30 June 2023

Jörg Polakiewicz*

**Laudation Rainer Hofmann**

Mr. President, dear Rainer, ladies and gentlemen,

If I remember correctly, I met "the jubilarian" at the Max Planck Institute for Comparative Public Law and International Law in Heidelberg at the beginning of 1987. You had just returned from the Federal Constitutional Court, where you had worked as a research assistant. I came to the Institute as a legal trainee at the end of 1986. While I was writing my dissertation, you were doing your habilitation at the University of Heidelberg.

Even though we worked for different directors, you for Professor Bernhard, I for Professor Frowein, there were always themes that brought us both together. First, there was your interest in Spain and the Spanish-speaking world. As far as I know, you were the first *Profesor Visitante* at the Universidad Alcalá de Henares in 1990, at the invitation of Prof. Juan González Encinar, who unfortunately died much too early. I followed you in 1993 and, like you, spent a very rewarding time in the historic *Residencia de Estudiantes,* where García Lorca, Buñuel and Salvador Dalí had already lived.

Today, however, I would like to highlight in particular your outstanding **services to the Council of Europe**, for which you have carried out various important

*The views expressed in this intervention are those of the author and do not necessarily reflect the official position of the Council of Europe.

tasks. Our paths have crossed again and again in Strasbourg, where I started as a staff member of the Council of Europe in November 1993.

## Protection of minorities

First of all, issues of minority protection brought us together. You became a member of the Advisory Committee on the Framework Convention for the Protection of National Minorities in June 1998, and subsequently its president twice (1998-2004, 2010-2012). At that time, I had started in the legal service, where I dealt in particular with questions of international treaty law.

At issue was the legal nature and admissibility of declarations made by some member states to define the concept of national minority for their legal system. The question of how to define a national minority is known to be one of the most controversial issues in the context of minority protection.

The Framework Convention drawn up in the wake of the 1993 Vienna Summit and opened for signature in 1995 does not contain a definition of the term national minority. The explanatory report explains that this pragmatic solution was chosen because it was not possible to formulate a definition acceptable to all member states of the Council of Europe.[1]

[1] Paragraph 12 of the Explanatory Report.

As is well known, the concept of a national minority is already found in Art. 14 ECHR, but had not been further specified in the case law of the ECtHR either, at least at that time.

At the time of signature and/or ratification, numerous states had made declarations on the concept of national minority, limiting it to historical minorities whose members held the nationality of the declaring state. This was the case of the Baltic states. Germany also made a declaration at the time of signing on 11 May 1995 that only Danes of German nationality and members of the Sorbian ethnic group with German nationality were minorities within the meaning of the Framework Convention. In addition, the Framework Convention was also to apply to ethnic groups that traditionally lived in Germany, the Frisians in Schleswig-Holstein and Lower Saxony and the Sinti and Roma.

The question arose as to whether such declarations were to be regarded as reservations within the meaning of the Vienna Convention on the Law of Treaties or as mere declarations of interpretation and whether there could be limits to the permissibility of such a unilateral definition by a State Party.

At the invitation of the Advisory Committee, I attended one of its meetings where these issues were discussed. As the legal service of the Council of Europe, our starting point was that the Framework Convention did not contain a definition, so the unilateral declarations did not call into question a provision of the treaty expressly intended by the treaty (cf. the definition of reservation in Art. 1 (d) of

the VCLT). The Treaty Office, acting on behalf of the Secretary General, had therefore not classified the declarations as reservations, but had notified them as simple *declarations*.

On the other hand, it seemed justifiable to apply the '*object and purpose test*' *of* Article 19 (c) of the VCLT irrespective of whether the declarations qualified as reservations or not. In this way, it seemed possible to regard as inadmissible at least those declarations that arbitrarily sought to exclude persons belonging to genuine national minorities from the scope of the Convention. The difficulty was to identify generally binding standards for such an arbitrariness test. Certain guidelines could be derived from existing United Nations texts, e.g. the 'Declaration on the Rights of Persons belonging to National or Ethnic, Religious and Linguistic Minorities', adopted by the United Nations General Assembly on 18 December 1992, or bilateral treaties on the protection of minorities. Finally, there was also the practice of the OSCE High Commissioner on National Minorities. The latter had stated famously that although he could not give an abstract definition of the term, when he saw persons belonging to a national minority, he would know that they were such persons.

Such a pragmatic approach also characterised the subsequent practice of the advisory committee. Even in its first reports, the Committee recognised that the Parties *had* a certain *margin of appreciation*, but stressed that this discretion had

to be exercised in accordance with the general principles of international law and the principles formulated in Art. 3 of the Framework Convention.

In particular, the Committee objected to the exclusion of the Faroese and Greenlanders by the Danish government. It did not accept the argument that these were indigenous people or even peoples who had been granted extensive self-government under a home rule and therefore did not need the protection of the Convention. The Committee stressed that home rule regimes are only territorially limited. A complete exclusion of any protection in the rest of Denmark was not compatible with the principles of the Framework Convention, nor was limiting the protection of the German minority to South Jutland alone. The Committee made a similar argument in the case of Russia and Norway (regarding the Sami).

I do not know what personal part Rainer Hofmann played in the development of this practice of the Advisory Committee, but it seems to me to embody very well his approach of developing pragmatic and at the same time highly effective solutions to complex legal issues.

