

The Legal Definition of Minority in the European Context: A Disquisition on the Term with a Focus on Ethnic Aspects

RAMIN REZAEI

Introduction

Nowadays for legal scholars, especially for those who are interested in human rights, the notions of minority and minority rights are very familiar. In political debates, in scholarly articles and in the reports of international non-governmental organizations or UN human rights bodies these words are frequently used. Different ethnic or linguistic groups consider themselves as a minority or claim that their rights as minority have been violated. Despite their widespread use these notions have no generally accepted legal definition. Although the term minority has been used in some hard and soft international documents it has no definition in international law. Therefore states decide to consider or not a group as minority based on their will or self-designed definitions.¹

Unlike in legal studies, in other disciplines of social sciences like political science, anthropology or sociology there are different definitions for the notion of minority. These definitions were created based on various criteria.² The first criterion that generally comes to mind in connection with these concepts is statistics. For example, if the members of an ethnic, linguistic or religious group in a society are fewer in number than the majority of the population they can be considered a minority. Another criterion, which is associated with sociology, defines minority as a “non-dominant or subordinated social group that might be oppressed or stigmatized on the basis of racial, ethnic, biological, or other characteristics.”³ These are just some examples of the methods for defining a group as minority. It is not always efficient and rational to use these criteria as there are examples when a numerical minority group has the superiority and dominance over the majority.

The existence of these definitions in other disciplines, especially in studies that are close to law like political science and sociology, and the proximity of law and politics in regard to this issue resulted in the use of ambiguous definitions or interpretations

1 Benoit-Rohmer Florence (1996): *The minority question in Europe: towards a coherent system of protection for national minorities*. Strasbourg, Council of Europe Publishing, p. 12, p. 20.

2 For examples of these definitions you can refer to: Turnsek, Nada et al. (2010): *An Inclusive Europe: New Minorities in Europe*. London, CICE. (also available at <https://metranet.londonmet.ac.uk/fms/MRSite/Research/cice/pubs/guidelines/guidelines-11.pdf>)

3 Ibid., p. 2.

in legal literature. This vacuum has created an opportunity for the majority to abuse its power. As a result, governments either do not define these terms in their domestic legal system simply naming the minorities they want to protect⁴ or have the opportunity to define the terms as they wish.

It seems that the European trend, considering the three levels of the Council of Europe, the EU law and the legal systems of the European states, has not followed the same pattern as the international law and other regional and domestic legal structures. The introduction of a legally binding supranational human right convention in the COE with a judicial body and at least two precise minority-related legal treaties are a clear evidence of the above mentioned claim.⁵ This is one of the reasons besides the EU's conditionality policy that we can see an "extraordinary development of minority rights" in Europe and especially in the domestic regimes of Central, Eastern and South-Eastern Europe; in comparison to developments in the international law and the other regional and domestic legal systems, despite the obstacles in the full and effective implementation.⁶

Nevertheless, it is very crucial to note that even in Europe, a leading example of minority rights, the word minority as a legal term has its own restrictions and has been shaped by historical, political and sociological patterns. The fact that there are conventions and charters that define or give criteria for defining a group as minority is one of the evidences to prove this. Furthermore, in the constitution of most European countries the definition or even the word minority is not to be found. This can be considered as evidence that despite all the progress there is a close connection between law and politics in regard to this topic. Sovereign authorities avoid restricting their power and sovereignty with minority rights by providing a definition and thus opening the doors for broad interpretation of the term. One of the results of this is that even if there are legal criteria for recognizing minorities, the notion of national minority remains in the realm of domestic policies and human rights protection systems are different from country to country.⁷

There are various reasons why the European legal regime for the protection of minorities has formed this way. One of the important causes is rooted in the history of modern Europe. The idea of nation-state and national identity is a core element; in political philosophy a nation was considered a "culturally homogenous people shar-

4 Balázs Vizi: "Protection without Definition – Notes on the Concept of Minority Rights in Europe", 84th session of UAI in Budapest, 10. (available at http://bgazrt.hu/_dbfiles/blog_files/7/0000004037/Balazs%20Vizi%20-%20Protection%20without%20definition.pdf)

5 ⁵ These two legal documents are the "European Charter for Regional and or Minority Languages" (ECRML) of 1992 and the "Framework Convention for the Protection of National Minorities" (FCNM) of 1995.

6 ⁶ Palermo Francesco (2011): Judicial Adjudication of Language Rights in Central, Eastern and South-Eastern Europe. Principles and Criteria. In: *European Diversity and Autonomy Papers*, EDAP 02/2011.

