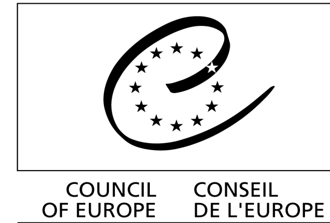

INTERNATIONAL LEGAL GUARANTEES FOR THE PROTECTION OF NATIONAL MINORITIES AND PROBLEMS IN THEIR IMPLEMENTATION

WITH SPECIAL FOCUS ON MINORITY EDUCATION

Status of international protection of national minorities: 'where do we stand?'

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The title of this seminar includes quite strong wording – 'international legal guarantees'. Thus, we are talking not about standards, guidelines, or other types of soft law, but about supposedly strong legal safeguards existing in the field of minority education.

Do we indeed have good reasons to speak about the legal guarantees of the kind – or this is just wishful thinking, and in reality the tools at our disposal are limited to "soft" recommendations and political conditionality?

The Framework Convention contains only two provisions relevant to education which can be interpreted as legal guarantees:

- the right to learn minority language or study in minority language;
- to establish, under certain conditions, private schools with minority language of instruction and corresponding curricula.

However, it is not evident that solely specific provisions on minority rights constitute relevant legal basis for the issues under consideration.

One has to keep in mind that exactly application of minority rights in education is the most sensitive issue. It is revealing that three whole articles of the Framework Convention are devoted to education, and that the first recommendations adopted in 1996 under auspices of the OSCE High Commissioner on National Minorities - The Hague Recommendations, were exactly on education. Moreover, the very first thematic comment adopted by the Advisory Committee, also tackled the education issues.

This is not at all surprising, as exactly education determines continuity of minority cultures, the possibility to preserve and develop minority identity. Cultural, linguistic and religious diversity is to be taken into account in several respects, such as the language (or languages) of instruction, curricula – particularly teaching history, cultural paradigms, organization of education system, etc. Lack of proper respect to these sensitive issues can cause marginalization of minorities, may be perceived as assimilationist policies, and hence trigger dissatisfaction and growing tensions in the society. In practice, this happened in a number of European countries, where exactly the issues related to minority education provoked inter-ethnic tensions and conflicts and thus threatened social cohesion.

In the meantime, minority rights in education seem to be "the least justiciable" – it is difficult to find proper ways **to invoke these rights before the court**.

The best known of the very few pertinent cases is the famous “Belgian linguistic case”, in which the European Court of Human Rights ruled that the ECHR does not stipulate the right to state-funded education in the language chosen by the parents. Another relevant case, the Cyprus vs. Greece one, although highlighted some essential aspects of the problem under discussion, can hardly provide universal guidance because of highly peculiar situation which was to be considered by the Court.

Are there any other tools we can employ to persuade member states to implement broader minority rights in the field of education?

The fundamental principle of non-discrimination is directly applicable here, i.e. Art.14 of the ECHR taken in conjunction with Art.2 of Protocol 1. In many practical situations, one faces wrong interpretation of the basic concept of equality, which entails attempts to ensure equality, as a matter of fact, through elimination of diversity. Formally equal treatment, when all students study in the same language, with the same curricula, disregarding cultural diversity, in many practical situations leads to substantial inequalities. In many cases, different treatment is needed to achieve the goal explicitly set by the Framework Convention, i.e. full and effective equality. This approach, when not only explicitly different treatment in equal situations, but also formally equal treatment of persons whose situations are substantially different, should be considered discriminatory, was confirmed by the European Court of Human Rights in its landmark judgment on Thlimmenos vs. Greece case. In fact, this is what the whole Framework Convention is about – when and what kind of different treatment is needed to achieve full and effective equality.

In this view, the key question is how the concept of **equal access to education** enshrined in the Framework Convention should be interpreted. Is it just lack of formal or informal obstacles based on ethnicity, religion and language (negative obligations), or does it require some positive action and more proactive approach?

In practical situations, two different approaches to the issue of equality could be singled out:

- equality understood as “all children study in the same language with the same curricula”,
- equality understood as the ideal situation when everybody has the right to study in his/her mother tongue.

In my view, the latter variant much better reflects the concept of full and effective equality (provided that this option is chosen by minority parents themselves, without any pressure on the part of authorities). Obviously, learning in the language other than mother tongue of the students, as such, inevitably creates inequality, as this requires more efforts for the students to achieve the same results and puts the students belonging to minorities in a disadvantaged position.

Needless to say, this “secondary” right to mother tongue education derived from the principle of equality is certainly not an absolute right and can be restricted if these restrictions are justified by legitimate public interest. Moreover, the restrictions of the kind are unavoidable, as under current conditions of growing diversity apparently no state can ensure full-scale education in all languages that are mother tongues for its residents.

