Strasbourg, 7 June 2006 **CDL(2006)053**
Engl. only

Study 294 / 2004

EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW

(VENICE COMMISSION)

ROUND TABLE ON
"NON-CITIZENS AND MINORITY RIGHTS"

16 June 2006
09.00 a.m.-1.00 p.m.

University of Geneva
Law Faculty - Department of Constitutional Law
Room 3050
40 Bd du Pont d'Arve
1211 Geneva 4
Tel + 41 22 379 85 30 /22

REPORT

By

Mr Gudmundur ALFREDSSON[1] (Expert, Iceland)

[1] The author is Director of the Raoul Wallenberg Institute of Human Rights and Humanitarian Law and Professor of international law at the Law Faculty of Lund University in Sweden. He is a member of the UN Sub-Commission on the Promotion and Protection of Human Rights.

This document will not be distributed at the meeting. Please bring this copy.
Ce document ne sera pas distribué en réunion. Prière de vous munir de cet exemplaire.

I. Introduction

1. Citizenship has traditionally been viewed as a matter so close to the core of statehood and sovereignty that international organizations[2] in their human rights standard-setting and monitoring activities have only made occasional inroads into the questions concerned. It would seem that these inroads have not always been well-coordinated; States are reluctant partners when it comes to this topic, and unclear terminology and inconsistent standards may have been the result.[3]

II. Equal Rights for Everyone

2. The main rule is that all human beings are born free and equal in dignity and rights (article 1, paragraph 1, of the Universal Declaration of Human Rights, UN 1948). Logically, subsequent articles of the UDHR and those of many other instruments, like the two International Covenants on Civil and Political Rights and on Economic, Social and Cultural Rights (UN 1966), stipulate that everyone, with one major exception, is entitled to the rights contained therein. For the purpose of realizing equal enjoyment of everyone to all human rights, the prohibition of discrimination and established special rights and special measures, like those adopted to the benefit of minority persons and/or minority groups, apply across the board of civil, cultural, economic, political and social rights. The one major exception has to do with the running for office and voting in elections, as set forth in article 21 of the UDHR and article 25 of the ICCPR.

III. The Rights of Citizens

3. In paragraph 3 of General Comment No. 25 on article 25 of the ICCPR entitled "The right to participate in public affairs, voting rights and the right of equal access to public service",[4] the Human Rights Committee stated:

> "In contrast with other rights and freedoms recognized by the Covenant … article 25 protects the rights of 'every citizen'. State reports should outline the legal provisions which define citizenship in the context of the rights protected by article 25. No distinctions are permitted between citizens in the enjoyment of these rights on the grounds of race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. Distinctions between those who are entitled to citizenship by birth and those who acquire it by naturalization may raise questions of compatibility with article 25. State reports should indicate whether any groups, such as permanent residents, enjoy these rights on a limited basis, for example, by having the right to vote in local elections or to hold particular public service positions."

---

[2] The focus of this discussion paper is on relevant standard-setting and monitoring activities of the United Nations.

[3] As to the activities of international organizations, see also the paper contributed by Professor Asbjorn Eide in 2004 to a previous gathering in the series of Round Tables on Non-Citizens and Minority Rights organized under the auspices of the Venice Commission.

[4] In UN document CCPR/C/21/Rev.1/Add.7.

IV. The Rights of Non-Citizens

4. A good example of the afore-mentioned reluctance is the International Convention on the Elimination of All Forms of Racial Discrimination (UN 1965). Since race is said in article 1, paragraph 1 to encompass national and ethnic origin and since the Convention addresses special measures as well as individual and group rights, it is highly relevant to the minority rights discourse. Notwithstanding repeated preambular references to the principles of dignity and equal rights inherent in all human beings and to the entitlement of everyone to all the rights and freedoms states: "Under the Convention, differential treatment based on citizenship or immigration status will constitute discrimination if the criteria for such differentiation, judged in the light of the objectives and purposes of the Convention, are not applied pursuant to a legitimate aim, and are not proportional to the achievement of this aim." In paragraph 13, it recommends: "Ensure that particular groups of non-citizens are not discriminated against with regard to access to citizenship or naturalization, and to pay due attention to possible barriers to naturalization that may exist for long-term or permanent set out in the Convention without distinction of any kind, including equality before the law and equal protection of the law against any discrimination and against any incitement to discrimination, the Convention stipulates in article 1 paragraph 2 that it "shall not apply to distinctions, exclusions, restrictions or preferences made by a State Party to this Convention between citizens and non-citizens".

