**Introduction: The 1990 CSCE Copenhagen Document, East-West encounters and evolutions of the minority regime in Europe**

Alexander Osipov*

*European Centre for Minority Issues*

The five articles included in this issue of the Journal on Ethnopolitics and Minority Issues in Europe are based on presentations given at the multidisciplinary conference held by the European Centre for Minority Issues (ECMI) in Sankelmark (Flensburg) on 5-7 June 2015. The conference was timed to coincide with the 25th anniversary of the 1990 Document of the Copenhagen Meeting of the Conference on the Human Dimension of the CSCE. The event was dedicated to the inception of the European minority rights regime at the end of the Cold War; the regime’s subsequent evolutions, affected by the re-drawing of the dividing lines in Europe; and the new challenges created by the recent turmoil in Eastern Europe.

The Copenhagen Document constitutes a landmark and in some respects a starting point in the development of the European minority rights regime. Part IV of the Document regards minority protection as a part of the human rights agenda and contains numerous innovative concepts – such as ‘full equality’, ‘effective participation’, ‘autonomy arrangements’, ‘proportionate measures’ and so forth – that provided an impetus for further political and scholarly debates and have since become central for minority protection in the framework of the OSCE, CoE and UN, as well as in national legislations in Europe and beyond.

The Document was a byproduct of the cooperation between the West and the East at the end of the Cold War. The still underexplored contributions of the USSR, Czechoslovakia, Hungary and East Germany to the drafting and adoption of the Copenhagen Document were in part inspired by the resurgence of ethnic claims and ethnic conflicts in the former

*Dr Alexander Osipov is Senior Research Associate at the European Centre for Minority Issues in Flensburg, Germany. Email: osipov@ecmi.de.*
communist states and the energetic attempts of the ruling elites in the countries of ‘real socialism’ to cope with the new challenges in the framework of democratization processes. These transformations of the previously closed decision-making of the communist party apparatus into public politics, the related new institutional set-ups, and the legacies of this period deserve a thorough analysis.

The recent turbulent political developments in Europe prompt an examination of the achievements and failures of the last 25 years, particularly of the loopholes in the international and domestic normative regulations of minority issues and the destructive effects they can generate. Broader challenges that the minority rights regime in Europe faces today and possible remedies to these issues shall be also addressed.

The five contributions included in this issue in part cover major issues pertinent to the formation and development of the European minority regime. The focal topics for the conference and this issue include the conceptual evolution of the minority regime in Europe and North America and the impact of the 1990 Copenhagen Document; communist conceptual and institutional legacies in the international and domestic minority regimes; institutional underpinnings of ethnic politics and diversity policies at the domestic and international levels; and merits and flaws of the European minority rights regime.

The first article by Elizabeth Craig entitled “Who Are the Minorities? The Role of the Right to Self-Identify within the European Minority Rights Framework” examines the implications of both individual and collective dimensions of the right to self-identify. The article argues that the status of the right to self-identify as a fundamental right remains unclear, even a quarter of a century after its inclusion in the CSCE Copenhagen Document. The article revisits some of the ‘justice-oriented’ arguments of the early 1990s about the need for group-differentiated rights in order to highlight the importance of the right to self-identify as an integral part of the European minority rights framework. The author then argues that the case for giving greater prominence to this right is strengthened if the challenge of cosmopolitanism, or freedom to select identities beyond ascribed and fixed group affiliations, is also considered. The second part of the article is focused more specifically on the challenges to the enjoyment of this right, particularly in its collective dimension. It argues that this can be attributed to the continued deference to states in relation to the scope of application of the Framework Convention for the Protection of National Minorities and that there needs to be a greater focus on clarification and internalisation of the right at the domestic level.
Tilman Lanz, in his article “Minority Cosmopolitanism. The Catalan Independence Process, the EU, and the Framework Convention for National Minorities”, stresses that minorities are often seen and portrayed as unable to successfully navigate the global politics. This article posits the notion of minority cosmopolitanisms as a viable alternative for minorities for the articulation of their collective identity in a globalized era. The author shows how this development might look using the case of Catalonia. The article’s focus is how the Council of Europe and the European Union have interacted with various Catalan publics and governmental bodies. The article entertains a provoking hypothesis that Catalonia’s success in approaching full independence might be due to the fact that it does not follow the guidelines of the Framework Convention for the Protection of National Minorities (FCNM), but has instead chosen to develop its very own mode of what one can call minority cosmopolitanism. The author provides two relevant examples from the domain of popular culture to illustrate the scope and trajectory of minority cosmopolitanism. Dr Lanz traces minority cosmopolitanism through the history of the Spanish-Catalan conflict, dating back to 1714 but with a focus on the 20th and 21st centuries, when the older notion of Catalanism was gradually replaced by Independentism as a result of cosmopolitan practices, or public activities resulting from the desire to view and to make Catalonia an open society and a part of Europe. The conclusion is that certain lessons can be drawn from Catalonia’s refusal to partake in the FCNM for reconsidering the current minority regime’s role in the changing political landscape of Europe. In addition, relations between Catalonia and the EU are also discussed. Based on the analysis of Catalan relations with the EU and the FCNM-related settings of the CoE, the authors suggest a few measures on how such transnational bodies can respond to engagements by minority groups.

The next article by Alexander Osipov is entitled “The background of the Soviet Union’s involvement in the establishment of the European minority rights regime in the late 1980s”. The author recalls that the USSR played a significant role in the adoption of the first CSCE instruments pertinent to minority protection, particularly the 1990 Copenhagen Document. He suggests an explanation as to why this East-West encounter was possible and why the two blocs were able to speak a common language on ‘nationalities’ issues. The author demonstrates that the communist party leaders of the Soviet Union managed to put forward a renewed doctrine of nationalities policy that included such elements as framing the country as a union of self-determining ‘peoples’; asymmetric federation; recognition of all ethnicities’ right to ‘develop’ their cultures and languages; protection of ‘non-titular’ ethnicities; and the
opportunity for people to organize themselves for the maintenance of their cultures and languages. This approach appears to have much in common with the new European minority rights regime, particularly because the underlying principles were open to *ad hoc* interpretations and both systems provide the governments with broad margins of discretion. The similarity between the ‘Western’ and ‘Eastern’ approaches can be explained by the fact that both were operating in the framework of modernist social engineering and the understanding of ethnicities as internally cohesive building blocks of society. The combination of symbolic policy and weak institutionalization of instrumental measures allows for an explanation of the viability of the established system in Eastern Europe and the broader post-Soviet space.

Stephanie E. Berry’s article “The Continuing Relevance of the Copenhagen Document – Muslims in Western Europe and the Security Dimension” touches upon the increasing relevance of minority rights to Muslims in Western Europe. The Copenhagen Document was adopted in the wake of the Cold War and was implicitly targeting the situation of ‘national minorities’ in Central and Eastern Europe as well as in the former Soviet Union. Notably, by recognising that the violation of human rights potentially leads to conflict, the Copenhagen Document remains relevant to minority situations throughout the world. This article argues that if Western European States wish to proactively prevent conflict with their Muslim populations, lessons can be learnt from the approach adopted in the Copenhagen Document. In particular, the emphasis on encouraging societal cohesion in order to reduce the potential for conflict through effective participation in public affairs combined with intercultural dialogue and tolerance is a message that must be heeded by Western European countries.

Ulrike Barten’s article entitled “The EU’s Lack of Commitment to Minority Protection” analyses an uneasy relationship between the European Union and national minorities in Europe. The EU claims to make life better for all by all means in all spheres of life. It does not, however, want to engage very much with national minorities. This is puzzling, as respect for minority rights has found its way into article 2 of the Treaty on the European Union which lists the common values upon which the Union is founded. It is furthermore puzzling, as the EU member states in other fora have recognized the vulnerability of minorities and the necessity of their special protection. On the other hand, the EU might be the wrong one to blame. EU institutions are limited in their competences to act when it comes to areas of importance to minorities. In addition, minorities are protected through other international organizations. It is argued that it is unlikely that the EU will become a significant minority
actor playing out its strength as a supranational force, and therewith create a truly coherent minority rights regime in cooperation with the OSCE and the Council of Europe.

All five articles raise questions about the merits and deficiencies of the current minority regime in Europe and about its origins and future evolutions. We expect that this special issue will be a contribution to further multidisciplinary international discussion which will involve scholars and policy-makers and focus on minority-related conceptual and practical challenges that the European and universal mechanisms already experience.
Who Are The Minorities? The Role of the Right to Self-Identify within the European Minority Rights Framework

Elizabeth Craig*

University of Sussex

Abstract

This article examines the implications of both individual and collective dimensions of the right to self-identify and reappraises the key challenges to its realisation. The article argues that the status of the right to self-identify as a fundamental right remains unclear, over a quarter of a century after its inclusion in the CSCE/OSCE Copenhagen Document in 1990. The article starts by revisiting some of the ‘justice-oriented’ arguments made in the early 1990s about the need for group-differentiated rights in order to highlight the importance of the right to self-identify as an integral part of the European minority rights framework. It then proceeds to argue that the case for giving greater prominence to this right is strengthened if the challenge of cosmopolitanism is also considered. The second part of the article is focused more specifically on the challenges to the realisation of the right, particularly the collective dimension. It argues that this can be attributed to the continued deference to States in relation to the scope of application of the Framework Convention for the Protection of National Minorities and that there needs to be a greater focus on the internalisation of the right at the domestic level.

Keywords: minority rights; national minorities; right to self-identify; Framework Convention for the Protection of National Minorities

* Dr Elizabeth Craig is Senior Lecturer at the Sussex Centre for Migration Research, University of Sussex, UK. Email: Elizabeth.Craig@sussex.ac.uk. The author would like to thank colleagues at the University of Sussex, who provided valuable feedback on earlier versions, in particular Stephanie Berry, Jo Bridgeman, Alex Conte and Charlotte Skeet. All errors are my own. Thanks also to fellow participants at the workshop on the 25th anniversary of the Copenhagen Document organised by the European Centre for Minority Issues in Flensburg in June 2015, where the paper was originally presented.
Introduction

‘To belong to a national minority is a matter of a person’s individual choice and no disadvantage may arise from the exercise of such choice.’

(para 32, CSCE/OSCE Copenhagen Document 1990)\(^1\)

The right to self-identify has been somewhat neglected in the expanding body of literature on the European minority rights framework.\(^2\) Yet this is a right of considerable importance to both individuals and groups, forming an integral part of the developing framework. This article examines the implications of both individual and collective dimensions of the right to self-identify and reappraises the key challenges to its realisation. The article argues that its status as a fundamental right remains unclear, over a quarter of a century after inclusion of the principle of self-identification in the Copenhagen Document. The article contributes to and develops current debates over the future of minority nations and minority rights (e.g. Gagnon, 2014 and Tierney (ed), 2015) by arguing that more needs to be done to strengthen the right to choose to be treated as belonging to a national minority (or not) as a fundamental right. The article starts by revisiting some of the ‘justice-oriented’ arguments made in the early 1990s about the need for group-differentiated rights in order to highlight the importance of the right to self-identify as an integral part of the European minority rights framework. It then proceeds to argue that the case for giving greater prominence to this right is strengthened if the challenge of cosmopolitanism is also considered. Such accounts tend to adopt a more dynamic approach to identity and group membership, placing particular emphasis on the plurality of identities and the value of dialogue and contestation.\(^3\) The second part of the article is focused more specifically on the challenges to the realisation of both individual and collective dimensions of the right to self-identify. This part considers ambiguities over the scope and significance of the right at the time of the adoption of the Copenhagen Document and of the drafting of the analogous provision in the Council of Europe’s Framework Convention for the Protection of National Minorities 1995.\(^4\) It then proceeds to examine the challenges that have emerged since that time. It is argued that a primary problem is the continued deference to States in relation to the Framework Convention’s scope of application and the failure of States to internalise the right within their domestic legal systems. It concludes by considering the future of the right, arguing that there needs to be greater focus on the internalisation of the right at the domestic level.
1. The right to self-identify and the role and purpose of minority rights

‘We should view human cultures as constant creations, recreations, and negotiations of imaginary boundaries between “we” and the “other(s)”. The “other” is always also within us and is one of us….Struggles for recognition among individuals and groups are really efforts to negate the status of “otherness”, insofar as otherness is taken to entail disrespect, domination, and inequality.’ (Benhabib, 2002: 8)

The peace and security context for the development of European minority rights law after 1989 is well established (e.g. Kymlicka, 2007), and clearly reflected in the Preambles of both the CSCE/OSCE’s Copenhagen Document and the Framework Convention. So too is the historical focus in Europe on the protection of ‘national’ minorities in the traditional sense, i.e. groups which consider themselves to have a distinct ‘national character’ or identity to the majority population (Claude, 1955: 2) and have ‘longstanding, firm and lasting ties’ with the State in question.⁵ The broadening of the Framework Convention’s scope of application to cover immigrant groups and other ‘new minorities’ and non-citizens through the work of the Framework Convention Advisory Committee (ACFC) has been explored elsewhere (e.g. Ringelheim, 2010). This article does not therefore seek to contribute further to that debate. Instead, its focus is on discussions over the scope and application of the right in relation to national minorities in the more traditional sense, who were initially intended as the main beneficiaries. This section provides an overview of more ‘justice-oriented’ arguments in defence of minority rights, considering also the challenge of cosmopolitanism, in order to ascertain the importance of the right to self-identify as an integral part of the developing framework.

The first point to be made is that the development of minority rights post-1989 was strongly influenced by the predominant liberal paradigm, clearly evidenced in the emphasis on the individual rights of persons belonging to national minorities rather than the adoption of a more group-rights based approach. This is also reflected in the explicit recognition of minority rights as an integral part of the international protection of human rights in both instruments.⁶ Although there are some provisions in the Copenhagen Document and the Framework Convention with more of a collective focus, the clear predominance is of individual rights (Gilbert, 1996: 182-183). Noting the continued uncertainty and debate over how to define the term ‘minority’, Packer in the early 1990s put forward his own definition of a minority ‘as a group of people who freely associate for an established purpose where their shared desire differs from that expressed by the majority rule’ (1993: 45). This was linked to a philosophy of human rights based on the ‘maximization of freedom’, and the argument that
‘the added value of minority rights must reside in their contribution’ to that goal (1996: 122). At the time his approach received some support (Gilbert, 1996: 162) and Packer himself argued that paragraph 32 of the Copenhagen Document, quoted at the start of the article, was an important step towards resolving the definitional issue (1996: 163). This suggests that within this paradigm the collective dimension in identifying which groups are entitled to benefit as ‘national minorities’ under the rights provisions in the Copenhagen Document was considered as important as the right of individuals to make a subjective choice about their own affiliation. Historically the emphasis within minority protection frameworks was on protecting individuals declaring themselves to belong to a minority group from verification or dispute by State authorities. However, this is a very narrow application of the right to self-identify and, as will be shown, the approach adopted under the Framework Convention suggest a much more nuanced position, which reflects the increased influence of those making the case for group-differentiated and minority rights from within a multicultural framework.

In order to explain what is meant by a justice-oriented or ‘multicultural’ approach to minority rights, we need to return to some of the literature from the early 1990s addressing the need for a new ‘politics of difference’. This is the term used by Iris Marion Young (1990) in making the case for a conception of justice that explicitly acknowledges and addresses differences between groups. This literature is important because it brings us back to the role and purpose of minority rights, a crucial aspect in the building of an argument for the strengthening of both the individual and collective aspects of the right to self-identify. First of all, it reminds us of the role of minority rights in challenging the domination and oppression of particular groups. For example, in making the case for group-differentiated rights, Young herself argued for a shift from distribution as the primary focus to the concepts of domination and oppression, manifest in exploitation, marginalization, powerlessness, cultural imperialism and /or violence (1990: ch 2). Secondly, it highlights the damage caused by non-recognition or misrecognition, and the link between the two is alluded to in the Benhabib quote at the start of this section. According to Charles Taylor:

[O]ur identity is partly shaped by recognition or its absence, often by the misrecognition of others, and so a person or group of people can suffer real damage, real distortion, if the people or society around them mirror back to them a confining or demeaning or contemptible picture of themselves. Non-recognition or misrecognition can inflict harm, can be a form of oppression, imprisoning someone in a false, distorted, and reduced mode of being. (1994: 25)
Here it is relevant that Taylor’s concern is for both individual and group identity, linked to the ideal of authenticity. It is clear however that he is not only concerned with recognition by the State, but also ‘the people or society’ around them. A minority rights regime would therefore appear to have a key role in challenging domination and oppression, and in dealing with the problems of non-recognition or misrecognition within society as a whole.

Whilst Honneth has argued that the goal of redistribution can be subsumed within the struggle for recognition, Fraser’s position is that a conception of justice should encompass both, without reducing one to the other (Fraser and Honneth, 2003). Fraser argues in particular that cultural injustice, which requires cultural or symbolic change and promotes group differentiation as a response, is distinct from socio-economic injustice, which requires redistribution and promotes ‘group de-differentiation’ (Fraser, 1995). The important thing for the purposes of this article is that a minority rights regime needs to do both. Although primarily conceived as an instrument aimed at the promotion of cultural identity, it is significant that Article 4 of the Framework Convention also stresses the need for the promotion of full and effective equality between individuals belonging to minority and majority groups. This is particularly relevant when it comes to the deconstruction of the right to self-identify in Article 3(1) of the Framework Convention, as it allows individuals and groups to identify as minorities for some purposes, but not for others, and provides that no disadvantage should arise from such a choice.

The literature discussed in this section is also significant because it highlights the role of groups in constituting identity (Young, 1990: 44-45), in contrast to approaches advocating a more contractarian approach. According to Walzer, Taylor’s politics of recognition allows for a commitment by the State ‘to the survival and flourishing of a particular nation, culture, or religion, or of a (limited) set of nations, cultures, and religions – so long as the basic rights of citizens who have different commitments or no commitments at all are protected’ (1994: 99). This alternative form of Liberalism emphasises a universal potential ‘for forming and defining one’s own identity, as an individual, and also as a culture’ (Taylor, 1994: 42). Will Kymlicka’s work is more explicitly grounded within ‘the dominant discourse of individualist liberalism’ (Bowring, 1999: 13), and for him the goal is not cultural survival. Nevertheless, one of the key contributions that he made was to argue that cultural membership is ‘qualitatively different to membership of other associations’ (Kymlicka, 1994: 25). In Liberalism, Community and Culture, Kymlicka famously made the case for the recognition of cultural membership as a ‘primary good’ (in the Rawlsian sense) in any liberal conception of...
justice due to the fact that our cultural heritage determines the range of options available to us (1989: 165). The ‘cultural structure’ being recognised is however a ‘context of choice’, the character of which can be modified by its individual members (1989: 166-167). His overall argument was that those belonging to minority cultural communities face disadvantages with respect to the good of cultural membership that can be rectified by minority rights (1989: 162). However, it is significant that he has also distinguished between the case made for external protections for those who identify as belonging to a recognised minority group, and for internal restrictions, which can result in oppression of the individual and the limitation of individual rights (1995: ch 3).

Minority rights for Kymlicka are, therefore, about promoting individual autonomy and freedom, and addressing inequality and a history of ‘benign neglect’. Kymlicka does not specifically address the right to self-identify, although he does recognise that some may choose to move between cultures. He argues that such moves are rare and also costly (1995: 84-85), concluding that ‘Leaving one’s culture, while possible, is best seen as renouncing something to which one is reasonably entitled’ (1995: 86). He therefore rejects the more fluid ‘cosmopolitan alternative’ presented by Waldron, who describes ‘freewheeling cosmopolitan life, lived in a kaleidoscope of cultures’, which has the effect of reducing the weight of minority claims to special support or assistance (1995: 99-100). He would, however, probably agree with Sen, who argues that it is the individual who is to decide on the relative importance of different identities, emphasising both their plurality and the role of choice within particular contexts to competing loyalties and priorities (2007: 19).

For Kymlicka, minority rights are an appropriate response to nation-building by the State, aimed at protecting minorities from injustices, and his particular concern has been with national minorities in the traditional sense, who often engaged in rival nation-building (2001: 1-2). Kymlicka himself has been quite critical of the limitations of the European minority rights framework, arguing that it was the security paradigm that prevailed over a more justice-oriented approach. He is particularly critical of the rights missing from the Framework Convention based on the claims often made by national minority groups in relation to territorial autonomy, official language rights, minority language universities and consociational power-sharing (2007: 215). However, for the purposes of this article, what is particularly relevant is the extent to which his arguments, and thereby also the liberal approach to minority rights adopted under the Framework Convention, are challenged by the ‘cosmopolitan alternative’ that has emerged.
According to Waldron, ‘the cosmopolitan alternative’ challenges ‘first, the assumption that the social world divides up neatly into particular distinct cultures, one to every community, and secondly, the assumption that what everyone needs is just one of these entities – a single coherent culture – to give shape and meaning to life’ (1995: 105). His particular criticism is focused on Kymlicka’s approach, but has a wider relevance. He also, significantly, goes on to consider the role of ‘the self in the cosmopolitan picture’, noting that in contrast to the person drawing his identity from a single culture who ‘will obtain for himself a certain degree of coherence or integrity…, the self constituted under the auspices of a multiplicity of cultures might strike us as chaotic, confused and even schizophrenic’ (1995: 110). He warns against the dangers of essentialising and fixing culture, and of cultural exclusiveness (1995: 113), as does Sen, who notes that many of the world’s conflicts ‘are sustained through the illusion of a unique and choiceless identity’ (2007: xv). Meanwhile Benhabib has argued that narrative accounts of culture are both ‘contested and contestable’ (2002: 5) and has criticised Kymlicka for his focus on ‘societal cultures’ and reliance on objective criteria such as territorial concentration, shared language and providing members with meaningful ways of life.\textsuperscript{8} Taking the example of Catalonia, she argues that these criteria do not help in understanding ‘the dilemmas of contemporary Catalan identity’ (2002: 64). Although Kymlicka himself has argued that the differences between ‘liberal nationalism’ and cosmopolitanism have been exaggerated, he asserts that one of the key differences between his own position and Benhabib’s is that she sees cosmopolitan citizenship as ‘transcending’ rather than ‘taming liberal nationhood’ (2006: 130). This has particular implications in relation to questions about the role of the State in positively promoting and protecting the identities of national minorities (Kymlicka, 2001: 219). However, the role of the right to self-identify is also key and therefore merits a prominent role.

Whilst a persuasive case has been made for the development of a cosmopolitan approach to contemporary global politics (e.g. Held, 2010), it is argued that, in the context of the developing European minority rights regime, Kymlicka’s approach is the right one. The very existence of the Framework Convention suggests that it is widely accepted that the State has a role to play in positively promoting and protecting national minorities and their identities. Indeed the protection of such groups was considered by the drafters of the Framework Convention to be ‘essential to stability, democratic security and peace’ and to form ‘an integral part of the international protection of human rights’.\textsuperscript{9} The Framework Convention has now been ratified by 39 State Parties,\textsuperscript{10} although as will be seen the approach
of States to minority issues and to its scope of application varies considerably. However, the increasing influence of cosmopolitan ideas means that more attention is now being given to the individual dimensions of the right to self-identify in the development and application of more group-oriented protections. This does not mean that challenges to the individual dimension do not persist, particularly in relation to tensions with the peace and security agenda. This is discussed further below. There are nonetheless particular harms and injustices that people suffer as members of groups. The points made above about domination and oppression, and about misrecognition, highlight the problems of imposition of minority status or identity by the State or others (in particular majorities) and of non-recognition. The rest of the article focuses on the current status of the right to self-identify at the European level. It argues that its status as a fundamental right remains unclear and makes the case for giving greater prominence to the right, focusing in particular on the need for a greater emphasis on internalisation of the right at the domestic level.

2. A European right to self-identify?

A brief overview of the development of the right to self-identify within the European minority rights framework reveals challenges to its status as a fundamental right from the outset. The CSEC/OSCE Copenhagen Document was the first minority rights initiative following the end of the Cold War, with section IV focused on questions relating to national minorities. Although there is no definition of the term ‘national minority’, it will be recalled that para. 32 provides that: ‘To belong to a national minority is a matter of a person’s individual choice and no disadvantage may arise from the exercise of such choice.’ Packer’s assertion that this was an important step towards resolving the definitional issue was however rather optimistic. Discussions continued, and some State representatives pushed the following year at the CSCE Meeting of Experts on National Minorities for inclusion of the express statement that: ‘[n]ot all ethnic cultural, linguistic or religious differences necessarily lead to the creation of national minorities’. This was described at the time as ‘a somewhat dangerous formula as it may be used by States to deny minority status to persons who feel they share with others an ethnic, cultural, linguistic or religious identity; in any event, it leaves it wide open who decides whether a minority exists: the State or the persons who share the common identity’ (Roth, 1991: 331). The view of a number of State delegates was that this was not in accordance with the approach taken in the earlier Copenhagen Document (ibid). As will be
seen, this remains a key tension and one that remains unresolved over two and a half decades later.

A slightly different formulation of the right to self-identify is included in Article 3(1) of the Framework Convention, which provides that: ‘Every person belonging to a national minority shall have the right freely to choose to be treated or not to be treated as such and no disadvantage shall result from this choice or from the exercise of the rights which are connected to that choice’ (emphasis added). The reference to disadvantage was intended to ensure that the freedom of the individual to choose was not ’impaired indirectly’ (Council of Europe, 1995: para. 36). Particularly significant for the purpose of this article is the fact that Article 3(1) is one of the few provisions in the Framework Convention directly articulated as a right that is potentially directly applicable, unlike other provisions that are programmatic in nature and formulated in terms of obligations on the State rather than the rights of individuals. The drafters of the Framework Convention notably elected to focus on choice of treatment and on consequences of the choice rather than emphasising that membership itself was a matter of individual choice. It is, however, clear that that neither special entitlements nor disadvantages associated with membership of a particular group can be imposed on individuals who choose to claim or exercise this right. Meanwhile it is the Explanatory Report that clarifies the limits of the individual dimension. It stipulates that the right ‘does not imply a right for an individual to choose arbitrarily to belong to any national minority. The individual’s subjective choice is inseparably linked to objective criteria relevant to the person’s identity’ (Council of Europe, 1995: para. 35).

