the success of the ACFC in publishing the two Thematic Commentaries in terms of the contents, the methodology, the policy framework and the recommendations to benchmark the first decade of the FCNM.

Commentaries as guidance or framework not a directive of action

The Thematic Commentaries (both education and participation) benchmark the interpretation, country specific issues, policy framework and options. In effect it is the starting point of the impact or potential impact. Although circumstances of national minority, such as their needs and disadvantage position, in each State Party are varied, it is nevertheless that different recommendations of the Thematic Commentaries can be applied to different national minorities as well as to different situations prevailing in the State Parties. Therefore the Commentaries can view as guidance rather than a directive of action as it cannot take one size to fit all. The real issue is how far will State Parties take action planning on the implementation of the policy framework that developed in the Thematic Commentaries through the next monitoring cycle. Therefore the third cycle report will show the real impact of the Thematic Commentary.

Lack of equality monitoring data will hamper minority participation

Lack of reliable and easily accessible data to demonstrate the extent of the problems as well as developing special measure to tackle these problems make it impossible for minority participation, particularly to address socio-economic discrimination and to enjoy the rights under effective equality (Article 4)¹. As Professor Eide points out that "the dominant market economy with its own regulations has its own cultural features which may not correspond with cultural preferences for some of the minorities." (p.12)

The State Party, under Article 2 of the FCNM, has an implied duty to develop monitoring data for the purpose on the implementation and monitoring process of the FCNM. Therefore it is worthwhile to put Article 4 on higher priority for the future Thematic Commentary. This move can benchmark the reliable and comparable monitoring data on one hand, to develop policy

¹ "Commentary on the effective participation of persons belonging to national minorities in cultural, social and economic life and in public affairs, ACFC, 27 Feb., 2008, p.4-5.

and practice in the area of non-discrimination and special measures to redress the existing inequality and social disadvantage of the minority.

Participation of minority NGOs in the preparation of the ACFC Opinion

As the ACFC points out that “participation including persons belonging to national minorities are also involved at all stages of the monitoring and implementation process of international instruments, and in particular the Framework Convention in order to achieve a balance and quality outcomes.” (p.4 Commentary on effective participation). Professor Eide also points out “more attention should probably be given to the reactions of the States Parties, and by minorities, to the opinions adopted. (at p.16)

From the NGO perspective minority and NGO representatives should have the right accessing to and participation in the discussions with the ACFC on their draft Opinions rather than limited consultation on part of the Opinion or listening to their reaction on the adopted Opinions. By involving the minorities and NGO representatives in the process, the ACFC’s final Opinion is much more comprehensive and credible.

One of the caution and concern, particularly from the State Parties, is about the overwhelming influence from NGOs to redundant the neutrality of the ACFC. The same argument is that if we do not trust the independent, impartiality and professionalism of the ACFC the whole reporting system is not working either. The fundamental issue is whether the ACFC Opinion reflects the state of minority protection under the FCNM in that particular country through different and wider sources of information whether coming from the government, agencies, NGOs, independent experts, academics, etc.

By doing so the ACFC will further benchmark the international standards by creating a more transparent process with full participation from those who should be protected. Moreover it will develop ownership and participation from minorities. Therefore the ACFC should consider a new mechanism to widening the participation of minority and NGO representatives in formulating it Opinions.

The new dialogue between the minority and the ACFC through the discussion of the draft Opinion form the first part of the engagement of the FCNM. There should also be a standard and structured dialogue between the State Party and their national minority through the implementation and monitoring of the FCNM. This second layer can create more trust, confidence building and working relationship between minority and their government or vice versa. The third part of the engagement is between the national independent experts and the minority. Independent experts can play a vital role to capacity building minority on both awareness raising and training on the FCNM, as well as to the government officials and the majority. Moreover they can also play a vital role on constructive discussions on scope of minority issues brining both the government, the minority and other civil society together. By doing so it can also create more partnership building such as joint research on minority issues.

The three levels of dialogue between minority and other actors of the FCNM will transform a new dynamic of interaction in the implementation and monitoring process into the next decade.