7 Mihr Anja: European Human Rights Regime: Cultural Rights and the Case of National Minorities. Utrecht University. (available at <https://www.iolaw.org.cn/pdf/14-European%20Human%20Rights%20Regime--Cultural%20Rights%20and%20the%20case%20of%20national%20minorities.pdf>)

ing one language, ethnicity and religion and following this creation of united official language, culture and symbols.”⁸ Reality, however, does not follow theory; in numerous situations, especially after wars when new borders were created based on peace treaties, an ethnic or linguistic group that used to be a majority or homogenous in one country became a minority in another. This is why after the collapse of the big European empires the problem of nationalities appeared as minority rights.⁹ The German-speaking population in South Tyrol (Alto Adige) in Italy is one of the most famous cases of an emerging minority as a result of an international treaty after the First World War. Furthermore, a new type of minority group has appeared in Europe recently. People, typically from non-European countries, immigrate to Europe and over the years they form their own communities within the host country. Although in most of the cases these groups are not considered as minorities in the legal definition of the term (with their rights and duties), in academic literature they tend to be categorized as “new minorities”.

As it has already been mentioned the notion of minority has developed with emphasis on culture and identity in the European legal system. It is important to examine how and by what reasoning process the current definitions came to existence. By interpreting legal documents we may understand the notion of minority and see whether it is developing towards a broader concept or not.

The Evolution of the Concept of “Minority” in the European Context

It is not easy to find a specific time or period in history as the beginning of a phenomenon, especially when it comes to social sciences. Furthermore, most of the time there is a combination of factors that causes the creation of a social or political issue.

The same problem arises in historical research when looking for the emergence of the notions “minority” and “ethnic minority” and on the reasons of their creation. For example, some scholars consider the suffering of the Jewish people as the most important reason for the creation of the so called “Ethnic Minority Rights” in Europe.¹⁰ Despite this problem, the term “national minority” is commonly used in European legal and political language. This term traditionally, without any concrete and generally accepted definition, refers “to ethnic groups living in a state, which are linked to a nation that has constituted its own state, so-called kin-state.”¹¹ Later it was used in different national legal systems and also in European treaties.

With the end of World War Two international and regional human rights declarations and treaties emerged recognising the importance of minority rights protec-

8 Turnsek and others, *An Inclusive Europe*, cit.,p1, Balázs Vizi, protection without definition – notes on the concept of “minority rights” in Europe, 84th session of UAI in Budapest.

9 Rosenfeld Michel, Sajó András (eds.) (2012): *The Oxford Handbook of Comparative Constitutional Law*. Oxford, Oxford University Press, 488.

10 For example see: Baron, Salo W. (1985): *Ethnic Minority Rights: Some Older and Newer Trends*. Oxford, Oxford Center for Postgraduate Hebrew Studies.

11 Turnsek, p. 7.

tion.¹² Although there are articles on the prohibition of discrimination, racism and encouraging the promotion of equal treatment regardless of race, ethnicity, language or religion, the only explicit reference to the minority issue in a legally binding international human rights treaty is Article 27 of the International Covenant on Civil and Political Rights. This article categorizes minorities as ethnic, religious and linguistic.

At a European level the most important multilateral human rights treaty was and still is the Convention for the Protection of Human Rights and Fundamental Freedoms of 1950. In this treaty there is no explicit article in regards to the protection of minorities. But it is important to notice that it is the first time that the notion of “national minority” is used in a legally binding treaty at a European level. Article 14 of this treaty about the prohibition of discrimination states: “The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.” There are several issues to be considered in this article. Firstly, the notion of national minority was used for the first time without any legal precedence and, as already mentioned, there is no article defining it. Secondly, the protection of these so called “national minorities” was mentioned under the principle of non-discrimination, which means the absence of discrimination rather than positive protective measures. In conclusion, neither the convention and Article 14 nor the preparatory works provide any definition or key for defining the term of national minority or minority.

In 1961 the Parliamentary assembly of COE recommended the inclusion of a protocol to (ECHR) guarantee certain rights for minorities. The draft had three important elements: culture, language and religion. Eventually in 1973 the committee of experts concluded that minority rights should not be the subject of a new protocol.¹³ The exact phrase “association with national minority” was repeated again in the Twelfth Protocol of the convention in 2000 Article 1.1.

