IN DEFENSE OF SPEAKING OUT: THE EUROPEAN HUMAN RIGHTS REGIME AND THE PROTECTION OF MINORITY LANGUAGES

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I. Introduction

This presentation will provide an overview of the impact of the European human rights regime on language rights of minorities. I will focus on the most comprehensive legal instrument in the area of minority rights, the Framework Convention for the Protection of National Minorities ("Framework Convention"), and on its monitoring mechanism.[1] This treaty, which entered into force approximately ten years ago, has provoked a number of improvements in the protection of language and other rights of national minorities. I believe that it can be a source of inspiration for those working on minority rights outside Europe, even though, within the realm of minority rights, regional answers do not automatically work outside their home base. Given the diversity of situations and wide variety of cultural, linguistic, and other contexts, minority rights regimes do not always "travel well."

Moreover, although today's Europe can boast about certain positive developments and tools such as the Framework Convention and the European Charter for Regional or Minority Languages, the European "answers" in this field have not always been worth exporting. With regards to the protection of minorities and their languages, Europe's history is hardly a basket of good practices.

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[1] Framework Convention for the Protection of National Minorities, Feb. 1, 1995, Europ.T.S. No.157, at 1, 2, *reprinted in* 34 I.L.M. 351, 353 (entered into force Feb. 1, 1998).

Overzealous political and legal support for state or official languages and suspicious official attitudes towards minorities have often meant bad news for minorities, not only in terms of the minority groups' efforts to promote and protect their languages, but also in terms of their ability to take part in the decision-making processes affecting their societies.

Despite this background, the major European institutions were relatively slow to decisively address minority concerns after the Second World War. This hesitancy was doubtlessly influenced by the fact that at the time, many perceived the minority rights regime of the League of Nations as a failure. The major human rights instruments of the immediate post-World War II era reflected this reluctance to pursue minority rights in the human rights context. For example, the European Convention of Human Rights, which was adopted in 1950,[2] and which remains the cornerstone of Europe's human rights law, does not contain any articles devoted to minority rights, and its non-discrimination guarantees were very limited until Protocol 12 was adopted in 2000.[3] The UN Covenant on Civil and Political Rights of 1966 went further by introducing specific provisions on minority rights in Article 27 and wider non-discrimination guarantees in Article 26.[4]

The approach of European institutions towards minority rights changed, however, drastically in the late 1980s and early 1990s. During this period, European political leaders faced a number of concrete, and numerous potential, inter-ethnic conflicts, such as those in the Balkans and the former Soviet Union. Faced with these conflicts, European political leaders began to recognize more widely that ensuring minority rights is not only an essential aspect of human rights protection, but also a key to ensuring security and stability of the continent. There emerged a heightened understanding that poor

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[2] Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, Europ. T.S. No. 5 [hereinafter *European Convention for Human Rights*].

[3] Protocol No. 12 to the Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 2000, Europ. T.S. No. 177.

[4] International Covenant on Civil and Political Rights, art. 1, Dec. 16, 1966, 999 U.N.T.S. 171, 6 I.L.M. 368.

minority rights practices require international attention and condemnation, while beneficial ones deserve to be collectively promoted and protected.

Reflecting this enhanced appreciation for minority rights, the Organization for Security and Co-operation in Europe (OSCE) drafted extensive soft-law standards concerning the treatment of minorities. The Copenhagen document of 1990 contains the most comprehensive list of these standards.[5] The Council of Europe was then tasked to transmute these political commitments into legally binding standards. The primary normative product of this effort was and continues to be the Framework Convention, which the Council of Europe adopted in 1994. After twelve ratifications, the Framework Convention entered into force in February of 1998. Today, it binds no fewer than thirty-nine countries.[6]

II. The Added Value of the Framework Convention

What makes the Framework Convention so unique that it would deserve attention outside Europe? Clearly, the internationalization of minority rights did not start with the Framework Convention. After all, international documents dealing with religious minorities have a long history, and protection of specific minorities was a key issue for the League of Nations. As mentioned above, even the U.N. Covenant on Civil and Political Rights of 1966 contains an article devoted to minority rights. Moreover, the OSCE developed extensive, non-binding minority rights standards, which were then coupled with authoritative and thematic recommendations by the OSCE's High Commissioner on National Minorities. I believe that the main aspect setting the Framework Convention apart from these other efforts is its unique