The office of the Chair of the Advisory Committee entails not only leading the monitoring work, conducting visits to the States Parties and submitting reports on the situation of the protection of minorities, but also pushing through the concrete recommendations for improving the situation of minorities in the Committee of Ministers of the Council of Europe. This work is not always easy and requires a great deal of diplomatic tact. Questions of minority protection are eminently

political issues in many member states of the Council of Europe. Prof. Rainer Hofmann has mastered this task with bravura and has played no small part in the fact that there is now a constant practice on the part of the Committee of Ministers to adopt the draft recommendations prepared by the Advisory Committee with no or only minor changes.

On 13 June 2002, Prof. Rainer Hofmann drew the following conclusions in his report to the Committee of Ministers:

"The Framework Convention is today truly pan-European human rights instrument ... A few years ago, some critics argued that an impressive rate of ratifications could be merely a reflection of the weakness of the standards and the monitoring mechanism of the Framework Convention. But looking back at the developments since the outset of our activities, I would argue that the monitoring mechanism has developed way beyond such small expectations. The development of the monitoring and the adoption of the first 11 resolutions of the Committee of Ministers and 19 detailed opinions of the Advisory Committee have demonstrated the value of the Convention and helped to determine the limits of the inherent flexibility of its substantive provisions. And as regards working methods, much more has been achieved than the critics of Resolution (97)10 expected. It is for noteworthy that we are, to my knowledge, the first and only human rights monitoring mechanism based on state reports to have introduced country visits as a regular element of the monitoring."

## EU Fundamental Rights Agency (FRA) in Vienna

In addition to the protection of minorities, Rainer Hofmann played a prominent role in the cooperation between the Council of Europe and the European Union Agency for Fundamental Rights ("Fundamental Rights Agency"), which started its work on 1 March 2007. Its task, according to Art. 2 of Regulation (EC) No 168/2007, is to provide assistance and expertise to the relevant institutions, bodies, offices and agencies of the Union and the Member States in the implementation of Union law in the field of fundamental rights.

In the run-up to the establishment of the agency, there had been considerable tensions because the Parliamentary Assembly in particular feared a competitive relationship with the Council of Europe as the central European human rights institution.

I remember well that time when we tried to work out modalities with the various EU Presidencies to find a mutually beneficial solution. A broad mandate for the Agency would have duplicated the work of the Council of Europe's existing mechanisms and thus risked undermining legal certainty in such an important area and ultimately weakening protection as a whole. It would indeed be regrettable if the Agency's assessments differed from or even contradicted those of the Council of Europe's bodies. This is why it was so important that the founding Regulation obliges the Agency to refer to the results and activities of the Council of Europe's monitoring and control mechanisms.  This is an important safeguard to ensure

coherence and consistency in the application of human rights standards across Europe.

Under the founding Regulation, the Agency is required to coordinate its activities with those of the Council of Europe in order to avoid duplication and ensure complementarity and added value. A more detailed agreement on cooperation between the Council of Europe and the EU Fundamental Rights Agency was concluded on 18 June 2008.

The founding regulation also provides for direct representation of the Council of Europe in the organs of the Fundamental Rights Agency. In addition to the member states and the Commission, the Council of Europe appoints another independent personality as a member of the Management and Executive Boards.

Prof. Rainer Hofmann was first an alternate member from July 2012 to June 2015, then a member of the Management Board and the Executive Board of the Fundamental Rights Agency from July 2015 to June 2018. In this capacity, he contributed significantly to coordinating the work programme of the Agency with the work of the Council of Europe and reported regularly to the Committee of Ministers of the Council of Europe.

Prof Rainer Hofmann has performed this task admirably. His rich experience in monitoring the Framework Convention for the Protection of National Minorities and his expertise in both EU and Council of Europe law made him an eminently suitable candidate.

In the end, the feared competition has turned into a real synergy, allowing the Council of Europe to feed its human rights standards into EU policy-making. While the Council of Europe sets human rights standards and monitors their implementation, the Agency provides objective and reliable data, publishes reports and comparative studies, which in turn influence not only the EU's internal human rights policy but also standard-setting and monitoring within the Council of Europe. Handbooks on the protection of fundamental rights in various areas, such as data protection, which summarise both EU law and ECJ case law, as well as Council of Europe standards and ECtHR case law, are concrete results of the cooperation.

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Overall, the relationship between the Council of Europe and the European Union has changed considerably in recent years. There has been a shift from a competitive relationship to a strategic partnership. Cooperation has intensified once again after last year's turning point.

Following Russia's exclusion from the Council of Europe, it has become possible to bring the negotiations on the EU's accession to the ECHR to a provisional conclusion. In the Reykjavik Summit Declaration 'United Around our Values' (17 May 2023), the Heads of State and Government welcomed the provisional agreement on the revised draft accession instruments as an important achievement.

I am convinced that only the Union's accession to the ECHR can ensure the necessary coherence of human rights standards across Europe. Accession is the ideal instrument to ensure a harmonious development of the jurisprudence of the European courts in human rights matters. Accession will be a strong political signal of coherence between the Union and the "wider Europe" reflected in the Council of Europe and its pan-European human rights system.

Rainer Hofmann has contributed like no other to the cooperation of the European institutions for human and minority rights and will hopefully continue to do so.

I wish you dear Rainer with all my heart much joy, strength and health for the rest of your life.