Before the creation of the first legally binding treaty in COE there was another attempt to add an additional protocol in regards to national minority protection in the recommendation 1201 (1993) of the COE’s Parliamentary Assembly. This is the first time that the term “national minority” is defined based on the 1979 definition of professor Capotorti the Rapporteur of United Nations Sub-Commission on the Prevention of Discrimination and Protection of Minorities under the section 1 article 1 (Benoît-Rohme, 14):¹⁴

“For the purposes of this Convention, the expression ‘national minority’ refers to a group of persons in a state who:

- a) reside on the territory of that state and are citizens thereof;
- b) maintain longstanding, firm and lasting ties with that state;

12 Vizi, p. 9.

13 Explanatory Report of FCNM, p. 10.

14 This draft has not approved and do not have any legally binding effects.

- c) display distinctive ethnic, cultural, religious or linguistic characteristics;
- d) are sufficiently representative, although smaller in number than the rest of the population of that state or of a region of that state;
- e) are motivated by a concern to preserve together that which constitutes their common identity, including their culture, their traditions, their religion or their language.”

To be considered a national minority according to this definition the “group of persons” should fulfil various conditions from citizenship to identity-oriented ones like affiliation to an ethnicity, culture etc. Among the first three conditions, the “long-standing, firm and lasting ties with the state” illustrates the trend in the international community and even in Europe that the issue of minority rights and the definition of the term “minority” should not question the principle of territorial integrity and national unity of the states and should not encourage separatism. (Benoît-Rohmer, 20-21) Besides the restrictive criterion of citizenship which excludes lots of those who may consider themselves as persons belonging to a minority group (Vizi, 14-15), the article added two new criteria to the traditional ones: “sufficiently representative” and “concern to preserve together”, which are conceptual and “subjective” (Benoît-Rohmer, 14) rather than measurable concrete conditions.

The Notion of Minority in the COE's First Binding Treaties in Regard to Minority Protection

Since the beginning the language and “linguistic identity” have been important for the European nation states and it seems that they still have a crucial role. The trend of the “unifying European approach” in regard to linguistic rights has only emerged during the past two decades.¹⁵

The first important multilateral treaty in regard to the minority issue in COE and in the whole European system is the European Charter for Regional and Minority Languages (ECRML) of 1992. This treaty is very important as it is the first European treaty in regard to minority issues. Despite the fact that its focus is just on minority languages, by defining different types of minority languages it gives us clues to understand better the notion of minority in Europe.

Before the creation of this treaty in the declaration of the Conference for Security and Co-operation in Europe in Helsinki 1992 the notion of national minority had been used extensively, without any definition, under part two where the parties decided to create a High Commissioner on National Minorities as a conflict prevention instrument.

It is beneficial to take a look at the preamble before analysing article 1 of the charter that defines minority languages. According to the preamble, the purpose of this charter is “the maintenance and development of Europe’s cultural wealth and traditions”. This phrase in the preamble clearly expresses that the charter is shaped to

15 Burch, Stella J. (2010): Regional Minorities, Immigrants, and Migrants: The Reframing of Minority Language Rights in Europe. In: 28 *Berkeley Journal of International Law*, 261, p. 79.

protect the linguistic diversity inside the European cultural and traditional identity and as a result it has a relatively concrete definition of the language types that are under the protection of this charter and excludes migrant languages. It tries to create a balance between protection and respect to the countries' sovereignty by mentioning the importance of official languages and also considering "specific conditions and historical traditions in the different regions of the European states".

As it has already been mentioned, the first article of the charter contains definitions. This article does not provide a definition for the term "minority"; however, it defines "regional languages" and "minority languages". There are some crucial elements for a language to be considered as subject of the treaty. These languages must be used "traditionally" in the states although it is not clarified what the abstract phrase of "traditionally used" means. The second criterion in this article is that the nominated language should be used by "nationals" of the state. This clause prevents broad interpretation and excludes non-nationals. These criteria illustrate that the two factors of historical aspect and nationality are important in this treaty.¹⁶ The other important criterion is numerical measure for considering a language as minority language. The article declares that the nominated language should be used by nationals that are numerically smaller than the rest of the population of the state. And finally it excludes dialects of the official language and also the languages of migrants.

The second treaty on the rights of minorities in Europe, Council of Europe, is the 1995 Framework Convention for Protection of National Minorities (FCNM).¹⁷ Although the preamble of the convention is not "an operative part", it helps in better understanding the notion of national minority or provides methods to define it. It refers to the European history and the necessity for the protection of minorities for the "democratic security and peace" in Europe. This might refer to the bloody conflicts in European history, a considerable portion of which has been the result of ethnic or identity oriented disputes.¹⁸ The convention does not define "national minority", because "mustering general support of all Council of Europe member States" was not possible, as the explanatory report mentions.¹⁹ The lack of a definition relegated the power to the member states to decide whether a group is considered a minority or not. As a result, some states have added interpretative declarations declaring some groups inside their territory national minorities. For example, Germany considers Danes and Sinti as national minorities while ignoring those with Turkish and Polish origin.²⁰

16 Congress of Local and Regional Authorities of Europe, Council of Europe, Implementation of the European Charter for Regional Or Minority Languages, Council of Europe, 1999, p. 38.