Committee of Ministers

The Committee of Minister should play a more proactive role by endorsing the Thematic Commentaries of the ACFC. It encourages use it as the citation in the Committee of Ministers' Resolution and follow up. One of the new emerging issue as points out by Alan Phillips that how can the ACFC minimise the delay in releasing its initially confidential Opinions as delays will reduce the impact of the Opinions? The Council of Minister should take more positive step to address this new phenomenon. One suggestion is that in case of State Party delaying the publication of the Opinions beyond reasonable time limits (to be determined), the Committee of Minister may authorise the Secretariat to publish it.

The Committee of Ministers must consider sanctioning non-compliant State Party, those which ignore the Opinions of the ACFC and even the Resolutions of the Committee of Ministers for which they have voted as frequent State Parties use delaying tactics to hinder the monitoring process. The Committee of Ministers should also develop a communication strategy to disseminate its Resolutions broadly at both international and national level, including communication with the national minorities and NGOs on the Resolution.

Future Thematic Commentary

As I point out above the lack of equality monitoring data will hinder minority participation. Therefore Article 4 (non-discrimination and effective equality) should be on the priority.

Regarding the situation of Roma and Travellers I agreed with Professor Eide to have a specific thematic commentary. It is the most socially excluded group in our society in many parts of the European states and good lessons can be learnt from different jurisdictions.

Other priority should include language rights and language use (Article 10 and 11), right to preserve one's own culture and identity (Article 5).

Lessons from Northern Ireland:

(1) Equality monitoring and Affirmative Action Programme

In Northern Ireland the new Fair Employment and Treatment (NI) Order 1998 (FETO) requires certain legal obligations to the employers in Northern Ireland to address the issues of fair participation in employment through compulsory annual monitoring return (details implementation see appendix).

Although the FETO does not define "fair participation", the Equality Commission for Northern Ireland adopted an interpretation which involves redressing imbalances and under-representation in employment between the two communities (Catholic and Protestant in the legacy of the conflicts) in Northern Ireland. The aims are to secure greater fairness in the distribution of jobs and opportunities between the two communities and to reduce the relative segregation of the two communities at work.

This unique experience of Northern Ireland in Fair Employment legislation shows a progressive improvement of fair participation of employment between Catholic and Protestant community over the two decades. This shows not only the equality monitoring system is not expensive or undue red tape for the employers. It is workable in terms of the monitoring system and the benefits of more integrated employment in our society. At the end of the day it gets the right people to do the right job and create a good working environment. It is a win-win situation to both the employers and the employees.

(2) Equality as participation

In United Kingdom it requires public authorities to adopt a positive approach to furthering equality of opportunity in the areas of race, colour, ethnic and national origins and nationality.² But Northern Ireland is unique in having a general requirement on public authorities (all government departments, next step agencies, and all non-departmental public bodies) under section 75 of the Northern Ireland Act (our mini-constitution to entrench the Good Friday Agreement or the Belfast Agreement) to have due regard to the need to promote equality of opportunity between people of different race and ethnic origins, religious belief or political opinion, sex, sexual orientation, age, disability, dependants and marital status.

And without prejudice to the duty to promote equality of opportunity it also impose a duty to promote good relations between persons of different religious belief, political opinion and racial group. They are required to assess the impact of all their policies on equality of opportunity and to monitor any adverse impact of these policies on the promotion of equality of opportunity and to a lesser extent the promotion of good relations. Public sector employment policies come within the scope of these statutory duties.

The current practice in employment monitoring within the public sector is that the monitoring form covers the above eight grounds, except sexual orientation. The monitoring information will assist the process to promote equality of opportunity to look into any adverse impact on any one of the nine groups. Once adverse impact is found they are required to conduct a full equality impact assessment, including measures, which might mitigate any adverse impact, and alternative policies, which might better, achieve the promotion of equality of opportunity (including affirmative measures or other positive action programmes).³

The similar practice also apply in the United Kingdom under the Race Relations (Amendment) Act 2000 in terms of employment monitoring for all public sector employer for the purpose to the promotion of racial equality and good relations to different racial groups.

