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(DH-MIN)**

**EFFECTIVE PARTICIPATION OF NATIONAL MINORITIES
A COMMENT ON CONCEPTUAL, LEGAL AND EMPIRICAL PROBLEMS**

Report prepared by Joseph MARKO *

* Professor, Institute of Public Law, University of Graz - Bozen

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1. Conceptual frame

Any analysis of the implementation of Article 15 of the Framework Convention for the Protection of National Minorities (hereinafter: Framework Convention) has first to clarify the substance of Article 15, i.e. the obligation of State parties “to create the conditions necessary for effective participation of persons belonging to national minorities.” Neither the term “effective” nor “participation” is defined in the Framework Convention and the explanatory report refers only to the goal to be achieved through “effective participation”, namely “real equality”, and enumerates in a non-exhaustive list the following measures which are proposed for the promotion of such participation:

- Consultation with these persons, in particular with their representative institutions when adopting legislative or administrative measures likely to affect national minorities;
- involving these persons in the preparation and implementation of development plans;
- undertaking studies to assess the possible impact of projected development activities;
- effective participation of such persons in decision-making bodies and elected bodies at all territorial levels;
- decentralised or local forms of government.

As can be seen from this description in the explanatory report, there are three important questions which must be addressed here:

First, effective participation is – in the explanatory report and thereby through the “legislative history” – intimately linked with the provision of Article 4 of the Framework Convention, the need to achieve “full and effective equality”. According to this provision, the Parties have to undertake “adequate” measures, i.e. special measures, if necessary. This raises, of course, the question whether such forms of “affirmative action” or “positive discrimination” are in themselves discriminatory. However, already paragraph 3 of the same article rules out that such measures can be considered an act of discrimination.

Secondly, the text and the explanatory report raise the question whether Article 15 refers to specific legal instruments or institutions which can be found in the constitutions or laws of the state parties which would satisfy the requirement of “effective participation”. This can be denied and the language of Article 15 was therefore criticized in academic literature as being extremely vague and without “real substance”. Hence, the Framework Convention gives the State parties a very wide discretionary power to fulfil this obligation. The only minimum standard which seems to follow from the list in the explanatory report are consultative mechanisms and some form of representation in decision-making and elected bodies.

Thirdly, both the terms “effective” and “participation” need further specification if governments, legislators and the Advisory Committee on the Framework Convention for the Protection of National Minorities (hereinafter: Advisory Committee) and the Committee of Ministers shall make a meaningful use of this phrase. To use a very non-technical language here first in order to clarify this concept: The entire Framework Convention is based on the idea of “integration” of minorities in the sense of inclusion in public affairs, cultural, social and economic life insofar as the members of national minorities are given a voice which should be heard by society in general and state bodies which adopt decisions, in particular

affecting them, with the aim that this voice should be taken seriously.¹ How can this be achieved? Obviously this implies some kind of dialogue between members of minorities and their representative bodies on the one hand, and the majority and state institutions on the other through mechanisms which provide for such a dialogue and “effective” influence on decision-making.

When we look into comparative constitutional law, it becomes obvious that there is a set of different legal instruments already in place in various countries which provide for these goals of “dialogue” and “influence” on decision-making. The functional prerequisites of “autonomy” and “integration” as cornerstones for members of minorities who want to preserve their different culture and identity and, at the same time, want to be integrated in state and society as “fully equal” persons, provide the basis for the following typology of legal instruments²:

A) Autonomy can be guaranteed through

- the enjoyment of general human rights such as Articles 8 – 10 of the ECHR, i.e. home and family, religious freedom, or freedom of expression including the use of one’s mother tongue in media, business and culture;
- cultural autonomy: this instrument is of particular interest if minorities are dispersed all over the territory. Under this notion, representative institutions of minorities are given the right to run the public education institutions for minority pupils or to manage their cultural institutions or own media;
- territorial autonomy: this instrument is of particular interest for territorially concentrated minorities which can exert state power in particular in that territory where they form the majority.

B) Integration can be fostered and guaranteed through instruments of representation and participation:

In this regard, one observation has to be made at the outset: It is not sufficient that single persons have a right to address state bodies and a right to get an answer to their petitions. “Effective participation” requires to recognize that members of national minorities form groups like political parties which represent political ideologies or interest organisations lobbying for their economic interests. In this regard “effective participation” cannot be understood without a group-oriented dimension. Insofar, national minorities and not only their members must have institutional mechanisms which provide for their “representation” within state bodies and their “participation” in the narrower sense, i.e. instruments which ensure their “effective” influence on decision-making in the institutional settings of a respective country, region or municipality.

