National and International Instruments of Minority Protection in Europe

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Practices of minority protection have a long history in Europe, dating back to as far as the Peace of Westphalia in 1648. Since then, and to varying degrees over time, instruments of minority protection have occurred in different forms, and at the beginning of the 21st century, European practice manifests itself in hard and soft international law, bilateral treaties, and national legislation, addressing a number of issues pertinent to minorities' ability to express, preserve and develop their distinct identities.

It is possible to distinguish between, on the one hand, substantive rights of minorities in both an individual and collective (or group) sense, and the procedural and institutional aspects to realise these rights.

Substantive rights are expressed in a number of international instruments, including the the Convention on the Prevention and Punishment of the Crime of Genocide (Art. II); the Convention on the Elimination of All Forms of Racial Discrimination (Arts. 2 and 4); the International Covenant on Economic, Social and Cultural Rights (Art. 13); the International Covenant on Civil and Political Rights (Art. 27); the Convention on the Rights of the Child (Art. 30); the UNESCO Convention against Discrimination in Education (Art. 5); the United Nations Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities; and the UNESCO Declaration on Race and Racial Prejudice (Art. 5).

Among these, Art. 27 of the International Covenant on Civil and Political Rights is widely considered to be a legally binding provision that, while not requiring specific measures, obliges states parties to the Covenant to ensure that members of minorities can enjoy certain rights:

> In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right in community with the other members of their group, to enjoy their own culture, to profess and practice their own religion, or to use their own language.

Adopted by the United Nations General Assembly on 18 December 1992, the Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities is not a legally binding document in the same way that the International Covenant on Civil and Political Rights, but it expresses an important set of common standards for minority protection. It details the rights of members of minorities (right to protection of their existence and specific identity by states, right to national or ethnic, cultural, religious and linguistic identity, the right to their own culture, religion, and language, right to participate in public life, right to participate in decisions which affect them, right to their own associations, right to contacts with other members of their group and with persons belonging to other minorities within and across state borders, right to exercise these rights individually and collectively without discrimination). In addition, the Declaration also establishes a series of measures states parties should adopt in an effort to give practical meaning to these rights, which should be considered in the context of formulating a national strategy for minorities.

Below the UN level, significant positive practice of minority protection has been developed at a regional level in Europe, particularly in relation to the OSCE and the Council of Europe, two pan-European organisations with broad state membership. While only one document is of a legally binding character (the 1995 Framework Convention on the Protection of National Minorities), both organisations have played an important role in setting relevant standards of minority protection and promoting their adoption.

In the same way in which the UN framework links the issue of minority protection to both human rights and security issues, the rationale of the European framework is a very similar one: ensuring that members of national minorities can ensure their legitimate rights without posing, or being perceived as, a threat to the security and rights of others or to the sovereignty and territorial integrity of existing states. This often careful balancing act has given rise to a number of minority-relevant legally binding and non-binding provisions and accompanying jurisprudence, as well as guidelines for states practice, well worth considering in formulating national minority strategies.

The Council of Europe, established in 1950, has dealt with minority issues at the level of both individual human and specific minority rights, in the form of legally binding and non-binding provisions and accompanying jurisprudence, and through Recommendations by its Parliamentary Assembly. Fundamental among them, the European Convention on Human Rights and Fundamental Freedoms, while focused on individual human rights, specifies in its Art. 14 that

> [t]he 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.

Far more specific instruments were developed following the end of the Cold War. The 1995 Framework Convention for the Protection of National Minorities was developed in close alignment with the OSCE Copenhagen process, and, arguably, has transformed the political commitments in the Copenhagen Document into legally binding obligations for states parties to the Convention by enshrining rights, among others, to self-identification, religious belief and practice, access to media, language use, mother-tongue education, and effective participation in cultural, social and economic life and in public affairs.

The Charter for Regional or Minority Languages does not have the same legally binding status that the Framework Convention enjoys and is focussed on protecting (minority) languages rather than minorities themselves. Nonetheless, it is an important reference point for any national minority strategy in that it focuses on practical measures that can ensure both the legal protection of languages and their practical use in order to ensure their survival as means of communication and cultural expression.

Another noteworthy initiative of the Council of Europe, through its Parliamentary Assembly, was the adoption, in 2003, of Resolution 1334 and Recommendation 1609 on autonomous regions and their 'contribution' to peaceful conflict settlement and prevention. This elevated the issue of territorial self-governance to high political level, and even though it does not constitute any legally binding obligation to grant self-governance, it has contributed, together, for example, with the 1998 Lund Recommendations (see below), to mainstreaming discussions on territorial self-governance as a conflict-mitigating arrangement in the context of minority protection.