The extent to which an individual’s declaration of affiliation can be disputed or denied by the State, or indeed by the other members of a group is less clear, particularly given the vagueness of the references to objective characteristics in the Explanatory Report. The UN Human Rights Committee has addressed this issue, and its view is that any denial of membership cannot be arbitrary and that objective criteria cannot be ignored. This is particularly relevant in relation to the Framework Convention given that Article 22 provides that: ‘Nothing in the present framework Convention shall be construed as limiting or derogating from any of the human rights and fundamental freedoms which may be ensured under the laws of any Contracting Party or under any other agreement to which it is a Party.’

In relation to the collective dimensions of the right, there is of course no definition of the term ‘national minority’ in the Framework Convention. The drafters opted instead ‘for a pragmatic approach, based on the recognition that at this stage, it is impossible to arrive at a
definition capable of mustering general support of all Council of Europe member States’ (Council of Europe, 1995: para 12). It was further recognised that, whilst some national minorities were easily identifiable, others were less so.\(^{15}\) The fact that this appeared to leave it open to States to arbitrarily deny recognition to certain groups has been strongly criticised (e.g. Alfredsson, 2000). The drafting of Article 3 and the accompanying sections in the Explanatory Report were clearly the result of political compromise, and a number of questions about the scope and significance of the right to self-identify therefore remained unresolved. The end result notably contrasts with the approach in ILO Convention No 169 on Indigenous and Tribal Peoples adopted 27 June 1989, which provided in Article 1(2) that: “Self-identification as indigenous or tribal shall be regarded as a fundamental criterion for determining the groups to which the provisions of this Convention apply.’ The next two sections consider in more depth some of the challenges and controversies that have arisen in relation to both the individual and collective dimensions of the right, with a view to establishing the significance of the inclusion of such a right in the Framework Convention and its current status.

### 3. The individual dimension of the right to self-identify

Particular emphasis has been placed within the developing European minority rights framework on the individual dimension of the right to self-identify, reflecting the adoption of an increasingly cosmopolitan approach. A very obvious example of this is the approach of the Framework Convention Advisory Committee (ACFC) to the conduct of housing and population censuses. Frequent references are made in this regard to Committee of Ministers’ Recommendation No. 97 (18) concerning the protection of personal data collected and processed for statistical purposes,\(^{16}\) which requires both anonymity and confidentiality, and the Conference of European Statisticians’ Recommendations (2006) for the 2010 Censuses for Population and Housing. The latter addresses a number of issues pertinent to the right to self-identify, recommending that representatives of minority groups be consulted in the drafting, and conduct of censuses (ibid: para 417) and special monitoring systems in relation to the collection of data on ‘ethnocultural characteristics’ (ibid: para 418). They require information on ethnicity to be based on free self-declaration, with the inclusion of open questions and freedom to indicate more than one ethnic affiliation or combination of affiliations (ibid: paras 425-6) or ‘none’ (ibid: para 427). A number of recommendations to States made by the ACFC
have subsequently reflected these requirements, and improvements have been made in the conduct of censuses in many States (ACFC Secretariat, 2016: Article 3). A more cosmopolitan approach is also reflected in the ACFC Commentary on Language, which notes that respect for the principle of self-identification is ‘of paramount importance in the interpretation and implementation of the Framework Convention’ (2012: para. 16). It stresses the importance of recognising that some people have multiple affiliations and that a person may identify in different ways for different purposes. This means, for example, that a person can claim linguistic rights with regard to a number of different languages (ibid: para. 18). The Commentary on Language confirms that the personal choice must ‘be based on some objective criteria relevant to the person’s identity’ (ibid: para. 17). However, the emphasis here is very much on the consent of the individual and the importance of self-identification: ‘The association of persons of a specific group based on visible or linguistic characteristics or on presumption without their consent is not compatible with the Framework Convention’ (ibid).

Despite these strong affirmations of the importance of the right to self-identify, challenges remain. Whilst the ACFC’s consistent view has been that data on ethnic origins can be collected for statistical purposes in a way that does not undermine this right, some States have continued to argue that the right to self-identify is in tension with the collection of statistical data as part of a wider agenda to promote equality. For example, Germany has invoked the right in rejecting ACFC recommendations on the need to obtain ‘more data on the composition and situation of national minorities’ (ACFC, 2010: para. 58 and 2015: para. 32) and not to rely only on information provided by the minorities themselves in order to ensure full and effective equality in accordance with Article 4(2) of the Framework Convention.\(^{17}\) The collection of such data is, however, important in terms of establishing the sufficiency of demand referred to in various provisions in the Framework Convention, and often required for access to minority rights. So for example, in the Czech Republic there is a link to the right to establish Committees of National Minorities, to display topographical signs in minority languages and to set up minority language schools (ACFC, 2011: para. 36). Another problem is that the right to self-identify is also a right that is open to abuse. There have, for example, been problems in Bosnia and Herzegovina, and in other jurisdictions which recognise a right to self-identify in domestic law, with some identifying as belonging to national minorities to gain electoral or other advantages but who are not recognised as such by other members (ACFC, 2013 (Bosnia): para. 151).\(^{18}\)
A classic example of a State’s failure to respect an individual’s right to self-identify can be seen in the case of *Ciubotaru v Moldova* (2010). The applicant had been advised that his identity card application would only be accepted if he indicated that his identity was Moldovan and not Romanian, and his request for the recorded entry to be changed had been refused because he had not provided sufficient proof that his parents were of Romanian ethnic identity (paras. 7-13). The European Court of Human Rights noted that the relevant domestic law included a provision that was very similar to Article 3(1) of the Framework Convention but that the practice in Moldova, as it had been in the former Soviet Union, was that an individual’s ethnic identity was recorded on the basis of the identities of his or her parents (*ibid*: paras. 15 and 21). The Government meanwhile put forward practical reasons for not recording ethnicity purely on the basis of an individual’s declaration, arguing that this ‘could lead to serious administrative consequences and to possible tensions with other countries’ (*ibid*: para. 56). The European Court of Human Rights notably did ‘not dispute the right of a Government to require the existence of objective evidence of claimed ethnicity’ (*ibid*: para. 57). In this case there were objectively verifiable links to the Romanian minority, including language, name and ‘empathy’. However, these could not be relied upon under Moldovan law (*ibid*: para. 58). The Court therefore concluded that ‘the State’s failure consists in the inability for the applicant to have examined his claim to belong to a certain ethnic group in the light of the objectively verifiable evidence adduced in support of that claim’ and that there was a failure to comply with the State’s positive obligations under Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 (ECHR) (*ibid*: para. 59).

The ACFC’s role is obviously very different. Nevertheless the reporting system under the Framework Convention has revealed a number of inadequacies in State approaches in relation to the individual dimensions of the right to self-identify. So, for example, the ACFC has declared that the constitutional position in Cyprus whereby the Armenians, Latins and Maronites have to choose to affiliate to either the Greek Cypriot or Turkish Cypriot Communities does not conform to Article 3 (ACFC, 2010: para. 39 and 2015: paras. 11-12). The ACFC also heavily criticized the system for the declaration of linguistic affiliation in South Tyrol where anyone choosing the category of ‘other’ still had to affiliate to one of the three main groups to be eligible for certain jobs and offices (e.g. Lantschner and Poggeschi, 2008). When Italy first ratified the Framework Convention, the declaration was compulsory and could not be made anonymously or changed until the next census. Furthermore, if you
failed to declare an affiliation, you would not be eligible to occupy reserved posts or to stand as a candidate in elections (ACFC, 2001: paras. 19-20). Improvements have subsequently been made, and the declaration is now anonymous and can also be changed. However, such a change only takes effect after 18 months, and the ACFC in the third monitoring cycle noted that affiliation was still obligatory with serious consequences for non-compliance (ACFC, 2010: para. 53). The ACFC has also raised questions about employment monitoring in Northern Ireland, which allows employers to designate perceived community background where an employee does not provide this information (ACFC, 2011: paras. 44-47). This can be linked to wider questions raised about the predominance of the ‘two communities’ paradigm and of identity politics, which often works to the exclusion of smaller minority groups or those who choose not to affiliate with a particular group.

Similar questions have been raised in relation to consociational arrangements in Bosnia and Herzegovina. Even before the judgment of the European Court of Human Rights in the case of Sejdic and Finci v Bosnia and Herzegovina (2009) and the finding that the ineligibility of ‘Others’ to stand for elections to the tripartite Presidency and to the House of Peoples was discriminatory, the ACFC found that existing safeguards to protect the right to self-identify were also insufficient (ACFC, 2004: paras. 30-31). The problem was that declarations of ethnic affiliation were a requirement for certain employment and political posts. In the most recent monitoring cycle the ACFC stated that it continued ‘to be deeply concerned by this prolonged and exaggerated emphasis on ethnicity’ in Bosnia and Herzegovina, and called ‘on the authorities to take resolute measures to ensure the right to free and optional self-identification … is fully respected in legislation governing access to political and public service posts and is duly applied in practice’ (ACFC, 2013: paras. 42-43). The ACFC has also noted indirect pressure exerted on individuals which impinges on the right to self-identify, expressing its deep regret at reports of politicians calling on people not to identify as Bosnian in the census because of the potential impact on the position of the constituent peoples in light of the principles in Article 3 (ibid: para. 49).

What many of these arrangements have in common is that the mechanisms in place to protect particular groups in a post-conflict situation have resulted in issues under Article 3. Despite strong criticism of the Council of Europe’s approach to such arrangements (e.g. McCrudden and O’Leary, 2013), it is argued here that the move away from the more security-dominated agenda and the emphasis by the ACFC on a more individual rights based approach is the right one from a minority rights perspective. Smaller minorities and those who choose
not to affiliate with one particular group are often the most marginalised and in need of protection, and the more justice-oriented approach reflected in the work of the Framework Convention Advisory Committee is to be welcomed (Craig, 2012). Unlike the Office of the OSCE High Commissioner on National Minorities, the ACFC exists as a human rights monitoring body rather than an instrument of conflict prevention (ibid). The importance of recognition was emphasised in the discussion in the first section of this article, with the argument made that the increasing influence of cosmopolitanism further strengthened the case for protecting both the individual right to self-identify and the right not to be placed at a disadvantage as a result of this choice. This does not mean that the arrangements should be dismantled, rather that it is right that the human and minority rights implications are properly discussed and decisions made about whether the sacrifice of individual rights and the rights of smaller minorities is justified with reference to the peace and security goals that might thereby be achieved. The peace and security context explains the decision to focus on the rights of national minorities at the time the Framework Convention was adopted, but should not be used to promote fixed identities and to entrench differences to the detriment of the rights of individuals. It further needs to be recognised that such arrangements constitute a considerable threat to the right to self-identify, and to more cosmopolitan approaches to identity. It was argued in the first section of this article that the taming of nationalism should be the goal of minority rights in light of the increasing influence of cosmopolitan ideas and of globalisation. The next section of the article therefore focuses in particular on the collective dimensions of the right to self-identify. This should play a key role in determining which groups come under the Framework Convention’s scope of application, which can be a crucial but often neglected first step for wider societal recognition.

4. The collective dimension

It is submitted that a key obstacle to the protection and promotion of minority rights in Europe has been differences in the approach of States to the Framework Convention’s scope of application. Due to the lack of a definition of the term ‘national minority’, Article 3 has been the focus of particular attention. The fact that the ACFC adopts a pragmatic approach, encouraging States to consider extending its application to additional groups on an ‘article by article’ basis, is well documented (ACFC Secretariat, 2016). This is particularly relevant to debates over the application of the Convention to ‘new’ as well as ‘old’ minorities (Medda-Windsicher, 2009). It was, for example, noted in the ACFC’s Second Opinion on the UK that
some British Muslims are excluded from the UK’s approach, which is based on the definition of a ‘racial group’ under domestic law (ACFC, 2007: para. 34). It was reported during the third cycle that representatives of the Muslim population had requested recognition and protection for Muslims as a minority group, and the suggestion made that the Government consult with representatives on this issue with a view to addressing their concerns (ACFC, 2011: paras. 33 and 36). This is in line with the standard approach of the ACFC, which is based on finding ‘pragmatic solutions in close consultations with the groups concerned, taking full consideration of the principle of free self-identification contained in Article 3 of the Framework Convention and in line with a generally inclusive approach to its personal scope of application’ (e.g. ACFC, 2012 (Ukraine): para. 88).

There are of course examples of differences of opinion within groups on the question of recognition. To take just one example, approaches have been made to the ACFC under the Framework Convention by those representing the Basque, Catalan and Galician cultures and languages. The position of the Spanish State is that these groups do not need the benefit of minority protection because of the special arrangements in place in the Autonomous Communities. Whilst the ACFC has noted that such arrangements do not preclude the applicability of the Framework Convention, it has referred the question back to the relevant authorities and suggested that they engage in consultations with the groups in question to ascertain if those views are shared by other representatives of these languages and cultures (ACFC, 2014: paras. 11-14). Here we already see a hint of the complexity of the issues. The ACFC is recognising that, whilst some representatives might aspire to such recognition, others affiliated with these languages and cultures might adopt a different stance. There are other examples of different views existing within groups. For example, the existence of a separate Macedonian national identity has long been contested in both Bulgaria and Greece (Cowan, 2001). However, the individual dimensions of the right to self-identify should ensure that those who do not self-identify as Macedonian cannot be forced to do so against their will, and the ACFC has focused in particular on encouraging dialogue with those self-identifying as such (ACFC 2014 (Bulgaria): para. 30). Similarly the ACFC has emphasized the right of the individual to choose freely in the light of ongoing contestation around whether or not Kurds and Yezidis in Armenia have separate national identities or are part of the same group with separate religious identities (ACFC, 2010: para. 29). It also needs to be recognized that some groups choose to reject recognition as a national minority under the Framework
There are, however, other groups with a significant proportion of members who claim national minority recognition and are denied such recognition by the State.

A particular problem lies in the ongoing contestation in relation to particular groups that perceive themselves as national minorities in the more traditional sense, but are not recognised as such by the State. One notable example was considered by the European Court of Human Rights in *Gorzelik and Others v Poland* (2004). The association in question had been refused registration under the title ‘Union of People of Silesian Nationality’, describing itself as ‘an organization of the Silesian national minority’ (*ibid: paras. 18-36*). In concluding that there was no violation of Article 11 of the ECHR, the stance of the European Court of Human Rights on the definitional issue was non-committal. Here it is worth noting that the domestic court had referred specifically to the linking of subjective choice to objective criteria in the Explanatory Report of the Framework Convention, concluding that: ‘a subjective declaration of belonging to a specific national group implies prior social acceptance of the existence of the national group in question’ (*ibid: para. 36*). This raises a number of issues from a minority protection perspective, which should be aimed at protecting marginalized groups from the disadvantage often caused by the dominance of the majority. There are also questions to be asked about why the European Court of Human Rights did not give more attention to Article 3 of the Framework Convention, focusing instead on the fact that the term ‘national minority’ was not defined in the Framework Convention and on the fact that Poland had declared that it understood the term as applying to national minorities residing in Poland whose members are Polish citizens (*ibid: paras. 46-47*). Indeed the Court specifically noted that there was no obligation on the State either to adopt a particular concept of ‘national minority’ in domestic law, or to have an internal procedure for official recognition (*ibid: para. 68*).

The ACFC has adopted a much more robust approach, but its powers and profile are limited in comparison to those of the European Court of Human Rights. The Committee of Ministers has also taken up the matter, but its approach has also been quite deferential to the State. In its first Opinion on Poland, the ACFC had questioned the reliance on the registration procedure on the Law on Associations for determining whether a group is a national minority, noting that more identified as Silesian in the 2002 Census than identified as belonging to any of the 13 groups identified as national minorities in the State report (2003: paras. 21 and 28). It therefore urged ‘the Polish authorities to continue their dialogue with the Silesians on this matter and to take care that persons claiming to belong to the Silesian group are able to
express their identity’ (*ibid*; para. 28). Subsequent legislation in Poland provided definitions of national and ethnic minorities, with the existence of a kin-State required for the former. However, it was noted with regret that Silesians were not included, and the opening up of a dialogue with a view to including them within its scope was recommended (*ACFC*, 2009: paras. 30, 36 and 38). The Committee of Ministers noted after the second monitoring cycle that there had been no follow-up or dialogue with those concerned after the first cycle and after the third cycle that there were divergent opinions on the options available. It appears therefore that little substantial progress has been made, highlighting one of the limitations of the Framework Convention’s monitoring system compared to the stronger enforcement system under the ECHR. The failure of the Committee of Ministers to follow through on the ACFC’s more robust approach on this issue is also unfortunate, and reinforces the impression that States remain very much in control and that significant obstacles remain to the realization of the collective dimensions of the right to self-identify in any meaningful sense.

Further problems with State approaches include differences of opinion in relation to nominations/labeling; territorial limitations and the use of citizenship criteria (*Heintze*, 2005: 120-126). Here it should be noted that the view of the ACFC is that the question of territorial application should also take into account the right to self-identify (e.g. in relation to contestation about whether those residing in certain parts of Italy should be considered as part of the Slovene minority or as a distinct group (*ACFC*, 2010: paras. 38-39) and that citizenship might be considered as a precondition to accessing certain minority rights but should not be considered an element in the definition (e.g. *ACFC*, 2013 (Serbia): para. 36). Unsurprisingly, the ACFC has emphasized the need for both objective and subjective criteria to be taken into account in relation to nomination and labelling. It has further stated that objective criteria for recognition as minorities ‘must not be defined or construed in such a way as to limit arbitrarily the possibility of such recognition, and that the views of persons belonging to the group concerned should be taken into account by the authorities when conducting their own analysis as to the fulfillment of objective criteria’ (*ACFC*, 2014 (Bulgaria): para. 28). The need to avoid reinforcing negative stereotypes by the use of labels not accepted by the minorities in question has also been emphasized.

As well as the symbolic importance of recognition for disadvantaged and marginalised groups, there are also significant practical implications. Once a State has accepted that a group should be considered as a national minority under the Framework Convention, then the State is required to provide ‘full information on the legislative and other measures taken to
give effect to the principles set out in this framework Convention’ (Article 25). Furthermore, when the ACFC visits the State, there will be meetings with representatives of minority groups. It is also recognised that such inclusion will often serve as a lobbying tool for change at the domestic level. The Cornish in the UK provide one notable example, having lobbied for inclusion within the scope of the Framework Convention from the outset. The ACFC recommended to the UK that requests in relation to Cornish be examined following the second and third monitoring cycles. It was noted during the third cycle that the numbers self-identifying as Cornish had increased significantly since the Framework Convention was ratified, with concerns expressed about a lack of recognition generally in public life, including the exclusion of Cornish national identity in the UK census (ACFC, 2011: para. 42). The Government’s standard response had been that Cornish did not fit within the definition of a racial group, and that non-inclusion was not a barrier to them being able ‘to maintain and celebrate their distinct identities’. Indeed it was only the inclusion of the Liberal Democrats in the Coalition Government in 2010, and the election of three Liberal Democrat MPs in Cornwall, that led to a change in approach. The decision to recognize Cornish as a national minority was announced on 24 April 2014. This recognition has subsequently been used to further other claims, including calls for inclusion of Cornish national identity in the 2021 census, in challenging development plans and to argue against electoral boundary changes.

4. Conclusion: What next for the right to self-identify?

Although the ACFC has adopted a robust approach to the individual dimensions of the right to self-identify, this article has argued that considerable obstacles remain to its effective realization. This is partly because its status as a fundamental right remains unclear. For example, the inclusion of a right to self-identify as belonging to a particular community or minority in any future Bill of Rights for Northern Ireland has proved highly controversial because of tensions with employment monitoring and the Northern Ireland Assembly voting arrangements (McCrudden, 2007). Of particular relevance here is that, in providing advice to the Northern Ireland Human Rights Commission on the possible inclusion of such a right, it was noted by Council of Europe experts consulted that it was ‘rare for a bill of rights or constitution to address such matters.’ According to the OSCE Ljubljana Guidelines on Integration of Diverse Societies: ‘Identities are subject to the primacy of individual choice through the principle of voluntary self-identification’ (2012: principle 6). The Guidelines
further recommend that legislative and policy frameworks should allow for the recognition that individual identities may be multiple, multilayered, contextual and dynamic’ (ibid: principle 5). It is unfortunate therefore that greater emphasis has not been placed by the ACFC on the incorporation of the right to self-identify into domestic law and on the failure of States that do provide for such a right in legislation to give proper effect to it.

It is submitted, however, that the real untapped potential in the right to self-identify lies in relation to the collective dimensions and in challenging the continued resistance of many States to extending the Framework Convention’s scope of application to groups that have longstanding, firm and lasting ties with the State, but who perceive themselves as having a distinct national identity to the majority. This can be attributed to one of the fundamental weaknesses of the Framework Convention, the failure to define the term ‘national minority’ and the decision to leave the determination of the scope of application to States. The arguments in support of group-differentiated rights for minority groups are highly persuasive, and the current system is encouraging both non-recognition and misrecognition by States. Work is currently underway on a new thematic commentary on the Framework Convention’s scope of application, which is likely to recognise that in practice both objective and subjective criteria are used to identify rights-holders. It is intended not only to draw together the analyses developed by the ACFC during the monitoring process, but also to help States ‘to find solutions to future or as yet unresolved problems in this field.' Although this is to be welcomed, it is clear that there are limits to what can be achieved by the ACFC without further reinforcement by other bodies, including the Committee of Ministers, the Parliamentary Assembly of the Council of Europe and the European Court of Human Rights, to challenge the approach of individual Member States to the Framework Convention’s scope of application.

Who decides if a minority exists and why does it matter? It is clear from the evidence considered here that the right to self-identify has an important role to play in this regard. This article has demonstrated that there is considerable ambivalence regarding the right to self-identify within the developing European minority rights regime. States in particular continue to be resistant to challenges presented in terms of a failure to give effect to this right. The minority rights framework itself reflects a shared conviction amongst Member States of the Council of Europe (Belgium, France, Greece and Turkey are the notable exceptions) that States have a role to play in positively promoting and protecting national minorities as collective entities, as well as to protect the rights of individuals. It is recognised that there
remains a lack of consensus in relation to the inclusion of ‘new’ minorities within that framework. However, this article has revealed that there is still considerable work to be done in relation to more established national minority groups. In particular, there needs to be greater focus on what is happening at the domestic level both in terms of internalisation of the right to self-identify and in relation to ongoing debates over the Framework Convention’s scope of application. The prospect of a new ACFC Commentary on this issue is to be welcomed, and it is to be hoped that the right to self-identify will feature prominently. However, there is a clear need for the mainstreaming of the right to self-identify and greater attention to its incorporation at the domestic level in order to challenge more effectively the approach of States in this area.

Notes

2 For a brief discussion, see Vrdoljak (2013: 41-43). See also Heintze (2005: 118-126).
3 Benhabib argues, for example, that ‘cultures are formed through complex dialogues and interactions with other cultures; that the boundaries of cultures are fluid, porous and contested. Cultural identities in complex, pluralist democratic societies should seek public recognition of their specificity in ways that do not deny their fluidity’ (2002, p. 184).
5 This was a requirement of the definition proposed by the Parliamentary Assembly of the Council of Europe in Recommendation 1201 (1993).
6 Para. 30 of the Copenhagen Document and Art 1 of the Framework Convention.
7 E.g. Art 131(1) German-Polish Convention Concerning Upper Silesia, 15 May 1922 relating to education and the Bonn-Copenhagen Declarations, 29 March 1955, outlining the rights of the German and Danish minorities in South Jutland and North Schleswig respectively.
8 Kymlicka defines a societal culture as ‘a culture which provides its members with meaningful ways of life across the full range of human activities, including social, educational, religious, recreational, and economic life, encompassing both public and private spheres. These cultures tend to be territorially concentrated, and based on a shared language’ (1995: 76).
9 Preamble and Art 1.
13 CAHMIN (94) 14, Proposals Concerning the Preliminary Draft Framework Convention for the Protection of National Minorities, p. 17 (the Romanian delegation).


See also recent reports of abuse of reserved quota system in relation to higher education in Kosovo (European Centre for Minority Issues, 2015).

Application no 27138/04, 27 April 2010 (ECtHR) Fourth Section.

Application nos 27996/06 and 34836/06, 22 December 2009 (ECtHR) Grand Chamber.

Examples include the Roma and representatives from Greenland and the Faroe Islands in relation to Denmark, and the Sami in Norway.

Application no 44158/98, 17 February 2004 (ECtHR) Grand Chamber.

Resolution CM/ResCMN(2012)20 on the implementation of the Framework Convention for the Protection of National Minorities by Poland (Adopted by the Committee of Ministers on 28 November 2012 at the 1156th meeting of the Ministers’ Deputies).

Resolution CM/ResCMN(2015)3 on the implementation of the Framework Convention for the Protection of National Minorities by Poland (Adopted by the Committee of Ministers on 4 March 2015 at the 1221st meeting of the Ministers’ Deputies).

For example, the ACFC noted the use of the term ‘tsigan’, considered to be derogatory, to refer to the Roma in Romania (2012: para. 42).


Hansard, 6 March 2007, col 1872W, Meg Munn, Communities and Local Government.


Hansard, 6 May 2014: Column WS148, written statement Secretary of State for Communities and Local Government (Eric Pickles) made on 28 April.


The Cornishman, July 2, 2015, p 16.

‘It's back: 'Devonwall' constituency talk’, West Briton, May 13, 2015, pp 30-31


This is due to be adopted by the ACFC in 2016.

ACFC, 49th meeting Strasbourg, 10-12 February 2014, ACFC/MR(2014)001, para. 20


References


ACFC. Opinion on Bosnia and Herzegovina adopted on 27 May 2004.
ACFC. Second Opinion on United Kingdom adopted on 6 June 2007.
ACFC. Third Opinion on Cyprus adopted on 19 March 2010.
ACFC. Third Opinion on Germany adopted on 27 May 2010.
ACFC. Third Opinion on Armenia adopted on 14 October 2010.
ACFC. Third Opinion on Italy adopted on 15 October 2010.
ACFC. Third Opinion on United Kingdom adopted on 30 June 2011.
ACFC. Third Opinion on Czech Republic adopted on 1 July 2011.
ACFC. Third Opinion on Romania adopted on 21 March 2012.
ACFC. Third Opinion on Ukraine adopted on 22 March 2012.
ACFC. Third Opinion on Bosnia and Herzegovina adopted on 7 March 2013.
ACFC. Third Opinion on Poland adopted on 28 November 2013.
ACFC. Third Opinion on Serbia adopted on 28 November 2013.
ACFC. Third Opinion on Bulgaria adopted on 11 February 2014.
ACFC. Fourth Opinion on Spain adopted on 3 December 2014.
ACFC. Fourth Opinion on Cyprus adopted on 18 March 2015.
ACFC. Fourth Opinion on Germany adopted on 19 March 2015.