Representation and participation can thus – in theory – be fostered and ensured through the following instruments which – if seen as a continuum – provide for “representation” through the individual right of freedom of association as the weakest form up to veto-power in decision-making processes which ensure

¹ See Kristin Henrard, ‘Participation’, ‘Representation’ and ‘Autonomy’ in the Lund Recommendations and their Reflections in the Supervision of the FCNM and Several Human Rights Conventions, in Intern. Journal on Minorities and Group Rights 2-3/2005, 133-168, at 152.

² See in particular Joseph Marko, Equality and Difference: Political and Legal Aspects of Ethnic Group Relations, in: F. Matscher (ed.), Vienna International Encounter on Some Current Issues Regarding the Situation of National Minorities, Kehl 1997, pp 67–97, also available at: www.uni-graz.at/suedosteuropa.

“effective” participation in the strongest sense by enabling minority representatives to block any decision which goes against the interests of the minority concerned.

With regard to representation, these instruments are:

- Freedom of association, in particular the freedom to form political parties to represent the interests of national minorities in public life, as a prerequisite to enable dialogue not only of single persons, but of groups;
- Electoral mechanisms such as exemptions from threshold requirements in proportional representation systems or the drawing of boundaries in majority vote systems. This mechanisms will foster, but not necessarily ensure representation;
- Reserved seats in the legislature, executive or judiciary: insofar as they are foreseen in the constitution or respective laws, they legally ensure representation;
- Proportional representation or ethnic quotas in the above mentioned state bodies.

With regard to participation, two forms of instruments can be distinguished:

- bodies and instruments which provide for the consultation of minorities so that their voice can be heard and taken into consideration;
- instruments which provide for “effective” influence on decision-making by various forms of veto-powers based on the representation of minorities in the bodies which adopt decisions.

Based on these conceptual clarifications, the opinions of the Advisory Committee in the first and second monitoring cycle can be analysed in the following chapters, first, with regard to observations where the Advisory Committee identifies and specifies legal “standards” for the implementation of the Framework Convention or gives recommendations to improve the national legal mechanisms and, secondly, where the Advisory Committee assesses the empirical “effect” of the legal instruments in place, i.e. whether they perform the function for which they have been created.

2. “Standard setting” through the opinions of the Advisory Committee

With regard to the problem raised in the beginning whether “special measures” violate the equality principle, the governments of Albania, Armenia, and the Ukraine raised concerns based on their constitutional law that “special” representation mechanisms in parliamentary bodies would run contrary to the principle of equality of all citizens and thereby infringe the rights of the majority. In the case of Ukraine, the Advisory Committee however explicitly referred to Article 4 of the Framework Convention which must allow for “adequate measures” in the sense of special measures so that the position addressed already in the explanatory report of the Framework Convention was confirmed by the Advisory Committee.

Two countries had also bans for the formation of parties on ethnic grounds entrenched in their legal systems, namely Albania and Russia. Whereas Albania amended its law and lifted the ban on the formation of ethnic parties, the Advisory Committee declared in the case of Russia that such a party ban amounts to a violation of the right to freedom of association. In the case of Moldova and Russia the Advisory Committee criticized also regulations about the registration of parties requiring a certain number

of members in at least half of the territorial districts of the respective country as hampering in particular the opportunities of territorially concentrated minorities to be represented in public life through such restrictions. In addition, the Advisory Committee addressed in the case of Moldova the fact that even if there are minority candidates on general party lists that such practice is not seen as to effectively guarantee minority representation.

As far as electoral mechanisms are concerned, first the right to vote and to stand as a candidate are the essential preconditions for any representation. In this respect, in particular legal requirements with the effect of hampering the exercise of the right to vote were criticized by the Advisory Committee. Estonia had language proficiency requirements established for electoral candidates, abolished, however, these requirements after the criticism of the Advisory Committee. Also for Russia language proficiency requirements were criticized as having a negative impact on the right to stand as a candidate despite of the fact that the knowledge of the languages of so-called “titular nations” was considered to be a legitimate aim. However, in no case was the choice of the electoral system as such, either proportional representation or a majority vote system, criticized by the Advisory Committee.

