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**The Dual Meaning of Participation:
The Advisory Committee's Commentary on Participation**
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The views expressed are those of the author only

1. Introduction

In February 2008, the Advisory Committee adopted a Commentary on Article 15 of the Framework Convention for the Protection of National Minorities (FCNM), which refers to the conditions necessary for “The Effective Participation of Persons belonging to National Minorities in cultural, social and economic life, and in public affairs”¹.

The Commentary aims to provide a useful tool for State authorities and decision-makers, public officials, organizations of minorities, NGOs, academics and other stakeholders involved in minority protection. The Commentary highlights the interpretation given by the Advisory Committee to provisions in the FCNM on effective participation. It is the second commentary of this kind, following the Commentary on Education adopted in 2006².

After providing a few general remarks on the concept of participation (2.), this paper highlights the dual meaning of “effective participation” underpinned by the Commentary: as to its contents, on the one hand, the Commentary stresses the links between participation in cultural, social and economic life, and in public affairs (3.); from a procedural point of view, on the other hand, participation is analyzed from the perspective of the involvement of minority representatives in both the elaboration of the Commentary and monitoring the implementation of the FCNM (4.). Finally, the paper draws some prospective conclusions with regard to the systemic role of the Commentary within the framework of the “soft jurisprudence” of the Advisory Committee (5).

2. The Dilemma of Participation

Minority participation faces an intimate dilemma: on the one hand, it is essential to minority governance, as that minority policies cannot be elaborated, implemented and monitored over the head of the minorities; on the other hand, involving minorities always brings about the risk to mean involving only *some* minorities, *some* of their representatives, *some* of their views, *some* of their interests.

It is therefore necessary to develop procedural devices to address the complex issue of selecting and determining the will of the respective group: referring to the mere majority within the minority group would be at odds with the pluralistic essence of minority rights. Therefore, procedures are being developed in order to allow for *effective* participation of minorities (i.e. of the largest possible number of persons belonging to them and of interests they may have): the more *effective* the participation, the more inclusive of the different interest and needs of persons belonging to minority groups.

The FCNM is aware of these two general issues, as it results from the deliberate reference to the concept of effective participation in its Article 15, and these problems have been present to the Advisory Committee in its practical work over the last decade. This is the reason why the

¹ ACFC/31DOC(2008)001.

² Commentary on Education under the Framework Convention for the Protection of National Minorities, ACFC/25DOC(2006)002, adopted on 2 March 2006.

Commentary has been drafted with the goal of providing some practical guidance on how to address these issues based on the accumulated experience of the Advisory Committee. In addressing the issue of minority participation and of its effectiveness, the Commentary on the one hand intends to spell out the link between effective participation in social, economic and cultural life and in the political sphere; on the other hand, even in the process of its elaboration and in suggesting ways for a consistent monitoring of the implementation of the FCNM, the Commentary follows an inclusive, participatory approach, based on pluralistic procedures to involve minorities to the highest possible degree.

3. Substantive Dual Meaning: The Contents of the Commentary

In ten years – and two cycles – of monitoring, it has become evident that minority participation is a multifaceted phenomenon: for it to be effective, a bundle of measures is required. Moreover, it is understood that effective participation in cultural, social and economic life is the prerequisite for effective participation in public affairs. Political participation is meaningless if “more basic” forms of participation are not guaranteed.

Following this approach, the commentary first deals with cultural, social and economic participation, and then moves to participation in public affairs. In its practice-oriented approach, moving from the most deeply rooted causes of exclusion of minorities, the Commentary in first place addresses the problem of the lack of reliable data with regard to minorities, as this is an essential precondition for developing effective measures to address discrimination. This is one of the most controversial aspects of the work of the AC and of minority legislation more generally. In fact, while those data are required, they at the same time are likely to intrude in fundamental rights of individuals, including of persons belonging to national minorities. They, in fact, often show reluctance to declare their affiliation because they fear negative consequences. In this field, therefore, not only the most consolidated international standards of data protection must be observed, but it must be ensured that the use of the data is not discriminatory. In principle, it can be said that ethnic data collection is necessary, but it is allowed only if it follows standards of data security and aims at promoting positive measures to enhance minority participation. This implies a delicate balance between potentially conflicting principles and an in depth-monitoring as to the aims and the practical use of data collection.