5. Furthermore, in paragraph 3 of article 1 of ICEAFRD it is provided: "Nothing in this Convention may be interpreted as affecting in any way the legal provisions of States Parties concerning nationality, citizenship or naturalization, provided that such provisions do not discriminate against any particular nationality."

6. In paragraph 4 of General Recommendation No. 30 of the Committee on the Elimination of Racial Discrimination (CERD), entitled "Discrimination Against Non-Citizens",[5] the Committee residents." In paragraph 17, it is recommended that States "Regularize the status of former citizens of predecessor States who now reside within the jurisdiction of the State party". While the CERD does not address minority rights in this General Recommendation, it calls in paragraph 37 for "the necessary measures to prevent practices that deny non-citizens their cultural identity, such as legal or de facto requirements that non-citizens change their name in order to obtain citizenship, and to take measures to enable non-citizens to preserve and develop their culture".

7. In the International Covenant on Economic, Social and Cultural Rights (UN 1966), in article 2, paragraph 3, it says: "Developing countries, with due regard to human rights and their national economy, may determine to what extent they would guarantee the economic rights recognized in the present Covenant to non-nationals." This exception is not available to developed countries.

8. The Declaration on the Human Rights of Individuals Who are Not Nationals of the Country in which They Live (adopted by UN General Assembly resolution 40/144 of 1985) demonstrates the reluctant approach. The text does not refer to minorities but, according to article 1, for the purposes of the Declaration, "the term 'alien' shall apply, with due regard to qualifications made in subsequent articles, to any individual who is not a national of the State

---

[5] Adopted in 2004 and available at http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/e3980a673769e229c1256f8d0057cd3d?Opendocument.

in which he or she is present". In article 2 it says that nothing "in this Declaration shall be interpreted as legitimizing the illegal entry into and presence in a State of any alien, nor shall any provision be interpreted as restricting the right of any State to promulgate laws and regulations concerning the entry of aliens and the terms and conditions of their stay or to establish differences between nationals and aliens. However, such laws and regulations shall not be incompatible with the international legal obligations of that State, including those in the field of human rights". The Declaration is not subject to a separate monitoring procedure, but it can be and is quoted by other monitoring instances when issues concerning non-citizens, non-nationals and aliens come up.

9. The Declaration, in articles 5-9, continues to list the rights that aliens shall enjoy. In the preamble, reference is made to equal rights for everyone, but the rest of the text is notably State-friendly and quite restrictive, for example with regard to references to domestic law and available funding. However, the list is not exhaustive and it includes: The right to life and security of person; the right to protection against arbitrary or unlawful interference with privacy, family, home or correspondence; the right to be equal before the courts, tribunals and all other organs and authorities administering justice; the right to choose a spouse, to marry, and to found a family; the right to freedom of thought, opinion, conscience and religion; the right to retain one's own language, culture and tradition; right to transfer abroad earnings, savings or other personal monetary assets, subject to domestic currency regulations; the right to leave the country; the right to freedom of expression; the right to peaceful assembly; the right to own property alone as well as in association with others; the right to liberty of movement and freedom to choose their residence within the borders of the State; unification with the spouse and minor or dependent children; prohibition of torture or cruel, inhuman or degrading treatment or punishment; limitations on expulsion; the right to safe and healthy working conditions, to fair wages and equal remuneration for work of equal value without distinction of any kind; the right to join and participate in the activities of trade unions and other organizations or associations of their choice; the right to health protection, medical care, social security, social services, education, rest and leisure; and the right not to be arbitrarily deprived of lawfully acquired assets.

10. Apart from certain political rights as elaborated above, minority persons who are not citizens, and minority groups even if many or some of their members are not citizens, are entitled to human rights and minority rights, as provided for in international law. This would be true, for example, concerning rights relating to physical existence under the Convention on the Prevention and Punishment of the Crime of Genocide (UN 1948), minority cultures and languages under article 27 of the ICCPR and article 30 of the Convention on the Rights of the Child, and minority schools under article 5 of the Convention against Discrimination in Education (UNESCO 1960).

V. Non-Citizens can Constitute Minorities

11. In General Comment No. 23 on article 27 of the ICCPR, that is on minority rights, the Human Rights Committee spelled out in paragraph 5.1: "The terms used in article 27 indicate that the persons designed to be protected are those who belong to a group and who share in common a culture, a religion and/or a language. Those terms also indicate that the individuals designed to be protected need not be citizens of the State party. In this regard, the obligations deriving from article 2.1 are also relevant, since a State party is required under that article to ensure that the rights protected under the Covenant are available to all individuals within its

territory and subject to its jurisdiction, except rights which are expressly made to apply to citizens, for example, political rights under article 25. A State party may not, therefore, restrict the rights under article 27 to its citizens alone." [6]

12. In other words, and this is reasonable, a group can constitute a minority even if its members have not obtained citizenship. Indeed, the existence of a minority is and should be a question of fact and not law or government recognition, as governments should not be allowed to exclude minorities or define them away by non-acknowledgement or by arbitrary denial of citizenship. Admittedly, non-citizens will not have the right to run for office or vote in elections, but minority persons without citizenship should have access to practically all other human rights, including minority rights.