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[5] Conference for Security and Co-operation in Europe, Document of the Copenhagen Meeting of the Conference on the Human Dimension of the OSCE (1990), *reprinted in* NATIONAL MINORITY STANDARDS - A COMPILATION OF OSCE AND COUNCIL OF EUROPE TEXTS (Council of Europe, 2007), *available at* http://www.osce.org/documents/odihr/1990/06/13992_en.pdf [hereinafter OSCE].

[6] Council of Europe, Framework Convention for the Protection of National Minorities, Chart of signatures and ratifications, http://conventions.coe.int/Treaty/Commun/QueVoulezVous.asp?NT=157&CL=ENG (Status as of May 25, 2008).

combination of scope, legal nature, and monitoring mechanisms.

As regards the scope of the Convention, it is most important to note that the Framework Convention was not designed for select European countries and their minorities. Rather, it represents a clear step towards the generalization of minority rights protection in Europe. This is unlike the League of Nations' minority rights system, which was applicable to only a limited number of countries, mostly in Central and Eastern Europe. The approach is also dissimilar to the European Union's so-called Copenhagen criterion on minority protection, which is applicable to European Union candidate states, but not to the member-states. Conversely, the Framework Convention has a more pan-European reach in that it aims to cover the Eastern as well as the Western portions of the continent, whether those states have large or small minority populations. Of course, this wide geographic reach has its limit, and eight Council of Europe member-states have yet to ratify the document. Notably, of the larger member States, France and Turkey have not even signed the Convention, arguing that they do not need European minority rights norms beyond those flowing from non-discrimination guarantees.

When discussing the Framework Convention's scope, we must also consider that the governments of some countries where the Framework Convention is in force have argued for a limited definition of the term "national minorities," insisting that the document's protections apply only to persons belonging to those minorities that have a historic, rather than a more recent presence in the country. As a consequence, many countries' migrant or so-called "new minority" populations do not, according to the authorities, benefit from the protection of the Framework Convention.

Admittedly, it is true that some of the Framework Convention's provisions were designed essentially to protect traditional minorities. A number of these provisions deal with language rights. For example, few would argue that the provisions dealing with topographical indications in minority languages apply to the Somali language in Finland, even though there are several thousand Somali speakers in that country. Also, the English language signs seen throughout Europe are there primarily for

economic or functional reasons and not as manifestations of minority rights implementation. Furthermore, in the area of participation, the measures required to ensure effective participation of persons belonging to traditional minorities in their compact areas of residency are not necessarily identical to those needed for more recent minorities. At the same time, the Advisory Committee of independent experts, a key body in the Framework Convention's monitoring process, is of the opinion that certain provisions, including those on the promotion of tolerance and intercultural dialogue, should apply to these newer groups.

The personal scope of application continues to be one of the most debated issues in the Convention's monitoring process. But, the dialogue seems to show that the authorities and monitoring organs do agree on a number of points. For example, both the Council of Europe and the several European governments alike largely accept that the Framework Convention's application can extend to groups that are not called "national minorities" in their domestic context. For instance, the domestic use of the term "national minority" is often inappropriate if applied to indigenous peoples in Europe. In many cases, however, both the authorities and the affected indigenous peoples agree that the Framework Convention is still applicable. Even here, there are some interesting differences in approach. The Sami in Norway provide an illustrative example. In that country, the ILO Convention No. 169 concerning Indigenous and Tribal Peoples in Independent Countries[7] is in force, and the Sami in Norway have decided not to invoke the Framework Convention. However, the Sami in neighboring states, where ratification of the ILO Convention is still pending, continue to rely on the Framework Convention together with other instruments for protection. The willingness of most of the European indigenous peoples to embrace the Framework Convention also reflects the fact that Europe lacks regional treaties devoted to the protection of indigenous peoples *per se*. However, there is a promising project underway in the Nordic countries to draw up a treaty devoted to one indigenous people, the Sami.