Vrdoljak, A.F. ‘Liberty, Equality, Diversity: States, Cultures and International Law’. In The Cultural


Minority Cosmopolitanism: The Catalan Independence Process, the EU, and the Framework Convention for National Minorities

Tilman Lanz*

Rijksuniversiteit Groningen

Abstract

Minorities are often seen and portrayed as unable to successfully access and navigate the global domain. This article posits the notion of minority cosmopolitanisms as a viable alternative for minorities to articulate their collective identity in the globalized era. To show how this works in the specific case of Catalonia, I investigate how the Framework Convention on National Minorities (FCNM) and the European Union (EU) have interacted with various Catalan public and governmental bodies. In discussing Catalonia, for instance, I entertain a somewhat provoking hypothesis: Catalonia’s success in nearing independence might be due to the fact that it has not joined the FCNM and that Catalonia has instead chosen to develop its very own branch of minority cosmopolitanism. I begin by giving two pertinent and detailed examples from popular culture to illustrate the scope and trajectory of minority cosmopolitanism. I then trace minority cosmopolitanism through the history of the Spanish-Catalan conflict, dating back to 1714 but with a focus on the 20th and 21st centuries, when the older notion of Catalanism was gradually replaced by Independentism as a result of cosmopolitan practices. I conclude with possible lessons to be gained from Catalonia’s refusal to partake in the FCNM for reconsidering its role in the changing political landscape of Europe. In addition, relations between Catalonia and the EU are also discussed. Based on the analysis of Catalan relations with the EU and the FCNM, I suggest a few measures on how such transnational bodies can respond to cosmopolitan engagements by minority groups.

* Dr Tilman Lanz, Department of Frisian Language and Culture, the Minorities and Multilingualism Program, Rijksuniversiteit Groningen, Netherlands. Email: t.lanz@rug.nl.
1. Introduction

Public sentiments towards independence in Catalonia are arguably most forcefully expressed during the diada. This national Catalan holiday commemorates, each September 11th, Barcelona’s surrender to the Spanish and French in 1714 and the end of an independent Catalonia. On the diada of 2013, some demonstrators brought a banner which showed their support for independence. The banner reads, in English, ‘Catalonia – the next independent state in Europe.’ With their English message, independence supporters are engaging in a cosmopolitan gesture, reaching out to the world at large and making their cause known globally. This new form of cosmopolitanism, expressed by a Western European national minority, the Catalans, is the focus of this article. I am interested in pursuing the concrete character and effects of such gestures of globality, with a particular eye towards transnational institutions. Concretely, I consider the relations of Catalans to two specific transnational entities, the Framework Convention for National Minorities (FCNM) and the European Union. I also consider what effects the Catalan (non-)relations to these entities have had on Catalan public discourses about independence and how these discourses have in turn influenced Catalan efforts to engage with these entities.

The relationship between Catalonia and the FCNM is one of missed encounters and opportunities; in a sense, this relationship is defined by its lack of relation. This is surprising, given the success of the Catalan minority; a success that is unique in several aspects. Catalans, as a minority, constitute an unusual case – among other things because of their highly successful language revitalization program (cf. Strubell and Foix 2011). Catalonia is also unique in Europe for achieving near-statehood– no other region, including Scotland, has come this far (Bourne 2014). The time might indeed have come to seriously consider the possibility of Catalonia breaking away from Spain, and the text at hand investigates some transnational aspects of how Catalonia and Spain have arrived at this point of impending divorce.

In discussing Catalonia, I contribute to scholarly debates about the future of minority rights as laid down in the Framework Convention on National Minorities (FCNM). I consider the following hypothesis: Catalonia’s success in nearing independence might be due to the fact that it has not joined the FCNM. What possible lessons could be learned from this refusal for reconsidering the role of the FCNM in the changing political landscape of Europe? We may think especially of the ongoing crisis in the borderlands of Russia, immigration issues in Europe, or the growth of populist movements in Western democracies and elsewhere. All of
these processes and events will impact the ways in which national minorities are perceived and treated and open or close possibilities for their own future agency.

To understand how Catalonia, specifically, is connected to these multifaceted processes, I explore some historical dimensions of the Catalan-Spanish conflict. Anderson, Hobsbawm, and others have shown extensively how minorities and nation states regularly employ history and traditions to legitimate their claims for national collectivity. History allows nation states and minorities alike to ground the longevity of the community in manifold events of a rich and, ideally, captivating and successful historical narrative (Anderson, 1991; Hobsbawm and Ranger 1983). In this reaching out into the past, Catalans, like most minorities, aim to root themselves within their own traditions, history, and territory (cf. Crameri 2014). Many Catalans reach out to further the world’s understanding of their cause but Catalans are equally invested in linking their local traditions to these global activities.

In what follows, I investigate the role transnational organizations such as the EU and minority protection mechanisms like the FCNM play in this context. I first analyze a pertinent example for Catalan global-cum-local engagement. Then, in a second step, I trace the relationship between Catalans and the world-at-large by analyzing their connections at key historical moments. This allows me to draw a number of perhaps unexpected conclusions about the possible role of EU and the FCNM in cases of impending secession.

2. Minority Cosmopolitanisms: Linking Catalonia to the Global Domain through Popular Culture

Today, the most prized discursive position is that of victim. This is so because victims earn the right to demand compensation from their assailant. Victims are, in other words, people who have been harmed in the past but can look forward to being recompensed in the future. In the Spanish-Catalan conflict, Catalans frequently seek to portray themselves as victims of three centuries of Spanish aggression. The Catalan government deliberately chose the date for the independence referendum to be September 11th 2014. It marked the three hundredth anniversary of the final partition of Catalonia between Spain and France in 1714 in the context of the Spanish war of succession. In this as in other instances, Catalans’ discursive objective of narrating their history as one of perpetual oppression is to obtain, securely, the victim position and to thereby establish further justification for their drive towards independence. If we understand this dynamic as one of the possible ways in which groups use
history, then it makes sense to also say that Catalans today narrate their history from the perspective of the present. They narrate their history in view of their contemporary objectives. The following example illustrates particularly well how Catalans develop a discourse of collective identity by skillfully deploying temporal elements, historical facts, or dreams for the future.

*Ara es l’hora*, Catalan for ‘Now is the Time’, is a song recorded in early summer 2014, and published in July 2014 on YouTube. It is performed by the *Cor Jove de l’Orfeo Catala*, the juvenile section of the most prestigious choir in Catalonia. Jaume Ayats has slightly adapted the lyrics from the poem *Meditacio ultima* (Eng.: Final Meditation) by the Catalan writer, poet and political activist Miquel Marti i Pol (1929-2003).

The song is borrowed from the Baltic context. The Latvian composer Martins Brauns composed it in 1989 as his contribution to the independence movement of Latvia. Today, in Latvia, performances of the song are mass-events often featuring choirs with hundreds or thousands of participants. The young group of performers in the Catalan version is smaller – perhaps forty or fifty young women and men – and they are directed by Esteve Nabona, the middle-aged head of the *Jove de l’Orfeo Catala*. The location is interesting: they are placed within the dome of the El Born, a former market and now a massive excavation site where medieval remains of the city of Barcelona have been discovered. To protect it, the site is covered by a massive dome, completely enclosing it and, as confirmed by the evidence of *Ara es l’hora*, creating a magnificent visual and sound atmosphere for their performance. Here are the lyrics, translated into English:

> Now, now is the time to say
> To say that the people persist
> In the houses now built
> Where there were no houses,
> In the trees that now grow
> Where there were no trees
> In the girls we now love
> And in everything that begins.
> Now, now is the time to say,
> To say that the people persist
> In all, in all, in all of us,
> In each one of us,
> In the words we invent,
> And in the people we love,
> And in everything that we remember,
> In the routine of work.
> It is the people’s essence,
> Indestructible.
> Now, now it’s time to say
> Catalonia persists
In all, in all, in all of us,  
Catalonia persists  
In each one of us.  
Now, now it’s time to say,  
In all, in all, in all of us,  
In each one of us.

The whole arrangement is bound to capture the imagination of pro-independence Catalans because they are able to relate elements from the song to Catalonia, its people, or its history. The location, for instance, is suggestive because of its antiquity: the singers are actually standing within the soil, within the very earth, of Catalonia and, moreover, they are standing in an excavation that investigates Catalan culture of the early 18th century and the fall of the city to the Spanish and French troops in 1714. Could there be any better way to dress the 2014 referendum in appropriate historical garb? Opposing the choice of location as emphasizing the past of Catalonia – both tragic and heroic – is the youth of the singers. It is the youth section of the most prestigious choir that performs this song – indicating that the future, too, belongs to Catalonia or, perhaps, that Catalonia belongs to this future, pictured as bright and beautiful in the text. The contemporary aspect of *Ara es l’hora* is highlighted by the way the singers and their director are dressed: they are wearing beige and brown clothes that are of a low-key quality and appearance, not making them stand out but making them appear rather ordinary, everyday citizens. Here, the message might well be one of egalitarianism, highlighting that all Catalans are in this together, without class distinction. The quite leftist appearance of the song is further amplified by the lyrics – for instance, when the ‘work’ that is commonly done to create a persisting Catalan essence indicates a work ethic based on left or even Marxist principles of community. In the end, all these elements come together to form a strong emphasis on community, the national community of Catalans.

The song contains three very different, yet interconnected references to temporality. First, there is the emphasis on Catalonia’s historical existence – always problematic for minorities who, generally, do not have access to the codified history-making machines (universities, media, governmental bodies, etc.) of established nation states. Thus, the song speaks of the houses built, the trees planted, the people loved, and everything remembered. This is complemented by the futural aspects mentioned above – the youth of the choir – to form the notion of Catalonia as persistent. Catalonia persists because its people are rooted, as a community, in past and future. A third temporal component is, then, the ‘now’ that is already contained in the title. This ‘now’ does not merely connote a moment, fleeting and passing; this is a highly urgent, pressing ‘now’ – the ‘now’ that presses us to act in this
moment because we must not miss the opportunity. We must seize this moment, this ‘now’ because there might never be another to accomplish what we desire; the song is not merely a nationalistic song, it is a call to action. In Agamben’s sense, this ‘now’ invoked here is of kairetic quality: it is not an element in the chronos, the time that passes us by steadily like a tranquil, mighty river; instead this ‘now’ is part of a kairos, a messianic time, where the time will come where there is no more time and the ‘now’ invoked will mark the end of this process, it will be the temporal moment to end all time (1999: 68-71). The ‘now’ invoked here is a time of urgency, of the pressing need to conclude one’s business in the face of a coming new order. In this spirit, the ‘now’ invoked here aims to mobilize Catalans to vote in the referendum in the fall. If enough Catalans can be mobilized for the cause, this referendum will mark the end of the time of waiting for the Catalan nation state to emerge; this is the time that will be ended by this ‘now’ of the hour. If one travelled to Catalonia at any point over the past decade, this urgency, this sense of ‘now’ for Catalan independence, has been ever-present. There has been a surprising level of political mobilization in Catalonia, a public mood with is captured exceptionally well in this song.

A third level of analysis concerns the question of language use. The obvious target audience for this song are Catalans. However, the song is posted with English subtitles so that it can be understood by non-Catalan speakers. The audience thus sought is not Spanish-speaking; rather, this song is posted for a global and English-speaking audience. The makers of this song and recording want the world to know about the Catalan side of the conflict and enlist supporters for it globally. The publication of the recording establishes a direct connection between the local and the global, the Catalan and the cosmopolitan perspective because the authors circumvent the interpositionality of Spanish. This recording, the song, the location, the participants, the target audience – all these elements come together, perhaps not making this song the most popular among Catalans but a perfect example for the linking up of local and global elements within some Catalans’ desire for independence. The song expresses one version of Catalan minority cosmopolitanism. The practice that this minority cosmopolitanism challenges is that of interpositionality.

Interpositionality says that there is a clear hierarchy that minorities are supposed to follow when communicating outside of their own community. Interpositionality denotes a practice in which foreigners are always addressed in the national language – in this case Spanish (Juarros-Daussa and Lanz 2009). An example for interpositionality would be, when ten Catalans are speaking Catalan but, once joined by a foreigner, they immediately switch to
Spanish, often not even checking whether the foreigner speaks Catalan. They do so because it is assumed that a foreigner, if he speaks any language they share, will speak Spanish as the national language, but not Catalan. Over the past few years, Catalans have been very successful in combating interpositionality (cf. Woolard 2013). They have broken through and established a direct access to the global sphere of communication and are in a much better position to make their case internationally than if they would have to go through the Spanish, national layer every time, distorting their message to fit the national mould. It is powerful testimony to the advanced state of the Catalan independence movement that the song is directed, in English, to the global audience of YouTube. We might even state that the circumvention of interpositionality by Catalans today is the nucleus for one of the criteria posited by the Montevideo Convention for determining the viability of nationalism: the external recognition component (cf. Malloy 2005). Such an interpretation would focus on ongoing Catalan attempts to bring the world’s attention to their cause through external recognition. This point is further buttressed and reflected in the borrowing of the song itself from Latvia. It is illustrative to read the many comments on the YouTube page for the song, to gauge the reception of this borrowing. Many comments are from Latvia. While a few are criticizing Catalans for ‘stealing’ their song, most Latvian commentators express happiness and joy that their song has been adapted in this way and generously wish the Catalans the best of luck in their bid for independence.

Finally, the use of history in the song is indicative of the special flavor of Catalan nationalism expressed within it (Woolard, 2004). There is indeed very little mention at all of Catalonia – only two stanzas contain direct references to it. This is likely so because of the problematic demographics in Catalonia itself. As pointed out above, about 20% of the Catalan population are of Spanish immigrant background. This population would be alienated if Catalan accusations of war crimes or other forms of oppression would be invoked in such an instance (Preston 2012). Instead, the song’s text is held in a very general manner and only the reference to the date could be construed as insulting to the Spanish state and its population living in Catalonia; but this reference is rather feeble and weak. In sum, the song shows how skillful Catalans have become over time in communicating and raising national sentiment within their own complex civil society. They skillfully deploy strategies of ambiguity in meaning when they claim that cosmopolitanism can also be part of a minority nationalism, that a minority cosmopolitanism is possible, useful, and seemingly instrumental for the
independence process today. I will now investigate how the cosmopolitan linking was handled by various different Catalan actors throughout the region’s history.

3. The 19th Century and the Franco Era: Catalanism as a Form of Romantic Nationalism and Fascist Oppression

One can identify, throughout the 19th century, three attitudes towards independence in Catalonia, which roughly coincide with class divisions. The poor – workers and peasantry – were largely supportive of the Catalan cause since they were often still practicing their ancient, local traditions and customs. Even today, many Catalans maintain that ‘true’ Catalans and the ‘real’ Catalonia are to be found in remote mountain villages in the Pyrenees but not in ethno-nationally and linguistically diverse Barcelona (Frekko, 2009; Woolard, 1992). The bourgeoisie, conversely, was more in support of the Spanish state. Cosmopolitan in orientation, the Catalan bourgeoisie looked towards Madrid as the center of the Spanish state for socio-economic upward mobility. The small group of wealthy Catalans, finally, remained ambiguous: depending on the political climate they threw their lot with Barcelona or Madrid.

Catalanism as an idea evolved during the era of European romantic nationalisms in the 19th century. In what came to be known as the Renaixança, the Catalan version of the Renaissance, emerging Catalanists focused on the German notion of Volk (English: people) and Volksgeist (English: ‘spirit of the people’ or ‘national character’) to develop an understanding of being different from the rest of Spain (Herder, 1968; Stocking, 1996). Fitting the times, 19th century Catalanism was a corporativist ethnic ideology, based on the bio-culture of the Catalan people (Llobera, 1983; 2004). This meant that Catalanists of the 19th century were largely championing the widespread version of nationalism at the time, its ethnic form that would only allow Catalans to be Catalan if they were of Catalan family origin. A good concrete expression of Catalan Volksgeist was also developed at this time: along the lines of ‘national character’ development, the Catalan writer Josep Torras i Bages (1846-1916) first spoke of seny i rauxa as the two states that best characterize a generic Catalan personality (Torres i Bages, 1913). Seny is the calm and patient consideration of facts before reaching a decision whereas rauxa denotes the almost instant, rash reaction to events. Both are supposed to commonly inhabit the national character of Catalans who might, depending on the situation, either take their time to deliberate or react immediately. This example is simply an expression for the ethnic (read: determinist) component in national
character studies and the timeless existence of these traits or, as Wolf has put, the existence of these traits in a timeless no-man’s-land of an essential but fictional culture (cf. Wolf and Silverman, 2001). A first qualification of the essential components in this concept was indeed undertaken by one of its most powerful Catalan proponents: Torras i Bages developed the notion of *seny i rauxa* as an express counter-concept to Prat de la Riba’s secular version of Catalanism. I submit, in passing, that the recent shift from Catalanism to Independentism, an issue I discuss extensively below, is a 21st century continuation of this conceptual qualification process.

By around 1900, Catalanists were openly advocating for a federalization of Spain to include a Catalonia with significant autonomy rights (Prat de la Riba 1906). This Catalanist objective was realized during the Spanish Republic, where a *de facto* Catalan independence was achieved while the region remained *de jure* within the Spanish state. Overall, Catalan participation in the European project of romantic nationalisms meant that they could also feel part of the larger projects of European enlightenment and civilization of the time. More importantly, Catalans were able to partake in these project *directly*, without the interpositional detour through Madrid.

Franco’s victory during the Spanish Civil War in 1939 put a sudden and drastic end to all Catalanisms – Christian and secular alike (Hansen 1977). After the war, Franco aimed at pacifying the Catalans and promoted Spanish immigration to Catalonia from the early 1940s until the mid-70s (Climent-Ferrando, 2012). Lured by economic opportunities, Spanish immigrants were also convenient to Franco for ‘diluting’ the ethnically homogeneous population in Catalonia (Benet 1995). Franco’s goal was to reduce Catalan sentiments of autonomy by settling more and more Spanish speakers in Catalonia. However, this has been of surprisingly limited influence on the present situation, although many children and grandchildren of Spanish immigrants do indeed still place their loyalties with the Spanish state and are, consequently, against Catalan independence. The immigration to Catalonia during Franco’s time meant that Catalans had to somehow accommodate the newcomers and, crucially, also to find a place for them in the political arena. This seems to have been somewhat successful since many Spanish immigrants today support Catalan independence. The *sumate* movement under Gabriel Rufián, for instance, is an organization of Spanish immigrants and their descendants who support it (www.sumate.cat). Their online presence gives a good indication what they stand for: they are not divisive and embrace their Spanish heritage but they also support Catalan independence. In sum, we can say that Franco’s attempt
to hispanize the Catalans through Spanish immigration was unsuccessful. In the long run it might even have accelerated the Catalan drive towards minority cosmopolitanism since at least some of the Spanish immigrants in Catalonia have let themselves be seduced by the promise of a diverse and globalized Catalan (nation) state.


The 1978 Spanish constitution is a compromise between two conflicting trends in Spanish history, centralism and federalism (De la Granja et al., 2001; Fernández, García & Petithomme, 2012; Requejo, 2005; 2009a). In the late 1970s, during Spain’s transition from dictatorship to democracy, the Franco faction had an interest in preserving the centralized character of the country, whereas emergent regional powers in Galicia, the Basque Country, and Catalonia were interested in federalizing the Spanish state to obtain a maximum of regional self-government (Guibernau 2004; Requejo 2009a). In late 1977, the parliament, still elected under Franco, was turned into a constitutional assembly, which then selected seven of its members to form a constitutional drafting commission. This commission came up with a draft text by October 1978, which was approved by the constitutional assembly and then put to popular vote in early December; the vote was overwhelmingly in its favor. On December 28th 1978, King Juan Carlos I. ratified the new constitution and it went into effect the day after.

We are interested, specifically, in how this constitution regulates the relationship between the central government and its regions. For these purposes, it is important to state that this constitution was, ultimately, a compromise between Francoists and democrats. This means that its many vague and unclear passages are likely worded such with intent. It should, in addition, be acknowledge that the speed of drafting this constitution did not improve its quality. Good examples for such ambiguity are the passages regulating the relationship between the regions and the central government. The passage speaking most directly to this issue, Article 2, reads:

“The Constitution is based on the indissoluble unity of the Spanish Nation, the common and indivisible homeland of all Spaniards; it recognizes and guarantees the right to self-government of the nationalities and regions of which it is composed and the solidarity among them all.”
In a later section of the constitution (articles 137-158), the relationship between the state and its regions is then defined in more detail. In this instance, too, both camps aimed to design the constitution in their favor. Based on the recognition of historical difference, the categories of nationalities and regions were created and used to account for Spain’s ethnic and linguistic diversity. The constitution relates these different categories in the following manner: Spain is a nation that is composed of various different nationalities; however, these diverse nationalities do not, in themselves, constitute nations or have the right to pursue their own nationalisms.

In addition to ‘nation’ and ‘nationalities,’ the category of *autonomous community* was introduced to have regional partners for the state, with which to negotiate the relationship between each region and the national government (Requejo, 2012). The creation of autonomous communities in the wake of the Franco dictatorship brought together regions with long-standing histories (the Basque Country, Catalonia, Galicia, Andalusia) and other, newly created ones, designed to give their inhabitants some sense of regional identity (e.g. Murcia). This, of course, resulted in vast differences in status and power of these communities. It is important to point out, however, that the system thus created did not, at least in the mind of its creators, constitute a federal system. Article 145, section 1 unequivocally states: “Under no circumstances shall the federation of autonomous communities be allowed.” The term ‘autonomous communities’ is not intended to denote members of a federal system. Rather, being in the category ‘autonomous communities’ in Spain comes with significantly less rights than being a member of a state in a federal system. The Spanish constitution further states that each region, nationality, or autonomous community has to design its own relations with the Spanish state in distributing the shared rights and responsibilities. This has created a somewhat paradoxical situation: it is, on the one hand, impossible to define Spain as an ethno-culturally organized federal state but on the other hand we have the presence of strong national minority groups (cf. Kymlicka 1998). In 1978, the deadlock between centralists and federalists was inscribed into the Spanish constitution. Its provisions on national minorities have remained heavily underdeveloped and therefore ill-equipped to deal with the country’s complex ethno-linguistic realities.

Given the 1978 constitution’s shortcomings on regulating nation-region relations, we might expect the FCNM report, starting in the early 2000s, to produce plenty of material, as it has been its task to investigate precisely these relations. However, those interested will be in for a surprise. From the very first report onward, the Spanish government strictly confines
itself to discussing the Roma minority and no other minorities in Spain (Council of Europe, 2000). Indeed one finds hardly a word about Catalans, Basques, or Galicians in any of the four country reports. All four reports heavily focus on the Roma and hardly discuss national minorities in Spain. The reasons are visible in the interaction between the Advisory Committee (AC) to the FCNM and the Spanish government in the first cycle. In its country opinion, for instance, the AC states explicitly that Spain is within its full rights to choose to only speak about the Roma in its regular reports (Council of Europe, 2003, 6).

Sections 21 and 22 summarize the discussions between the AC and the Spanish government on this point and throw into relief the problems the Spanish approach brings with it for the FCNM. This text is found within the discussion of application scope for the FCNM in Spain:

22. Certainly the Advisory Committee has recently taken note of the fact that the Spanish authorities do not accept any inclusion of “nationalities” of Spain in the scope of application of the Framework Convention. That being the case, in the absence of in-depth discussions with the authorities and contacts with the persons concerned, it is not possible, or even desirable, for the Advisory Committee to conclude whether it would be appropriate or inappropriate to treat these groups as national minorities. Moreover, since they are recognised as “peoples” by the Spanish Constitution, it may be that they would not wish to be designated nor treated as national minorities.

23. However, the Advisory Committee is of the opinion that, if these persons were to evince interest in the protection afforded by the Framework Convention in the context of a dialogue with the authorities, that this possibility should not be ruled out and that this protection should not be denied to them a priori. Consequently, the Advisory Committee invites the authorities to envisage consultations with the groups potentially concerned in order to discuss these matters. As linguistic boundaries do not always coincide with territorial divisions, it might be helpful also to consider as part of this dialogue, and if the parties concerned show the relevant interest, the situation of Catalans, Basques, Galicians or Valencians living in areas outside those where they are present traditionally or in large numbers, as well as Spanish speakers living in the Autonomous Communities with special linguistic status. (Council of Europe, 2003, 9-10).

The issue here is the precise definition of what constitutes a ‘national minority’ as spelled out in the documents underfeeding the FCNM and the position of the Spanish government on the issue (Council of Europe, 1995). The FCNM documents clearly state that it is the prerogative of national governments to define the application scope of the FCNM in their specific case. Yet, there was obviously discord between both parties on this issue with the Spanish government ultimately prevailing and keeping its ‘autonomous communities’ out of the FCNM framework. The AC has raised this very question again in its most recent report on Spain:
10. The Advisory Committee acknowledges that the notion of “national minority” in the sense of the Framework Convention does not exist in the Spanish legal order. […] (Council of Europe, 2014: 6)

The AC addresses this issue for good reason:

11. The Advisory Committee has again been approached by persons belonging to organisations representing the Basque, Catalan and Galician cultures and languages, who have expressed interest in the protection offered by the Framework Convention, while at the same time observing that awareness of the Framework Convention in Spain is generally very low. Olivençine Portuguese-speakers living close to the Portuguese border have also expressed interest in benefiting from the Framework Convention’s provisions. (Council of Europe, 2014: 6)

It is helpful that the AC mentions various different minorities in Spain by name since much else of the exchange between AC and Spanish government gives the impression of a serious match of shadow boxing, where it becomes unclear which groups are talked about. Beyond this point, the AC openly mentions groups that have expressed an interest in being included with the FCNM protection regime – namely Basques, Catalans, and Galicians. However, in the following section, the AC, again, comes around to accept the Spanish position of excluding ‘autonomous communities’ from FCNM protection (Council of Europe, 2015: 7).

