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MINORITIES PROTECTION: BETWEEN LEGAL FRAMEWORK AND POLITICAL MECHANISMS

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"While the attempt to provide a minority rights protocol to the European Convention for the Protection of Human Rights and Fundamental freedoms in Council of Europe Parliamentary Assembly Recommendation 1201 (1993) was commendable, it would have proved ultimately ineffectual. Minority rights are better protected through indirect political mechanisms, such as interventions by the High Commissioner on National Minorities of the Organization for Security and Co-operation in Europe than through courts."

Introduction

One of the issues that have progressively gained attention in the debate over minorities protection at an international level is the one as to whether the best instruments of protection against minorities' rights violations are offered by strictly legal instruments or rather through a set of political commitments.

The argument has become increasingly present in the European context, as a consequence of the intensification of destabilising events occurred in the "Troubled New Europe". Considering the impact that minorities issues had in the start of both World Wars, it is hard to understand how the European Convention on Human Rights did not include any norm specifically directed to minorities' protection. Yet the reasons of the revived interest in the

protection of minorities essentially are to be found in a renewed belief that "international norms on minority rights would be a contribution to stabilisation."[1]

This paper will attempt to analyse the different minorities rights mechanisms by differentiating legal and political instruments available. The convergence of superior political logic and necessity of practical protection will emerge in relation to the working of some non-legal mechanisms questioning us on a comparison between the two sets of instruments.

Legal Protection within the Council of Europe.

As it has been pointed out, Governments are not always convincingly prone to accept the imposition of legally binding standards. The comment provided by a journalist on this point is epigrammatic: "we are all for the protection of the rights of the minorities... of the others"[2] The confirmation of this basic assumption is evidenced by the adoption of the Framework Convention for the Protection of National Minorities adopted by the Council of Europe in 1994[3]. The document represents an attempt at providing a specific legal protection from minorities' rights violations in the European environment.

a) The European Court of Human Rights and minorities' issues: art 14.

Within the European Council sphere, the only legal instrument available was, in fact, the general *non-discriminatory clause* of Article 14 of the European Convention on Human Rights (ECHR),[4] that – however - was not purposively directed to minorities' protection. This does not imply that the European Court has been reluctant to judge on minorities' issues: the jurisprudence of the Court, in fact, has developed the most considerable body of

[1] See KLEBES, H. *The Council of Europe's Framework Convention for the Protection of National Minorities* in Human Rights Law Journal 1995, 92.
[2] Anonymous as reported by KLEBES, *ibid*.
[3] Committee of Ministers of the Council of Europe (95th Ministerial Session), 10 November 1994.
[4] Article 14, until the entry into force of Protocol 12 to the Convention, not constituting a free-standing norm, does not represent an unbeatable shield against systematic violations of minorities' rights.

law on this topic in the European dimension. The protection offered, anyway, "has been incidental to some individual claim of right not to be object of discrimination".[5]

Within the ECHR, the monitoring system – constituted by the European Court and the Commission has always relied on the so-called *Judicial Review* system. The legally binding character of the decisions adopted by the two organs and the possibility of asking for compensation represent a clear advantage of the system, but, at the same time, political considerations can negatively affect its ultimate results. On one hand, the possibility of reservations and derogations can seriously weaken the overall body of legal provisions. On the other, States have shown an evident reluctance to initiate inter-State complaints for the obvious political implications attached to such an instrument.[6]

b) The Framework Convention for the Protection of National Minorities: a missed chance?

The Framework Convention fell short the original target scheduled in Recommendation 1201 (1993) referring to the adoption "of an additional protocol on the rights of national minorities to the European Convention on Human Rights".[7] The reasons for such a failure can be attributed to the difficulty of attaining common positions on some crucial issues among the States participating to the drafting project. The difficulty in reaching consensus on the definition of minorities, first of all, pushed the Committee of Ministers to dodging the question.[8] Furthermore, the States considered preferable to submit disputes on minorities to the political monitoring system of the Committee of Ministers of the Council of Europe than to the European Court of Human Rights.

[5] GILBERT, G. *The Council of Europe and Minorities Rights* Human Rights Quarterly, 1996, p.173. An anti-discriminatory clause, as underlined by the Human Rights Committee, does not yet constitute a real guarantee for minorities' rights protection.