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[7] Convention (No. 169) Concerning Indigenous and Tribal Peoples in Independent Countries, *adopted* June 27, 1989, *reprinted in* 28 I.L.M. 1382 (1989).

Turning our attention to the legal nature of the obligations the Framework Convention contains, it is important to stress that, in contrast to the OSCE commitments on minority issues, the Framework Convention is a legally binding treaty. Certainly, as the term "framework" suggests, the Framework Convention's provisions provide a certain margin of appreciation for the States Parties, and many of the Convention's articles only set forth principles. This leaves the exact implementation modalities for the States Parties to determine. However, there are limits to this flexibility and honoring these limits remains a legal obligation of the States Parties.

It is also significant that the Framework Convention is a *human rights* instrument. This can add strength to the legal arguments formulated on the basis of the document and contribute to the document's influence outside its own implementation and monitoring procedures. The latter aspect is evidenced by references to the Framework Convention's monitoring system's findings in the judgments of the European Court of Human Rights, which has recently generated some promising jurisprudence on minority issues -- despite the paucity of explicit reference to minority issues *per se*, in the text of the European Convention on Human Rights. At the same time, it is clear that a human rights perspective is not the only approach through which minority concerns can be effectively advanced in international treaties. Indeed, another important Council of Europe minority-oriented instrument, the European Charter for Regional or Minority Languages,[8] has a more cultural vocation, and its detailed provisions are highly complementary to the standards of the Framework Convention.

As previously mentioned, the Framework Convention's monitoring mechanism provides the third key distinguishing element. It is largely through this mechanism that the Council of Europe is able to push for improvements, when legislation or practice is lagging behind, and to evaluate whether the Framework Convention has had an observable impact. The monitoring mechanism is relatively "soft" in comparison with the complaint procedure of the

[8] European Charter for Regional or Minority Languages, Nov. 5, 1992, Europ.T.S. 148.

European Convention on Human Rights, which provides judicially binding decisions delivered by the European Court of Human Rights. Nevertheless, findings sourced through the Framework Convention's system regularly yield concrete results, in particular when they are echoed by the European Union or other international actors that carry substantial political weight.

The Framework Convention's Advisory Committee, which is comprised of eighteen independent experts, plays a major role in the monitoring mechanism. The Advisory Committee conducts country visits and issues detailed reports on the Framework Convention's implementation. The reports, which are called "opinions," are the basis for recommendations for the States Parties adopted by the Committee of Ministers of the Council of Europe.[9] As of today, the Advisory Committee has carried out more than fifty of these visits, which include extensive meetings with governmental and non-governmental organizations. The visits often provoke new attention and dialogue on minority rights and the quasi-jurisprudence contained within the Advisory Committee's opinions provide significant guidance to those interpreting and implementing the Framework Convention.

III. Language Rights under the Framework Convention

In terms of substance, the Framework Convention covers a broad range of national minorities' concerns. These range from the right to participation and educational rights, to media questions, discriminations issues, and the prohibition of forced assimilation. A majority of its substantive articles relate, directly or indirectly, to language rights, so long as the term "language rights" is broadly defined. The prominence of language issues within the Framework Convention reflects the cultural and functional importance of language rights for minorities.

Of course, the relevance of minority language issues differs

[9] For country-specific findings of the Advisory Committee and of the Committee of Ministers, see http://www.coe.int/t/e/human_rights/minorities/ (last visited April 12, 2008).

from minority to minority. For example, language rights protection may be a key question for the Hungarian minority group in Slovakia and those who speak Russian in the Baltic States. But some minorities, such as the Roma, face such fundamental problems of discrimination and socio-economic marginalization that language concerns, while important, understandably take often a back seat in their minority rights advocacy. Moreover, for the so-called "new minorities," a principal language concern may actually be learning the state or official language of the country in which they currently reside. This being said, it is important that minority language concerns amongst these communities are also addressed.