The quote from above is also relevant since there is soft evidence suggesting that the Catalans refused to slip under FCNM protection when they were approached in the late 1990s. Presumably, the Catalan government of the time, headed by Pujol under CiU, was already twenty years into consolidating Catalan minority status mainly through linguistic policies but also a host of other measures discussed below. In this situation, the Catalan government might possibly not have been interested in joining the FCNM since it could see no benefit: especially in its beginning, the FCNM was regarded with suspicion because it was not yet clear who would really benefit from its implementation. It is entirely conceivable that the Catalan government feared to hand its Spanish rival a new instrument to help in minoritizing the Catalans, to continue their oppression by other means. It is also conceivable that the Catalan government of the time already considered independence a possible future option and chose not to be constrained in the pursuit of this goal by having the AC monitoring process constrict their agency. While this is speculation, it is certain that the majority of Catalans did not consider independence a viable option in the late 1990s. It remains then to consider the advanced state of the autonomy process in Catalonia as the main reason why there was no interest in joining the FCNM. The repeat mentioning of national minorities by
the AC in this cycle is due to the escalation of the Spanish-Catalan conflict. However, in its reply to the AC commentary the Spanish government dismisses, for now, any possibility of extending the scope of the FCNM in Spain out of hand (Council of Europe, 2015: 5).

This underlines the underdevelopment of federalism in the 1978 constitution as a significant factor for the specific development of the Spanish-Catalan conflict. The constitution created a centralist Spanish state, which negotiates its relationship with each region individually; unsurprisingly, this has led to frequent complaints about unequal treatment by virtually all regions. In addition, the Spanish constitution and its creation of unique categories such as ‘autonomous communities’ or ‘nationalities’ that cohabitate one ‘nation’ have proven detrimental to the Spanish cause in the conflict. Since they are not compatible with other international legal terms, they are frequently used – as in the case above – to shield the Spanish state from what would be clearly necessary constitutional reforms to better conform to contemporary global conditions. The Spanish state maintains the imperative of interpositionality, namely that all its national minorities always need to go through the national government for interactions with the outside world. The Spanish government retains to this day the romantic but hierarchical notion of minority-nation-world. This is regrettable for, surely, the present situation would lend itself to mediation – for example through the FCNM and related instruments (such as the ECRML). Instead, the Spanish government continues to maintain its legal position, to which it is indeed legally fully entitled. Meanwhile, many Catalans are tinkering away at creating their own version of minority cosmopolitanism: my initial examples showed how they simply circumvent the national and go directly for the global level.

In addressing the flaws of the 1978 constitution, the implementation of a functioning second chamber in the Spanish legislative, representing the regions, would be helpful because it could combat centralist tendencies in Spain as well as divisive competition for resources among the regions. Federalization would provide a viable solution for the present conflict. The regional and national socialist parties in Spain, PSC and PSOE, have championed federalism as a solution to the conflict for several years. As a result, Spanish reactionary and Catalan revolutionary forces have moved past that option as not radical enough. In addition, the constitution, with its rejection of federalism, stands in the way of such a move.

In the wake of the passing of the Spanish constitution, the Catalan government (Generalitat) and the Spanish central government negotiated a Statute of Autonomy, which was passed into law in 1979. It organized Catalan self-government, gave significant rights and
privileges to the Catalans, but, crucially, did not include tax autonomy for Catalonia. We might well speculate that Catalonia was too important as a tax base to allow for regional autonomy in this field.

Finally, the European dimension of the constitution drafting process in 1978 should not be neglected. During its drafting, all actors, Catalans and Spanish alike, were motivated by the possibility of Spain eventually joining the European Community. This was indeed one of the driving motives for the centralists to allow for some democratic reforms in the first place. The Catalan side, too, expected further European integration to be favorable for them. Of course, at the time very few Catalans seriously considered independence but they were more than interested in gaining further regional autonomy, if it could be obtained through European support. Spain joining the European Community was almost the Catalans’ only option to achieve further autonomy and minority rights from the central government. The FCNM and other mechanisms protecting minority rights was still another two decades away and so the Catalans embarked on this process without significant external support. The Catalanist movement was about to consolidate itself internally, a necessary prerequisite for both the contemporary independence process and the contemporaneous development of one of its most important elements, minority cosmopolitanisms.


Between 1979 and 2010, Catalans and their respective governments set about to inject life into their Statute of Autonomy. Since Catalans were barred from expressing their collective identity in the usual ways of national populations, the focus was quickly placed on language. The language had been prohibited from public use during the Franco dictatorship and survived because of the rural population’s continued use of it as well as exile activities. During this time, the Catalan education system was gradually changed to be exclusively in Catalan, which was achieved in 2003 with all universities in Catalonia switching to the regional idiom (Woolard, 1989; 1992).

In 1980, the first open elections were held in the region with Convergencia i Unio (CiU) carrying the vote and then governing Catalonia for twenty three years under their charismatic leader Pujol. With the election of the first CiU government, a period of stability commenced that would last for a little over three decades. During this era of stability the first CiU government under Pujol and the so-called Tripartit government from 2003 until 2010 worked,
together with many civil society institutions, towards the Catalanization of the local population. Important projects of this time included the shift in the education system from Spanish to Catalan; a shift in economic focus from production and agriculture to a service economy and its mercantile derivatives like, for instance, the ’92 Barcelona Olympics; the incorporation of, first, Spanish immigrants and, later, global immigrants into the Catalan project of building a multi-ethnic yet distinctly Catalan civil society; the creation of a diversified media landscape in Catalan (e.g. radio station, .cat as top-level Internet domain, subventions for publications in Catalan etc.); and the implementation of an efficient regional administrative system (excluding the legal system, which resisted incorporation). All these long-term goals were, more or less satisfactorily, achieved during this period of stability and steady progress. In itself, this constitutes further rationale for not joining the FCNM in the late 90s: Catalans were doing well and didn’t feel in need of protection. We may, however, presume that, during this time, Catalans were also quite content with the constitutional status quo since it played in their favor for the time being.

From 1999 until 2007, Catalonia was a popular destination for global immigrants who came to the economically prospering region for work (Carlà and Medda Windischer, 2015). While the foreign population in both Spain and Catalonia was below 3% in 1998, it rose quickly to around 15% by 2008, then plateauing off mainly as a result of the economic crisis (Generalitat de Catalunya, 2008; Recolons, 2009). These immigrants can be roughly divided into two groups – those from Spanish-speaking countries and those from non-Spanish-speaking countries. Immigrants from South America often went on very similar trajectories as the earlier domestic migrants and maintained their linguistic practices, not learning Catalan and not showing a significant interest in Catalan language or culture (Garzòn, 2012). Contrarily, those not speaking Spanish prior to their arrival were often won over for the Catalan cause; they took language courses, learned about local culture, customs, and traditions and made an effort to integrate not just into Spanish but also Catalan society (Bosque, 2015). It is not surprising, though, that these recent immigrants have largely stayed out of the conflict. Their often precarious legal and economic situation – exacerbated by the economic crisis – would not make it advisable to step into the limelight in this way. Yet, non-Spanish immigrants coming in large numbers to Catalonia contributed to global exposure of the conflict. Beyond migrants reporting informally about their new place of residence, media interest in supplying countries was raised significantly, giving the conflict yet more global visibility and, thus, also the cause of the Catalans. It is perhaps for this reason that Catalans
tend to be, by comparison, friendly to immigrants. Plataforma pel Catalunya (PxC) is a right-wing populist party, running on a xenophobic program. It has failed, though, to garner the same support that like-minded parties – the Front National in France or the FPÖ in Austria – have enjoyed.

In 2003, a major political shift occurred in Catalonia. Convergencia i Unio with their charismatic leader, Jordi Pujol, had been in power since the early 1980s but the 2003 elections brought to power a three-party coalition, comprised of the Partida Socialista de Catalunya (PSC, English: socialist party of Catalonia), the ecosocialists Iniciativa per Catalunya, Verds (ICV, Eng.: Initiative for Catalonia, Greens), and Esquerra Republicana de Catalunya (ERC, Eng.: Republican Left of Catalonia). The new government was called, based on its coalition character, the Tri-partit, a three party government. One of its main objectives was to draft a new statute, which would crucially include tax autonomy and mentioned Catalonia as a nation. Drafting and passing into law a new Statute of Autonomy for Catalonia was to prove a key accelerator for Catalan independence (Lopez Bofill 2014: 71-73).

Following the Spanish national elections of March 2004, the political climate for a new statute seemed quite favorable. In Barcelona, the Tri-partit had entered government and was soon joined, in Madrid, by the socialist Zapatero government. Because of the socialist party’s favorable stance on federating Spain, Zapatero was favorably inclined towards a new statute and, crucially, also towards granting tax autonomy to Catalonia as well as the mentioning of the term ‘Catalan nation’ within the statute on several occasions. The new statute was drafted in 2005 and passed Catalan and Spanish legislatures in early 2006. It was then put to a popular vote, accepted, and went into effect on August 9th 2006 (Parlament de Catalunya, 2012). However, anti-independence parties Ciutadans (Catalan) and Partida Popular (Spanish and Catalan) and the autonomous communities of Aragon, Valencia, and the Balearic Islands appealed against the statute in the Spanish Constitutional Court. Deliberating for four years, the court finally ruled (part of) 14 articles of the statute as unconstitutional in 2010 (FJ 12 de la STC 31/2010). These points all concerned tax autonomy or the mentioning of Catalonia as a nation. This constituted a major blow to the Catalan cause and, as a counter-reaction, significantly fueled secessionist sentiment among the Catalan population.
6. From Catalanism to Independentism: The Impact of the Economic Crisis and Legal Battles with the Central Government

In the years 2007 and 2008, Spain was especially hard hit by the global economic crisis. It had focused on its own real estate boom for a long time and now suffered from a relatively uneducated workforce, a lack of productive industries, and significant corruption. As the crisis took hold of Spain, many Catalans wondered whether being stuck in one economy with the rest of Spain was such a good idea. The argument was as powerful as it was simple: Catalonia, without the millstone of the remaining Spanish economy around its neck and without being squeezed dry by the central government in Madrid, would be far better off. For the next years, the Spanish-Catalan conflict would be almost inevitably seen as determined by the economic issues – not completely but to a large extent. The economic crisis and its widespread effects also led to a significant intensification of the conflict and, ultimately, to a complete change in the party landscapes of both Spain and Catalonia.

In 2010, the political climate in Catalonia as well as Spain had worsened dramatically (Argelaguet 2014). After more than two years of trying to stem the financial and economic crisis, the Zapatero government was weak and expected to lose the coming elections. The same was true for the Tri-partit, which was replaced by a new CiU government under Artur Mas in 2011. In 2012, then, Mariano Rajoy and the PP came to power in Spain, making any governmental agreement to a new statute unlikely. Nevertheless, Catalan president Mas and Spanish prime minister Rajoy met several times between February and April 2012 (Lopez Bofill 2014: 73-75). Mas’ main objective was to negotiate a ‘fiscal pact’ between Catalonia and Spain to gain tax autonomy for his region instead of getting a new statute of autonomy approved by all sides. Yet, Rajoy made it unequivocally clear that there would be no renegotiation of the fiscal status quo. The uncompromising position of the Spanish government was like pouring oil into the fire of Catalan independence; in the months after these failed negotiations, support for Catalan independence skyrocketed and, indeed, for the first time went beyond 50% (Lopez Bofill 2014: 75).

As a result of the failed talks with the central government, Mas declared that the Catalan government would now pursue independence. However, he wanted popular approval for this dramatic change in policy and called for elections in the fall of 2012 since, until now, only ERC had been openly advocating for independence. The elections brought minor losses for CiU, making a coalition with ERC necessary to pursue independence. Forming this coalition was difficult since CiU and ERC did not share many political positions beyond pursuit of
independence. They managed, however, and an independence referendum was scheduled for the fall of 2014, a highly symbolic date, marking the 300th anniversary of the loss of Catalan independence in 1714. This planned official referendum had been precipitated by a whole host of smaller, non-official referendums in earlier years, all of which had been organized by pro-independence movements and all of them had been hugely in favor of independence (Muñoz and Guinjoan 2013).

In the fall of 2014, the Spanish Constitutional Court declared the referendum illegal, citing the constitutionally guaranteed unity of the Spanish state. The position of the Spanish government on the referendum was (and still is) that if such a referendum were to be held legally, the whole of Spain would have to vote on the subject. Amidst serious threats from Madrid, the Catalan government still held the referendum as a consultation, resulting in a clear victory for the independence camp. The situation was heavily influenced by the independence referendum held in Scotland only a couple months earlier (cf. Bourne 2014). Many Catalans either travelled to Scotland or publicly expressed their sympathies. The eventual victory of the anti-independence side constituted a major disappointment for the Catalan pro-independence camp. Most likely, various British governments allowing for this referendum to take place legally had not expected such a close result and they certainly wished that it had been less dramatic. The situation concerning minority referendums in Europe in the fall of 2014 was quite paradoxical: one referendum, likely to fail, was allowed whereas another, likely to succeed, was disallowed.

As a response to the disallowed referendum, the Mas government called elections for September 2015 with independence being the only question on the agenda. The unusual circumstances of these elections led to major changes within the Catalan party landscape. Until recently, this landscape had been quite stable: The PSOE, the Spanish socialists, had its regional complement, the PSC, as did the conservative Spanish party, the PP. In addition there were regional parties. The Esquerra Republicana de Catalunya (ERC) are a leftist Catalan nationalist party, and Convergencia i Unio (CiU) is a combination of two conservative nationalist parties. Iniciativa per Catalunya, Verds (ICV) was important between 2003 and 2011 as part of the so-called Tri-partit, a three-party coalition government (PSC, ERC, and ICV). Since 2011, ERC and CiU had been in an awkward and difficult coalition as the main parties advocating for independence. Until recently, they had successfully put aside their political differences on many subjects and cooperate to move towards independence. For the 2015 elections, both parties formed a common platform (together with several pro-
independence groups with no parliamentary representation), called Junts pel Si (JpS/English: Together for Yes). This latest turn was, however, too much to swallow for Unió, the junior partner in CiU, ending decades of cooperation between Convergència and Unió. At the same time, developments in Spain and Catalonia brought about the emergence of three new parties. The Candidatura Unitat Popular (CUP, Eng.: United Popular List) is a radical left, pro-independence movement that ran for the second time in the September elections, where it was able to secure a surprising amount of seats. Ciutadans (Spanish: Ciudadanos; English: Citizens) are originally a Catalan party, now active in the whole of Spain and firmly opposed to Catalan independence. They have been around for a decade and, having expanded their operations to the whole of Spain, are now serious competition for the PP. Podemos (Catalan: Podem; Eng.: We can) is a left-wing populist party that emerged from the blockupy protests throughout Spain five years ago; it is in principle against Catalan independence but allows individual members to have differing opinions.

The parties in the pro-independence camp, in absolute numbers of seats in the Catalan parliament, lost significantly in the 2012 and 2015 elections. Their majority – initially quite comfortable – was reduced to a few seats despite most parties forming a common front.

Recently, further categorical differentiation has been introduced, namely between Catalanists and Independents. Independents were, until well into the 2000s, regarded as utopians, as unrealistic dreamers (Argelaguet 2014). They were relatively few in numbers, frequently considered radicals, and far too weak to gain key political positions. Even just a decade ago, many Catalans would have subscribed to the notion of extended autonomy for their region but would not have thought independence possible, let alone advocated for it in a serious fashion. However, in recent years, independentism has become a respectable, mainstream political position.

Results provided by various different polling agencies suggest that a fundamental shift occurred in the period between 2006 and 2013. In 2007, for instance, the Social and Political Sciences Institute of Barcelona published a poll that rated the attitudes towards independence in four categories: Support/Against/Indifferent/Did Not Reply with a result of 32%/52%/14%/3% respectively (ICPS 2007). Four years later, the same poll produced the following results: 41%/23%/27%/9% (ICPS 2011). While this specific poll only gave the option to either be for or against independence but did not consider alternatives, other polling institutions did allow for more specific answers; especially the years 2006 to 2013 are interesting to report in this instance. In their yearly opinion polls, the Centre d’Estudis
d’Opinio (CEO) routinely asks: What kind of political entity should Catalonia be with respect to Spain? Giving three different possible answers, CEO has created a more nuanced picture of changing public opinion in Catalonia. In 2008, the numbers between the independence option, federalism, and autonomous community were fairly stably hovering around 18%/35%/33% respectively (e.g. CEO, 2008). In 2013, however, independentism peaked at a stunning 49% with the other two options coming in at 22% and 19% respectively.

This means a fundamental change, within only five years, of popular opinion on independence. This change was brought about in part by the refusal of the Spanish government to renegotiate the Statute as well as the 2010 decision of the Constitutional Court on the Statute of 2006. In part, it was also brought about by the severe economic crisis, when arguments for sustained Catalan solidarity with the economically even poorer Spanish neighbors were wearing thin. Both factors favored the independence camp, as did the carefully prepared civil society discourse, which was built during the long reign of the Pujol governments with their emphasis on linguistic issues, specifically language revitalization. Another reason for the boost in support for independence was, however, the reaching out of Catalans at so many different levels to learn about the world and to make the world learn about the Catalan situation.

However, over the past two years, the numbers in favor of independence have begun to drop again. For 2015, CEO reports numbers in favor of independence closer to 38% with the other two options each getting 5% of the 10% drop in favor of independence (CEO, 2015). Independence is still the favorite option among Catalans but federalism and continued autonomy are also strongly supported. Also, the supporters of independence continue to run a stunning 20% above their levels (roughly 18%) before the recent surge and while there has been a drop in support for independence, it seems to stabilize at around 38% for now.

The elections produced a slim majority for the pro-independence camp with JpS winning 62 of the 135 seats in parliament and missing the majority by six seats. CUP, equally pro-independence, gained another 10 seats thus giving the pro-independence camp a clear majority of seats. But this majority was theoretical since CUP had declared before the elections that they would not partake in any government, making the formation of a pro-independence coalition very difficult. In addition, the pro-independence camp gained the majority in seats but it did not actually win the majority of votes, something swiftly pointed out by Spanish government officials as delegitimizing Catalan independence claims. After lengthy negotiations between JpS and CUP, the latter agreed to tolerate a minority
government by JpS and support the government in important decisions. At the same time, at the Spanish national level, a stalemate between various different parties has resulted from the last national elections. Until new elections, scheduled for the early fall, few things will move openly in Catalonia or between Catalonia and Spain. Given past evidence, we can however safely assume that many Catalans will continue to quietly work towards their goal.

7. Conclusions

Cosmopolitanism has been present in various different forms and among quite different groups in Catalonia throughout history. First, it was present in the 18th and 19th century among the emerging trading and industrial elites, with their international connections and aspirations. Later, it was emulated by the growing bourgeoisie and the middle class, aiming to successfully insert itself into the splendor of the colonial Spanish state; only when this splendor was vanishing in the 19th century did the symbiosis between the Catalan middle class and their national cosmopolitan aspirations end. Now bourgeois hopes for moving towards the center (and socially/economically upwards) were projected towards other, more successful European nations. For Catalans, the most popular new target was France, in part because of its proximity but also because it offered much cosmopolitan flair – especially towards the close of the long 19th century. Even today, those Catalans, say in Barcelona, with real cosmopolitan aspirations look neither to Madrid nor Barcelona but to Paris, London, New York. Yet, in recent years, Catalan independentists have accomplished a surprising feat: they have succeeded in establishing a Catalan minority cosmopolitanism that transcends the minority culture rut as well as national limitations. This cosmopolitanism celebrates the ability to directly partake in global cultural affairs, discussions, and processes without Spanish interposition.

Strangely, cosmopolitanism is thus used on both sides as a positive concept: for and against independence. The anti-independence side uses cosmopolitanism to dismiss Catalan aspirations for independence as outdated in a globalizing world and the mark of a profoundly parochial and backward-oriented mind frame. The pro-independence movement asserts that lived globality and the simultaneous celebration of local customs are very much possible in the contemporary world. Cosmopolitanism is perhaps also championed by Catalans because they feel that they have to distinguish themselves from other minority movements that have been successful such as the Ukraine, where ethno-nationalist policies have led to a crisis of
European dimensions. In stressing the peaceful and cosmopolitan character of their movement, they aim to appease the rest of Europe and to counter unfavorable comparisons with violent minority conflicts in Europe (Ukraine, Northern Ireland, etc.). In a stunning dialectic, the term cosmopolitanism has now changed to include a local component – something alien to its initial meaning but staunchly asserted by minorities such as the Catalans.

The Catalan case urges us to augment conventional understandings of minorities as parochial, backward, or inward-oriented, which still haunt many public discourses today. No matter how their present bid on independence will end, Catalans have shown how localized minorities can skillfully insert themselves within a cosmopolitan discourse without interposition of the nation state. But this also raises the question of how minorities need to be protected when they engage transnationally – especially minorities that are much smaller and far more vulnerable than the Catalans. The Catalan case shows that minority protection cannot limit itself to maintaining ancient, parochial traditions or languages; minority protection must, in the future, understand that members of localized minorities will want to productively live their minority culture by integrating it into local-cum-cosmopolitan ways of life. While modernity has frequently maintained the dichotomy between parochial minorities and cosmopolitan majorities, this dichotomy is no longer useful when minorities can easily go around the national level to directly access the global in the way they choose. Contemporary minorities can be both parochial and cosmopolitan, locally rooted and part of the global discourses.

Many commentators have pointed out that definitions of minorities are notoriously difficult to pin down and the Catalan case confirms this: de-contextualized, categorical definitions of minority are severely limited in their conceptual purchase power (Malloy, 2013; Jackson Preece, 1998). In addition, the same minority might change substantially over time, and thus require us to reevaluate its status. If Catalan independence seemed utopian in the 1970s, it has become a real possibility today and while circumstances might have played a role in this change, it has mostly been brought about by substantial changes in Catalonia itself. If we read it well, the Catalan case reminds us that our definitions of minorities need to be flexible and malleable – among other things because minorities change over time.

This last point is also of relevance if we now want to consider the relations between the Catalan national minority and the FCNM. Why did Catalans refuse to slip under its protection, when it was established in the late 1990s? By the time the Convention went into
effect, Catalonia had long established its relationship with the Spanish state, had found, in its linguistic policies, a venue for expressing Catalan identity, and was overall quickly proceeding to secure the ‘soft’ gains in areas such as linguistic policy into ‘hard’ ones of legislation as well as legal and administrative implementation. In her work on national minority rights, Malloy points out that the overwhelming majority of legal experts today considers minority rights as cultural and not political or legal in character (2005: 17). The Catalans of the late 1990s had, however, already established their own cultural forms of minority identification, mainly through the revitalization of their language. It appears that the Catalan leadership understood well that slipping under the FCNM umbrella would not have substantially helped them in taking the next step: the political implementation of the achieved cultural differentiation from Spain. In this sense, the relationship between the FCNM and the Catalans is indeed one of a missed encounter in history. In the late 1970s and certainly in the earlier times under Franco the Catalans would no doubt have been very happy to enjoy the protection of something like the FCNM. But twenty years later, nearing the end of millennium, Catalans felt well established in their minority status in Spain, even if there was no talk yet of independence.

This does not mean that the non-relation between Catalans and FCNM has to continue indefinitely. There might well be a future for a more substantial involvement of the FCNM in the Catalan case. The EU is not particularly well equipped to deal with cases of possible secession of a region from an EU member state. There are, for instance, no stipulations for such a case in any key European document. It might be beneficial in this case that the FCNM is itself situated beyond the EU context. Its impartial position as an instrument of the Council of Europe would make the FCNM quite suitable to mediate such conflicts. To this end, the FCNM would benefit substantially from including a mediation procedure, which would, to be sure, change its character from an instrument primarily designed to monitor rights to one of rights enforcement. Cases such as the Catalan one are likely to occur with higher frequency in the near future given widespread dissatisfaction with the EU and general retrenchment from global flows. For Catalonia, the definitions of national minorities and ethnic groups in the Spanish government’s response to the Advisory Committee’s criticism of the first country report might well form a basis for mediation. These definitions might provide a possible compromise to avoid independence, while at the same time affording the Catalan side with substantially more autonomy.
References


The background of the Soviet Union’s involvement in the establishment of the European minority rights regime in the late 1980s

Alexander Osipov*

European Centre for Minority Issues

Abstract

The USSR played a significant role in the adoption of the first CSCE instruments pertinent to minority protection, particularly the 1990 Copenhagen Document. The author argues why this East-West encounter was possible and why the two blocs were able to speak a common language on ‘nationalities’ issues. The author demonstrates that the communist party leaders managed to put forward a renewed doctrine of nationalities policy that included such elements as framing the country as a union of self-determining ‘peoples’; asymmetric federation; recognition of all ethnicities’ right to ‘develop’ their cultures and languages; protection of ‘non-titular’ ethnicities and people’s right to organize themselves for the maintenance of their cultures and languages. This approach appears to have much in common with the new European minority rights regime, particularly because the underlying principles were open to ad hoc interpretations and both systems provide the governments with broad margins of discretion. The similarity between the ‘Western’ and ‘Eastern’ approaches can be explained in a way that the both were operating in the framework of modernist social engineering. The combination of symbolic policy and weak institutionalization of instrumental measures allows explaining the viability of the established system in Eastern Europe and broader post-Soviet space.

Keywords: the CSCE; the Copenhagen Document; nationalities policy; minority regime; human rights; the 1980s; the Soviet policies of reconstruction
Introduction

Four significant turns are closely associated with ethnic politics in Europe in late 1980s. These are the start of ethnic conflicts in the European East and South-East; the departure of the socialist multi-ethnic federations in the direction of their dissolution that followed later; revision in the approaches practiced by communist or by that time already transitional governments in the East toward diversity management; and the emergence of the European minority regime, which manifested itself primarily in the activities of the Conference for Security and Cooperation in Europe (CSCE). These four areas of public politics are interrelated in a complex way; one may state that so far a simplistic analysis of this mosaic and causal links between its components still prevails in academic literature. The emerging international regimes are routinely explained as derivatives of security concerns of that time striking the leading players – governments and intergovernmental organizations (IGOs). In turn, the said concerns are deemed to be an obvious outcome of ethnic conflicts and the threats to the territorial integrity of individual states. The reaction to the latter was the elaboration of the liberal democratic approach to minority issues in order to tame both the destructive nationalist aspirations and minority concerns and the subsequent transfer of these innovative ideas eastwards. For example, Will Kymlicka attributes the emergence of the modern minority regime to the convergence of two factors, fear and hope: ‘fear of the spread of ethnic conflict after the collapse of Communism, and a hope for the possibility of a viable liberal-democratic form of multiculturalism’ (Kymlicka 2007: 48).

