



**WORKSHOP 3:
THE ADVISORY COMMITTEE'S THEMATIC WORK**

CONFERENCE ENHANCING THE IMPACT OF THE FRAMEWORK CONVENTION

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Workshop 3: Roundtable discussion

The views expressed are those of the author only

This working group considered the concept, practice and impact of thematic commentaries by the Advisory Committee on the Framework Convention for the Protection of National Minorities. The Working Group was informed of several substantive background papers. This report also draws upon the input generated by the background papers. However it does not seek to present a comprehensive record of the debate that ensued in the Working Group.

The Working Group was also not requested to present a consensus document. Instead, the report merely highlights points of view expressed according to certain themes that emerged during the debate, augmented at times by the views of the Rapporteur.

The Working Group also marked the launch of the latest, the second comment from the Advisory Committee. In view of the comprehensive exposition of the content of the comment, and the focus of this report on thematic comments more generally, it will not be necessary to summarize the substance of this important and highly impressive document.

The principal themes addressed are as follows:

1. The Concept and Aims of Thematic Commentaries
2. The Process of Generating Thematic Comments
3. Problems, or Tensions, that arise in this Context
4. Steps that can be taken to Enhance the Impact of Thematic Comments
5. Topics that Might be addressed in the Future

1. The Concept and Aims of Thematic Commentaries

The meeting briefly considered the history of thematic comments, noting that they had originally been generated when it was difficult within the UN system to obtain agreed country recommendations or conclusions of treaty bodies. However, even when this became easier with the easing of Cold War tensions, the practice of thematic comments persisted. The rationale for thematic reporting included

- The need to ensure consistency and a systematic approach across the country reports of one individual treaty body;
- The need to inform other treaty bodies and human rights organs of the approach taken;
- The wish to draw attention to insufficiencies in the treatment of certain issues and to the need to develop existing standards;
- And the wish to contribute to a more effective implementation process through recommendations directed towards it, and by clarifying the expectations of the treaty bodies in relation to reporting states.

However, thematic reporting also serves a broader function: to review and refine the content of the legal rules contained in the primary legal instrument that is being addressed. This may also include the further development of such rules in the light of evolving state practice. Potentially, thematic comments may also anticipate, or lead, state practice. There may be pressure for such an approach where the original provision was obscure or general, or where conditions or social

needs, or their perception, have changed in ways that are no longer adequately addressed by the rule in question.

2. The Process of Generating Thematic Commentaries

The Advisory Committee has thus far adopted two Commentaries, the first covering education, the second addressing participation. The meeting heard that the approach to the drafting of the thematic instrument had changed over time. The first commentary had been largely the work of one individual member of the Advisory Committee labouring heroically and shouldering nearly the entirety of the work to generate the initial draft. This would then be reviewed with the Council of Europe, and subsequently discussed with other relevant international actors. There might then follow wider consultation before adoption.

In the case of the second commentary, several members of the Committee had been involved as principal drafts people over time. Moreover, a consultation process had been initiated earlier, in order to ensure that the commentary would address the concerns of a broad constituency, including in particular minorities.

However, the meeting noted that even earlier and more consistent efforts might be made to involve the principal stakeholders. They might even be involved the pre-drafting process, where important decisions are taken about the scope of the document, and the basic concepts that are being deployed. While there was discussion about outreach and dissemination after adoption of an instrument within the Council of Europe, there might also be a case for such work even before or during drafting, to enable especially minority stakeholders to contribute effectively.

Indeed, it might be useful to consider whether minority communities might need to have access to technical experts at that stage, so as to be able to address their interests in a way that can flow into the drafting process. Preliminary regional seminars might be organized to facilitate such an aim. The newly established coalition of non-governmental organisations (NGOs), and umbrella organisations, might play a useful role in this context.

It was noted that such a process would foster the building of relations between the Advisory Committee, governmental and NGO actors, academic experts and others. Such relationships might persist into the dissemination and implementation phase and prove highly useful in that context. Moreover, dissemination and implementation might be eased by a wider sense of ownership among stakeholders.

There was also a sense that more could be done to monitor and report on the reception of thematic commentaries once they are issued. For instance, while the Council of Europe had noted that within its own organisation, the first commentary has been invoked with increasing frequency, one might wish to learn more about its reception of the commentary among governments, NGOs and other international governmental organisations (IGOs). This might offer useful lessons when drafting the next set of commentaries.