Language issues -- together with such questions as land rights, property or participation rights -- are amongst the most sensitive minority rights questions. This is repeatedly demonstrated in the country-specific monitoring under the Framework Convention, in which the Advisory Committee regularly deals with language questions that have sparked controversy and tension. Not only is this the case in the "usual suspects" of minority concern, but also in old democracies with well-established minority regimes. There, for example, the Advisory Committee has seen cases of minority language signs vandalized by unappreciative locals. The role of the Framework Convention and its monitoring mechanism is to depoliticize any heated debates on language rights and other issues, and to provide objective standards and impartial guidance. This is by no means an easy task, since there simply are no one-size-fits-all solutions within the realm of minority rights.

In some areas, the text of the Framework Convention's substantive articles provides only limited direct guidance. For example, many national minorities are concerned about obstacles blocking the use of their languages in official contexts. In this respect, the Framework Convention's text contains clear limits. It does not, for example, contain any clear right to have a minority language as an internal working language of official bodies, not even in local municipalities where minorities may constitute a clear majority. However, some countries have envisaged such a possibility in their domestic legislation. Steps like these, which may go beyond the Framework Convention's requirements, are of course

welcomed, since the international standards merely provide a minimum level of protection. This is an important premise to keep in mind, not only in the area of language rights, but also in other relevant areas, such as participation rights.

While not requiring the use of minority language as an internal language, Article 10 of the Framework Convention does provide guarantees for the use of minority languages in contacts with administrative authorities in areas where minorities traditionally reside, or are otherwise present in substantial number. The record of compliance with this guarantee varies greatly across Europe. In countries like the Czech Republic, domestic legislation provides for a relatively low threshold that triggers relevant implementation measures. In that country, the right applies when at least ten percent of the local residents belong to a specific minority group. Some other states have required that a *majority* of the local population must belong to a given minority, before they have a right to communicate with officials in their language. In a number of cases, the Advisory Committee has judged the latter threshold to be too high, although much depends upon the circumstances in the country at issue.

Some of the Framework Convention's most important language-related provisions deal with education. The instrument provides guarantees for the teaching of the language itself, or of other subjects in that language, and further provides minorities with the right to set up independent educational institutions. Upon first glance, these provisions seem vaguely formulated. Consider article 14, which states:

> In areas inhabited by persons belonging to national minorities traditionally or in substantial numbers, if there is sufficient demand, the Parties shall endeavour to ensure, as far as possible and within the framework of their education systems that person belonging to those minorities have adequate opportunities for being taught the minority language or for receiving instruction in this language.[10]

Critics of this language have quipped that if tax legislation were formulated in the same fashion as some articles of the

[10] Framework Convention, *supra* note 1, art. 14.

Framework Convention, some people may not feel obliged to pay taxes. While I agree that the language quoted above would not be a good model for drafting tax legislation, we must keep in mind that we are dealing with an international instrument, which is applicable to thirty-nine countries, each having very different cultural, linguistic, and demographic contexts. This reality must be reflected in the formulations the Framework Convention uses. Furthermore, it is no secret that not all European countries were equally enthusiastic about drafting a minority rights treaty, and perhaps the price of the Framework Convention's adoption was a certain reduction in its clarity. But, as the old saying goes, "Don't let the perfect be the enemy of the good."

Moreover, as has been the case with other human rights treaties including the European Convention on Human Rights, the more specific content develops over time, through the monitoring processes of the generally worded rights and guarantees. The Framework Convention and its language provisions are no exception. The Advisory Committee and the Committee of Ministers gradually offer more clarity through their monitoring findings and through the Advisory Committee's thematic comments, the first of which was devoted to minority education.[11]

In its everyday monitoring work, the Advisory Committee has identified a range of problems plaguing the implementation of the above-cited provision on minority (language) education. In some cases, the monitoring organs found that the commitment to minority language education had translated only into token classes organized outside regular school hours and held in inconvenient locations without adequate teachers or textbooks, even when the number of minority pupils was significant. Clearly, such conditions do not equal "adequate opportunities" and there are numerous, country-specific recommendations by both the Advisory Committee and the Committee of Ministers on this very topic.