17 It should be mentioned that according to the explanatory report of the framework convention it is the first legally binding instrument devoted to the protection of national minorities in general.

18 This might be one of the reasons for the 1992 Conference for Security and Co-operation in Europe in Helsinki, where the participating states decided on the creation of the High Commission on National Minorities as a conflict prevention instrument, Helsinki Summit Declaration 1992 - OSCE, part 2(2).

19 Explanatory Report of (FCNM), p. 12.

20 Carter, Johnson (2006): The Use and Abuse of Minority Rights: Assessing Past and Future EU Policies, towards Accession Countries of Central Eastern and South-Eastern Europe. In: *International Journal on Minority and Group Rights* 13, 27–51.

European Union: A vague picture

Protecting minorities, unlike other human rights, has not always been an issue in EU treaties.²¹ Many scholars believe that the collapse of the Berlin wall brought about a change in the EU's policy towards minority protection because being a member of a minority became one of the conditions for admission to the EU according to the Copenhagen criteria.²² After the Lisbon treaty EU law includes references to minority rights in Article 2 of TEU and also Article 21 of the Charter of Fundamental Rights. Despite the use of the term it is not easy to analyse the notion of minority, especially with focus on identity, based on EU documents. The reason for this difficulty is that the EU has no generally accepted legal definition for notions like minority,²³ national minority and similar terms and it seems that in regard to minority protection the EU relies on the COE's protection system.²⁴ Another reason is the sensitivity of the minority issue and the fact that some member states do not recognize the importance of minority protection.²⁵

EU's Primary Law: the Treaty of Lisbon, Article 2 and EU Charter of Fundamental Rights

The issue of minority protection was included in the Lisbon treaty despite some objections during the drafting process.²⁶ Article 2 of the treaty has a combination of rights and principles in general as it declares:

“The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail.”

It is important to notice that in this treaty as a legal document there is a special focus on respect for “rights of the persons belong to minorities” just after mentioning

21 Kochenov Dimitry (2011): EU Minority Protection: A Modest Case For A Synergetic Approach. In: *Amsterdam Law Forum*, 2011, Vol 3, N 4, 33-55, p. 44.

22 Ringelheim, Julie (2012): Book Reviews / *International Journal on Minority and Group Rights* 19, 233–241.

Benoit-Rohmer Florence (1996): *The minority question in Europe: towards a coherent system of protection for national minorities*. Strasbourg, Council of Europe Publishing, p. 29.

Kochenov Dimitry (2011): EU Minority Protection: A Modest Case For A Synergetic Approach. In: *Amsterdam Law Forum*, 2011, Vol 3, N 4, 33-55, p. 44.

23 Carter, Johnson (2006): The Use and Abuse of Minority Rights: Assessing Past and Future EU Policies, towards Accession Countries of Central Eastern and South-Eastern Europe. In: *International Journal on Minority and Group Rights* 13.

24 Malloy, Tove H. (ed.) (2013): *Minority Issues in Europe: Rights, Concepts, Policy*. Berlin, Frank & Timme GmbH, p 65.

25 Kochenov, p. 37.

26 Malloy, p. 68.

the respect for human rights in general. A question for further discussion is why the issue of minorities is highlighted here. Importantly, the respect for the personal rights of minorities is considered as one of the “values” of the EU. These values could be considered as the identity of the EU and as union objectives.²⁷

In this article the term “minority” is used without any qualifying adjectives especially without the word “national”, which is frequently used in COE legal documents.²⁸ This could be the reason why the European Union Agency for Fundamental Rights (FRA) in its report on the protection of persons belonging to minorities used a broad interpretation of the notion of minority. From a legal point of view it is important to notice that the European Commission declares that:

“The Commission has no general power as regards minorities, in particular over issues relating to the recognition of the status of minorities, or their self-determination and autonomy. Therefore, Member States retain general powers to take decisions about minorities.”²⁹

It is visible that as long as there is no definition or guidelines for interpretation, the competence and power for “the recognition of the status of minorities” is in the hand of the member states.

The other EU document in which the notion of minority appears is the European Charter of fundamental rights, which provides interpretation and not a legal basis for action.³⁰ This charter does not have any article that directly addresses minority rights or protection. In article 21 about non-discrimination it prohibits discrimination based on “membership” of national minorities. This part is the repetition of article 14 of ECHR about non-discrimination and the word “association to” is replaced with “membership” of a national minority.