I am not going to say that these perceptions are totally wrong in themselves; my point is that they offer an inaccurate and incomplete picture. First, the suggested timeframe is questionable. The critical turn in international minority-related politics was the Copenhagen Document of the CSCE Summit (Document of the Copenhagen Meeting 1990), which in fact set up the guidelines for the subsequent minority framework in Europe currently employed by all major European organizations. The Copenhagen Summit took place in June 1990; the preparatory process started much earlier, and at that time it would be premature to talk about real threats of large scale ethnic conflicts in Europe or to predict flows of refugees from the Caucasus or other already violence-torn regions. It is likely that some experts anticipated such unfortunate developments, but they were hardly a central part of the international agenda. Second, knowledge transfer from the West to the East, or broader, ideological patronage of the developed democracies over the transit countries started later, in the early 1990s when the Soviet Union and Yugoslavia dissolved and full-fledged civil wars actually began. By the turn
of the 1980s, these two multinational countries, although both experienced turbulence in domestic politics and economics, demonstrated vitality, and the USSR still was one of the superpowers and major actors in Europe and the world.

On top of this is the fact that the Soviet Union as it was between 1988 and 1991 is by default regarded in the limbo of a failed state on a fast track to breakdown. The fact that the USSR could not cope with domestic disintegration and collapsed surprisingly quickly prevents most scholars from taking the changes in the Soviet nationalities policy seriously. The country’s rapid erosion and ultimate disappearance seem to justify by default the almost common negative judgements of Michael Gorbachov’s policies as slow in response, inadequate and erroneous (Beissinger 2002; Bilinsky 1991; Karklins 1994); this attitude causes people to overlook the transformations in the Soviet ethnic policies and their consequences, both in the international arena and in further evolutions of the post-Soviet states.

The fact is that in 1990 the Soviet Union and other socialist countries took active part in the CSCE activities and particularly in the drafting of the 1990 Copenhagen Document as well as in facilitating the subsequent initiatives (Inder Singh 2001: xiv-xv; Eide 2005; Coakley 2016: 15). The fact is that both opposing blocs were able to come to common grounds in framing diversity issues; however, there is no evidence that minority or broader ethnicity-related issues were a source of significant controversies among diplomats and experts. It is not my intention here to engage in diplomatic history and to address concrete motives behind the major actors’ behaviour. My task is to look at the ideological background of the negotiations and to analyse to what extent the official stances, concepts and vocabulary of the Soviet authorities were beneficial for the search for a common position with the West. I am seeking to answer why this East-West encounter was possible and why the two blocs were able to speak a similar or the same language on ‘nationalities’ issues. My hypothesis here is that the official approach to the ‘nationalities question’ of the Soviet Union did not contradict the other stakeholders’ position; this made the adoption of the basic international guidelines in minority protection possible.

I can only emphasise one motive that must have strongly affected the behaviour of the Soviet leaders in international arena. In light of the emerging conflict and rivalry between the Soviet central leadership and governments of the union republics as well as the need for foreign loans, Michael Gorbachov did his best to convince the Western counterparts that the
central government rather than republican authorities was a reliable and responsible partner. This interpretation does not contradict but rather develops the major hypothesis of this article.

1. The 1980s turn in the Soviet nationalities policies

The USSR’s rapid collapse in 1991 overshadows some drastic changes in the country’s domestic politics and the effects they had on international relations and the development of the successor states. Among the most noteworthy processes pertinent to nationalities issues are the relatively prompt reaction of the Soviet authorities to the new challenges posed by nationalism-driven claims of the constituent regions and ethnic movements; the following legislative and institutional reforms; and the transformation of the previously closed decision-making into public politics.

Before talking about the events of the second half of the 1980s and the official responses, it makes sense to touch upon the preceding models of diversity governance in the USSR. Throughout Soviet history, the Bolsheviks pursued specific policies for the management of ethnic diversity and regarded it as a key element of their system of rule. These policies were not something uniform, and they were changing over time (for an overview see Suny 1993; Martin 2001; Brubaker 1996). Until the early 1930s, the Soviet rulers incorporated ethnic elites into the system of governance by institutionalization of ethnicity through territorial organization and ascribed individual affiliation (Brubaker 1996). This policy entailed different investments and protective measures aimed at social development and promotion of non-Russian ethnicities (Cadiot 2007). From early 1930s, the official policies were gradually turning to further centralization and reduction of the cultural and institutional mosaic in favour of the Russian language and, to a lesser degree, languages of the first-tier union republics (Roeder 1998; Slezkine 1994). Repressive policies amounting to genocide against some ethnicities and the harsh centralizing policies of the late 1930s to early 1950s were replaced by some degree of decentralization and more opportunities for non-Russian languages in the late 1950s to early 1960s (Anderson and Silver 1990; Suny 1992). Finally, from the mid-1960s, the Soviet authorities elaborated a relatively stable modus vivendi, or some balance between the centre and the peripheries (Rigby 1990; Smith 1999). Social, economic and cultural homogenization and formal centralization went hand in hand with some informal power division between Moscow and the union republics and some silently acknowledged degree of republican elites’ freedom in the pursuit of their interests.
The official ideology of ‘internationalism’ was combined with the crypto-ideology of nationalism\(^1\) at the republican level; numerical prevalence of ethnic Russians in central party and governmental bodies was combined with dominance of ‘titular’ ethnicities at the regional level (Kolstoe 1995:102-103; Smith 2013: 238-251; White 1993: 143-185).

Despite significant shifts and transformations in nationalities policies over the entire Soviet history, there were some basic features that remained intact. The ‘nationalities question’ was not regarded as merely a branch of administration – it was a core element of the official ideology developed by the communist party. Explicit official approaches were termed in unclear and sometimes contradictory ways that left them open to interpretations, while making such interpretations was allowed only to authorized ideologists (Lapidus 2004: 125-126). The ruling apparatus and official spokespersons did not explicitly recognise any significant problems in the very fundamentals of the nationalities policies. Official comments and explanations concerning the ‘nationalities question’ conducted in public and particularly vis-à-vis the outside world prior to 1988 looked to be merely a set of ideological clichés (Banton 2002: 185-186). Academic expertise on ethnic issues was either marginalized or was developing as a part of the official propaganda machinery. The actual decision-making pertinent to ethnic relations was closed to the public. The institutional underpinnings of the Soviet nationalities policies over decades remained intact. The country was designed as a multi-level federation, where the constituent units and autonomies within were implicitly treated as ethnicity-based and where the actual governance was embedded in the party machinery and highly centralised. Strategically, the domestic policies aimed at the achievement of the whole country’s full governability and therefore at creating similar social and economic structures, and at the pursuit of homogenising linguistic, cultural and educational policies.

From early 1980s, the Soviet rulers started to acknowledge some problems in keeping nationalities issues under control. First, they admitted to demographic and economic disproportions in the development of different republics and a partial loss of control over republican bureaucracy because of corruption and ‘clanism’ (Smith 1990: 10-16; Lapidus 2004: 128-130). Later on, the authorities were confronted with multiplying conflicts and manifestations of unrest (for a detailed overview of conflicts and other ethnopolitical developments prior to 1990 see: Nahaylo and Swoboda 1990).

In December 1986, the Kazakh youth in Alma-Ata protested against the replacement of an ethnic Kazakh by an ethnic Russian as the first secretary of the republican branch of the
communist party; the protests escalated into riots and clashes with the police. In June 1987, the Crimean Tatars rallied at the Red Square in Moscow and other places, demanding their right to return to their homeland from which they had been deported in 1944. In February 1988, the Armenians of the Nagorno-Karabakh Autonomous Province of Azerbaijan started urging the transfer of this territory to Armenia; this motion triggered mass interethnic clashes and then a large-scale conflict between the two republics. In the second half of 1988, mass movements for sovereignty (at that time understood broadly and with a large degree of ambiguity) emerged in three Baltic republics; later on, they created alliances with the local communist elite, took over in the regional legislatures and in 1990 started a transition period to full independence. A similar evolution took place in Moldova; an attempt to quell nationalist movement in Georgia by armed forces in April 1989 failed and resulted in the loss of the centre’s control over the republic. Control of the communist authorities over Armenia and Azerbaijan also started to evaporate concurrently; the Ukrainian nationalist movement also widened and strongly affected the stances of the official communist leadership in Ukraine. From October 1988 to June 1991, all the union republics adopted their declarations of sovereignty aiming at either full independence or supremacy of the regional legislation over the all-union one. All the union republics but Russia started the processes of cultural and linguistic ‘nationalization’ in favour of their ‘titular’ ethnicities, and the ‘titular’ languages gained official status. Autonomous regions within union republics in turn claimed greater autonomy; Georgia, Moldova, and Azerbaijan engaged in conflicts with their autonomous units or compactly settled minorities. Formerly deported ethnicities urged return to their homelands and compensations for the past sufferings; smaller scale ethnic clashes were sparked across the country. The centre’s armed responses failed; the negotiations over a new Union Treaty resulted in nothing, and after the coup of August 1991 the Soviet Union fully collapsed in December of the same year.

Although the history of the country’s breakdown is impressive and cannot be judged in a way other than a full failure of the Soviet rulers, this shall not overshadow the fact that the country’s leaders responded to the new challenges in a way other than that we can observe earlier in Soviet history. The means used included not only suppressive measures, intimidation of the protestors and political manipulations. It is important to note that the Soviet central authorities, first, overtly recognised the problems; second, relocated ‘nationalities question’ to the domain of public politics and open discussions; and third,
started to elaborate and implement a comprehensive model of diversity management to a large extent departing from the old Soviet dogmas pertinent to nationalities issues.

In January 1987, the Plenum of the Central Committee of the Communist Party of the Soviet Union (CPSU) recognized the flaws in ethnic policies and the need to study the existing problems and improve the official approaches (Lapidus 2004: 131-132). Shortly afterwards, new analytical units on nationalities issues were established within the USSR Academy of Sciences and then in republican academies. The XIX CPSU Conference (amounted to a Congress) reserved time for a discussion on the future of the Soviet federation and in one of the adopted resolutions called for its deep reformation. In August 1988, a special unit on ‘nationalities policy’ was established within the CPSU Central Committee (see Kuleshov et al. 1997:346-351). In May–June 1989 there were wide debates on nationalities issues at the 1st Deputies Congress, a new supreme legislative organ of the USSR, and this resulted in the establishment of standing and ad hoc committees on ethnicity-related affairs. In September 1989, a special Plenum of the CPSU Central Committee adopted the Communist Party Platform on Nationalities Issues (for a compilation of the relevant documents see: K soyuüz 1991) – a detailed and comprehensive policy guideline drafted after a long lasting countrywide public discussion. In November 1989, the USSR Supreme Soviet – the permanent legislative body formed by the Deputies’ Congress – adopted the Declaration of rehabilitation of the ‘repressed peoples’; this act really launched a cascade of supportive actions targeting formerly deported ethnicities. In April 1990, the Supreme Soviet enacted five all-Union laws pertinent to federative and ethnic relations, namely on the persecutions of violent encroachments on the Soviet Union’s integrity and of fueling interethnic tensions; on the procedures of the union republics’ secession from the USSR; on languages; on the rights of persons residing outside of their national-territorial units or not having such in the USSR; and on the division of competences between the central government, union republics and autonomous units. Finally, from 1990 on, there were two major attempts and related negotiations that involved union and autonomous republics and aimed at the elaboration and adoption of a new Union Treaty for the re-establishment of the renovated Soviet Union.

The whole array of party and governmental conceptual documents, legislative acts, statements of high-ranked officials, and the entire course of action allows for deconstructing the conceptual underpinnings of the renewed policy. Here I address public narratives produced by people and institutions representing the central authorities of the USSR; for
practical reasons it makes little if any sense to make a distinction between the Communist Party and the governmental institutions in a strict sense.

In the first instance, the country was framed as a union of self-determining ‘peoples’ understood as ethnicities. The federation was viewed as an asymmetric setting comprising ethnicity-based territorial units, the statuses of which were in principle negotiable rather than imposed from above. In turn, federation units were supposed to be economically viable and to develop in accordance with their cultural traits. Along with this, all ethnicities were considered to enjoy the right to ‘develop’ their cultures and languages. Language policies were supposed to include such elements as the creation of conditions for the usage and development of all languages; official recognition of those belonging to ‘titular’ ethnicities of union republics, autonomous regions and ‘compactly settled’ groups; and individual freedom to choose the language of communication in private life as well as in education and communication with the authorities and in other spheres of public life. Equality of all citizens regardless of their ethnicity and language and their freedom from intimidation and hate speech were strongly emphasized on each possible occasion in almost every official text concerning the ‘nationalities question’. In this regard, ‘non-titular’ ethnicities (or, to be precise, according to the official formulation, “persons resident outside of their national-territorial units or not possessing such within the USSR”) were supposed to be protected and supported by the state in the pursuit of their cultural, linguistic and educational needs and interests. ‘Peoples’ friendship’ and ‘internationalism’ were regarded as tools for preventing ethnic conflicts. Last, but not least, people must have the right to organize themselves for the maintenance of their cultures and languages. Formerly deported peoples as collectivities were to get full ‘rehabilitation’ and an unspecified compensation for the past sufferings.

Were these basic principles something new as opposed to the normative and discursive guidelines of the earlier periods of the Soviet history? Definitely not. The communist party doctrines and the mainstream Soviet academic discourses recognised ethnic underpinning of the constituent units’ statehood albeit not always clearly and explicitly. The Soviet legislation after the 1920s was less straightforward and contained only ambiguous provisions on ethnic ‘belonging’ of the republics and autonomous regions. The idea of self-determination was embedded in the constitutional acts and widely acknowledged, although without any practical consequences. The notion of ethnic groups’ (nationalities) subjectivity (and nationalities’ rights and interests as its derivatives) as such was embedded in the legal doctrines of ‘national’ i.e. ethnic sovereignty elaborated within the Soviet academia from the 1940s on
(Korkmasova 1984; Sudnitsin 1958). Finally, the communist authorities to a varying degree always relied on ‘participatory totalitarianism’ (Gill 2011: 2; Fukuyama 1993: 12-13) and thus exploited bottom-up mobilization induced, guided and controlled from above.

From 1989, this renewed official conceptual framework was gradually translated into legislation and institutional settings. Two remarks are required here. First, the union republics and later on autonomous regions pursued their own nationalities policies, which terminologically and conceptually had much in common with the all-Union approach. Moreover, the centre and the periphery were developing their normative and institutional frameworks in parallel; sometimes the centre was outpacing the republics, and sometimes the republics went ahead. For example, the all-Union law on languages of April 1990 conceptually resembled the republican laws, most of which (11) were adopted earlier, from January 1989 to January 1990. The all-Union law on the rights of persons resident outside of their national-territorial units had much in common with the Estonian law on nationalities rights of 1989. Second, the issue at stake is the explicit framework driven by the central elites. I do not consider below, to what extent it was a common frame of reference for other domestic stakeholders, to what extent it was implemented at that period and, broader, what kinds of effects it generated on the ground (for more on legacies see Biaspamiatnykh et al 2014; Osipov 2015). The latter question is generally highly relevant for the understanding of post-Soviet evolutions, but it goes far beyond the topic of this article.

The course and tentative practical outcomes of norms- and institution-setting of that time can be briefly described in the following way. The explicit legislative provisions pertinent to ethnic relations were vague in scope and content; it was resting on nebulous formulations open to interpretations. Legislative following the conceptual documents of the Communist Party were also ambiguous since their contained different rhetoric strategies and included direct references to different values and ideological systems (Lenin’s legacies, social justice as an ideal of socialism; democracy and individual rights; nationalisms in terms of nationalities’ collective rights). The provisions enshrined in the all-Union legislation were mostly blanket norms; they did not neglect the issue of implementation, but rather pointed out the division of competences between different levels of government and assumed that the union republics and the lower level territorial units would specify and implement their assignments. No piece of legislation envisaged and included any explicit criteria of effectiveness and sufficiency.
It is worth noting the legislation on languages: the republican laws on languages, adopted mostly in 1989, prior to the all-Union law established the languages of their ‘titular’ ethnicities as state languages (instead of previously used and unspecified notion of ‘languages of the republics’) while Russian was defined as the ‘language of interethnic communication’ with multiple albeit unclear functions. Republican laws also declared the right to choose individual linguistic identification; reaffirmed a general principle of respect and protection to all languages; and implied the opportunity of an individual to live and communicate in public domain with one functional language of the person’s choice (in fact, either the state republican language or Russian). This conceptual triad (state languages - Russian as the language of interethnic communication – minority languages in places of the bearers’ compact settlement) was replicated in the all-Union law on language while Russian was also granted the status of the state language of the USSR, and therefore obligatory for federal institutions. Besides, the all-Union laws and programmic statements promised governmental support to public institutions (schools, theaters, media) serving “nationalities” (both ‘titular’ and ‘non-titular’). A novelty was also the promise to facilitate and support ethnicity-based non-governmental organizations and to cooperate with them. In practical terms, the central government established in 1990 an administrative body – the State Committee amounting to a ministry – on nationalities affairs (although it appeared non-functional) and really started interaction with a wide array of ethnicity-based organizations, particularly those that did not directly engage in politics.

2. International context and the Copenhagen Summit as the critical point

The turn towards minority protection within the Council of Europe took place after the USSR’s dissolution; in any case, the Soviet Union was not a Council of Europe (CoE) member and could not affect the Council’s internal evolutions. Perhaps Soviet diplomacy played a role in the elaboration and development of minority-related instruments in the UN and its agencies, but this issue is not sufficiently studied and there is no evidence that an involvement of the USSR and its allies in minority debates at the UN arena had any visible impact on the overall process. For that reason, one shall regard the Conference on Security and Cooperation in Europe as the major organizational framework where the European minority standards were incrementally set up.
The CSCE was not designed as a fully functional international organization and norm-setting institution, but rather the West and the communist East regarded it as a forum providing for additional communicational opportunities for both blocs in the broader framework of *detente*. In fact, the search for communicative grounds resulted in the identification of certain common values and guiding principles, then in the formulation of common commitments, which later on were reinterpreted as the blueprints for binding (at least politically) international norms. This process also concerned national minority issues.

The founding CSCE document – the Helsinki Final Act of 1 August 1975 - contained two general and vaguely formulated principles stipulating that the states secure equality and full enjoyment of fundamental rights of persons belonging to minorities and that they facilitate identities of national minorities through cooperation with them in cultural and educational spheres. These general commitments were reiterated and reaffirmed at the follow-up summits held in 1980-1983 in Madrid and in 1986-1989 in Vienna.

The turning point was the CSCE Copenhagen Summit held in June 1990; it was supposed to review the implementation of the member states’ commitments in the field of the human dimension. Among other issues, the discussion and the final document (Part IV) concerned minorities. As almost all observers admit, that was a breakthrough: the Summit formulated several innovative principles and approaches that later on became the fundamentals of the European minority regimes being embedded in further OSCE documents and in the CoE instruments including legally binding the Framework Convention on the Protection of National Minorities and the European Charter for Regional or Minority Languages (for more on the CSCE see Bloed 1995; Benoit-Rohmer 1996).

What were those principles? First of all, Part IV of the Document regarded minority protection as a part of the human rights agenda and refers to democratic framework as a necessary precondition for minority protection (items 30, 38). Second, the Document clearly reiterated and reaffirmed the already adopted principles such as equality and full enjoyment of rights by persons belonging to minorities (items 31, 40), the crucial role played by civil society organizations (item 30) and the need to protect and promote specific identities of minorities (item 32, 33, 34). Third, the Document introduced numerous innovative concepts – such as ‘full equality’, ‘effective participation’, ‘autonomy arrangements’, ‘proportionate measures’ (items 31, 35, 40.2); last but not least, it reaffirmed the general approach adopted by most international organization to defining the scope and content of ‘collective rights’ by
the formula of ‘individually as well as in community with other members of their group’ (item 32.6).

3. Differences and commonalities between the Soviet approach and the CSCE framework

Obviously, there is no reason even in a formal sense to treat the CSCE-induced principles as a purely ‘Western’ approach since they were elaborated and approved in cooperation and upon agreement of the delegations from both the West and the East. As Asbjørn Eide observed, ‘principally, support for minority rights came from Central and Eastern Europe, including the USSR’ (2005: 41). The other way around, it makes sense to look more closely at the ‘Western’ approaches vis-à-vis the ‘Soviet’ ones, because the final approval meant the acceptability of the Copenhagen framework for the Western stakeholders; besides, within just a couple of years after the summit, the CSCE principles were instrumentalized without any revision as benchmarks used by the West for ameliorating the minority situation in the former communist countries (Kelley 2006; Sasse 2008).

Conventional wisdom fails here. One may assume that the major difference was in the language of ‘rights’ abundant in the Copenhagen Document but absent in the Soviet conceptual approach. In fact, the difference was of a quantitative, but not qualitative character. To begin with, the Copenhagen Document and the later instruments of the CSCE/OSCE and other European organizations contain no such notion as ‘minority rights’ or entitlements of special collective entities. In both frameworks, the drafters extensively referred to “rights” in the meaning of individual rights and the equality of these rights; the rationale of minority protection or ‘nationalities policy’ was thus guarantees of general human and/or civil rights. The Copenhagen Document emphasized equality of individual rights and the prohibition of discrimination; moreover, the Document introduced a new notion of ‘full and effective equality’ also without a definition or any indications to procedural guarantees (Henrard 2007). The Soviet conceptual and normative documents of that time contained an abundance of references to equality of individual rights of citizens and the need to prevent their violations. The Soviet authorities did little to set up a respective procedural framework; the comprehensive law of 1990 reaffirmed criminal persecution of hate speech (by then already criminally liable) and pointed out the already established mechanisms enabling the authorities to suspend or disband organizations engaging in fuelling ethnic tensions or incitement to discrimination.¹⁰
The central concept of the Copenhagen Document, the Framework Convention for the Protection of National Minorities and other fundamental instruments pertinent to minority protection is rights of persons entitled to certain protective measures, i.e. rights of persons belonging to minorities. Since the said belonging is not a legal condition and is not determined somehow, the issue at stake is persons in a specific social context.

The Soviet conceptual evolutions of the same time demonstrated a similar, but not identical approach. Several conceptual documents of the Communist party and the 1990 law referred to the “rights of persons resident outside their respective national-territorial units”, or, in other words, not belonging to the ‘titular’ ethnicities that in fact amounted to a minority concept. Also the newly emerging legislation on languages stipulated the rights of persons to the usage and preservation of their languages. One should also add that the very term ‘national minorities’ was not alien to Soviet ideologies: it was repeatedly employed in official reports of the USSR before international treaty bodies even before the perestroika (policies of reconstruction), and it was used in the CPSU Platform on nationalities affairs of 1989 (Natsionalnaya politika 1989: 228). Along with this, the Soviet legislative text and party conceptual outlines contained numerous notions implying rights of collective entities such as ‘republics within the USSR’, ‘peoples’ right to self-determination’, ‘rights of groups resident outside their national-territorial units’ as well as ‘equality of peoples’.

Both the Soviet conceptual texts and the Copenhagen Document refrained from references to security and prevention of conflicts as a rational and desired outcome of minority and/or nationalities policies. The Soviet conceptual documents recurrently placed emphasis on the conditions for the ‘development’ of ethnicities and the need to satisfy the needs and interests of persons related to their ethnic affiliation. The language pertinent to the resolution of problems, development of groups and the need to meet human interests and demands prevailed in the Soviet official rhetoric over references to ‘rights’, but it was, first, combined with a rights-based approach and, second, it was not alien to the Copenhagen Document as well (see items 30, 32, 35). Finally yet importantly, both the CSCE approach and the Soviet official rhetoric of that time bound nationalities or minority politics with democratization and treated it as part and parcel of democracy.

If one looks at a wider context of ethnicity-related political and scholarly debates of the late 1980s inside and outside of the communist world, it would be easy to list a number of substantive thematic and conceptual parallels. In other words, both the East and the West demonstrated a similar outlook, set up the same agendas and offered similar solutions.
The first common feature is the silent recognition of ethnicity-based polity as a fundamental of statehood either fully independent or incorporated in a compound multinational country. Respectively, territorial autonomy was explicitly recognized as a promising tool of diversity management. The rhetoric of group agency (minority rights) evolving into ‘self-determination’ was present in numerous political statements and expert debates, albeit kept aside from international legal instruments in a strict sense until 2007. The notion of minorities being devoid of any clear definition is by default widely interpreted on both sides of the former Iron Curtain as ‘non-dominant’ or ‘non-titular’ groups (for more on the notion of minority see: Fottrell and Bowring 1999; Jackson-Preece 2005). The notion of equality on ethnic grounds is understood broadly; it is not confined to formal equality between individuals and includes group perspective and the cultural dimension (on synergies of different legal approaches to equality on ethnic grounds see: Henrard and Dunbar 2008; Weyss and Lubich 2004). Both the West and the East linked nationalities politics with democracy and placed emphasis on the self-organization of civil society and a positive role it could play in ethnic relations. Both sides recognized the need for protective governmental policies; both were ultimately concerned with territorial integrity, stability and prevention of conflicts; both acknowledged the need to preserve and promote cultures and languages, which were by default treated as attributes of particular ethnicities. Finally, there was to some degree a common interest toward restorative justice on ethnic grounds, although in the USSR it became an official policy targeting formerly deported ethnicities, while in Europe at that time it was confined to the domain of political philosophy rather than legal theory.

Several other features should be put on the top of the similarities list. First, both sides demonstrated an overarching nationalist worldview treating ethnicities as building blocks of society and perceiving cultures and languages as attributes of ethnic groups and concurrently as universal values. Second, both sides elaborated broad and loose normative frameworks where all formulae were open to interpretations and allowed for keeping a gulf between symbolic and instrumental policies (on the differences between symbolic and instrumental policies see Birkland 2005; Edelman 1971; Schneider and Ingram 1997). Third, both parties’ approaches can be referred to as social engineering; in other words society figured as an object of top-down state action mainly driven by developmentalist or security concerns. This list looks self-explanatory; if one assumes that both sides’ approach had the same origin in the 19th century nationalist worldview and embodied high modernity where individual liberties and democracy were optional elements, everything falls into place.
Conclusion

Despite the previous inertia and dogmatism of the ruling apparatus, the communist party leaders managed to respond relatively rapidly to the newly emerging challenges. They put forward a renewed doctrine of nationalities policy that included such elements as framing the country as a union of self-determining ‘peoples’; asymmetric federation; recognition of all ethnicities’ right to ‘develop’ their cultures and languages; measures and mechanisms for the protection of individual equality; protection of ‘non-titular’ ethnicities and people’s right to organize themselves for the maintenance of their cultures and languages. The emerging system of diversity management had several institutional features, namely vaguely formulated ethnicity-specific legislative provisions; executive bodies in charge of ethnic relations; legislative hierarchy of languages with unclear obligations of public authorities; support to and communication with ethnicity-based civil society organizations; and support to public minority institutions.