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[11] Advisory Committee on the Framework Convention for the Protection of National Minorities, Commentary on Education Under the Framework Convention for the Protection of National Minorities, March 2, 2006, ACFC/25DOC (2006), http://www.coe.int/t/e/human_rights/minorities/2._framework_convention_(monitoring)/3._advisory_committee/5._thematic_work/.

On a more positive note, there are exemplary minority education policies, practices, and models in Europe, which provide substantial minority language education from pre-school to high school and beyond. In some instances, minority language education is, at least relatively speaking, so advanced and well organized that even majority students seek to enroll. This trend has been reported, for example, in Italian schools in Croatia.

While it is possible to point out individually positive and negative practices, in terms of minority language education in Europe, it is not easy to draw up generalized comments on the state of affairs in Europe as a whole, due to the specificity of issues faced in each state. For example, consider the case of Russian language education in the former Soviet states. Russian occupied a privileged position in the former Soviet Union, so much so that the local languages, ranging from Estonian to Ukrainian, and Georgian, were severely marginalized. Today, the monitoring bodies must ensure that as these countries pursue their legitimate efforts to promote their small state languages in education, the pendulum does not swing too far in the opposite direction, and that Russian-speaking pupils and other minority children continue to have access to quality mother-tongue educations.

I would further like to stress that when considering the Framework Convention's application to education concerns, we must not have a "one-track mind." In addition to ensuring the availability of minority language education, there are other key principles that we need to keep in mind. These include the principle of inter-ethnic dialogue, which is contained within Article 6 of the Framework Convention.[12] Of course, even though minority language education requires teaching in specific classes, the obligations to ensure minority language education must not be used or abused as a tool to unnecessarily isolate minority pupils or to widen the gap between minorities and majorities. It is important that the Framework Convention's minority language provisions are not distorted to justify such methods. This is particularly essential in post-conflict situations. Therefore, it is disconcerting that in places that have

[12] Framework Convention, *supra* note 1, art. 6.

experienced inter-ethnic conflict and violence, including in the Balkans, some school facilities and programs have been designed so that they discourage, rather than encourage contact between pupils with differing ethnic backgrounds. This can only perpetuate problems and hurt confidence-building efforts.

Most of the language rights problems highlighted by the Framework Convention's monitoring process involve authorities taking too limited measures to promote and protect minority languages. In many cases, implementing the so-called negative obligations contained in the Framework Convention does not pose significant problems. But, there are cases where states' governments have gone so far as to impose obstacles to minorities' own efforts to promote or use their own languages. In certain cases, it was purportedly done in the name of protecting a state language. For example, there have been cases where state language proficiency requirements were arguably excessive, which caused undue obstacles for minorities. One draft law envisaged that even shoe-shiners should have a specific state language proficiency to be allowed to work. That particular provision was not adopted, due to the fact that there was no clear public interest necessitating a fluid conversation in shoe shining sessions, and therefore no legal basis to impose such a restriction.

On the other hand, some problematic language provisions have become law. For example, there are still some norms in place prohibiting minority language signs visible to the public, which include signs posted by private businesses. This is an area where the criticism of the Framework Convention's monitoring bodies have helped to ease the practice, but has yet to bring adequate changes in legislation. In contrast, international criticism, based upon the Framework Convention, but echoed also by the OSCE High Commissioner on National Minorities and the European Union in its accession reports, has helped abolish legislation imposing state language proficiency requirements for candidates in local and national elections.

IV. Concluding Remarks

Ultimately, I would like to stress that Article 15 of the Framework Convention, which guarantees effective participation of minorities in decision-making, is often also key to the proper implementation of the document's language-oriented articles.[13] If a country has adequate mechanisms in place to ensure that minorities have a truly effective role and voice in decision-making, that country's laws and practices are likely to address the minorities' language needs and also be in line with European standards. In the area of minority language protection, we can promote, provoke, and support changes in the right direction, with international tools like the Framework Convention. However, positive and lasting developments can only be achieved if they are genuinely endorsed at the domestic level through decision-making processes that involve both majority and minority groups.

[13] Framework Convention, *supra* note 1, art. 15.