The most important specifying rules elaborated by the Advisory Committee in the monitoring process affect the representation mechanisms:

- First, as a general rule the Advisory Committee set the standard that equal voting rights and the integration of minority members in general party list is not sufficient for “effective participation” in elected bodies. In several countries the Advisory Committee criticized that there is virtually no representation of minorities in elected bodies at all or that only some, regularly numerically bigger minorities, are represented.³ In all of those cases the Advisory Committee requires the state parties to consider the adoption of “specific measures” without, however, specifying and recommending particular legal instruments. As can be concluded, a seat in elected bodies is seen as a necessary requirement in order to make “their voices heard.” This implies also that consultative mechanisms – which will be elaborated in more detail below – without representation in elected bodies is not seen as sufficient for “effective participation.”
- Secondly, whenever the national legal system provides for such “special measures” such as exemptions from threshold requirements, benign gerrymandering through drawing the lines of electoral districts in favour of minorities, reserved seats or even quotas, the Advisory Committee welcomes – as a rule – these measures as fostering the obligation to provide for “effective” participation. These instruments and their practical implementation did not raise any concern of the Advisory Committee with regard to the equality principle as already outlined above. If a country has adopted such measures, the Advisory Committee recommends using these mechanisms for all territorial levels, not only for the national level (BiH). However, none of these measures as such is seen as a legal standard following from the provisions of the Framework Convention itself, but the choice is left to the state parties with regard to the specific practical circumstances of the respective country. If a country, however, has introduced one of these legal instruments, the Advisory Committee adopted the position that it is – as the monitoring body – in a position to assess the implementation of the respective domestic standard of the country under review for not giving effect to its own standards. Thus, for instance, the Advisory Committee criticized in the case of Lithuania that threshold requirements were introduced in 1996 for all political parties without exempting parties representing national minorities thereby “reducing the chances of parties of national minorities to be elected and in the case of Ukraine the abolition of

³ See the Opinions on Armenia, the Czech Republic and Moldova. In the case of Croatia, the Advisory Committee criticizes moreover that in particular the biggest minorities, the Slovenes and Roma, are not represented despite of special measures for other minorities.

drawing of boundaries in favour of national minorities in 2001 as well as the abolishment of reserved seats for Crimean Tatars was commented as a “setback” and recommended again.

In Slovenia, the Advisory Committee particularly welcomed the establishment of reserved seats for Roma representatives on the local level as an important tool of “integration” of Roma into public and social affairs. This is one of the rare occasions where the Advisory Committee also made a cross reference on the link between political participation and participation in social and economic affairs insofar as the reserved seats in municipality assemblies are seen as an important instrument “in solving the problems of their social exclusion” in particular with regard to housing/living conditions, unemployment and the low level of education from which they still suffer in many European countries.

- Finally, when it comes to proportional representation or quota mechanisms in elected bodies, again the Advisory Committee welcomed such instruments in place in Bosnia and Herzegovina, Kosovo or Cyprus on principle as a means to achieve the legitimate aim, but raised several concerns with regard to their implementation, in particular as Article 3 of the Framework Convention is concerned which guarantees to every person belonging to a national minority the right freely to choose to be treated or not to be treated as such and no disadvantage shall result from this choice or from the exercise of the rights which are connected to that choice. Therefore the Advisory Committee criticized electoral rules in BiH which oblige candidates to declare their ethnicity in advance for reserved quotas and the legal regime in the autonomous province of South Tyrol in Italy which requires a language affiliation declaration from everybody as being “suspect” under Article 3 and recommended less restrictive measures to achieve the aim of minority representation. The same holds true for the allocation of electoral districts to specific ethnic groups in Dagestan, which was considered an effective tool to ensure an ethnically balanced system, but was nevertheless seen as too rigid restriction with regard to Article 3 of the Framework Convention.
- As far as the representation of national minorities in administrative structures and the judiciary is concerned, the Advisory Committee does not claim a legal obligation for the establishment of such mechanisms. However, if they are in place, the Advisory Committee criticizes their lack of implementation, in particular also for the regional level.

With regard to participation mechanisms in the narrower sense we can distinguish between institutions or instruments which provide for consultation or give persons belonging to national minorities an influence in the decision-making process through the right to vote including various forms of veto-power.

As far as consultative mechanisms are concerned, the Advisory Committee welcomes all forms of advisory bodies established for or within parliaments or executive bodies such as Councils of National Minorities, Committees or Sub-committees for national minorities in parliaments, inter-ministerial committees or government departments for national minorities on various territorial levels. However, as outlined above, all these consultative mechanisms are legally seen as necessary, but not sufficient for “effective participation.” The basic standard which was established by the Advisory Committee as a “general rule” for consultative mechanisms to meet the legal obligation from Article 15 is the requirement of establishing a “permanent dialogue” through “institutionalised consultative mechanisms.” So, whenever a government met with national minority representatives on an ad hoc basis or when existing consultative bodies such as National Councils were not convened, not regularly consulted in the preparation of draft legislation or not sufficiently funded, this was criticized by the Advisory Committee connected with the recommendation to establish a “permanent dialogue on an institutionalised basis.” Secondly, the Advisory Committee criticized in several cases (such as Austria) the composition of consultative bodies for not being “representative” enough when the members are not elected by the affected minorities themselves, but appointed by the government or in the case of “mixed” bodies composed of minority representatives

and government appointees. In this respect the rule was established that at least 50% of the members of consultative bodies must be selected by the minorities themselves. Further on, the Advisory Committee criticized if the governmental bodies favoured one minority organisation by creating a de facto monopoly of minority representation for one institution. Again the Advisory Committee elaborated as a rule that governmental bodies have to respect “democratic pluralism” also with regard to minority representation and that they have to establish a “direct link” also with other national minorities, in particular if they are – being smaller in numbers – not effectively represented in such bodies.

