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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
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REPORT

By

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1. I have previous submitted papers on the general question of the relevance of the citizenship criterion, and have explained the position of the Advisory Committee (ACFC) in this regard. Reference could also be made to the Commentary to the United Nations Declaration on the Rights of Persons belonging to National or Ethnic, Religious and Linguistic Minorities, to which I had a major role in drafting, as then Chairman of the UN Working Group on Minorities.

2. The purpose of the present roundtable is different from the previous discussions. I take it that there is now nearing a consensus that 'citizenship' is not in general a criterion for the personal scope of minority protection in customary international law, nor is it in the relevant instruments such as the Framework Convention on the Protection of National Minorities (FCNM), Article 27 of the Covenant on Civil and Political Rights, or the UN Declaration on the right of persons belonging to minorities.

3. The question at the present session is when, if at all, the citizenship criterion is relevant, and what other criteria are relevant for personal restriction of rights or measures of protections for minorities

4. What to some extent remains controversial is whether states are entitled, by way of declarations (which might be construed as reservations), to restrict their protective measures to citizens only. In other words: Even if it does not follow from the concept of national minority itself, is it legitimate to make a reservation of that kind?

5. It is clear from the ACFC practice that it examines such reservations (or restrictions otherwise expressed) as an exercise of the margin of appreciation enjoyed by states, taking into account the specific circumstances prevailing in the country concerned. The exercise of the margin of appreciation must not, however, be a source of arbitrary or unjustified distinctions. The ACFC therefore examines the restrictions or reservations in the light of the principles in Article 3 of the FCNM, and pursues a dialogue with the state concerned to encourage it to extend its scope of application of protective measures, on an article by article basis, when the ACFC find that this would be desirable. We have seen in several cases during the second round of monitoring that countries have followed this advice, either by formally changing the criteria or by in practice extending the protection also to groups which are formally not covered.

6. When following the 'article by article' approach, the question is to identify which of the protective measures envisaged in the (Framework Convention for the Protection of National Minorities (FCNM) can be restricted to citizens, and which other criteria are relevant.

7. It may be useful, in this connection, to make use of the distinction now generally used in human rights analysis between the threefold levels of state obligations which apply to all human rights: The obligation to respect, the obligation to protect, and the obligation to fulfil the rights.

8. The obligation to respect the freedoms contained in the FCNM is generally applicable to all persons belonging to minorities irrespective of their citizenship. These are also generally universal human rights, not limited to minorities. States are obliged to respect the rights of minorities set out in FCNM Article 7 to freedom of assembly, association and expression, in Article 8 the right of minorities to practice their religion, and in Article 9 on freedom of expression and information including their own media. The State is also obliged to respect the

right of minorities under Article 10.1 to use their own minority language, in private and public, their right under Article 11 to manage their own private educational institutions, and their right under Article 14.1 to learn their own language. The state has a duty to respect the use of these rights also for minorities, or individuals within the minorities, whether they are citizens or not.

9. It is also clear from the practice of the ACFC that the state has a duty to encourage a spirit of tolerance and intercultural dialogue between all groups living on its territory, irrespective of citizenship (Article 6.1) and that the state also has a protective function in regard to minorities including non-citizens against threats or acts of discrimination (Article 6.2).

10. What remains to be discussed is whether those rights which require more active or proactive measures (the duty to fulfill) also apply to non-citizens. Three issues may be useful for discussion:

- While states generally must ensure equality before the law to minorities, whether citizens or not (Article 4.1), do states have a duty under Article 4. 2 to adopt proactive measures, in all areas of economic, social and cultural life, between minorities and the majority, even for non-citizen members of minorities? I would assume that this duty does exist in regard to permanent non-citizen residents.
- The next example is more difficult: Is the state obliged, under Article 10.2 (and provided the other conditions in that article are fulfilled such as 'inhabited traditionally or in substantial number and where there is a real need) to ensure conditions under which the minority can use their own language in relations with the authorities? My assumption is that non-citizen individuals who are affiliated with a group traditionally residing in the territory must be entitled, together with those who live there before, to use their own language in such contexts, but that 'new minorities' as such cannot generally demand this. On the other hand, resident minorities affected by a sudden territorial/ constitutional change (such as the independence of the Baltic states or the dissolution of former Yugoslavia) can demand that the language they traditionally have used in relation to authorities still can be used.
- The third example concerns language education. Can non-citizens legitimately demand publicly funded education in their own language or instruction in their language? As in the previous example, it depends on the context. 'New minorities', in the sense of persons who have on their own volition entered into and settled in a country they knew was not their own, are not necessarily entitled to demand instruction in their language, but groups of non-citizen residents who lived there at the time of independence or restored independence should have the possibility to learn their language and to some extent obtain education in their language, especially in primary school. The practice regarding the Baltic States and former Yugoslavia bears this out.

11. With regard to effective participation in public life (Article 15) it is a general rule that the right to vote and to be elected to certain kinds of public office can be reserved to citizens, in line with Article 25 of the Covenant on Civil and Political Rights. The ACFC has pointed out, however, that this restriction must not go beyond what is the legitimate purpose of the restriction contained in Article 25. The term 'public service' in Article 25 (c) should be limited only to positions which imply exercise of public authority, and should not include employment in service institutions such as railways, telecommunication enterprises and others, even if publicly run.

12. Restrictions to citizens only of the right to be elected and to vote should apply only to elections for regular governmental bodies. The ACFC has for instance criticized Estonia for their restriction to citizens only of the right to be elected to the governing boards of cultural groups under the law on cultural autonomy, and also encouraged the authorities to give the non-citizens the right to vote in local elections (without suggesting that this is a clear obligation under the FCNM), which Estonia later did do.

13. The right also set out in Article 15 for persons belonging to minorities to effective participation in the economic, social and cultural life of the country concerned, can generally not be restricted to citizens, but the relevant criterion would probably be residence of a certain duration, though the details of this may have to be worked out.

14. In conclusion, I welcome this new approach, moving beyond the old debate whether 'citizenship' in general can be a criterion for minority protection (which can no longer be maintained) to a much more detailed discussion of relevant criteria for the enjoyment of the different kinds of rights and protective measures for minorities. The extensive jurisprudence of the ACFC, which I have only briefly touched upon here, can be an important source for future examination of those criteria.