13. Following the presentation and debate about the State report by Japan under the ICCPR, the Human Rights Committee observed in paragraph 13 of its concluding observations, under the heading of principal subjects of concern and recommendations:

> "The Committee is concerned about instances of discrimination against members of the Japanese-Korean minority who are not Japanese citizens, including the non-recognition of Korean schools. The Committee draws the attention of the State party to General Comment No. 23 (1994) which stresses that protection under article 27 may not be restricted to citizens."[7]

VI. Definition of the Term 'Minority"[8]

14. While no universal definition of the term 'minority' has been adopted, it has long been debated,[9] and the main components or elements of such a definition flow quite clearly from the practice of States and of international organizations. The four widely accepted elements would be objective characteristics (national or ethnic origin, language and religion), the subjective element (self-identification and common desire to maintain and develop the identity and culture of the group), the numbers element (less than half of the population of the State) and the time element (historical ties or presence in a State for long enough for the children or grandchildren to identify more closely with the new country than with the old country). Further underlining the time element, the UN has put in place separate instruments for the protection of asylum seekers, refugees, migrant workers and immigrants which would not have been necessary if they had come under the minority definition.

---

6 In UN document CCPR/C/21/Rev.1/Add.5.

7 In UN document CCPR/C/79/Add.102 of 19 November 1998.

8 For a detailed discussion, see Gudmundur Alfredsson, "Minorities, Indigenous and Tribal Peoples, and Peoples: Definitions of Terms as a Matter of International Law" in Nazila Ghanea and Alexandra Xanthaki (editors), Minorities, Peoples and Self-Determination. Essays in Honor of Patrick Thornberry, Leiden: Brill Publishers, 2005, pp. 163-172.

9 Compilation of proposals concerning the definition of the term 'minority', in UN document E/CN.4/1987/WG.5/WP.1. Going back to the League of Nations, the compilation was made for the working group of the Commission on Human Rights that prepared the 1992 UN Declaration on the Rights of Persons belonging to National or Ethnic, Religious and Linguistic Minorities.

15. In connection with the time element of the minority definition, article 7 of the Convention on the Rights of the Child (UN 1989) may provide a relevant consideration inasmuch as the second and subsequent generations and possible statelessness are concerned:

> "1. The child shall be registered immediately after birth and shall have the right from birth to a name, the right to acquire a nationality and. as far as possible, the right to know and be cared for by his or her parents. 2. States Parties shall ensure the implementation of these rights in accordance with their national law and their obligations under the relevant international instruments in this field, in particular where the child would otherwise be stateless."

16. As elaborated above, not least drawing on the General Comment on article 27 by the Human Rights Committee, citizenship, official recognition and vulnerability are presumably not part of the minority definition. In other words, a group of non-citizens can constitute a minority provided they meet the four definition elements above, and a group of citizens, if they are recent or first generation arrivals, who meet all the components except the time element, would not constitute a minority. Indeed, a few countries have specified that the duration of the time element should be as much as a century and, while that seems excessive, it may not run contrary to international law.

VII. Other Rules of International Law

17. Minority rights is part and parcel of human rights, and the international human rights instruments are part of public international law. One has therefore to keep in mind that other rules of international law may be capable of influencing or modifying the interpretation and application of the minority rights standards. At the United Nations in particular, issues relating to the right of self-determination of peoples, decolonization in line with the UN Declaration on the Granting of Independence to Colonial Countries and Peoples (General Assembly resolution 1514 (XV) of 1960), the prohibition of the use of force, and unlawful and foreign occupation may thus affect the granting of citizenship to populations that have been created as a result of such illegal acts. Nevertheless, said populations can become minorities, provided they meet the international definition requirements.

VII. Concluding Remarks

18. Based on the arguments above, it would seem that minority persons need not have citizenship in order to enjoy human rights and minority rights. The one exception concerns political rights, in terms of running for office and voting in elections, at least at the national level. States have significant leeway for deciding on the criteria for the granting of citizenship, as long as they do not discriminate in their legislation and practices and as long as they take into account and respect the rights of the child.