This approach appears to have much in common with the new European minority right regime, particularly because the underlying principles are open to ad hoc interpretations and both systems provide the governments with broad margins of discretion. Both systems recognize ethnicity-based statehood in principle; employ the rhetoric of human rights and ‘development’; refer to group agency evolving into ‘self-determination’; broadly understand ‘equality’ with group and cultural dimensions; place emphasis on civil society self-organization; and express concern about territorial integrity, stability and prevention of conflicts.

The similarity between the ‘Western’ and ‘Eastern’ approaches can be explained by the fact that both were operating in the framework of modernist social engineering. The combination of symbolic policy and weak institutionalization of instrumental measures allows for an explanation of the viability of the established system in Eastern Europe and broader post-Soviet space. The parallels between the ‘Eastern communist’ and ‘Western liberal-democratic’ approaches to diversity policies also prompt two other assumptions: first, nationalities or minorities policies are bound to human rights primarily rhetorically rather than substantively, and second, these policies in the first instance belong to the domain of symbolic rather than instrumental policies.
Notes

1 In this context, the term was coined by a Russian journalist and political analyst Eugene Ikhlov.
2 USSR Law No. 1403-I from 2 April 1990.
3 USSR Law No. 1409-I from 3 April 1990.
4 USSR Law No. 1451-I from 26 April 1990.
5 USSR Law No. 1452-I from 26 April 1990.
6 USSR Law No. 1457-I from 26 April 1990.
8 <…> The participating States on whose territory national minorities exist will respect the right of persons belonging to such minorities to equality before the law, will afford them the full opportunity for the actual enjoyment of human rights and fundamental freedoms and will, in this manner, protect their legitimate interests in this sphere.<…> The participating States, recognizing the contribution that national minorities or regional cultures can make to co-operation among them in various fields of culture, intend, when such minorities or cultures exist within their territory, to facilitate this contribution, taking into account the legitimate interests of their members. At: http://www.osce.org/mc/39501?download=true.
9 There were also follow-up where the Soviet Union managed to contribute to, first of all in the Paris Summit. Its final document – the Paris Charter for a New Europe of 21 November 1990 – reiterated inter alia the following comitments. ”<…> We reaffirm our deep conviction that friendly relations among our peoples, as well as peace, justice, stability and democracy, require that the ethnic, cultural, linguistic and religious identity of national minorities be protected and conditions for the promotion of that identity be created. We declare that questions related to national minorities can only be satisfactorily resolved in a democratic political framework. We further acknowledge that the rights of persons belonging to national minorities must be fully respected as part of universal human rights. <…>”, at: http://www.osce.org/mc/39516?download=true.
10 USSR Law No. 1403-I from 2 April 1990.
12 Specifically, the 2007 Declaration that included the notion of the ‘right to autonomy’ for the indigenous populations; see United Nations Declaration on the Rights of Indigenous Peoples. Adopted by General Assembly Resolution 61/295 on 13 September 2007.

References


The Continuing Relevance of the Copenhagen Document – Muslims in Western Europe and the Security Dimension

Stephanie E. Berry*

University of Sussex

Abstract

The Copenhagen Document was adopted in the wake of the Cold War, with the situation of ‘national minorities’ in Central and Eastern Europe and former Soviet States in mind. However, by recognising the potential for the violation of human rights to lead to conflict, the Copenhagen Document remains relevant to minority situations throughout the world.

This article explores the increasing relevance of these rights to Muslim minorities in Western Europe. It is argued that if Western European States wish to proactively prevent conflict with their Muslim populations, lessons can be learnt from the approach adopted in the Copenhagen Document. In particular, the emphasis on encouraging societal cohesion in order to reduce the potential for conflict, through effective participation in public affairs and intercultural dialogue and tolerance, is a message that must be heeded by Western European States.

Keywords: Copenhagen Document, Framework Convention for the Protection of National Minorities, Muslim minorities, Western Europe, Integration, Societal Cohesion, Conflict Prevention

* Dr Stephanie E. Berry is Lecturer in Public Law at the University of Sussex, UK. Email: S.E.Berry@sussex.ac.uk.

The author would like to thank the participants at the conference ‘The 1990 CSCE Copenhagen Document, East-West Encounters and Evolutions of the Minority Regime in Europe’ held at ECMI in June 2015 for their comments and questions on this paper. She would also like to thank Jo Bridgeman and the anonymous reviewer for their insightful comments. All errors and omissions remain the author’s own.
At the time of its adoption the Copenhagen Document was described as the ‘peak of “standard setting on national minority issues”’ (Wright, 1998: 4). Although it has subsequently been overtaken in academic discourse by legal minority rights instruments, the Copenhagen Document signalled a shift in the approach taken to minority issues in Europe. Whereas the question of minorities had primarily been approached as a human rights issue in the post-war period, the Copenhagen Document recognised the nexus between the protection of human rights and conflict prevention (1990: para 30) and, in so doing, contained a number of innovative provisions. Specifically, the Copenhagen Document recognised the need to adopt special measures (1990: para 31; Wright, 1996: 198), the right to self-identify (1990: para 32; Bloed, 1990: 40), the right to ‘express, preserve and development their ethnic cultural, linguistic or religious identity … free of any attempts at assimilation against their will’ (1990: para 32; Jackson-Preece, 1997: 90) and that the establishment of ‘local or autonomous administrations’ may be appropriate to ensure the effective participation of national minorities in public affairs (1990: para 35). Furthermore, this was the first instrument to add effective participation to the traditional ‘two pillars’ of minority protection: preservation of minority identity and non-discrimination and equality. While the Copenhagen Document was adopted with the situation in Central and Eastern European States and post-Soviet Union States in mind, its contents remain relevant to minority situations throughout the world.

This article focuses on Muslim minorities in Western Europe. Although it does not argue that these minorities constitute ‘national minorities’ for the purpose of the Copenhagen Document, it does argue that their situation is increasingly analogous to that of more traditional minorities. Muslim minorities now constitute citizens and permanent residents in Western European States, but with the rise of right-wing politics, Islamophobic discourse and restrictions on their rights justified by security concerns, these communities are increasingly marginalised. This, in turn, poses challenges in relation to integration, societal cohesion and conflict prevention. Whereas research into the rights of ‘new minorities’ has primarily focused on the challenges of integration and societal cohesion (Medda-Windischer, 2009; Berry, 2015), this article explores the rights of European Muslims from the perspective of the security dimension. It is submitted that if Western European States wish to proactively prevent conflict with their Muslim populations, lessons can be learnt from the approach adopted in the Copenhagen Document. In particular, there is a need to take proactive steps to facilitate societal cohesion through intercultural dialogue and tolerance, and the effective participation of these communities in public affairs.
Initially, a comparison is made between the situation of national minorities and Muslim minorities in Western Europe, in order to evaluate whether the aims of the Copenhagen Document are relevant to Muslim communities. Although there are some significant differences between national minorities and Muslim minorities, the permanence and marginalisation of Muslim communities in Western Europe alongside the prospect of conflict leads to the conclusion that lessons can be learnt from the Copenhagen Document. Secondly, the relevance of the standards established in the Copenhagen Document to the situation of Muslim minorities in Western Europe is drawn out, focusing on effective participation in public affairs (1990: para 35) and intercultural dialogue and tolerance (1990: para 36). It is argued that by focusing on the equal participation of these communities in society, these standards aim to increase societal cohesion and thereby reduce the potential for conflict. However, in practice, Western European States have not fully realised these rights in respect of their Muslim minorities.

1. Comparing National Minorities and Muslims in Western Europe

This article does not suggest that Muslims in Western Europe fall within the term ‘national minority’ employed in the Copenhagen Document. As previously noted, the Copenhagen Document was adopted with the situation of national minorities in Central and Eastern Europe and the former Soviet Union in mind. Furthermore, the suggestion that migrants, including ‘guest workers’ (or Gastarbeiter) in Western Europe, should be included in Chapter IV of the Copenhagen Document on ‘National Minorities’ was dismissed during the drafting of the instrument (Helgesen, 1994: 20-21). As a significant proportion of the ‘guest workers’ recruited in the post-war period in Western Europe were Muslim, this resulted in the exclusion of these communities from the scope of the Copenhagen Document. However, their situation has changed significantly since the 1990s and has begun to resemble that of national minorities more closely. Consequently, while the Copenhagen Document itself may not be applicable to Muslim minorities in Western Europe, it is argued that the rights contained therein are of increasing relevance to these communities. This section will explore how the situation of Muslim minorities originating from immigration to Western Europe has evolved, and the key ways in which it corresponds and diverges from the situation of national minorities. This facilitates the evaluation of the relevance of the Copenhagen Document to Muslim minorities in Western Europe.
The exclusion of ‘new minorities’ from the scope of application of minority rights standards has been justified on the grounds that immigrants were initially expected to assimilate into their receiving State\(^2\) or to return to their State of origin (Davy, 2005: 126). Citizenship (Capotorti, 1977: para 568) and an element of permanence or ‘longstanding, firm and lasting ties with’ the State (Capotorti, 1977: para 202) have consistently been cited as prerequisites of minority rights protection. While the majority of British Muslims would have satisfied the requirement of citizenship at the time of the adoption of the Copenhagen Document (Nielsen, 2004: 51-2), other Western European States, such as Germany, were still systematically denying their Muslim ‘guest workers’ citizenship. However, subsequent developments such as the Act of German Citizenship of 2000\(^3\) have meant that the majority of Muslims in Western Europe are now citizens of the State in which they reside (Nielsen, 2004: 51-2; Choudhury, 2010: 36). This development has thus reduced the legitimacy of arguments for the denial of minority rights to Muslim minorities based on their lack of citizenship or permanence. Furthermore, by continuing to practice their religion and maintain their culture, a significant proportion of the Muslim population in Western Europe have withstood the pressure to assimilate. Thus, the oft cited requirement of the ‘will to maintain their distinct identity’ appears to have been satisfied by European Muslims, implicitly. As noted by Alfredsson ‘[a]t some point ... the newcomers become minorities’ (2005: 167). Consequently, since the turn of the Century, Muslim communities have increasingly been recognised as constituting minorities under article 27 of the International Covenant on Civil and Political Rights\(^4\) (ICCPR)\(^5\) and the Framework Convention for the Protection of National Minorities (FCNM)\(^6\) (Thornberry and Martin Estébanez, 2004: 95).\(^7\) Nonetheless, opposition from some Western European States to the inclusion of Muslim minorities within the scope of application of the FCNM remains.\(^8\)

Muslims in Western Europe are not national minorities, in the sense intended by the drafters of the Copenhagen Document. Historically the term ‘national minority’ implied a connection to a kin-State, ‘a larger nation already constituted in a state or in a federated entity within a federal state’ (Benoît-Rohmer, 1996: 15). Although a common understanding of the term has not evolved (Benoît-Rohmer, 1996: 15; Malloy, 2005: 21) as indicated by the liberal approach adopted by the Advisory Committee to the FCNM (AC-FCNM) (Hofmann, 2005: 16),\(^9\) the context of the adoption of the Copenhagen Document indicates which minorities were the intended beneficiaries of Chapter IV. National minorities in Central and Eastern Europe and the former Soviet Union had an ethnicity connected to a corresponding kin-State,
as required by the historical definition. Thus, in the aftermath of the Cold War ‘minority demands which remained unanswered were identified as potential threats to the post-Cold War international order’ (Jackson-Preece, 1997: 88). This perceived threat to security provided the incentive for the adoption of the Copenhagen Document. Notably, minorities such as the Roma that do not pose a threat to security were originally marginalised within the CSCE/OSCE system (Wright, 1998: 6).

The national minorities understood to be the focus of the Copenhagen Document primarily identify on the basis of ethnicity, with a common language or religion and connection to territory as a corollary of this. In contrast, Muslim minorities in Western European States, originating primarily from immigration, are ethnically heterogeneous. Nonetheless, particular ethnic identities are associated with Islam in Western Europe, such as Pakistani or Bangladeshi origin in the UK, Turkish origin in Germany and Denmark, North African origin in France and Somali origin throughout Western Europe. This impacts the form of Islam that is practiced and the language spoken. Religion is often intertwined with the cultural identity of Muslim communities in Western Europe (Berry, 2011, 439-47). Claims made by European Muslims to the accommodation of identity, in particular specific forms of religious clothing or access to linguistic education, may be rooted in both religion and culture (Berry, 2011, 440-41). Rather than forming one religious minority in Western Europe, the complexity of European Muslim identity means that they form plural ethnic, linguistic and religious minorities. Consequently, they are not directly comparable to the intended beneficiaries of the Copenhagen Document. Moreover, although Muslims in Western Europe have in many instances settled in similar regions for several decades, influenced by ethnic origin as well as religion (Yilmaz, 2005: 56), their minority identity is not connected to territory in the same way as national minority identity. Therefore, the extension of rights on the basis of a historical connection to territory is not appropriate.

Muslims in Western Europe have not suffered from historical oppression to the same degree as the national minorities addressed by the Copenhagen Document. For national minorities ‘[i]n many postcommunist countries, there is a strong sense that historical wrongs have not yet been acknowledged or remedied’ (Kymlicka, 2008: 28). This, Kymlicka suggests, justifies an accommodationist, rather than integrationist, approach to the question of national minorities (2008). In contrast, ‘[i]n deciding to uproot themselves, immigrants voluntarily relinquish some of the rights that go along with their original national membership’ (Kymlicka, 1995: 96). Consequently, it is reasonable for States to expect such
‘new minorities’ to integrate. While an accommodative approach to national minorities is preferable, in practice, the majority of the Copenhagen Document’s innovative provisions adopt an integrationist approach (1990: para 35, 36), with the exception of the second subparagraph of paragraph 35 of the Copenhagen Document, which mandates ‘appropriate local or autonomous administrations corresponding to the specific historical and territorial circumstances’. Similar integrationist clauses are found in the FCNM, an instrument which has been criticised, alongside the OSCE HCNM’s recommendations for adopting an integrationist approach to the question of national minorities (Kymlicka, 2008: 30). While a distinction between the rights of national minorities and ‘new minorities’, including Muslims in Western Europe, is justifiable, there is less reason to restrict the application of the integrationist provisions found in the Copenhagen Document, with the exception of the rights pertaining to territory or autonomy.

Although it can be argued that ‘new minorities’ do not satisfy the elements of the definition of national minority, if the approach of the OSCE to conflict prevention is to remain proactive rather than reactive, as intended (Wright, 1996: 192), the similarity between the situations of new and old minorities should be recognised. Reserving the rights found in the Copenhagen Document exclusively for national minorities does not recognise the potential for the oppression of ‘newcomers’ to cause similar problems over time. In noting the ‘security-rights nexus’, Sasse, suggests:

… the focus on security also creates a link between groups recognized as ‘national minorities’ and recent immigrants. The lack of integration of minorities, however defined, undermines societal cohesion and can give rise to political mobilization against the host polity, for example in the form of separatism or fundamentalism. (2005: 679)

The recognition of the connection between security and human rights lies at the heart of the OSCE. Notably, paragraph 30 of the Copenhagen Document ‘reaffirm[s] that respect for the rights of persons belonging to national minorities as part of universally recognized human rights is an essential factor for peace, justice, stability and democracy in participating States’ (1990: para 30). Thus, to the extent that the provisions of the Copenhagen Document aim to integrate diverse societies and improve societal cohesion, lessons can be learnt from their content. Despite being designed to combat a specific situation at a specific time, the Copenhagen Document has continuing relevance to new and emerging minority situations.

Developments since the 1980s indicate the potential for dissatisfaction amongst some Muslim communities in Western Europe to lead to conflict. Conflict has a wide meaning and
does not inevitably lead to violence. Simply defined, ‘conflict denotes the incompatibility of subject positions’ (Pia and Diez, 2007: 2). If the causes of conflict are not adequately addressed then there is potential for the resulting dissatisfaction to lead to physical violence (Pia and Diez, 2007: 2). Prominent examples of conflict with groups within European Muslim communities include the Rushdie Affair in the UK in 1988, the Danish Cartoon Affair in 2005, peaceful protests in opposition to the Iraq war in 2003, and riots in the North of England in 2001 and the banlieue of Paris in 2005 and 2007. Furthermore, a rise in anti-Immigration and Islamophobic political agendas, Islamophobic hate speech, and discriminatory media reporting in Western Europe has been noted by the AC-FCNM. As a result of this ‘climate of intolerance’, restrictions have increasingly been placed on the manifestation of Islam in public spaces, including bans on the hijab, burqa and minarets, leading to increased alienation amongst European Muslim minorities (Hammaberg: 2010).

As noted by Gilbert, ‘a state that persistently fails to recognize the rights of its minorities will sow the seeds of disloyalty’ (1996: 167).

Additionally, the fear that Muslims in Western Europe threaten national security also resembles the perception that national minorities are disloyal and irredentist (Kymlicka, 2007: 24). The growth of Islamic fundamentalist terrorism, including attacks in Madrid 2004, London 2005, Copenhagen 2015 and Paris 2015, and the rise of Daesh in the Middle East, have also led to suggestions that Muslims in Western Europe are disloyal and sympathise with extremists (Newton Dunn, 2015). Thus, the need to adopt measures to integrate Muslim minorities in Western Europe has been recognised by the former OSCE High Commissioner on National Minorities (HCNM), Knut Vollebæk:

In the light of what we have already seen in many places in Europe and after discussions with many Western European governments, in my opinion we will face a serious social threat if we do not quickly implement measures in order to integrate all groups in our society, not least the new. (2008: 5)

Similarly, Kymlicka has noted that the security dimension of minority rights ‘is a non-issue throughout the established western democracies with respect to historic national minorities and indigenous peoples, although it remains an issue with respect to certain immigrant groups, particularly Arab and Muslim groups after 9/11’ (2010: 106).

Consequently, while the situation of Muslim minorities in Western Europe is not directly comparable to that of national minorities in Central and Eastern Europe and post-Soviet Union States, there are sufficient similarities to suggest that the application of the
integationist provisions of the Copenhagen Document may be beneficial. As Wolff has stressed ‘[a]t the heart of all of these – past, current, latent, potential – conflicts is a fundamental lack of social cohesion’ (2013: 70).

2. Integrating Diverse Societies with a view to Conflict Prevention: Participation and Dialogue

Despite the presence of many national minorities in Western Europe, the specific focus of the Copenhagen Document has meant that these States have historically been excluded from the oversight of the OSCE mechanisms. This has been attributed to the fact that these States were ‘generally less willing, and less susceptible to pressure, to allow HCNM engagement in conflicts in their jurisdictions’ (Wolff, 2013: 63). Moreover, the mandate of the HCNM has been restricted to prevent oversight of pre-existing conflicts and any situation involving terrorism, at the request of the United Kingdom and Turkey (Alexanderson, 1997: 52; Heintze, 2000: 386-7). However, as ‘[m]inority conflicts in Western Europe are doubtless subject to the same rules as those in Eastern Europe’ (Heintze, 2000: 390), Western European States would benefit from engaging with the specialised instruments and bodies of the OSCE.

Western European States have recognised the need to improve societal cohesion on the basis of unrest amongst their Muslim communities (Council of Europe, 2008: 9) and have linked this to security concerns (Cameron, 2011). However, the approach adopted by many of these States runs counter to the message of Chapter IV of the Copenhagen Document, which recognises the nexus between the protection of human rights and conflict prevention (1990: para 30). Levey submits that ‘in the wake of militant Islam and the moral panic over Muslim immigration’ there has been a shift towards integration and ‘interculturalism’ in Western Europe (2012: 218). While the Copenhagen Document recognises that the preservation of minority identity alongside measures of integration are central to cohesive societies, States have increasingly conflated integration with assimilation (Xanthaki, 2016: 821-22). This phenomenon has been recognised, in the context of Western Europe, by the AC-FCNM, which has expressed particular concern about Dutch authorities ‘addressing integration issues mainly through the objective of protecting Dutch national identity’. Forced or unwanted assimilation violates the rights of persons belonging to minorities (UN Commission on Human Rights, 2005: para 22; Council of Europe, 1995: para 45). Furthermore, such measures are recognised as decreasing societal cohesion, as noted by Bengoa, ‘[t]he causes of
fundamentalism are generally to be found in the implementation of such assimilationist
policies, whereby the State refuses to recognize the existence of minority groups within itself
or simply prevents the build-up of a multicultural society’ (2000: para 36). By adopting
assimilationist policies, Western European States are likely to increase the alienation of
Muslim minorities, contrary to the message of the Copenhagen Document.

The Copenhagen Document encourages the adoption of integrationist measures that
allow the participation of persons belonging to minorities as equal members of society, in
conjunction with measures to facilitate the preservation of minority identity. The link
between societal cohesion and conflict prevention has been emphasised by the former HCNM,
Vollebaek: ‘Developing and implementing integration policies should be among the priorities
of all States seeking to accommodate diversity and avoid the risk of conflict developing out of
increased separation and tension between groups in society’ (Ljubljana Guidelines, 2012: 6).
Two provisions that originated in the Copenhagen Document stand out as both innovative and
important in this respect: the right to participate in public affairs (para 35) and what is now
known as the right to intercultural dialogue and tolerance (para 36). Notably, the addition of
these rights extended the scope of minority protection past the two traditional pillars of
minority protection: non-discrimination and equality and the preservation of minority identity
(Henrard, 2000: 8-11). They have subsequently been given legal effect through their
formulation as rights in the FCNM. This, Ringelheim suggests, ‘bring[s] the FCNM beyond
a mere ideal of peaceful coexistence of majorities and minorities. It is also geared towards
ensuring their inclusion and participation on an equal footing in the society at large’ (2010:
118). While the AC-FCNM has focused on ‘justice’ ahead of ‘security’ (Craig, 2012: 64), the
connection between the achievement of these rights in practice and the security dimension
remains:

Effective integration and conflict prevention are also linked in that they require a
comprehensive approach in terms of the policy areas and people or groups they
involve. Integration and conflict prevention policies, thus, have both horizontal and
vertical dimensions: they need to engage elites and the masses within and across
different population segments and they need to address the specific concerns that
they have (Wolff, 2013: 72).

Whereas the right to effective participation allows minorities ‘to engage elites’, the right to
intercultural dialogue and tolerance encourages engagement ‘within and across different
population segments’. However, not all Western European States have been willing to
recognise that the FCNM extends to Muslim minorities. Notably, if Muslims are not
recognised as falling within the scope of minority rights instruments, equivalent protection is not available in generally applicable human rights treaties. As the achievement of these standards has the potential to improve societal cohesion and, in turn, prevent conflict, it is argued that Western European States would benefit from adopting a similar approach with respect to their Muslim minorities to that advocated in the Copenhagen Document.

This section evaluates whether the lessons of the Copenhagen Document have been heeded by Western European States in relation to the integration of their diverse societies. The content of effective participation and intercultural dialogue and tolerance, as elaborated by the AC-FCNM, will be considered alongside the extent to which Western European States have realised these rights in relation to their Muslim minorities. This approach, however, does not allow for a full elaboration of the implications and potential difficulties faced by States when striving to implement these standards.

2.1. Effective participation

As citizens and permanent residents of the States in which they live, the majority of European Muslims are able to vote and participate in democratic processes. However, procedural inclusion alone is unlikely to enable persons belonging to minorities to influence decisions, as ‘[i]n a democracy, the majority/dominant ethno-cultural group will dictate the relevant convention’ (Wheatley, 2005: 160). The right to effective participation has been interpreted as serving the dual purpose of providing the necessary conditions for persons belonging to minorities to overcome structural inequalities in the political process (Council of Europe, 1995: para 80), and enabling persons belonging to minorities to participate in decisions that have the potential to impact their culture (Hofmann, 2006: 22; Verstichel, 2009: 253). The AC-FCNM has therefore stressed that effective participation should allow minorities to engage in decision-making processes that ‘encompass a wide range of areas, including those not exclusively dealing with minority issues’.24 If a minority is able to participate on equal terms with the majority in public life and, in particular, voice the specific concerns of the community, then it is less likely to resort to non-democratic means (Palermo and Woelk, 2004: 240-41; Verstichel, 2009: 72) and will have increased ownership in and loyalty to the State (Palermo and Woelk, 2004: 240-41; Hofmann, 2006-07: 6). Thus, effective participation has the potential to reduce the likelihood of conflict, by providing appropriate fora for persons belonging to minorities to air grievances.
Rather than the ‘local or autonomous administrations’ suggested by the Copenhagen Document, which are more appropriate for national minorities, Hofmann has suggested that consultative mechanisms are the most appropriate method of enabling the effective participation of ‘new minorities’ (Hofmann, 2006-07: 16). As a result of their flexibility, ‘consultative mechanisms often prove more effective in transmitting the interests of minority constituencies into the chain of legislative or political decision-making’ (Weller, 2010: 478-79). Minority rights monitoring bodies have recognised that there cannot be a one-size-fits-all approach to minority consultative mechanisms and, consequently, have not been overly prescriptive in respect of the requirements of such mechanisms (UN Commission on Human Rights, 2005: para 43; Lund Recommendations, 1999: 25-6 paras 12-13; AC, 2008: paras 113-15). However, the difficulties faced in establishing effective and representative bodies are particularly apparent in relation to attempts to consult Muslim minorities in Western Europe.

The nature and mandate of consultative mechanisms and the legitimacy of the representatives consulted have the potential to impact their success. Thus, the AC has established that ‘[i]t is important to ensure that consultative bodies have a clear legal status, that the obligation to consult them is entrenched in law and that their involvement in decision-making processes is of a regular and permanent nature’ (AC, 2008: para 107). Belgium, France and Germany have established permanent consultative fora specifically for their Muslim communities, whereas the Netherlands and the UK have established consultative mechanisms with broader mandates, based on ethnic origin or religion. However, these attempts to consult Muslim minorities in Western Europe have frequently fallen below the standard advocated by the AC-FCNM.