In practice, relevant authorities always have to seek balance between the will of minorities (or part of them) and availability of resources. This is the way how the limitations of the right to equal access to education and of the derived right to education in mother tongue are justified by the legitimate pubic interest. However, one should note that the latter is often understood as the will of a majority group, not the interest as a society at large, including also persons belonging to minorities.

In my view, the main criteria for determining whether the provision on equal access is fulfilled, is the quality of education. This issue is far from being trivial even from the purely methodological point of view. However, some general issues not directly related to pedagogical aspects are also essential. In particular, while assessing factors which determine the quality of education, how essential is the knowledge of official language? How to evaluate the knowledge of history – as compliance with the

"correct", officially recognized version of historical events, or rather student's ability to develop his/her own views and concepts and substantiate them with arguments?

It is also important not to be guided only by average indicators in decision-making. It is essential to take into account "the alignment by the weakest", i.e. how many minority students will be excluded if they have less chances to study in mother tongue, the share of early drop-outs, etc. In many cases less capable students can more or less successfully study e.g. mathematics in mother tongue but if teaching is switched to official language, coping both with the complicated curricula and the language difficulties becomes a hurdle they cannot overcome.

Forthcoming case law under the 12th Protocol to ECHR which has recently come into force will probably offer interpretation of the principle of non-discrimination that could be of use to evaluate the cases of the kind.

Effective participation envisaged in Art.15 of the Framework Convention is one more basic principle highly relevant to minority education. In fact, when applied to education, this principle reflects a more general approach enshrined in the UN Convention on the Rights of the Child and a number of other basic instruments – namely, that the decision-makers must act in accordance with the best interest of a child, coupled with the parents' right to represent the interests of the child and formulate them on the child's behalf. Here too, we arrive at the conclusion that the will of parents can be limited, but not arbitrarily, and in each case this limitation must be justified with the legitimate public interest.

In practice, governments often face the problems of improving teaching the official language to minority students at the expense of curtailing education in minority languages, or of separate minority education establishments – which are sometimes described as "segregated", despite the 1960 UNESCO Convention on Elimination of Discrimination in Education explicitly excludes schools singled out on the basis of religious and linguistic considerations from such a definition. In these and similar situations, the concepts of non-discrimination and effective participation mentioned above should be acknowledged as the guiding principles in decision-making.

One of the most recent cases of the kind is the ongoing minority education reform in Latvia which caused serious tensions in the society and provoked mass rallies and street manifestations of unprecedented scale. Such factors as the existence of the historically established system of education in minority languages, including the language of the biggest minority – Russian, wide awareness of the provisions of the most progressive – even by today's standards – law on minority schools arrangements of 1919, presence of two linguistic "streams" in the entire education system in Soviet period, as well as lack of de jure recognition of minority languages, make the situation particularly peculiar and complex. Despite the formally right approach (gradual reforms, emphasis on bilingualism – although not inter-cultural nor multicultural approach) the issue remains highly controversial exactly because the basic principles of non-discrimination (understood as thorough monitoring of quality and prevention of its deterioration as a result of implemented reforms) and effective participation of minorities themselves were neglected. The debate in the Constitutional Court of Latvia on this issue which took place in 2005 could be of great use also for other European countries.

Integration of the society is becoming increasingly topical issue in Europe. In many countries, education in minority languages is curtailed allegedly for the sake of integration. No doubt, proficiency in the official language(s) is one of necessary prerequisites for integration. But how essential is it indeed? Should it be considered a dominant criteria? It is not at all obvious, as potential losses related to the frustration of minorities caused by the perceived assimilationist policies in education could appear mote substantial than alleged gains.
In fact, we often face an allegation that "too much" education in minority languages and "overly generous" policies towards minorities in general are detrimental to integration. How true these allegations are?

Frankly speaking, I am not aware of a single case when "too much of minority rights" enhanced minority nationalism, triggered secessionist attempts or separatist aspirations. On the contrary, lack of or insufficient respect to minority rights, and particularly in education, quite often provoked increased inter-ethnic tensions and even caused conflicts.

Paternalism, suspicious attitude towards minority groups, denial of full participation, emphasis on linguistic, religious or cultural foundations of the nation – rather than civic unity and social cohesion – these are in fact the main reasons behind restrictions on minority education in a number of the Council of Europe member states.

To sum up, one has to admit that the legal guarantees as such are indeed very limited at the moment. In the meantime, the standard-setting in the field of minority rights at the current stage is basically completed, and application of these standards remains the key issue.

In this view, it is essential to recognize that not only provisions on minority rights as such, but also two basic principles mentioned above constitute these legal guarantees: non-discrimination (understood as full and effective equality, not just equal treatment), and effective participation and the parents' rights to define the child's interest – what is, in fact, part of general principles of democracy applied in particular situations. Therefore, litigation and development of relevant case law will be a useful and necessary complement to recommendations, persuasion and dissemination of good practices which represent typical action in the field of minority protection.