Exemplary Countries in Western and Eastern Europe

In regard to the domestic system for the protection of minorities, European countries can be divided into western and eastern-central Europe. The main reason for this division lies in the cultural and political differences before the collapse of the Soviet Union and the creation of “the post-communist east” and extension of western integration and complex minority standards.³¹ This integration policy has affected the constitution of these emerging states, in which more attention is paid to minority

27 Cremona, Marise (2004): Values in the EU Constitution: the External Dimension. CDDRL Working Papers. (available at http://cddrl.fsi.stanford.edu/sites/default/files/Cremona-Values_in_the_EU_Constitution-External_Relations.pdf)

28 Report of European Union Agency for Fundamental Rights (FRA) Respect for and protection of persons belonging to minorities 2008-2010, p. 9.

29 Petition 0849/2013 by Andreja Sirsikova (Latvia), on Latvian mistreatment of the Russian minority in Latvia.

30 Kochenov, p. 38.

31 Pentassuglia, Gaetano (2001): The EU and the Protection of Minorities: The Case of Eastern Europe. In: *European Journal of International Law*, Vol.12, No.1, 3-38.

and linguistic rights than in the western European ones. This general categorization should not mislead us to ignore the fact that in both parts there are countries that follow a different path: France in the west and Turkey in the east are such examples. France, as one of the leading examples of human rights promotion since the 18th century, has followed a different pattern in regards to minority recognition and minority protection. In the eastern part Turkey,³² a country which has already applied to join the EU, has not shown any flexibility on the issue of minority recognition and rights despite its considerable Kurdish ethnic population.³³

Finding and understanding the definition of the term minority in the legal documents of European states is hard and easy at the same time. Firstly, in most countries it is not possible to find a definition even if there are legal and political protective mechanisms. Most states do not want to restrict their power and sovereignty by defining or giving interpretive criteria for the definition of minority and minority rights. This strategy enables them to recognize some groups as minority and ignore those they do not want to consider as minority. As a result, there are different criteria and methods of recognition or non-recognition of minorities in European states.³⁴ But this lack of definition or criteria is a double-edged sword. In this situation it is not possible for those groups that want to be considered as minority to refer to legal documents if there is no definition to justify their demands. But the absence or lack of a definition in combination with the non-discrimination and equality principles opens doors for them to request their recognition.

In Europe the notion of minority is closely connected to language as an important factor of identity especially cultural identity. Perhaps this is one of the reasons why ECRML, as one of the two important treaties in COE, specifically focuses on minority languages. Moreover, in most European constitutions, even if there is no reference to minorities, there are articles on linguistic rights.³⁵ Historical research on minority is-

32 Including Turkey in "Eastern Europe" is to simplify matters for discussion, since this country is not categorized as Eastern Europe in political science.

33 For example, France has made a reservation on Article 17 of the International Covenant on Civil and Political Rights, which is about minority protection, and signed but not ratified the European Charter for Regional or Minority Languages and neither ratified nor signed the Framework Convention for the Protection of National Minorities. Turkey as a member of COE has not signed or ratified these treaties. The fact that these treaties are not ratified by France does not mean that there is no protection for individuals belonging to different self-identified minorities based on general international non-discriminatory and equality principles and protective judicial and non-judicial instruments. Also it is important to distinguish between the general human rights situation and the minority situation in France and Turkey; the first one, despite some of the criticism based on European standards, is considered in general a perfect European example while Turkey is far from this standard.

34 Turnsek, 8.

35 Articles 2,4,43,45,129,136,138,139 of Constitution of 7 February 1831, revised to 17 February 1994, Article 6 of Italian constitution of 1947, Articles 3,20,148 of Spanish constitution of 1978, Article 8,14 of Austrian constitution of 1929, Articles 68,70A of Constitution of 1949 amended in 1996, are some examples of this despite the fact that even the method of framing these articles are utterly various as some uses right-oriented literature.

sues in European legal systems and constitutions also proves this theory. For example, in article 19 of the Austro-Hungarian Basic Law of 21 December 1867³⁶ the focus is on the language and different ethnic groups. This could explain why the research on minority rights in national legal systems is mixed with the research on linguistic rights.

A quick scanning and skimming of European constitutions indicates interesting picture of minority protection in Europe. In general there are lots of articles in regard to minority protection of emerging countries after 1990 in the Eastern European countries as a result of EU call for protection of minorities.³⁷ As it already mentioned in the western part constitution the trend is not the same.