As far as participation in the decision-making is concerned, the Advisory Committee welcomed the possibility of such participation through reserved seats and quotas. In the case of Denmark the Advisory Committee even criticized that the minority representatives were guaranteed a seat in the county assembly, but without the right to vote. This was criticized insofar as the room for political manoeuvre would be considerably weakened and reduce the level of political influence. Also in the case of Cyprus the mere advisory role of representatives of religious groups in the parliament was criticized as being insufficient to ensure effective participation. The countries, where members of national minorities do not only have a right to cast a vote in an elected body like all the other representatives, but also enjoy veto-power are Slovenia and Bosnia and Herzegovina as well as UNMIK administered Kosovo. Whether reserved seats even in combination with veto mechanisms are effective tools will be addressed in the next chapter. What is, however, of legal concern with such mechanisms from a democratic perspective is the fact that the parliamentary minority can dominate the majority so that in ethnically divided societies ethnic quota mechanisms in combination with strong veto powers can block political decision-making processes and thereby turn democracy into ethnocracy. This is currently hotly debated in Bosnia and Herzegovina in the course of a reform of the entire Dayton constitution. Already in 2000 the Bosnian Constitutional Court had in the so-called “Constituent Peoples’ Decision” ruled out that ethnic quotas in combination with unlimited and/or absolute veto power violates the constitution.

As far as the second functional requirement of “autonomy” is concerned, the Advisory Committee never adopted an opinion whether it is necessary for state parties either to establish cultural or territorial autonomy as a legal obligation following from Article 15. Nevertheless, if such regimes have been put in place they are again welcomed by the Advisory Committee as instruments which have the capacity to foster “effective participation.” Only with regard to the actual effects the Advisory Committee raised concerns which will be tackled in the next chapter.

3. The empirical effects of instruments for autonomy and integration

One of the main findings from the opinions of the Advisory Committee is the fact that even exemptions from thresholds, reserved seats or proportional representation are not sufficient to ensure effective participation. For instance, in Poland despite of an exemption from the 5% threshold requirement the Advisory Committee established that minorities are poorly represented and had fewer and fewer representatives in the last two parliaments. Even in Slovenia, where the two minority representatives in parliament enjoy veto power, there were complaints that their voices were insufficiently heard in public affairs and that their impact on legislation has been diminishing in the last years so that their influence on decision-making remains rather limited. In Kosovo, even the over-proportional representation of Serbs foreseen in the Constitutional Framework for the Kosovo Assembly, does not foster interethnic dialogue and co-operation since Serb representatives complained that they were “outvoted” in each and every proposal they had submitted in parliament so that they finally withdrew from the Assembly.

The same holds true for consultative mechanisms. Even if National Councils representing minorities are in place, it depends on the good will of the governmental bodies to make use of them in a spirit of “constructive and permanent dialogue” taking their concerns and expectations seriously.

Hence, it must clearly be seen that consultative mechanisms and representation and participation in elected bodies are not an alternative, but mutually supplementing instruments. Consultative mechanisms which provide for full participation in the drafting of laws or in executive decisions will therefore even be more “effective” than reserved seats when the voice and vote of one or two representatives out of 80 will not be taken into account. The other way round, all consultation in the pre-parliamentary drafting process will not help at all, when there are no elected representatives of minorities which can follow up the substantial matters from consultation to the voting procedures.

In conclusion, the best legal instruments for “effective participation” cannot “ensure” this goal if there is not a political climate and willingness of inter-ethnic dialogue and co-operation to give the members of national minorities a voice which is also “taken seriously.” Hence, in the end, not more or other legal instruments are necessary, but the full implementation of the instruments in place linked with much more effort to provide for the goals foreseen in Article 6 of the Framework Convention, namely to create “a spirit of tolerance and intercultural dialogue and take effective measures to promote mutual respect and understanding and co-operation.” Hence, the “effectiveness” of Article 15 of the Framework Convention has to be seen in the entire context of the Framework Convention, since the creation of tolerance and intercultural dialogue is a task to be achieved through the education system, the media and civil society empowerment. Moreover, the intimate link between political participation and participation in cultural, social and economic affairs has to be taken much more into account since they are mutually reinforcing as can in particular be seen from the serious problems which Roma face all over Europe.