[6] On the political biases of the system, see PENTIKAINEN M. and SCHEININ M. *A comparative Study of the Monitoring Mechanisms and the Important Institutional Frameworks for Human Rights Protection within the Council of Europe, the CSCE and the European Community* in Monitoring Human Rights in Europe (Bloed A. et al. ed.s), Dordrecht 1993.

[7] Parliamentary Assembly of the Council of Europe (44th Ordinary Session), Recommendation 1201, 1 February 1993.

[8] The previous proposal for an Additional Protocol attempted at a definition – modelled on the one proposed by Capotorti in 1977 – limiting the application of the eventual protocol to *citizens* of the State mainataining *longstanding, firm and lasting ties with the State* (Recommendation 1201, Art.2, para.1). Notwithstanding the deprivation of legally binding force, the "Parliamentary Assembly requires that the legislation of Member States ...conform with the requirements of the Protocol". See on this point F.BENOIT-ROMER, *The Minority Question in Europe,* Presses de Conseil d'Europe, 1996.

The Framework Convention contains mostly program-type provisions that establish a series of principles for the States to implement. Yet the main weakness of this document is represented by the inadequate wording that characterises most of its provisions: the language utilised recalls, in fact, the one that first modelled the Helsinki Final Act of the CSCE: the State Parties are called upon *endeavours* in order to ensure, *as far as possible*, *the conditions*...[9]

The use of programmatic clauses hampers the effectiveness of the text. It can be argued that – differently from the European Convention – in case of doubt over the interpretation of the text, the national legislation has to prevail[10]. Stretching the argument further, it would be possible to say that these norms do not constitute binding provisions of international law and are rather to be confined in the domain of *soft law.*

It is, finally, relevant to highlight how it was decided not to put the Framework Convention under a system of judicial review. The monitoring over the compliance of States with their obligations under the Convention is exercised under Art.s 24-26 by the Committee of Ministers. The consultation with the States is conducted *in camera* proceedings the content of which is to remain totally confidential[11]. The decision of choosing a political monitoring has increased the possibility of dialogue with the States Parties.

Political agreements: Governments' widened availability

The failure of realising a specific Protocol on Minorities and the subsequent decision of drafting, instead, a document resorting to the sphere of the political agreements - such as the Framework Convention – is to be considered in line with a more general States' tendency of restricting commitments (and corresponding monitoring) in the minorities' field at a political level. States are in particular wary of attributing – mostly collective - rights to minorities

[9] At this regard, emblematic is Article 10 – concerning a crucial issue such as the use of the minority language – which leaves to the States the widest possible margin of appreciation.

[10] See KLEBES, *supra* note 2, p. 94. GILBERT on this point notes that "the success of Framework Convention", the instrument being by no means directly applicable in the legislation of the single States, "is dependent on domestic legislation and procedures to protect minorities".

[11] *Compliance with Commitments Entered into by Members States: Vade-mecum on the Committee of Ministers' Thematic Monitoring Procedure*, Doc. Prepared by the Monitoring Department of the Directorates of Strategic Planning, Council of Europe, 4 Jan. 2001

which could start to foment "disintegration...by awakening ambitions for cultural autonomy followed by administrative and local political autonomy and ...secession"[12].

a) OSCE: between Security and Human Dimension

Moving away from the Council of Europe's engagements as regards to minorities, it is remarkable how, within a political organisation such as the Organisation for Security and Co-operation in Europe - OSCE, the issue of "national minorities" protection has started to arise from concerns over international security and inter-State relations within the ambit of "the so-called "kin-State" or *mere patrie* phenomenon"[13] and not from documents exclusively oriented to the task of protection.

The linkage between human rights and security issues is evident in the OSCE programming: the two fields of action are so interdependent that advance or stagnation in one field has always had an impact on the other. At this regard, it has to be underlined how some OSCE documents make express references to other human rights tools and recommend for the States to adhere to international human rights treaties.[14] The commitments undertaken by the States in the Human Dimension of the OSCE include a wide range of engagements related to different relevant matters for the protection of human beings. Human rights, human contacts, processes of democratisation, rule of law are all interconnected. In this sphere, OSCE commitments sometimes extend beyond traditional treaty obligations binding upon States and come to play a complementary role with norms set up in the legal area[15].
The explanation of this dual approach is to be searched in the more comprehensive pattern of activities constituting the main focus of the organisation.