In the constitutions of the so-called western countries there is no reference to minorities even though there are protective measures for safeguarding linguistic or ethnic groups. At the time of the creation of these constitutions the notion of minority and minority rights was not widely discussed and considered. However, there are exceptions in this regard. The 1814 Norway constitution is one of the first three written constitutions. Although the phrasing minority or ethnic groups does not appear in the document, it provides constitutional protection for the “Sami people” in article 110a.³⁸ This fact is surprising, because this article was added to the constitution in 1988 and by that time the notion of minority was already widely used in legal literature. Despite this, there is no reference to the term minority in this constitution. Still, there is a system for the protection of the Samis in Norway. Consequently, the “Sami Assembly” declared that the FCNM should not be applied to the Sami people since the Norwegian legal framework gives them rights far exceeding the ones guaranteed by the convention.³⁹

Belgium follows a different path in protecting minorities, although there are considerable differences in the Belgian practice.⁴⁰ In the 1831 constitution of Belgium (revised in 1994) there is no reference to the notion of minority or minority languages, however, there are protective measures for different linguistic “groups” or “community” in the articles 2, 4, 43, 54, 129, 136, 138 and 139.

Among these so called western and northern European states Finland and Austria are the ones that have explicit articles on minority issues.⁴¹ In Austria the issue of mi-

36 Basic Law of 21 December 1867 on the General Rights of Nationals in the Kingdoms and Lander represented in the Council of the Realm, (available at https://www.ris.bka.gv.at/Dokument.wxe?Abfrage=Erw&Dokumentnummer=ERV_1867_142).

37 Johnson, pp. 27–51.

38 Available at: <https://www.stortinget.no/en/In-English/About-the-Storting/The-Constitution/The-Constitution/>

39 Refer to: “Initial report submitted by Norway pursuant to Article 25, Paragraph 1 of The Framework Convention For the Protection of National Minorities” (available at http://www.regjeringen.no/upload/AID/temadokumenter/nasjonale_minoriteter/nasjmin_europaradet_norges_forste_rapp_eng.pdf).

40 Ferle, Tina, Šetnic, Manca (2004): Constitutional Protection of Minority Languages in the European Union. paper presented at Inclusion and Exclusion in Contemporary European Societies, IUC Dubrovnik, April 2004. (available at file:///C:/Users/JANDRAS/Downloads/Tina%20Ferle%20Manca%20Setinc%20-%20constitutional%20protection%20of%20minority%20languages%20in%20the%20EU.pdf)

41 Ibid.

norities, especially linguistic minorities, is addressed in article 8 of the 1929 Federal Constitutional Act, and Article 7 of the 1955 Austrian State Treaty. Also, as a rare example, there the term minority is legally defined in the “National Minorities Act” of 1976.⁴²

In article 8 of the constitution, while it declares that the official language of the republic is German, the rights of “linguistic minorities” are also guaranteed. It is important to note that the emphasis of the article is on minorities and not on language, contrary to some legal documents or constitution where the focus is on the language itself.

Article 7 of the Austrian State Treaty considers the “Austrian nationals” of “Slovenian and Croatian minorities”, who are settled in three territorial places: “Carinthia, Burgenland and Styria”, as minorities that have equal rights as “all other Austrian nationals”. This method in 1955 recognizes a group as minority arbitrarily, without giving any definition of the term minority.

In 1976 Article 1 (2) of “National minorities Act” defines the notion “minority” as follows.

“The groups of Austrian citizens with another language than German as a mother tongue and their own folklore tradition who live on and are natives of parts of the federal territory.”⁴³

Based on this definition, the number of recognized national minorities is not limited to three any more as it used to be pursuant to Article 7 of the Austrian State Treaty.⁴⁴ In the above definition there are certain criteria for being recognized as minority such as citizenship, long-time residence and being “native” in Austrian territory, which excludes emigrants and non-citizens. Another important point in this definition is that the recognition of minorities is solely based on linguistic differences. This excludes those who may consider themselves a minority based on other factors like religion.

Finland, a country of about five million, has a contemporary history of dealing with the issue of minorities or ethnic groups, especially in the Aland Islands case in the League of Nations.⁴⁵ The country has a considerable Swedish speaking population and other linguistic groups like Russians, Tatars, Yiddish speaking people, Karelians and also Sami ethnic groups.⁴⁶ The term “minority” does not appear in the constitution, however, under “Section 17”, entitled the “Right to one’s language and culture”,

42 *Project: Practice of Minority Protection in Central Europe*, Legal-theoretical part, Legal Country Study: Austria. Institute for Minority Rights of EURAC (available at http://www.eurac.edu/en/research/institutes/imr/Documents/LCS_Austria_1.pdf)

43 This translation taken from *The Second Report by the Republic of Austria pursuant to Art. 15 paragraph 1 of the European Charter for Regional or Minority languages*, 2007. (available at http://www.coe.int/t/dg4/education/minlang/report/PeriodicalReports/AustriaPR2_en.pdf).