Alongside the Council of Europe, the OSCE (and its predecessor organisation, the CSCE) has been the other pillar of the pan-European framework of minority protection. Fundamental to the contribution of the OSCE to minority protection has been the 1990 Copenhagen Document (Document of the Copenhagen Meeting of the Conference on the Human Dimension of the CSCE) in which

> [t]he participating States recognize that the questions relating to national minorities can only be satisfactorily resolved in a democratic political framework based on the rule of law, with a functioning independent judiciary.

The Document then goes on to specify the rights of members of national minorities in significantly greater detail than relevant UN provisions, noting, among others, that

> Persons belonging to national minorities have the right freely to express, preserve and develop their ethnic, cultural, linguistic or religious identity and to maintain and

develop their culture in all its aspects, free of any attempts at assimilation against their will. In particular, they have the right

(32.1) — to use freely their mother tongue in private as well as in public;

(32.2) — to establish and maintain their own educational, cultural and religious institutions, organizations or associations, which can seek voluntary financial and other contributions as well as public assistance, in conformity with national legislation;

(32.3) — to profess and practise their religion, including the acquisition, possession and use of religious materials, and to conduct religious educational activities in their mother tongue;

(32.4) — to establish and maintain unimpeded contacts among themselves within their country as well as contacts across frontiers with citizens of other States with whom they share a common ethnic or national origin, cultural heritage or religious beliefs;

(32.5) — to disseminate, have access to and exchange information in their mother tongue;

(32.6) — to establish and maintain organizations or associations within their country and to participate in international non-governmental organizations.

Through its High Commissioner on National Minorities, the OSCE has subsequently elaborated on some of these rights through the publication of recommendations and guidelines as to how these rights can be given concrete meaning through states practice. Relevant documents, all of which are legally non-binding but have contributed to standard setting at the European level, include the 2012 Ljubljana Guidelines on Integration of Diverse Societies, the 2008 Bolzano/Bozen Recommendations on National Minorities in Inter-State Relations, the 2006 Recommendations on Policing in Multi-Ethnic Societies, the 2003 Guidelines on the Use of Minority Languages in the Broadcast Media, the 1999 Lund Recommendations on the Effective Participation of National Minorities in Public Life, the 1998 Oslo Recommendations regarding the Linguistic Rights of National Minorities, and the 1996 Hague Recommendations Regarding the Education Rights of National Minorities.

A final and complimentary aspect of international instruments worth noting are the many bilateral treaties on good neighbourly relations and friendly cooperation concluded between states across Europe following the end of the Cold War. In many cases, they serve a double objective: recognition of existing borders between states and reciprocal protection of minorities. The earliest examples date back far prior than the end of the Cold War, namely to the 1946 Gruber-DeGasperi Agreement on South Tyrol and, arguably, to the parallel Bonn and Copenhagen Declarations of 1955 providing arrangements for minority protection on either side of the German-Danish border. Subsequently, a significant number of similar treaties have been signed, including by Moldova and Ukraine, that form an important component of the multi-layered framework of minority protection in Europe.

Various international instruments, thus provide reference points to both substantive rights that members of minorities enjoy individually and collectively and to various measures through which these can be given concrete meaning. This is similar to national-level instruments where European practice combines a mix of constitutional and other legal provisions with relevant policies and implementation mechanisms.

At the most general level, equality and non- discrimination provisions offer a baseline provision of protection, but are often not considered as sufficient to address specific concerns of minorities. Best practice, thus, requires an explicit constitutional recognition of minorities, and thus of difference, which subsequently translates into specific legislation, including minority laws and laws on territorial or non-territorial self-governance, as for example in Scandinavia (including autonomy provisions for the Aland Islands, Faroer Islands, and Greenland, as well as the, partly transnational, Sami autonomy) and Italy (including autonomy for South Tyrol).

Moreover, established European practice of minority protection at the national level also includes examples a broad range of implementation mechanisms, such as procedures for

monitoring and enforcement or redress (e.g., Ombudspersons), provisions for representation of members of minorities in executive, legislative, judicial, and administrative bodies (e.g., through formal or informal quotas, specific language competence requirements, particular appointment procedures to certain offices, consultative mechanisms in the legislative or executive branch, etc.).

The meaningful realisation of rights and mechanisms of minority protection moreover requires resources to be allocated on a fair and proportional basis, with allocation procedures that have in-built transparency and accountability, for example through parliamentary oversight.

National and international instruments of minority protection in Europe thus form a multi-layered framework that establishes minority protection not as a choice but as both a legal obligation and a pragmatic necessity. Diverse societies are more inclusive, resilient, and stable when they not only recognise diversity but also entrench it legally and provide the mechanisms for the effective translation of recognised rights into a positively experienced reality. In this sense, minority protection is, and can only succeed as, a jointly owned endeavour of minorities, the states and societies in which they live, and their relevant international partners.