The commentary then moves on to a number of areas in which discrimination and exclusion often occur. It therefore addresses anti-discrimination legislation, provisions on access to employment, housing, health care and social protection, on access to administrative services (including in minority languages and by trained personnel), and requires that remedies be available in cases of discrimination. Possible forms of exclusion resulting from privatisation processes, post-conflict arrangements, land control and, not least, regulation of the media sector are also addressed.

As to participation in public affairs, the Commentary offers an overview of the available instruments for a promotional representation of minorities in parliaments, governments, courts, administrations, law enforcement agencies, consultative mechanisms or cultural autonomy arrangements. The Commentary does not take any preference for any of these instruments, as

their practical impact varies based on the different social and political preconditions of each country and each minority. The only clear preference is (obviously) for legislation that does not prohibit the establishment of political parties representing national minorities, although it is stressed that sometimes minorities can better voice their concerns also through mainstream parties. Therefore, also internal rules of the political parties are addressed.

As preferential representation is a delicate subject, the Commentary contains an overall advise to the States to periodically review their arrangements, whatever there are. In particular, it must be ensured that the representation is effective, i.e. it gives real voice to the minorities and enables them to directly influence the decision-making.

4. Procedural Dual Meaning: Elaboration of the Commentary and Monitoring the Implementation of the FCNM

The dual meaning of participation under the Commentary also emerges with regard to its procedural side. The Commentary focuses on domestic participation, with the Advisory Committee observing that it is essential for minorities to be involved in all stages of the process of monitoring and implementing the FCNM itself and the rights it provides. In this regard, it contains several provisions related to the involvement of minorities in the monitoring process, including by means of consultative bodies, parliamentary committees, periodical review of legislation and policies.

But the procedural side of participation has been particularly relevant during the phase of drafting the Commentary itself. The AC has constantly noted the benefit of the field visits in drafting its country opinions, not least because this gives the chance to meet also with representatives of national minorities. The same logic is underpinned by the possibility – which the AC encourages – to produce shadow reports. It was therefore consistent with this open, participatory approach that the AC decided to consult as many minority representatives as possible and to ask for inputs by other actors, particularly academics and other international organizations. In particular, a broad consultation was carried out in October 2007. This has been particularly helpful for receiving inputs from several sources and from persons and organizations that could bring their own practical experience in participation issues.

Such an attention to the procedural facet of participation is visible throughout the whole Commentary: it is repeatedly stressed that participation means also procedural inclusion in decision-making, in monitoring, in implementing.

5. Concluding remarks

First, on a practical level, this Commentary is a working instrument. It will feature in the future work of the Advisory Committee as it formulates Opinions in the third cycle of monitoring that begins in 2009³. Furthermore it is hoped that it effectively contributes to the review of the impact of the Advisory Committee's work. After ten years of existence of the AC, the Commentary represents a fundamental stocktaking of its doctrine, a short analysis of the

³ Indeed, it is already quoted in the opinions adopted in October 2008 on Bosnia and Herzegovina and Latvia

Committee's past practices and a tool which is offered to all the actors involved in minority protection to better address the challenges over the next decade.

Secondly, on a more abstract level, the Commentary represents an important instrument of soft law. National minorities law is increasingly becoming the realm of soft law. We may wonder whether this is a positive or a negative trend.

On the one hand, scholars have noted that soft law mechanisms serve primarily the purpose to “give substance to the provisions in international law and to facilitate at the national level the practical implementation of the international commitments, so making it possible to find the appropriate balance between the legitimate concerns of the State and the majority on the one hand and the concerns and requirements of the minority on the other”⁴. Soft law has a different purpose than hard law, as this Commentary makes evident.

On the other hand, the idea that international law is eventually finding ways of becoming increasingly prescriptive and that soft law is simply something that is deemed to disappear when international law will finally become fully enforceable is quite naïve. Indeed, soft-law is not necessarily the consequence of lack of agreement on binding documents, but rather an instrument to complement and further specify the binding standards. Against this background, the simultaneous development of both hard and soft law is not to be seen as contradictory, but rather as complementary, with the common aim of increasing the legal and practical significance of international minority law.

⁴ *A. Eide*, The Oslo Recommendations: An Overview, in *International Journal on Minority and Group Rights*, vol. 6, no. 3, 1999, 325.