44 Ibid.

45 For further information refer to: Rosenfeld, Sajó, pp, 488-489.

46 *The Fourth Periodic Report of Finland on the Application of the European Charter for Regional or Minority Languages*, 2010, (available at http://www.coe.int/t/dg4/education/minlang/report/PeriodicalReports/FinlandPR4_en.pdf)

it grants a series of general rights - rights equal to the rest of population - to specific groups like the “Swedish speaking population”, “the Samis” as “indigenous people”⁴⁷ and “Romas” in a very specific manner. Similarly the same rights are granted in general to the “other groups”.

Despite the above, the constitution does not define the term minority; however, it provides special protections for some groups. The fact that the term “minority” does not appear in the constitution does not mean that it does not exist in the Finnish legal system. In the “Act on the Ombudsman for Minorities and the National Discrimination Tribunal of Finland” the word minority is used. It seems that although there are different protective acts in the legal system, the term is not legally defined. In the Finnish government report to COE under the title of “The definition of persons speaking a regional or minority language” instead of providing a definition or criteria for a definition it explains the methods how each person can affiliate to a linguistic group. One of the reasons is that the Finnish protection of minority languages relies on the definitions of ECRML for recognizing minority languages.

After the 1990 collapse of the Soviet Union, which resulted in the independence or creation of new countries and the disappearance of almost all communist regimes in Eastern Europe, a new era of democracy and human rights promotion set in.⁴⁸ Consequently, the protection of minorities, especially national and linguistic minorities, became an important issue. One of the tangible results of this phenomenon was the amendment or rewriting of the constitutions with a more democratic and human rights oriented approach. This is the reason why there are more articles in regards to minority protection in the constitutions of these states in comparison to Western and Northern European states.

The use of the words “nation” and “nationality” makes these countries different from Western European countries in regard to minority issues. In these countries, there are minorities that have a different “nationality”⁴⁹ from the majority of the state, which creates a different situation.⁵⁰ Consequently, minority protection is often addressed - besides constitutional protection - in bilateral treaties between the state where the national minority inhabits in and the state where it constitutes a majority.⁵¹

47 “Indigenous people” are considered different from minorities in Finish constitution with various consequences. The term “indigenous people” is defined in Article 1 (1b) of the International Labor Organization’s Convention as “people in independent countries who are regarded as indigenous on account of their descent from the populations which inhabited the country, or a geographical region to which the country belongs, at the time of conquest or colonization or the establishment of present State boundaries and who, irrespective of their legal status, retain some or all of their own social, economic, cultural and political institutions.”

48 Pogany, Istvan (1999): *Bilateralism versus Regionalism in the Resolution of Minorities Problems in Central and Eastern Europe and in the Post-Soviet States*. In Cumper, Peter Wheatley, Steven (eds): *Minority Rights in the „New” Europe*, The Hague, Kluwer Law International, p. 105.

49 In this context “nationality” does not mean citizenship.

50 Pogany, p. 109.

51 Ibid.

In the article 35 of the constitution of Poland and articles 27, 32B and 68 of the Republic of Hungary the term “national and ethnic minorities” is used. In Hungary the constitution is the primary basis for minority protection.⁵² Article 68 of the constitution refers to ethnic and national minorities without providing a definition. In this article, instead of focusing on the person or persons belonging to an ethnic minority, the emphasis is on “ethnic and national minorities” and Article 68(2) guarantees their “collective participation” in public life. This is also repeated in article 3(2) (3) of “Act LXXVII of 1993 on the Rights of National and Ethnic Minorities”. Article 1(2) of Act LXXVII defines national or ethnic minorities as: “national or ethnic minority (hereinafter ‘minority’) is any ethnic group with a history of at least one century of living in the Republic of Hungary, which represents a numerical minority among the citizens of the state, the members of which are Hungarian citizens, and are distinguished from the rest of the citizens by their own language, culture and traditions, and at the same time demonstrate a sense of belonging together, which is aimed at the preservation of all these, and the expression and protection of the interests of their communities, which have been formed in the course of history.”