3. Problems, or Tensions, that arise in this Context

As was noted at the outset, the initial aims of establishing thematic commentaries appear to have focused on assisting the treaty bodies and governments in achieving a consistent standard of compliance. However, there are also some additional, underlying aims. These may at times find themselves in a state of tension with one another.

The first problem relates to the use of thematic commentaries to clarify conceptual issues. An example might relate to the question of whether or not minority rights are individual rights, or whether they are collective rights. It is felt by some that a general commentary might offer a useful opportunity to advance the debate on an issue of this kind. On the other hand, it might be said that there are reasons for the absence of consensus on such an issue, at least among the state parties.

In view of the Rapporteur, a thematic commentary will offer an opportunity to advance the debate about issues of this kind, in parallel, or sometimes a little bit ahead of, advancing state practice. However, it is unlikely that the comment itself will be able to resolve it. If the governments have been unable to settle the issue, it might be risky for a treaty body to attempt to do it for them. Indeed, a formal attempt of standard-setting on issues of this kind, even through soft-law such as a commentary, might lead to a situation where opposition to the aim that is being pursued is made more manifest than before. Governments may feel impelled to adopt formal positions opposing the proposed stipulation, inhibiting the intended aim. Gradual implementation practice may serve this purpose far better, up to the point when more formal standard setting becomes possible.

This problem may become more pronounced in relation to issues where there exists open disagreement between a treaty body and individual states. For instance, the issue of the scope of application of the Framework Convention for the Protection of National Minorities (hereinafter 'Framework Convention') was mentioned. While some stakeholders were expressing a sense that a formal position of the Advisory Committee in the form of a detailed comment would help clarify the issue, it might also be argued that such an approach might polarize views. In consequence, an informal working consensus that is in operation at present might be jeopardized.

On the other hand, there will be instances where the treaty body can very confidently assert its position, even a conceptual one, in the face of some opposition. For instance, the insistence that minority rights are part and parcel of the canon of human rights is not for disposition. An argument that an enhancement of standards for the protection of minorities might entrench distinctiveness among communities and contribute to the development of 'ethnic politics' could, for instance, be easily rebutted with reference to the value attached to diversity in the convention itself.

Of course, all of these issues relate to the broader question of whether a thematic commentary is meant to clarify an existing rule through an authentic interpretation by the treaty body, or whether it is aimed to serve the progressive development of a rule. If the former is the case,

then the drafting would be a technical process of advancing upon the often quite general standard offered in the instrument, and adding substance to it on the basis of the practice of the states, the Advisory Committee and perhaps related treaty bodies and Courts. If the latter is the case, then a far more flexible approach that is responsive to new social needs can take place.

The Rapporteur himself would believe that this issue is in reality being addressed through a balancing of both approaches. Clearly, the thematic commentary must be rooted in the standard to which it relates. It may also advance upon that standard in view of the implementation practice, or in view of new challenges or needs that may not have been foreseen.

However, where the treaty body loses contact with the norm in question, and the evolving consensus about its interpretation, the value of the comment itself will be placed in question. It may be seen as a campaigning document, rather than as an authoritative reflection of an advancing standard.

On the other hand, where a norm is kept static, it will lose relevance to stakeholders who feel, with reason, that their needs are not addressed. A thematic commentary therefore balances the need with retaining its legal quality or ambition while offering room for the dynamic development of rules.

Another problem raised was that of generality. A thematic comment, especially in the Framework Convention context, may be aimed at adding more specific meaning to often quite general provisions. However, this, in itself, may not always be desirable, at least if carried too far. Given the great diversity of situations in which individuals or minorities may find themselves, a one size fits all approach cannot be taken.

Even the most detailed commentary cannot anticipate the specificities of all possible situations. Still, the greater detail of a comment does offer, on the one hand, an enlarged menu of options for addressing certain kinds of problems, and on the other, it will reflect an enhanced expectation that the state concerned will address the issue area that is covered, whichever option it may adopt.

Finally, the issue of the risk of fractionating the international legal system might be considered. If each treaty body develops its own, detailed interpretation of at times overlapping rules, might we not end up with competing legal regulation of the same issue? While this may be a theoretical risk, it appears that most agencies involved in standard setting, including soft standards, will tend to do so with due reference to the practice of other institutions.