One of the key elements in the equality duty in Northern Ireland is that public authority must engage 9 vulnerable groups within the law and to consult their views on any policy that affecting them. This is in effect promoting participation in public affairs, including minorities.

²Race Relations (amendment) Act 2000 adopted the same equality duty under Section 75 of the Northern Ireland Act 1998 to cover the above said grounds.

³ Schedule 9 of the Northern Ireland Act 1998

Conclusion

There remain many challenges ahead to ensure that we are committed to develop a more dynamic interaction between actors of the FCNM and benchmark for the next decade. The current and future Thematic Commentaries will form the basis of impact analysis for the next decade. We look forward to working together with all actors of the FCNM in order to benchmark minority protection into the next decade.

Appendix: Obligations under the new Fair Employment and Treatment (NI) Order 1998

The first obligation on employers is to monitor. The legislation ⁴ requires private sector employers with more than 10 full-time employees in Northern Ireland to register with the Commission. Registered employers and public authorities are required to prepare and serve each year on the Commission a monitoring return to enable the composition of the workforce (including part-time employees) to be ascertained, that is the number of employees who belong to the Protestant community and the number who belong to the Roman Catholic community. In addition, these employers are required to serve a monitoring return to enable the composition of applicants for employment to be ascertained.

Each public authority and the employer in a registered concern with more than 250 employees also have to serve a monitoring return in respect of those ceasing to be employed. ⁵ There are detailed requirements as to the information to be contained in a monitoring return, and the methods by which the employer can determine the community to which an employee or applicant belongs. Employers have to retain certain information for three years, and there are criminal offences for failing to serve a return, or giving false information. ⁶

The second obligation on employers is to undertake periodic review (once every three years) of their employment practice (affecting recruitment, training, promotion or redundancy) for the purpose of determining whether members of each community are enjoying, and are likely to continue to enjoy, fair participation in employment in the firm. Thirdly, where fair participation is not evident the employer must engage in affirmative action. ⁷ In doing so the employer must have regard to the Code of Practice. The Commission must, if requested by the employer to do so, give advice as to the manner in which a review should be carried out. ⁸

Fourthly, the Commission has enforcement power. ⁹ It can request information from the employer, including the matters disclosed by the review and as to affirmative action that has been taken, and it can make recommendations as to the affirmative action to be taken. Where the Commission is of the opinion that the employer's monitoring is inadequate, or the employer is not carrying out a satisfactory review, it must use its best endeavours to secure satisfactory written undertakings. If such undertakings are not given, the Commission can serve a notice giving directions to the employer; similarly if an undertaking, although given, is

⁴ FETO, Article 47-54

⁵ Under the earlier legislation, only employers in public authorities and in registered concerns with more than 250 full-time employees were required to monitor applicants for employment. There was no requirement on any employer to monitor those ceasing to be employed. In addition, the definition of "employee" excluded those working less than 16 hours weekly.

⁶ Fair Employment (Monitoring) Regulations (Northern Ireland) 1999, SR 1999, No. 148 (replacing old regulations from 1 January 2001)

⁷ Article 4 of the FETO defined "affirmative action" as meaning- action designed to secure fair participation in employment by members of the Protestant, or members of the Roman Catholic, community in Northern Ireland by means including – (a) the adoption of practices encouraging such participation; and (b) the modification or abandonment of practices that have or may have the effect of restricting or discouraging such participation.

⁸ FETO, Article 55(5)

⁹ FETO, Article 55-61. Under the earlier legislation, the FEC had received 64 formal undertakings, and affirmative action programme were in place with 137 employers by the end of March 1998: House of Commons Northern Ireland Affairs Committee Fourth Report (1999), para. 48.

not complied with the Commission may either serve a directions notice or apply to the tribunal for enforcement of the undertaking. The Commission also has power to serve a notice about goals and timetables, against which to measure progress, on an employer who has given an undertaking, or been directed to take action, or has been subject to a tribunal order to take any action.