This is one of the rare detailed definitions of the term national or minority group in a domestic legal code. From the very beginning of the definition the collective aspect of “national or ethnic minority” is highlighted. The phrase “sense of belonging together” shows that collectivism is more important than individualism. It is worth noting that there is a precise time criterion for a group to be considered minority. There are common numerical and identity oriented factors. More precisely in article 2 of this code refugees, immigrants, foreign citizens and persons of no abode are excluded from the status of ethnic or national minority. Overall it seems that “The actions of the State Hungarian vis-à-vis its minorities outside, through the promotion of their rights collective, have a different nature with designs underway in the country Western Europe, in which the rights and freedoms, including those of minorities are strictly individual.”⁵³

Croatia is another Eastern European country with ethnic diversity. The existence of different minority groups and a multilevel legal system for the protection of minorities, which became better and more democratic after 1990, is the characteristic of these states. The protection system includes the constitution as the highest level legal document and also “special acts” for the protection of minorities.⁵⁴

In the Croatian legal system the terms “ethnic groups”, “national groups”, “ethnic minorities” and “national minorities” are used interchangeably.⁵⁵ The 1990 Croatian

52 Dezső Márta (2010): *Constitutional Law in Hungary*. Kluwer Law International, p. 298.

53 Gouez Aziliz (2005): Le débat sur l'identité européenne : mise en perspective historique. In: *La question de l'identité européenne dans la construction de l'Union*, Compte rendu du séminaire du 24 novembre 2005, p. 15. (available at http://www.institutdelors.eu/media/etud48_05.pdf?pdf=ok)

54 Tatalovic Sinisa (2006): National Minorities and Croatian Democracy. In: *Politička misao*, Vol. XLIII, No. 5, pp. 45–59.

55 Trifunovska, Snezana (ed.) (1999): *Minorities in Europe: Croatia, Estonia and Slovakia*. The Hague, Asser Press, p. 47.

constitution in the “Historical part” enumerates the national minorities and in article 15 the constitution describes how “national minorities” can “express their nationality”. The Croatian legal system also defines the term minority. Article 5 of the “The Constitutional Act on the Rights of National Minorities in the Republic of Croatia” says:

“A national minority in the sense of this Constitutional Act is a group of Croatian citizens whose members traditionally inhabit the territory of the Republic of Croatia, its members having ethnic, linguistic, cultural and/or religious characteristics different from other citizens and are lead by the wish to preserve these characteristics.”

The Croatian definition in comparison to the Hungarian one draws the attention to the collective aspect of the Hungarian approach when defining national and ethnic minorities. In the Croatian definition the focus is on individuality and the rights of individuals as members of a group just like in international and COE treaties. A national minority is a “group of Croatian citizens” as opposed to the Hungarian “group” and in the following phrases the “members” of the group are in the centre of the definition not the group as a collective entity. A unique feature of the Croatian definition in the European context is that “religious characteristics” are added to the criteria for national minority.

It seems that in some European states the notion of national minority closely connected to historical identity and “the law of several European countries defines national minorities referring to the historical ties with the state, the link to a traditional area of settlement and the citizenship of the state.”⁵⁶

Conclusion

When reviewing the legal documents to understand the notion of minority in the European context we may come to reflect on concepts like common and historical identity in Europe and even on vague terms like the “European Identity” and “Pan-European Identity”. The terms used in the two COE treaties for the protection of minorities and minority languages and also in most of the provisions in domestic European constitutions in regards to ethnic or national minority protection circle around the common European heritage, culture and history. Probably based on this idea “many European countries have constructed a ‘we’ discourse in public debate which is synonymous with many national ethnos identities in Europe. These identities in most cases imply that a ‘real’ citizen has a white complexion, a Christian belief, and speaks an official national language of the country as his/her first language, which means that the families have been speaking the official language of the country for generations.”⁵⁷ The fact that immigrants are excluded from the definition of ethnic and national minority is based on this strategy.

⁵⁶ Turnsek and others, p. 7.

⁵⁷ Ibid, p. 2.

Although “there is nothing in the founding treaties of the European Union which allows us to base the European identity on cultural or religious criteria”⁵⁸ it seems that the definition or criteria for defining ethnic or national minority revolves around the general idea of European Identity and European civilization.⁵⁹ Using phrases like the “development of Europe’s cultural wealth and traditions” (ECRML) or “the aim of the Council of Europe is to achieve greater unity between its members”, “common heritage”, “stability, democratic security and peace in this continent” and similar phrases in FCNM and the absence of a definition for the term minority are proofs substantiating this claim. Even in rare domestic documents where national minority is defined (see above examples) the criteria for recognition are very restrictive for European immigrants and impossible for non-European immigrants or groups. This shows that the political strategy is to promote internal diversity within the framework of the European Identity.

58 Cohn-Bendit Daniel: “Quo vadis Europa”, the Council of Europe Debates on European Identity 2013-14, (available at http://www.coe.int/t/policy-planning/debates/identity_debates/default_EN.asp)

59 Gouez.