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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.

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WHICH MINORITY RIGHTS CAN BE RESTRICTED TO CITIZENS?

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I. Background

1. The international protection of persons belonging to minorities is generally viewed as a combination of classical individual rights and freedoms on the one hand, and "enhanced" or "core" minority rights on the other. Individual human rights are universal in nature and can be invoked by every human being. Enhanced minority rights embrace a set of States' obligations and principles, which may result in rights, facilities and concrete measures taken on behalf of persons belonging to minorities through the adoption of relevant domestic legislation.

2. While enhanced minority rights are sometimes dealt with as a separate *corpus* of norms, they should not be considered a distinct regime. Indeed the protection of national minorities and of the rights and freedoms of persons belonging to those minorities forms an integral part of the international protection of human rights.[1] Hence both categories complement each other and constitute a prerequisite to build a coherent minority protection regime. In other words, it can be argued that the equal enjoyment of human rights and freedoms by everyone necessitates the establishment of special rights and measures for minority groups.

II. Applicability to non-citizens as a rule

3. The rights of minorities as enshrined in relevant instruments both at the European and international level do not in principle provide for explicit limitations to citizens. For example, the Council of Europe Framework Convention for the Protection of National Minorities (FCNM) contains no reference whatsoever to the citizenship criterion. This instrument simply mentions the term "persons belonging to national minorities" in most of its provisions setting out principles and objectives for the State Parties. As the FCNM is a human rights instrument, it should consequently protect every human being belonging to a national minority. States which have made declarations and/or reservations to limit the scope of the FCNM to citizens presumably also proceed from this assumption.[2] Similarly, the approach of the OSCE High Commissioner on National Minorities has consistently emphasised that citizenship was not a meaningful criterion for the entitlement to minority rights and encouraged the States concerned to refrain from using it.

4. In the same vein, Article 27 of the UN International Covenant II on Civil and Political Rights (ICCPR) uses a terminology which suggests that the individuals designed need not to be citizens of the State Party as it addresses "persons belonging to ethnic, religious or linguistic minorities".[3] It is interesting to note that human rights instruments not specifically designed to protect minorities, such as the UN International Convention on the Elimination of All Forms of Racial Discrimination, may also call for special measures enabling non-citizens to preserve and develop their culture.[4]

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1 See Article 1 FCNM.

2 The list of declarations/reservations entered upon ratification of the FCNM is available at http://conventions.coe.int/

3 See HRC General Comment N° 23(50) on Article 27 ICCPR, ad § 5.1.

4 See General Recommendation No. 30 of the Committee on the Elimination of Racial Discrimination on Discrimination against Non-Citizens (CERD) (2004), ad § 37.

III. Restriction of certain rights to citizens: admissible exceptions

5. There seem to be very few individual rights explicitly reserved for citizens in the various international instruments which are relevant to persons belonging to minorities. This does not mean that in practice all minority rights, especially enhanced linguistic rights, are equally relevant for every person (or group of persons) belonging to a minority since States may legitimately use other criteria to target their measures aimed at helping minorities to preserve and develop their identity.[5]

6. The most frequently quoted example, in terms of admissible restrictions to citizens only, concerns the field of political rights. In this context, it is worth recalling that Article 25 ICCPR, which deals with the right to participate in public affairs, voting rights and the right of equal access to public service, addresses "every citizen" and not "everyone" or "every person" as in other provisions of the same treaty.[6] Restricting certain political rights - including those which may guarantee minority representation in the legislature - to citizens who belong to a national minority is also viewed as a legitimate requirement by the supervisory mechanism of the FCNM.[7]

7. Even though the restriction of the right to vote and to stand for office to citizens only can be regarded as admissible under international law, mentions needs to be made of a more recent tendency in Europe to extend these rights to non-citizens at the local level, provided they have been lawful residents of the area concerned for a certain period of time.[8] Another cautious word must be added to stress that all rights, facilities and measures which are reserved for citizens and aim at ensuring an effective participation of persons belonging to minorities in public affairs cannot automatically be considered admissible. Although this is beyond doubt for the right to vote and to be elected in the legislature, the restriction of other participatory rights to citizens only has already raised concerns in different contexts and may not always appear legitimate.[9]

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5 See document CDL(2006)052 on "identification, relevance and admissibility of criteria other than citizenship", ad §§ 12-13

6 See HRC General Comment N° 25(57) on Article 25 ICCPR, ad § 3.

7 See ACFC Second Opinion on Croatia of 1 October 2004, ad §§ 28-29; Second Opinion on Slovakia of 26 May 2005, ad § 21.

8 See in this context the right to vote and to stand as candidate at municipal and European Parliament elections for all EU-nationals residing in the EU zone (Treaty establishing a Constitution for Europe, Part II, Title V, Article II-100; Article 19 of the Treaty establishing the European Community); see also PACE Recommendation 1500(2001), ad item 11 iv (a), which "*urged the governments of member states to grant the right to vote and stand in local elections to all migrants legally established for at least three years irrespective of their origin*"; See Commentary of the Working Group on Minorities to the UN Declaration on the Rights of Persons belonging to National or Ethnic, Religious and Linguistic Minorities, ad § 50 (E/CN. 4/Sub.2/AC.5/2005/2 of 4 April 2005); Explanatory Report of the Code of Good Practice in Electoral Matters of 23 May 2003 (CDL-AD(2002)23rev), ad Part I, item 1.1 (b): "*(…) a tendency is emerging to grant local political rights to long-standing foreign residents, in accordance with the Council of Europe Convention on the Participation of Foreigners in Public Life at Local Level. It is accordingly recommended that the right to vote in local elections be granted after a certain period of residence*".

9 See ACFC first Opinion on Estonia of 14 September 2001 ad § 29, which encouraged the Estonian authorities to reconsider the exclusion of non-citizens from the leading bodies of the cultural autonomies. See also Opinion of 25 October 2005 on the Draft Law on the Statute of National Minorities living in Romania (CDL-AD(2005)026), ad §§ 30, 56-57.

8. In addition to certain political rights, it seems that the right to equal access to the military service and civil service,[10] which may be seen as contributing to the effective participation of minorities, can legitimately be restricted to citizens. The right for a person to return to his/her own country, guaranteed *inter alia* by Article 12 ICCPR, may be another example of a right which can be restricted to citizens.[11]

[10] At least for higher functions of the civil service.

[11] See, however, HRC General Comment N° 27(67) on Article 12 ICCPR, ad § 20, which stresses that *"(…) the scope of "his own country" is broader than the concept "country of his nationality". It is not limited to nationality in a formal sense*".