The broader platforms established by the Netherlands and UK have been discontinued in favour of ad hoc consultation mechanisms, which, as noted by the AC-FCNM in the context of the discontinuation of the Dutch National Consultation Platform on Minorities, do not satisfy the requirements that ‘participatory structures need to be of a long term and institutionalised character in order to ensure continuity and to allow for the broader discussion of minority issues among all concerned’. Rather than enabling effective participation, ad hoc mechanisms have the potential to further disenfranchise and alienate persons belonging to minorities. This is apparent in the UK, where the AC-FCNM has noted:

[T]he complaints it has received from representatives of minority ethnic communities of Muslim faith regarding the difficulties they encounter in establishing a dialogue with the Government. This sense of alienation is reported to be widespread among representatives of most sections of the Muslim population in
Consequently, if consultation mechanism are to be effective, States must make greater efforts to ensure that they are permanent, accessible to Muslim minority representatives and have a broad mandate. While ad hoc mechanisms are problematic, operational concerns have also been raised in relation to permanent consultation mechanisms. The UN Committee on the Elimination of Racial Discrimination welcomed ‘the establishment of the Islam Conference, as a forum … with the aim of establishing continuous dialogue to address Islamophobic tendencies and discuss relevant policy responses’. However, in reality, it has been suggested that Muslim representatives in the German Islam Conference are unable to raise issues of concern to their communities and influence the outcome of consultation (Amir-Moazami, 2011: 8). The French Council for the Muslim Faith, despite being an elected and permanent body, has no legal standing. This, in turn, has the potential to lead to inconsistency in consultation and hinder the effectiveness of the body. If minority consultative mechanisms are unable to influence the decision-making process, they will be perceived by persons belonging to minorities to constitute a token gesture and lack legitimacy (AC, 2008: para 9; Human Rights Council, 2009: para 27). Inadequate or insufficient consultation has the potential to undermine societal cohesion by marginalising minority voices and increasing the alienation of communities.

The Lund Recommendations and the AC-FCNM have also recognised that the internal diversity of minorities must be represented, if consultative procedures are to be effective (Lund Recommendations, 1999: para 12; AC, 2008: paras 110-111). In this respect, the adoption of democratic methods to appoint minority representatives are preferred, but not required. The AC-FCNM has emphasised that States should consult a variety of minority associations. ‘The “representativeness” of organizations that allegedly represent ethnic groups or the degree to which organizations can claim to represent the will, interest and support of its constituents is often variable’ (Malloy, 2007-8: 218). Consequently, States should avoid privileging one minority representative association to the disadvantage of others as ‘such differential treatment between organisations of minorities is not conducive to pluralism and internal democracy within minorities’. European Muslims are heterogeneous in nature and, thus, if consultation is to be effective it is important that the variety of opinions, practices and perspectives within Muslim communities are represented. The failure to consult
legitimate representatives, who represent the internal diversity of these communities, has the potential to undermine the purpose of consultation.

In direct contrast to the AC-FCNM’s recommendations, members of formal consultative mechanisms in the United Kingdom have been unelected, and ‘appointed because of their personal experience and expertise not as representatives of any community or organisation’. The legitimacy and representativeness of Muslim representatives at a national (Hellyer, 2007: 236; McLoughlin, 2005: 60) and local level (Vertovec, 2002: 28-9; McLoughlin, 2005: 58-9) have been called into question. Notably, the 2001 riots in Bradford, Burnley and Oldham in Northern England were attributed to the disenfranchisement of Muslim communities (Bagguley and Hussain, 2008: 193). Thus, the potential for inadequate consultation to lead to conflict has already materialised in the United Kingdom. Accordingly, in relation to the United Kingdom, the AC-FCNM has stressed that ‘[t]here is a clear need to step up communication and meaningful consultations with a full spectrum of representatives of Muslim communities, in order to ensure their inclusion in decision-making’. Similarly in relation to the Netherlands, the AC-FCNM has expressed concern that the National Consultation Platform on Minorities consulted only one representative organisation for each ethnic minority.

Even when democratic processes have been adopted, State interference has the potential to undermine the legitimacy of representatives. The requirement that the Ministry of Justice approve the democratically elected members of the Muslim Executive of Belgium led ‘almost half of all the members of the Assembly’ to be vetoed ‘due to their “fundamentalist” leanings’ (Cesari, 2004: 66-7). This is problematic as minority representatives should be appointed in an open and transparent manner (AC, Commentary 2008: 8; Lund Recommendations, 1999: 26 para 13) and consultative mechanisms should reflect the internal diversity of the minority (AC, 2008: paras 110-111). Although it is not suggested that States engage with terrorist organisations, they must engage with a wide spectrum of Muslim representatives, including those who are perceived to be illiberal, if consultations are to be effective. The vetoing of elected members of a minority organisation has the potential to leave sections of Muslim communities unrepresented and removes the opportunity to air grievances. This, again, has the potential to increase alienation and lead to conflict.

Attempts have been made to consult Muslim minorities in Western European States, including Belgium, France, Germany, the Netherlands and the United Kingdom. However, these mechanisms have consistently been criticised for failing to allow meaningful
consultation and for not fully reflecting the spectrum of views within the communities they are supposed to represent. This has the potential to increase alienation, undermine attempts at societal cohesion and, in turn, increase the prospect of conflict. If the message of the Copenhagen Document is to be heeded, a more concerted effort to engage Muslim minorities in Western Europe, through truly representative bodies, is required.

2.2. Intercultural dialogue and tolerance

Even if the requirements of effective participation are satisfied, it is unlikely that the cause of conflict can be transformed if the majority is not receptive to the perspective of the minority. Stavenhagen has noted that:

… a dominant ethnie (whether majority or minority) may attempt to impose its own norms and standards, or its own model of society, on a weaker, underprivileged minorities (or majority) and encounter resistance when it does so. Or the dominant majority may feel that the minority has ‘been granted’ or is demanding ‘too much’ and must be kept in its place. No matter what the apparent expressions of ethnic conflict may be, and the underlying causes are usually much more complex, the issues of group interests and groups rights are always at the center of the debate. (1987: 510)

In order to transform conflict, intercultural dialogue and tolerance play an important role, as ‘the proposition for conflict resolution relies on the transformation of conflictive discourse through self-reflection and a broadening of dialogue between conflict parties’ (Pia and Diez, 2007: 7). Thus, paragraph 36 of the Copenhagen Document establishes that ‘[e]very participating State will promote a climate of mutual respect, understanding, co-operation and solidarity among all persons living on its territory’. Integration policies are key in this respect, and ‘should promote contact and exchange between communities and individuals through incentives and by raising awareness of the mutual advantages of interaction, dialogue and participation’ (Ljubljana Guidelines, 2012: 21). Thus, intercultural dialogue is central to integration and has the potential to transform relationships between different groups within Western European societies.

However, the AC-FCNM has expressed concern that the conditions in Western Europe are not conducive to intercultural dialogue and tolerance. In relation to the Netherlands, for example, it has expressed concern that the move away from multiculturalism ‘has led to an increased polarisation of the society whereby minority communities, and in particular persons belonging to the Muslim population of the Dutch society, tend to be stigmatised’. It has also expressed concern at the rise of right-wing political movements and Islamophobic political
The AC-FCNM has linked intolerance and a lack of intercultural dialogue to interference with the rights of Muslims, in the form of opposition to and the rejection of planning permission for mosques, the ban on minarets in Switzerland and restrictions on the hijab, burqa and niqab. The FCNM, HCNM’s Ljubljana Guidelines and the UN Declaration on Minorities have recognised that intercultural dialogue and tolerance can be improved through educational measures and the approach adopted by the media (Council of Europe, 1995: paras 48-9, 71; UN Commission on Human Rights, 2005: paras 65-9; Ljubljana Guidelines, 2012: 21-23, 54-55, 60-61). Furthermore, the AC-FCNM has increasingly stressed that politicians have a responsibility to create conditions of intercultural dialogue.

The Ljubljana Guidelines establish that education serves the dual purpose of the preservation of minority identity and is ‘one of the most effective ways to promote intercultural contact and understanding and a shared sense of civic identity’ (2012: 54). Education within article 4(4) of the UN Declaration on Minorities and article 12(1) of the FCNM is not limited to the majority being educated about the minority, as integration is a ‘two-way process’. By reducing ignorance of other cultures, languages and religions, intercultural dialogue has the potential to prevent stereotyping and intolerance against minorities. However, by requiring that the minority learn about the majority, such education may also prevent myths and prejudices about the majority from developing within the minority (Eide, 1998: 13) and, thus, ‘counteract tendencies towards fundamentalist or closed religious or ethnic groups’ (UN Commission on Human Rights, 2005: paras 65-8).

The AC-FCNM has stressed the importance of interaction between the majority and minority in the school environment, the role of bilingual education and the adoption of measures to reduce hostility and bullying in order to ensure such interaction. It has praised programmes which seek to increase knowledge of minorities of immigrant origin and the benefits of diversity. For example, the AC-FCNM welcomed ‘the implementation of innovative experiences to counteract these negative trends, such as the creation by the City of Barcelona of a “network of anti-rumours agents”, trained to challenge stereotypes that are spread about immigrants’. Nonetheless, it has also recognised that often these measures are inadequate and that a lack of understanding can lead to restrictions on the rights of European Muslims. Thus, in the context of the Swiss minaret ban, the AC-FCNM noted that ‘during public debates following the vote on the popular initiative, many people voiced a need for a better understanding of Islam’. Consequently, while steps have been taken to improve mutual understanding and interaction between Muslim communities and the majority in
Western Europe, these measures have not gone far enough. As the restriction of the rights of Muslim minorities has been attributed to a lack of understanding, States must increase their efforts in the field of education.

The media serves the dual purpose of educating the majority about the minority whilst creating space for intercultural dialogue to take place (Council of Europe, 1995: 29-34). Media hostility towards minority concerns has the potential to lead to distrust of both the majority and the media (Verstichel, 2009: 61), and inhibit minority political participation (Human Rights Council, 2009: para 30). Consequently, the media has the potential to present minority claims as a threat to societal security but can also help to desecuritize the minority-majority relationship. In accordance with the Ljubljana Guidelines, States are required to encourage the media to promote tolerance and intercultural dialogue and ‘challenge negative stereotypes and intolerance’ (2012: 60). Moreover, the AC-FCNM has emphasised the importance of minority representation to ensure that ‘the public is adequately informed … about political issues relevant to persons belonging to national minorities’ (AC, 2008: 8). This may require funding for minority media, intercultural initiatives and programmes dealing with minority issues or as well as minority representation in the mainstream media (Council of Europe, 1995: para 62). The AC-FCNM has welcomed media initiatives with respect to multicultural education and combatting xenophobia and the reporting of minority issues in an impartial and unbiased manner.

In contrast, the AC-FCNM has been particularly critical of reporting in the media that is xenophobic and has the potential to incite hostility and hate crime. Notably, the AC-FCNM has expressed concern at the increasing Islamophobic discourse present in Western European media. In its Opinion on the Fourth Danish State Report, the AC-FCNM emphasised that in the context of media reporting on Muslims,

…the media analysis indicated that most news stories were restricted to topics such as extremism, terror, sharia, freedom of speech, democracy versus Islam, and women’s rights, which contribute to negative stereotyping of Muslims. More positive topics such as the general contribution of Muslims to Danish society, the everyday life of the vast majority of Muslims, the value of ethnic, religious and cultural diversity, and discrimination against Muslims appeared in newspapers less frequently.

Similarly, in relation to the Third United Kingdom State Report, the AC-FCNM expressed concern ‘that a steady rise in hate crimes against Muslims in the United Kingdom, most notably in London, is being fuelled by a negative discourse being held in the media’. Thus,
further measures are needed to ensure that the media does not promote intolerance and lead to the marginalisation of Muslim minorities.

The manner in which the media reports right-wing political movements and Islamophobic discourse also has the potential to be divisive. Thus, ‘[t]he media need to be mindful of the potential consequences when they report statements made by politicians or other public figures that contribute to negative stereotyping and other divisive activities’ (Ljubljana Guidelines, 2012: 61). As negative reporting and political speech have the potential to undermine intercultural dialogue and tolerance, the AC-FCNM has encouraged States to take proactive steps to combat manifestations of intolerance in the public sphere. Such measures include ‘legislative measures and policies’ and ‘initiatives to encourage both national and regional media outlets to promote more balanced and objective reporting on issues related to diversity within German society and to strengthen the training of journalists and other media professionals’. Divisive and Islamophobic political discourse and reporting has the potential to marginalise and alienate Muslim communities. Nonetheless, the AC-FCNM has also recognised that measures must be balanced with freedom of expression. Therefore, it is preferable that the media self-regulate and any measures adopted should ensure freedom of expression and the editorial independence of the media.

While measures have been adopted to increase societal cohesion in Western European States, the AC-FCNM has expressed concern that racist and Islamophobic manifestations in the media and by politicians have increased. Such intolerance directly undermines attempts to establish dialogue between minorities and the majority and has the potential to lead to the restriction of the rights of minorities. If the lessons of the Copenhagen Document are to be learnt and the potential for conflict reduced, Western European States must make concerted efforts through education and the media to reduce intolerance and the resulting alienation of their Muslim minorities.

Conclusion

The Copenhagen Document was adopted at a specific time with specific minorities in mind. However, many of its provisions have subsequently been reiterated in generic minority rights instruments. The innovations of the Copenhagen Document are relevant not only to ‘national minorities’ in Central and Eastern Europe and former Soviet States, but also to new and emerging minority situations.
The situation of Muslims in Western Europe highlights that it is not only ‘national minorities’ that have the potential to be a security concern. Consequently, this article has argued that the innovative elements of the Copenhagen Document, to the extent that they encourage integration and societal cohesion, are relevant to these Muslim minorities. Paragraph 35 of the Copenhagen Document, the right to effective participation in public affairs, and paragraph 36, the right to intercultural dialogue and tolerance, are both central to the integration of these communities and the prevention of future conflict. However, not all Western European States have recognised that these rights apply to their Muslim minorities and, where they have, insufficient efforts have been made to give effect to these standards. Contrary to the message of the Copenhagen Document, Western European States are increasingly pursuing assimilation rather than integration. Attempts to engage European Muslims in public affairs have been selective, unrepresentative and tokenistic. Furthermore, an increase in Islamophobic discourse in the media and political discourse has been reported alongside inadequate educational measures to facilitate mutual understanding. These issues alone have the potential to increase the exclusion and alienation of persons belonging to Muslim minorities. As acknowledged by the Copenhagen Document, if minorities are able to fully participate as equal members of society, the potential for conflict is reduced. Rather than adopting assimilationist measures, Western European States should heed the message of the Copenhagen Document and make a more concerted effort to facilitate the inclusion of Muslim minorities in their societies.

Notes

1 The 'guest workers' recruited in the post-war period were not exclusively Muslim, with France and UK recruiting 'guest workers' from their former colonies and Germany recruiting from Southern and South-Eastern Europe (Fassmann, 2009, 27-28). Although many Western European States also had small Muslim populations prior to this, the post-war period saw the settlement of significant Muslim populations (Nielsen, 2004: 1-7).


First Opinion on Denmark, above n 11, para 61-64; Fourth Opinion on Germany, above n 11, para 63; Third Opinion on the United Kingdom, above n 12, para 109.

Fourth Opinion on Spain, above n 12, para 42.

Lori no 2004–228 du 15 mars 2004 encadrant, en application du principe de laïcité, le port de signes ou de tenues manifestant une appartenance religieuse dans les écoles, collèges et lycées publics; Aktas v France App no 43563/08 (ECtHR 30 June 2009); Bayrak v France App no 14308/08 (ECtHR 30 June 2009); Gamaleddyn v France App no 18527/08 (ECtHR 30 June 2009); Ghazal v France App no 29134/08 (ECtHR 30 June 2009)

Loi no 2010–1192 interdisant la dissimulation du visage dans l’espace public of 11 October 2010; Loi visant à interdire le port de tout vêtement cachant totalmente ou de manière principale le visage of 1 June 2011, JO Le Moniteur 13 July 2011. SAS v France App no 43835/11 (ECtHR 1 July 2014); Fourth Opinion on Spain, above n 12, para 42.

Ouardiri and Ligue des Musulmans de Suisse and Others v Switzerland App nos 65840/09 and 66274/09 (ECtHR 8 July 2011); Third Opinion on Switzerland, above n 12, para 63.

SAS v France App no 43835/11 (ECtHR 1 July 2014) para 150.


Article 6(1) and 15 FCNM. The UN Declaration on Minorities contains a right to effective participation (article 2(3)) but does not contain a general right to intercultural dialogue and tolerance.

Above n 8.


Report Submitted by the United Kingdom, above n 7, paras 71-72.

Ibid.

Second Opinion on the Netherlands, above n 11, para 56. See also, Second Opinion on the United Kingdom, above n 19, para 252; Third Opinion on the United Kingdom, above n 12, para 192; HC Deb 23 June 2011, vol 530, cols 440W-441W.

Second Opinion on the United Kingdom, above n 19, para 253. See also, Third Opinion on the United Kingdom, above n 12, para 192.


Ibid.

Second Opinion on the United Kingdom, above n 19, para 257. [Emphasis added].

Opinion on the Netherlands, above n 20, paras 38, 41.

Ibid., para 37.

Fourth Opinion on Germany, above n 11, para 56

Second Opinion on the Netherlands, above n 11, para 57; See also, Third Opinion on Sweden, above n 11, para 63.


AC, 'Second Opinion on Switzerland' adopted on 29 February 2008 ACFC/OP/II(2008)002, para 89; Third Opinion on Switzerland, above n 12, para 63.

Third Opinion on Spain, above n 43, para 75, Fourth Opinion on Spain, above n 12, para 42.

Articles 6(1), 12 FCNM; article 4(4) UN Declaration on Minorities.

Fourth Opinion on Denmark, above n 11, paras 62, 64; Fourth Opinion on Germany, above n 11, para 56; Second Opinion on the Netherlands, above n 11, paras 57, 133; Third Opinion on Sweden, above n 11, para 63.

Opinion on the Netherlands, above n 20, para 56.


Third Opinion on the United Kingdom, above n 12, para 106.

Second Opinion on Switzerland, above n 44, para 85; Second Opinion on Spain, above n 34, para 83; Third Opinion on Germany, above n 3, para 88; AC, 'Third Opinion on Norway' adopted on 30 June 2011 ACFC/OP/III(2011)007 para 67.

Third Opinion on Spain, above n 43, para 73.

Second Opinion on Spain, above n 34, para 91; AC, 'Fourth Opinion on Lichtenstein' adopted on 21 May 2014 ACFC/OP/IV(2014)002 para 6; Third Opinion on Germany, above n 3, para 88.

Fourth Opinion on Switzerland, above n 12, para 64.

Second Opinion on the United Kingdom, above n 19, para 113; AC, 'Third Opinion on Denmark' adopted on 31 March 2011 ACFC/OP/III(2011)002, para 64.


Fourth Opinion on Denmark, above n 11, para 64

Third Opinion on the United Kingdom, above n 12, para 117.
Fourth Opinion on Denmark, above n 11, para 66.

Fourth Opinion on Germany, above n 11, para 65.


Second Opinion on Austria, above n 49, para 92; Third Opinion on Denmark, above n 55, para 63; Opinion on Finland, above n 9 para 24; Fourth Opinion on Germany, above n 11, para 65; Third Opinion on the United Kingdom, above n 12, para 112

References


Eide, A. 'Minorities in a Decentralized Environment' Background paper (All Human Rights for All International Conference on Human Rights, Yalta, Ukraine, 2-4 September 1998).


HCNM, 'The Lund Recommendations on the Effective Participation of National Minorities in Public Life and Explanatory Note' (September 1999).


HCNM, 'The Ljubljana Guidelines on Integration of Diverse Societies' (November 2012).


The EU’s Lack of Commitment to Minority Protection

Ulrike Barten*

University of Southern Denmark

Abstract

The European Union and national minorities have an uneasy relationship. The EU claims to make life better for all of us in all sorts of ways. It does not, however, want to engage very much with national minorities. This is puzzling, as the respect of minority rights has found its way into article 2 of the Treaty on European Union, which lists the common values upon which the Union is founded. It is furthermore puzzling, as the EU member states in other fora have recognized the vulnerability of minorities and the necessity of their special protection. On the other hand, the EU might be the wrong one to blame. EU institutions are limited in their competences to act when it comes to areas of importance to minorities. In addition, minorities are protected through other organizations. It is argued that it is unlikely that the EU will become a serious minority actor playing out its strength as a supranational actor, and therewith create a truly coherent minority rights regime with the OSCE and the Council of Europe.

Keywords: European Union, minority rights, Lisbon treaty, competences, European minority regime

‘The EU tries to make life better for all of us in all sorts of ways.’ This is the opening sentence in the EU’s Kids’ corner – the EU website for children (‘EU’s Kids Corner’, 2016). It is certainly true that the EU involves itself in almost all aspects of everyday life of its 500 million citizens. It may also be true that the EU aspires to improve the life of all of us living in the European Union. However, is it prepared to work in all sorts of ways? And is it prepared to address specific issues of vulnerable groups such as minorities? The answers to
those two questions can at best be a hesitant yes, as the EU certainly has not proven to be a friend of minorities. Of course, generalizations are dangerous.

The EU is one of three international organizations in Europe that work with and on human rights: the OSCE, the Council of Europe and the European Union. The EU no doubt has the weakest link with minorities. It is not surprising that minorities crave the attention of the last missing big player in Europe. It even makes sense. The European Union is far more involved in all aspects of every-day life than the Council of Europe and the OSCE. If the EU were to take minorities seriously, what might be possible?

On the other hand, it is too easy to blame the EU for everything. The two EU treaties set the limits for the EU’s competences. The flaw in the European minority regime, at least from a minority viewpoint perceived, is largely legally determined. Transforming the EU into a serious minority actor is a huge challenge where battles will have to be fought in many different places. At the same time, the OSCE and the Council of Europe already provide protection. The EU certainly can do more for minorities than it does at the moment – it does not work ‘in all sorts of ways’ for improving the everyday life of members of minorities. However, high expectations are met by legal limits.

The first chapter of the contribution opens with an overview of the status quo. Chapter two presents reasons in favour of increasing the EU’s commitment to minority issues and reasons against such increased commitment. On the basis of these reasons, the third chapter discusses the possibilities and challenges of an increased commitment. Finally, the EU and its non-commitment are set in the larger European context. It is argued that it is unlikely that the EU will become a serious minority actor, and therewith create a coherent minority rights regime with the OSCE and the Council of Europe. This, however, is not necessarily a flaw of the European system for the protection of minorities.

1. Status quo of the EU as a minority actor

The Lisbon Treaty was a step forward for minorities; or so it seemed. Minorities are now mentioned in the new article 2 of the Treaty on European Union (TEU). The Charter of Fundamental Rights (CFR) includes minorities in art. 21 on non-discrimination. Art. 6 (1) TEU now confers on the Charter ‘the same legal value as the Treaties.’ In other words, the Charter is now legally binding on the member states and even more importantly on the EU institutions. Furthermore, new art. 6 (2) TEU paves the way for the EU to accede to the
European Convention on Human Rights (Defeis, 2010; McDermott, 2009-2010; Douglas-Scott, 2011). The accession is still in progress. On paper, these changes wield a number of opportunities and seem to indicate that minorities have finally been accepted within the EU regime. So far, these changes have been hardly felt at all (Barten, 2015).

In order to understand and evaluate the EU as a minority actor (Hummer, 2011), it is important to be aware of the legal limits. Granted, the legal limits are set by political actors and can thus be changed. However, conventional wisdom tells us that the EU itself is unwilling to engage. This is, of course, a blatant generalization. The EU is made up of many institutions and the Commission, Parliament and Council should not be confused. They have distinct approaches and most importantly different possibilities and competences.

If the legal boundaries prohibit the EU from entering more substantially into minority issues, one needs to call on the state actors to change the treaties. It will not change anything to blame, for example, the Commission if it only follows the rules. If, however, the rules allow for further engagement than is shown, then the EU actually is the right addressee of minority frustration.

1.1 Institutions

The European Commission is at the heart of the European Union. It is staffed by persons working for the EU and art. 17 TEU makes it abundantly clear that Commissioners are independent and work in the interest of the European Union. The Commission is the institution concerned with citizens’ initiatives and therefore of special relevance. Art. 17 TEU specifies that the Commission promotes the general interests of the Union and takes appropriate initiatives to this end: ‘It ensures the application of the Treaties, and of measures adopted by the institutions pursuant to them.’ The Commission is thus a key actor when it comes to whether minorities could or should play a more prominent role in the European Union.

The European Parliament’s powers have been massively expanded over the years; however, the parliament is still the smallest sibling of the three institutions. The parliament has not been an enemy of minorities; however, it is telling that the current parliament was on the verge of not establishing the Intergroup for Traditional Minorities, National Communities and Languages (Diedrichsen, 2014). According to art. 14 TEU, the parliament exercises legislative and budgetary power jointly with the Council.
The Council of the European Union is the institution that represents state interests. The Council is also involved in the legislative process. Art. 16 TEU regarding the competences of the Council mirrors art. 14 TEU on the European Parliament.

The Council and the Parliament have a key role in the legislative process while the Commission is the heart of the Union. Thus, all three actors are of prime importance for minorities. An institution such as the Court of Justice of the European Union, of course, is also relevant as it increasingly deals with human rights issues. However, as it is mainly involved in a post-potential breach situation and does not create law or take institutional initiatives, the Court is not central to the discussion of this contribution. Similarly, the Agency for Fundamental Rights is not a main actor, even though it has the potential to become a main actor.

1.2 Competences: minority issues and regional issues, culture, education and language

While the three main institutions have different competences regarding the legislative process, they are all bound by the principle of conferral as laid down in art. 5 TEU. Competences are conferred to the EU on the basis of the principles of subsidiarity and proportionality. As art. 4 TEU states, competences that are not conferred upon the Union in the treaties remain with the member states. It is thus important to establish which competences the EU actually has with regards to minority issues and the related issues of culture, language, education and regional issues.

Regarding the first area, the answer is short and simple. The EU has no express competences regarding minority issues. Even though the Union may be founded on the respect of rights of persons belonging to minorities, this is no legal basis for legislative action. Minorities are not mentioned in any other place in the TEU and TFEU. Art. 21 of the Charter of Fundamental Rights mentions members of national minorities in connection with non-discrimination.