OSCE – originally born as a diplomatic process (CSCE), then institutionalised into a formal organisation – was the fruit of a compromise between the two main political-military blocks aimed at the realisation of a platform for action for the achievement of concerted political

[12] *Ibid*., p.92
[13] PACKER, J. *Problems in Defining Minorities,* p. 225.
[14] PENTIKAINEN M. and SCHEININ M., *supra* note 6, p. 96-97.
[15] PENTIKAINEN M. and SCHEININ M., *ibid.*, p.98

commitments. The foundation of such institution, mainly on the Western States' side, "was dictated by the wish to further security and humanitarian issues".[16] Human Rights commitments were originally present in Basket I on "Questions relating to Security in Europe" of the Final Act of Helsinki, 1975 – the founding document of the organisation[17]. But a more focused perspective on minorities' rights protection was to come from later documents such as the 1990 - Second Conference on the Human Dimension hold in Paris and mostly the 1992 – Helsinki Follow-up Meeting that established the High Commissioner on National Minorities (HCNM).

b) The High Commissioner on National Minorities

The institution of the HCNM nothing does but reinforces the fact that minorities' rights concerns in the political sphere are embedded in the accomplishment of superior exigencies. It should be noted, in the first instance, that the name itself given to the new body is revelatory. The High Commissioner is meant to be operational "*on*" and not "*for*" National Minorities[18], that means that it constitutes an instrument for security rather than another wheel in the human rights' violations monitoring machinery.

The Helsinki 1992 Document "The Challenges for a Change", defines the HCNM's mandate as follows:

> an instrument of conflict prevention at the earliest possible stage and will provide "early warning" and, as appropriate "early action" at the earliest possible stage in regards to tensions involving national minority issues which...have the potential to develop into a conflict...[19]

The HCNM's, therefore, will play a major role in the conflict prevention activity that resides in the area of preventive diplomacy while he will be precluded from considering breaches of (O)SCE commitments concerning individual members of a national minority[20].

[16] WRIGHT, J. *The OSCE and the Protection of Minority Rights*, Human Rights Quarterly 1996, p.191
[17] The remaining headings of the document were Basket II on "Co-operation in the fields of Economics, of Science and Technology and of the Environment"; Basket III on "Co-operation in humanitarian and other fields"; and Basket IV, "Follow-up to the Conference".
[18] WRIGHT J. *Supra* note 10, p.200.
[19] 1992 CSCE Helsinki Document "The Challenges for a Change", paras 14-16, 1992.

A closer analysis of the kind of protection provided by the HCNM reveals some apparent weaknesses.

First of all, as pointed out above, the Commissioner will be entitled to consider minorities' rights violations amounting to more general situations of "tension" likely to explode into conflict. Political commitments obviously allow a high level of interpretation, but it still remains clear that minorities rights' violations not involving "tension" fall outside of the mandate[21].

Another theoretical "inequality" of the HCNM's mechanism is the inclusion of an *escape clause* within its mandate: the efficacy of the HCNM mechanisms results ultimately limited, not to say impeded, when the minorities' issues at stake in situations involve "organised acts of terrorism."[22] The norm clearly represents an example of political compromise favouring (and meant to overcome eventual dangerous reservations of) some States, such as Turkey, Spain and United Kingdom.

A further weak point emerges in relation to the right to communication reserved to individuals and NGOs that constitutes one of the most remarkable developments in the OSCE practice but, again, is subject to a deleterious limitation:

> The High Commissioner will not communicate with and will not acknowledge communications from any person or organization which practices or publicly condones terrorism or violence[23]

Needless to say, in this instance too, we face a provision strictly affected by reasons of political convenience: such a clause "was the price to be paid for the consent of CSCE States to the establishment of the High Commissioner"[24].

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[20] See on this point BRETT *Is More Better?* in "Papers in the Theory and Practice of Human Rights" No.9, 1994, p.45.

[21] BLOED A. *Monitoring the CSCE Human Dimension: in Search of its Effectiveness* in "Monitoring Human Rights in Europe" (Bloed et al. Eds.) Dordrecht, 1993, p. 68.