4. Steps that can be taken to Enhance the Impact of Thematic Commentaries

While the meeting marveled at the comprehensiveness and legal beauty especially of the second commentary ranging over some 150 paragraphs that was presented to it, the debate focused on the issue of implementation. It was noted that a major launch event was a good first step, but that more action could be undertaken.

In this context, the encouragement of translations of thematic commentaries was noted. Minority representative organisations themselves might take a role in this, and perhaps receive funding in this context.

Moreover, the holding of dissemination seminars with multipliers of information among minority communities, as well as with officials involved in implementation could be considered. Regional seminars might also be an option. One might also consider supporting governments or NGO actors seeking to generate implementation steps, for instance through the generation of model clauses of legislation or other measures.

This may include practical ‘beacon point’ implementation projects. The network among government, the Advisory Committee, independent experts and minority representative organisations could be maintained in the context of such activities.

Again, it was emphasised that both government and minority organisations can take the lead in publicising thematic commentaries and encouraging further dissemination and implementation work.

Moreover, the academic community can play its role in disseminating knowledge on the advancing standards that have been adopted. Legal commentaries offering even greater detail of understanding, and sources supporting the legal quality of the provisions proposed, offer one such avenue.

There was debate about whether or not it would be desirable to have thematic commentaries adopted by the Committee of Ministers. On the one hand, this might add to their legal authority. On the other hand, it was observed, that such an eventual outcome might cast a long shadow into the drafting process.

The project aimed at developing and advancing a standard might be turned by stealth into an intergovernmental negotiation that might not be best suited towards that purpose. Moreover, one might wonder what would happen if some commentaries are adopted by the Committee of Ministers, but others are not. Would this not lessen the authority of the latter categories of cases?

Instead, it was noted that an indirect endorsement of commentaries has already taken place. The Advisory Committee and the Committee of Ministers are of course drawing on the commentaries in the implementation work, confirming their legal authority.

5. Topics that Might be Addressed in the Future

It was noted that one issue originally considered for treatment through a thematic commentary has not yet been addressed: the media. This issue might now warrant further consideration, especially in the light of challenges and opportunities presented by new electronic forms of the media. This would concern both minority access and ownership of the media, as well as the treatment of minorities in the media.

Another issue for consideration concerns the issue of minority and kin state relations across borders. As is the case in relations to aspects of problems concerning the media, this issue too has recently been addressed by the OSCE HCNM in a detailed comment. It was felt that the Advisory Committee could usefully build on this work in the special context of its legal environment, without the need of re-inventing the wheel.

Significant debate ensued about another topic that had been considered some time ago for a possible thematic commentary: Article 4¹ to 6² of the Framework Convention. One position was that one should address this issue. By so doing, one might also offer important observations on the scope of application of the relevant obligations. One might later expand on such a view if the climate is right for a comment on Article 3³. Another view was that one might treat Article 3-6 together, to achieve the same aim. Finally, it was argued that, as a precondition for addressing Article 4 to 6, one should first consider Article 3 by itself. The Rapporteur for this session refers back to his observations relating to possible problems that may be encountered in relation to the creation of thematic comments in this context.

The Rapporteur expressed his gratitude to the authors of the background reports on which this report draws, to the chair and commentators and the participants in the right debate during this workshop.

¹ Article 4 guarantees the right to equality before the law and the prohibition of discrimination on the basis of belonging to a national minority. It also provides for a possibility of adopting adequate measures to promote full and effective equality in socio-economic, political and cultural life. Such measures shall not be considered to be discriminatory.

Article 5 deals with the promotion of conditions necessary for preservation and development of minority culture, religion, language, traditions and cultural heritage of persons belonging to national minorities.

² By virtue of Article 6 the State Parties shall encourage a spirit of tolerance and intercultural dialogue and to take effective measures to promote mutual respect and understanding and co-operation among all persons living on their territory, in particular in the fields of education, culture and the media.

³ Article 3 concerns the personal scope of application of the Framework Convention. It ensures the principle of self-identification of every person belonging to a national minority and provides for a possibility of national minorities to exercise the rights and enjoy the freedoms embedded in the Framework Convention individually as well as in community with others.