This is a first sign of possible schizophrenia. The EU claims to be based on the respect of minority rights; however, it has no competences to protect or further the respect of minority rights. As is shown below, this is not surprising; and yet, it leaves a sour taste with members of minorities when the EU in art. 2 TEU speaks of EU values that are common to the member states but is not given the competences to secure respect for and promote the fulfilment of minority rights. Is this the EU’s fault? Hardly; or at least not fully. The treaty of Lisbon, which introduced the respect for minority rights into the TEU, was negotiated by the
EU member states. Similarly, the conferral of competences was agreed upon by the member states that had to sign and ratify the Lisbon treaty. In this particular context, the EU is no more than the sum of its members. It would thus not do justice to accuse the EU as such of empty promises. If promises were indeed made, they were made by the member states.

If minorities want the European Union, or more precisely its institutions, to become active in minority protection, they need to take detours over the areas that are of importance to minorities. Traditionally, these are culture, language and education. Participation in political affairs is in EU terms covered by economic, social and territorial cohesion.

There are different categories of competences in the TFEU. According to art. 2 (1) TFEU, in areas where the Union has exclusive competence, only the EU may legislate and adopt legally binding acts. Art. 3 TFEU lists the areas where the EU has exclusive competence. Neither culture, language, education nor regional issues are among them. The most common category of competences is the one of shared competences. According to art. 2 (2) TFEU, both the EU and the member states may adopt legislation and legally binding acts. Primacy is given to the Union, stating that ‘member states shall exercise their competence to the extent that the Union has not exercised its competence’ and that member states ‘shall again exercise their competence to the extent that the Union has decided to cease exercising its competence.’ According to art 4 (2), the areas covered by shared competences include the area of economic, social and territorial cohesion.

Articles 174-178 TFEU address this area. They address issues of economic development in ‘least favoured regions’ (Art. 174 (2) TEU). Development is supported through five structural funds (for an overview, see Structural and Investment Funds, 2016). While minorities can benefit from these initiatives if they live in poorer or underdeveloped regions, they are by no means the target groups. The rationale behind cohesion policy is economic development and not a humanistic approach to improve the lives of people.

A better chance of improving participation of minorities might be through membership in the Committee of the Regions. The committee is composed of 350 elected representatives in regional or local authorities from all EU member states. The aim is to ‘give regions and cities a formal say in EU law-making ensuring that the position and needs of regional and local authorities are respected’ (Committee of the Regions, 2016). The first obvious weakness of the Committee is, of course, its lack of competence when it comes to binding decisions. The competences of the Committee are laid down in art. 307 TFEU and are namely
restricted to consultation and submission of opinions. None of the main institutions are bound by these opinions. The second weakness for minorities is that in order for a member of a minority to be eligible for membership in the Committee of the Regions, the particular member has to have been elected into an office at the regional or local level. In areas where the minority is a numerical majority, this might not pose a problem; however, where the minority is not politically represented (which can happen for a variety of reasons) at the regional or local level, members of a minority are precluded from becoming members of the Committee of the Regions.

In areas where no competence is conferred to the EU, the member states retain exclusive competence and the EU’s competence to adopt legislation or other legally binding acts is very limited. Art. 6 TFEU lists areas where the Union is allowed to ‘carry out actions to support, coordinate or supplement actions of the member states.’ Among these areas are education and culture.

Art. 165 (4) TFEU lays down the competences of the EU in the area of education. The EU actually may adopt binding law; however, only ‘incentive measures, excluding any harmonization of the laws and regulations of member states.’ The Council may adopt recommendations. Art. 165 (1) explicitly states that the EU in all its actions ‘fully respect[s] the responsibility of the member states for the content of teaching and the organization of educations systems and their cultural and linguistic diversity.’ The EU may encourage, promote and develop – however, only as supplements to member state activities.

Art. 167 (1) TFEU on culture shows a similar approach. The EU ‘shall contribute to the flowering of cultures of the member states.’ The Union shall encourage cooperation. Specific actions can be taken in the form of ‘incentive measures, excluding any harmonization of laws and regulations of the member states.’ In addition, the Council may adopt recommendations. This is a mirror of the competences in the area of culture.

Language does not appear as a separate policy area within the treaties. Art. 3 TEU speaks of cultural and linguistic diversity; however, art. 3 is not a legal basis for the EU institutions. Art. 165 TFEU also refers to linguistic diversity; however in the larger context of education. Furthermore, it is by no means clear that articles 3 and 165 refer to the linguistic within member states. It rather seems they refer to the linguistic diversity between the member states (for a more general discussion, see Toggenburg, 2003). They would thus refer to the official languages in the European Union.
In conclusion, the member states have not provided the EU with strong competences in the areas of special relevance for minorities. The institutions are legally limited in their activities. This, however, does not mean they cannot do anything.

2. An overview of reasons in favour and against more EU commitment

Legal limits need to be taken seriously. However, limits can be moved. As the current limits are laid down in the EU treaties, any movement of limits would have to be done in the treaties. Are there good reasons for going down that road? Arguably yes. Are there just as good reasons for not going down that road? Arguably yes, as well. Below, an overview of reasons is given before the next chapter looks at the possibilities and challenges if one were to go down the road of increasing the EU’s commitment with minority issues.

2.1 Reasons in favour of increasing EU commitment to minority issues

Several reasons come to mind that favour a stronger commitment of the EU to minority issues. Firstly, it seems obvious that the EU should take special care of the 50-75 million people belonging to minorities within the EU. That is the equivalent of the entire populations of Denmark, Sweden, Portugal, the Czech Republic, Austria and Slovakia taken together – add the entire populations of the Netherlands, Finland and Lithuania to reach the upper estimate of 75 million people.

Most of the EU member states have ratified the Framework Convention for the Protection of National Minorities (Council of Europe, 2016) and thereby confirmed that they recognize minorities as groups in need of special protection. The UN Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities (UN General Assembly, 1992) was not opposed by any (EU member) state. All EU member states are also members of the Organization for Security and Cooperation in Europe and agreed to the Copenhagen Document in 1990 which includes a long section on minority rights (Copenhagen Document, 1990). It only seems to be the next logical step to let the EU become a serious actor regarding minority issues.

Another argument could be the extent to which the EU involves itself with the everyday life of its citizens. Due to its supranational character, it has a further reach than any of the other organizations. If there is a group with special needs, the EU should surely not only be
aware of these special needs but also be able to become active in that regard? The EU could make a difference in the everyday life of members of minorities that face special challenges because of their membership. If minority protection is a common value for the European Union, it would only be consistent that the EU was also able to effectively protect minorities in everyday life.

A third argument takes the larger framework into account. Human rights, and thereby minority rights, are protected by the Council of Europe, the OSCE and to some degree the European Union. The EU, however, has only limited competences as shown above. This leaves a caveat. Providing the EU with competences on minority issues would simply be filling in the missing piece in a coherent minority protection regime in Europe.

Fourthly and lastly, after having elevated the respect for minority rights to a common value and after making the Charter of Fundamental Rights with its prohibition of discrimination on the basis of membership in a national minority, the follow-up is to provide the EU with competences to act on these expectations, which were raised with the Lisbon Treaty. A Danish member of the European Parliament, Christel Schaldemose, expressed this view after the Commission rejected the Minority Safepack (Nygaard, 2013). She went further and asked the Commission for ‘the real reason’ for rejection, and whether it would reconsider its refusal and if not, ‘re-evaluate the citizens’ initiative so that in future it can actually be used for those matters that concern citizens’ (Schaldemose, 2013). The Commission answered the first question by referring to its letter of refusal (Letter from the Commission, 2013) and did not answer her other questions (European Commission, 2013).

2.2 Reasons against increasing EU commitment to minority issues

While there may be good reasons in favour of providing the EU with special minority competences, there are also some good reasons against this. For one, the mere fact that there is a group of 10-15% of the EU population that somehow stands out from the crowd is a superficial argument. This argument implies that any group that can be singled out among the five hundred and ten million inhabitants of the European Union and that numbers about 10-15% of the population is worthy of extra EU protection. This is clearly not the case. The size of the group is not decisive for protection. 10.2% of all people living in the EU were born outside the EU (‘People in the EU’, 2015), yet there is no special protection mechanism in place for them.
Furthermore, there is a risk of spill-over effect; or rather, spill-over demands. If minorities can be singled out as a group worthy of extra attention or protection, then other groups might claim the same attention or protection. Whereas this reason is understandable from the EU’s point of view, it potentially lacks in substance. Spill-over effects to groups in need of special protection can hardly be considered a drawback. At the same time, demands from all sorts of groups, simply because they make up 10-15% of the population, will in most cases not be constructive. Special measures have to depend on the need for protection, not on the size of the group.

The second in-favour argument is based on the EU’s involvement in everyday life. True, EU citizens meet some sort of EU law every single day; mostly without being aware of it. However, the treaties are very clear that for example culture and education are two areas where the EU does not play a main role. EU competences are simply limited in these areas. If the EU’s commitment to minority issues should cover culture and education it would not be enough to simply establish some sort of minority competence, but the competences in the areas of culture and education would have to be broadened as well. Minority education or minority culture cannot be treated separately from majority education and culture.

The last in-favour argument claims that the EU is the missing piece in a coherent minority protection regime in Europe. It is odd that both the OSCE and the Council of Europe have identified minorities as needing special protection or playing a crucial role in security issues and the European Union, which has the furthest outreach of the three organizations, remains a background player at best. However, to a large degree, this is explained by the limited competences of the EU. In addition, the fact that the EU will (probably) accede to the European Convention on Human Rights, and the Charter of Fundamental Rights is legally binding on EU institutions, moves the EU to the front stage of human rights. In the wake of this development, members of minorities will have opportunities to claim respect for and protection of their rights.

After the Court of Justice of the European Union delivered its opinion on EU accession to the ECHR (CJEU: Opinion 2/13), it is unclear if and when the EU will accede to the Convention. This is a decisive step for a coherent human rights regime that also strengthens the rights of persons belonging to minorities. At the moment, the EU is a missing piece; however, the CFR’s binding nature already changes this to a certain degree. While this means that the EU becomes a more serious human rights actor, it does not change the fact that the minority protection regime in Europe is incomplete without the European Union.
The main argument against providing the EU with far-reaching competences on minority issues seems to be state sovereignty. States have simply not been willing to let the EU enter the minority arena. National governments exhibit very different approaches towards their minorities ranging from non-recognition to fruitful integration. Minority issues can be sensitive issues. There is a reason why the OSCE High Commissioner on National Minorities is a security mechanism. It is not surprising that the handling of such sensitive issues is not left to a supranational organization; let alone conferring competences to the EU that provide for legally binding decisions on the basis of majority voting.

Of course, equating increased EU commitment with exclusive EU legislative competence is a serious exaggeration. Increasing the EU’s commitment can take many shapes as is shown below. It does not necessarily lead to legislative competences and legally binding decisions. It does not necessarily mean that a new policy area on minority issues is introduced into the TFEU. This is all up to the member states.

Which reasons – those in favour or those against increased commitment – weigh heavier is a matter of personal conviction. For the purpose of this contribution, it is now necessary to look at the possibilities and challenges of increased commitment.

3. Possibilities and challenges of increasing the EU’s commitment

Increasing the EU’s commitment to minority issues can take many forms and faces many challenges. Whereas the possibilities will first be discussed, the challenges make up the second part of this chapter.

3.1 Possibilities

The possibilities suggested here by no means make up an exhaustive list of possibilities. The suggestions fall mainly into two categories: institutions and material competences. Any new institution must, of course, also be endowed with a mandate; however, the material competences referred to here mean the competences in certain policy areas as laid down in the treaties and independent of specific institutions.

In the context of institutions, minority rights could be addressed in various ways. One possibility could be the establishment of a Commissioner for Minority Rights or a Commissioner on Human Rights including minority rights. Human rights are spread out in the portfolios of several commissioners. There is no word on minorities. Bundling at least
the broader area of human rights issues with one commissioner would lead to putting focus on human rights and minority rights. The mandate of the commissioner could include mainstreaming minority protection.

A second possibility is the establishment of a Committee of Minorities which is modelled on the Committee of the Regions. The Committee would be involved in areas of minority concern. Regarding its competences, it would submit opinions and be consulted by the main institutions. Of course, a larger role would be desirable from a minority point of view; however, the question is – which is also addressed in more detail below – what is feasible considering a general member state reluctance to let the EU deal with minority issues at all.

An idea taken from the UN human rights regime is the establishment of a Special Rapporteur. The mandate of special rapporteurs typically includes country visits and the possibility to interact with civil society; in this case obviously with minorities. Special rapporteurs are no ombudsmen and they do not make legally binding decisions. They raise awareness, shed light on situations and challenges and make recommendations (de Schutter, 2014: 973-980). A special rapporteur is an intergovernmental institution. The special rapporteur could, like a Committee of Minorities, be involved in the work of the main institutions on a consultative basis.

The Fundamental Rights Agency could be made a more substantial player in the minority arena. This would mean setting new priorities for the Agency. The Agency could serve as a sort of watch dog on EU legislation with a special focus on effects for minorities. The Commission, of course, is already obliged to ensure that all EU legislation is in conformity with the Charter of Fundamental Rights, and thus does not discriminate against members of national minorities. The mandate of the Agency could be slightly different in the sense, that the Charter would only form part of the work. By watching over EU legislation, a mainstreaming of minority protection would ideally be achieved.

In regards to material competences, there is always a possibility to broaden competences during treaty revisions. Either a new policy area could be introduced or the competences in those areas of special minority concern could be broadened. Apart from the fact, though, that no general treaty revision is in sight at the moment, general state reluctance and sovereignty issues makes this a less than likely possibility.
A third category of possibilities is that of the proposals in the minority citizens’ initiative Minority Safepack (FUEN, 2016). The initiative includes eleven specific initiatives that strengthen minority protection in various ways. The problem with these eleven initiatives is that some or all have been deemed by the Commission to fall outside its scope of competences (Letter from the Commission, 2013). Unfortunately, the Commission failed to clarify which initiatives might fall within the scope of its competences. The decision by the Commission has been challenged before the Court of Justice of the European Union (case T-646/13); however, no decision has been made yet by the court. Thus, it is as of today unclear which initiatives, if any, fall within the competences of the Commission. If the Commission indeed has competences that it does not make use of, then the Minority Safepack Initiative offers new possibilities that may require new institutions, but no broadening of material competences.

It goes beyond the scope of this contribution to assess each of the eleven initiatives in terms of the scope of competence of the Commission. Therefore, only a few are mentioned here. The first initiative aims at a council recommendation as referred to in articles 165 and 167 TFEU – also referred to above in the context of education and culture. The recommendation is meant to aim at the protection and promotion of cultural and linguistic diversity in the Union (initiative 2.1). An institutional initiative, also on the basis of articles 165 and 167 TFEU, concerns the setting up of language diversity centres (initiative 2.3). Adjusting regional funds to promote pluralism in regions with minorities (initiative 3.2) is based on articles 173 (3) and 182 (1) TFEU and addresses the issue of minority participation. Similarly, initiative 2.2, based on articles 165 and 167 TFEU, aims at adjusting funding programmes to make them accessible for smaller language communities. All of these initiatives have in common that they seem – pending a thorough analysis – to fall within the scope of competence of the Commission. None of them aims at harmonization of national laws, and they are supportive and supplementary to existing instruments. They could be implemented without treaty revision.

3.2 Challenges

Possibilities are usually countered by challenges. It was already stated above, that the main challenge for increasing the EU’s commitment to minority issues is a general member state reluctance to provide the EU with the necessary competences. This is not only the case with explicit minority issues, but also with areas such as education and culture, which are of special importance to minorities.
A revision of the treaties is not on the agenda and even if that were to take place soon, that would not guarantee the good will of EU member states towards minorities. Establishing new institutions that work at the intergovernmental level and not supranationally might have a better chance than broadening material competences. However, again there are no signs that indicate that the EU itself or the member states would have an interest in establishing a special rapporteur or a Committee of Minorities.

In short, the political will of member states is lacking. How far the limited competences can justify the reluctance of the Commission remains to be seen, when the Court of Justice makes a decision in the Minority Safepack case. One should also bear in mind, that even if the Court should find against the Commission, this does not in any way mean that any of the initiatives falling within the Commission’s competences will become reality.

Even if good will towards minorities were to be found, it will be important to cooperate closely with the OSCE and the Council of Europe. Being the then no longer missing piece means filling a hole and both regarding the OSCE and the Council of Europe, duplication of their work should be avoided. Instead cooperation is envisaged. The EU and the Council of Europe have signed a Memorandum of Understanding, which speaks of an enhanced partnership (Memorandum of Understanding, 2007).

Even if goodwill were to be found, minorities would bring a number of challenges with them. The spill-over demands were already mentioned above and would have to be dealt with. The fact that there exists no legally binding definition of what constitutes a minority might become a problem. At the moment, states themselves decide which minorities they recognize and protect under different mechanisms. This is in stark contrast to the first OSCE High Commissioner Max van der Stoel’s statement, that minorities are a matter of fact, not of definition (van der Stoel, 1993). Furthermore, when engaging with minorities, how is it determined who rightly represents a minority? Minorities come in various characters (linguistic, religious etc.), sizes and geographical spreading. The lack of a binding definition shows how difficult it is to find a description which fits so many different groups.

3.3 Intermediate conclusion

There are ample possibilities of improving minority protection within the European Union. Probably, the EU has competences which are of use to minorities which it does not make use of at the moment or which the minorities are not aware are useful for them (Ahmed, 2011). Almost any initiative faces the challenge of lack of member state interest. Be it for security
reasons, because of sovereignty issues, for competence issues or for other reasons, minorities seem to meet a wall of resistance when it comes to the EU.

4. The European context

In order to assess whether the European Union really is of such vital importance to minorities, the larger European context has to be taken into consideration. Minorities are protected by the Framework Convention for the Protection of National Minorities and the European Charter for Regional or Minority Language – of course, only in the states party to the treaties. The OSCE has established a security mechanism with the High Commissioner on National Minorities; the HCNM. The question now is, whether the EU actually is the missing piece.

4.1 The Council of Europe

The Council of Europe is characterized by an intergovernmental approach based on international law. The two main protection mechanisms for minorities are provided by the Framework Convention for the Protection of National Minorities and the European Charter for Regional or Minority Languages. Implementation is in both cases supervised through a monitoring system. Individuals have no possibility of claiming breaches under either treaty. The monitoring cycles end with recommendations.

The Framework Convention often uses broad or vague formulations. This leaves space for the states to fill the framework of minority protection according to their own national situations. The Convention covers all of the most important areas for minorities: existence, identity, language, culture, education, participation and cross-frontier contacts. The Advisory Committee of the Framework Convention has been able to establish itself as a heavy weight in the minority protection regime in Europe.

The Language Charter focuses only on language. However, the Charter is extremely detailed and offers a so-called menu of rights. A certain number of rights in prescribed sections must be chosen; however, the parties to the Charter again have the possibility to apply the Charter to their own situation. As was noted above, minorities come in all forms, sizes and territorial spreading. Effective protection is always tailored to a specific minority. Thus, a certain degree of flexibility ensures a better application of protective measures.
4.2 The OSCE

The OSCE is characterized by a political approach. There is no treaty under international law. Even the founding documents – the Final Act of Helsinki and the Charter of Paris for a New Europe are not treaties under international law. Decisions are taken by consensus. The OSCE relies solely on diplomacy, political pressure and political goodwill.

Despite the absence of judicial mechanisms, the OSCE is able to effectively work for security and promote cooperation in Europe. In the field of minorities, the High Commissioner on National Minorities is most noteworthy. A conflict prevention tool, the HCNM works quietly and aims at solving issues before serious conflicts break out. The HCNM does not take sides when problems arise between a government and a minority. However, the security approach is characterized by the belief, that well treated minorities pose no threat to the peace and security of a state. This should not be understood to grant each minority each and every single wish. It is a mere general approach that believes that persecution and oppression of minorities easily can lead to breaches of peace and security in a state (CSCE Helsinki, 1992: ch. II). The OSCE serves as a forum for negotiations, confidence building and generally keeps in the background.

4.3 The European Union: The missing piece?

Both the OSCE and the Council of Europe interact with the government of states. For twenty-eight of the member states of the OSCE and the Council of Europe, there are other institutions that have a profound impact on national legislation: the EU institutions. Until 2009, the EU institutions were outside the scope of any human rights obligations, not even speaking about minority rights. In 2001, the Charter of Fundamental Rights slowly introduced the EU institutions to human rights obligations. However, it is only since 2009 that the institutions also are legally bound by the Charter. This change of the Charter’s legal status marked a profound turning point in the European human rights regime. Now, all actors that make legally binding law must meet human rights standards. These standards stem from different sources such as the Charter of Fundamental Rights and the European Convention on Human Rights. They may vary slightly and some rights, such as the right to data protection in the CFR, are only found in source. Nevertheless, the fact that EU institutions now have legally binding human rights obligations means that the EU is no longer completely missing in the European context. The EU will further strengthen its commitments when it accedes to the European Convention of Human Rights.
Furthermore, the three organizations already cooperate. Already the Treaty on the European Coal and Steel Community included provisions on close cooperation, and cooperation has existed ever since (Vandenberghe, 2008/2009: 8-31).

The fact that the European Union is no longer missing and will even come to the fore once accession has taken place bodes well for human rights and members of minorities, who, of course, also enjoy general human rights. Neither the change of legality of the CFR nor EU accession to the ECHR, however, cause the EU to fill the hole in the minority rights regime in Europe. Members of minorities certainly benefit from better human rights protection; however, their special needs of protection are left unconsidered in the general human rights context.

Based on this assessment, even with the changes of the Treaty of Lisbon, the European Union remains the missing peace in a coherent minority rights regime in Europe. The tentative steps towards minority protection were not supported by competences in the treaties. A follow-up is thus just as necessary as it is unlikely at the moment. None of the initiatives introduced in chapter 3 stand a good chance of being implemented. The EU will thus remain a severed minority rights actor. Art. 2 TEU and the prohibition of discrimination on the basis of membership in national minorities together with the general strengthening of human rights provides for a good basis – however, minorities cannot expect much protection from these changes in their everyday life as members of minorities.

At the same time, though, minorities are actually protected via other mechanisms. The European Union may thus be the missing piece; however, the hole it has to fill is not as large as it once was. Considering the limited competences of the EU in areas of relevance to minorities, there are limitations to what the EU could fill the hole with.

The Federal Union of European Nationalities lends support to the citizens’ initiative Minority Safepack whose very aim is to engage the EU more with minority issues and the initiative includes specific proposals. The implementation of the Minority Safepack could fill the hole to a certain degree. However, when considering the competences and ways of working of the three organizations, the one thing that separates the EU from the OSCE and the Council of Europe is its supranational character. The hole in a coherent minority regime in Europe is not likely to be filled with supranational competences for the European Union.
Yes, coherence will be improved if the EU were to implement the suggestions of chapter three. However, it wouldn’t draw on the strength of the European Union; its supranationality.

5. Non-commitment as a merit or a flaw

Whether one considers the relative non-commitment to be a merit or a flaw depends very much on one’s own starting point and cannot be answered objectively. In chapter 2, reasons in favour of and against stronger commitment were presented. Obviously, being in favour of increased commitment is based on seeing the non-commitment as a flaw. Being against increased commitment, however, does not necessarily correspond with seeing the non-commitment as a merit. More commitment might actually be desired; just not under the current conditions.

Non-commitment of the EU, being the limited actor it is at the moment, may actually be a good thing for minorities. This, however, should not be confused with an acceptance of the status quo but could equally signify a wish for a profound change of the EU in order to transform the EU into a serious minority actor – as realistic or unrealistic as this may be.

The fact that the European actor with the furthest reaching competences does not engage with minorities is puzzling from a minority point of view. However, from a variety of other viewpoints, this is actually comprehensible. The EU is only gradually evolving into a political and human rights actor. Granted, more promises have been indicated than have been acted upon; however, the European Union is not a human rights organization. Furthermore, the EU does not aim at special group protection. There is no reason why the EU would start singling out minorities and awarding them with special protection mechanisms. Lastly, the member states themselves have not been willing to provide the EU with strong competences in the areas of special relevance to minorities. In other words, the EU is legally limited to act. In conclusion, puzzlement at non-commitment is misplaced.

A real change for minority protection in Europe would mean an extension of competences within the European Union. This presupposes the good will of states and a treaty revision process; none of which is anywhere in sight. To make real changes and introduce the EU as a minority actor, minorities have very a long way to go and hard work to do. Only if they persuade their governments will they stand a chance of changing competences.
Until this happens, the EU is not really a missing piece in the European minority rights regime. What the EU could offer is very little with the limited competences. A special rapporteur, a Committee of Minorities or a different focus for the Agency of Fundamental Rights may all contribute to putting a focus on minorities and mainstreaming minority rights. The EU is already on its way to strengthening human rights. The missing piece becomes smaller and smaller. However, the important characteristics of the EU compared to the OSCE and the Council of Europe is its supra-nationality. The supra-national competences of the EU, however, are unlikely to reach minorities anytime soon.

Notes

1. The Commissioner on Justice, Consumers and Gender Equality is, amongst other things, responsible for the finalization of the EU accession to the ECHR and that all Commission proposals respect the Charter of Fundamental Rights. The responsibilities of the Commissioner on Education, Culture, Youth and Sport include ‘empowering young people of all social and cultural backgrounds so that they can participate fully in civic and democratic life.’ This could be of relevance for young members of minorities; however, at the same time, there is no indication that they are the target of this responsibility. The Commissioner on Migration, Home Affairs and Citizenship has the somewhat vaguely formulated responsibility of “strengthening citizens’ rights provided for in the EU treaties”. For the tasks see respectively the mission letters from Jean-Claude Juncker from 1 November 2014.

References


Charter of Fundamental Rights. *OJ C 326, 26/10/2012, p. 391–407*


Mission Letter from Jean-Claude Juncker to Věra Jurová, Commissioner for Justice, Consumers and Gender Equality, 1 November 2014.

Mission Letter from Jean-Claude Juncker to Dimitris Avramopoulos, Commissioner for Migration, Home Affairs and Citizenship, 1 November 2014.

Mission Letter from Jean-Claude Juncker to Tibor Navracsics, Commissioner for Education, Culture, Youth and Sport, 1 November 2014.


Toggenburg, Gabriel. ‘Minorities (…) the European Union: is the Missing Link and ‘of’ or a ‘within’?” European Integration. 25 (2003): 273-284.