[22] See para II.5 (b) of the Helsinki Decisions 1992. It has to be said, anyway, that States are also entitled to reject permission of visits to the HCNM for exclusively substantial and not just for legal ones. If a State refuses to receive the HCNM on whatever basis, the fact normally results in an undoubtedly negative publicity: the eventuality of falling into the public opinion's eye, nevertheless, has not prevented Turkey and Greece from expressing such a refusal.

[23] *Ibid*., para. II.25

[24] BLOED, A. *Supra* note 15, p.69.

The right to individual complaints has a limited reach, since it does not imply a further entitlement to receive an answer or a decision on the raised concern. The norm is to be read into the general scope of the Commissioner's activities targeting inter-state security rather than individual protection.

c) Nature of OSCE commitments

The significance and the actual value of the OSCE commitments on States has been and still is object of discussion, in spite of the clear statement contained in the Helsinki Final Act according to which "the documents negotiated from the HFA onwards are not legally binding".[25] However the distinction between legal and political instruments gains momentum in relation to the evaluation of the consequences of a failure of respect of the standards included therein. As van Dijk notes, "the distinction between legal and non-legal binding force resides in the legal consequences attached to the binding force"[26].

In any case, the value to be given to breaches of political commitments is obviously the same as the one referring to legal violations: a violation of norms to which the States have bound themselves – in fact - is just unacceptable[27].

Notwithstanding the existence of a precise statement over the nature of the OSCE commitments, it is still possible to argue for the attribution of legal significance to some specific provisions contained in them. The basis for this thesis is to be found in the reasoning of the International Court of Justice in the *Nicaragua Case*[28]. The judicial body, called to search on the *locus standi* of an exception to the general prohibition on the use of force (U.N. Charter, art.2.4), interpreted in an expansive way a provision contained in the GA Resolution 2625 stating:

> Nothing in the foregoing paragraphs shall be construed as enlarging or diminishing...the scope of the provisions of the Charter concerning cases in which the use of force is lawful

[25] The content of the provision is reported as such by BRETT *supra* note 15, p.10. The author, moreover, observes that the exclusively political nature of the OSCE agreements is clear from the OSCE terminology that differentiates between "political agreements" and "legal obligations".
[26] VAN DIJK P. *The Final Act of Helsinki: Basis for a Pan-European System?* Netherlands Yearbook of International Law, 1980 p. 110.
[27] See again BLOED A. *Supra* note 15, p.52.
[28] Nicaragua Case, Nicaragua v. United States, ICJ Reports 1986, p.14

According to the Court, the provision demonstrated that the States represented in the General Assembly, clearly considered the right at stake (individual or collective self-defence) "as already a matter of customary international law". Recalling what already stated in the *North Sea Continental Shelf Case*, in this case too the State must have behaved so that their conduct is "evidence of a belief that this practice is rendered obligatory by the existence of a rule of law requiring it" (*opinio juris sive necessitatis)*.

In a similar fashion it is possible to argue for the attribution of legally binding force to typically political provisions such as the High Commissioner for National Minorities' Recommendations. States, in fact, tend to comply with this authority's orders by assuming an attitude of subordination towards it that goes beyond the one adopted towards merely political agreements.[29]

Conclusions

These final remarks over the nature of the OSCE commitments do not detract from the fact that the human dimension as much as the HCNM recommendations work in a sphere that is distinguished from the traditional legal instruments available in the minorities' protection.

The advantage of this approach is evidenced by some practical achievements of a political institution such as the HCNM. The possibility of working in a *silent* fashion and to interpret its own mandate in a flexible way has, in some cases, resulted in an enhanced capability of the organisation to affect the decision-making of States in the shaping of minorities' policies. The superior level of confidentiality – see also the Monitoring Department of the Council of Europe - that political instruments are able to establish is likely to determine more favourable conditions for the resolutions of minorities' related issues, than a scattered judicial intervention.

[29] However, conferring a legal value to such compliance also depends on the analysis of the circumstancial evidences testifying the motivations lying behind the State's behaviour.

The next challenge for these institutions will be to overcome their tendency to operate in an almost exclusively "East-ward direction": further attention to the attitudes of some Western Governments towards delicate situations involving minorities should be paid in order to enhance the credibility and, therefore, the effectiveness of these instruments.

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