[H]THE PROTECTION OF MINORITIES IN THE COUNCIL OF EUROPE: POSSIBILITIES TO USE THE EUROPEAN CONVENTION ON HUMAN RIGHTS FOR MINORITY ISSUES

Av. A. Deman GÜLER*

Abstract

Almost all human rights systems choose the way to adopt special treaties for the specific matters. This guarantees to detail the normative rules and the jurisprudence for a specific group or/and specific rights. Minority protection of the Council of Europe is provided by the Commissions of its two principal minority instruments: the Framework Convention for the Protection of National Minorities and The European Charter for Regional or ***Minority*** *Languages. Since there is no such a special protection mechanism under any other systems, the European system should be accepted as the most powerful one for the minority protection in the world. However, the European minority protection system has its own pros and cons. For example the CoE creates neither a judicial mechanism nor gives a duty to the European Court on Human Rights for the supervision of its minority system. The CoE only offers the classical report mechnism for the monitoring of the minority rights system. In this way the system that is created by the CoE can be interpreted as being more progressive than any other international or regional mechanisms but also becomes open to be criticised for its less advantageous position than the ECHR mechanism.*

H Hakem incelemesinden geçmiştir.

* Attorney at Law (e-mail: demanguler@gmail.com) (Makale Gönderim Tarihleri: 13.01.2017-13.01.2017/Makale Kabul Tarihleri: 11.07.2017-13.07.2017)

Therefore, possibilities to use the European Convention on Human Rights for the minority issues should be discussed in order to provide new opportunities to the minorities of Europe.

Keywords

The Framework Convention for the Protection of National Minorities, The European Charter for Regional or ***Minority*** *Languages, European Convention on Human Rights, minority rights, minority protection.*

AVRUPA KONSEYİ SİSTEMİ İÇİNDE AZINLIKLARIN KORUNMASI: AVRUPA İNSAN HAKLARI SÖZLEŞMESİ'Nİ AZINLIK MESELELERİ İÇİN KULLANMA OLASILIKLARI

Öz

Neredeyse tüm insan hakları sistemleri özel durumlar için yine özel sözleşmeler yapma yoluna giderler. Bu şekilde özel grup ve/veya özel haklar için normatif kurallar ve içtihatların detaylandırılması garanti altına alınır. Avrupa Konseyi'nin azınlık koruması onun iki özel azınlık belgesi olan Ulusal Azınlıkların Korunması İçin Çerçeve Sözleşme ile Bölgesel ve Azınlık Dilleri İçin Avrupa Şartı'nın komisyonları eliyle sağlanmaktadır. Diğer bölgesel ve uluslararası sistemlerde benzeri başkaca bir özel koruma mekanizması var olmadığından Avrupa azınlık koruması sistemi var olan en güçlü sistem olarak kabul edilmelidir. Ancak, Avrupa sisteminin olumlu yönleri olduğu gibi olumsuz yönleri de bulunmaktadır. Örneğin Avrupa Konseyi kendi azınlık koruması sisteminin denetimi için ne bir yargı mekanizması yaratmış ne de Avrupa İnsan Hakları Mahkemesi'ne bir görev vermiştir. Avrupa Konseyi azınlık hakları sisteminin denetimi için sadece klasik rapor mekanizmasını önermektedir. Bu yönüyle Avrupa Konseyi sistemi diğer uluslararası veya bölgesel mekanizmalardan daha ilerici olarak değerlendirilebilse de aynı zamanda Avrupa İnsan Hakları Sözleşmesi'nden daha az avantajlı bir durumda olması nedeniyle eleştiriye açık hale gelmektedir. Bu

sebeple Avrupa İnsan Hakları Sözleşmesi'nin azınlık hakları için kullanılması olasılıklarının Avrupalı azınlıklara yeni fırsatlar sağlamak bakımından tartışılması elzemdir.

Anahtar Kelimeler

Ulusal Azınlıkların Korunması İçin Çerçeve Sözleşme, Bölgesel ve Azınlık Dilleri İçin Avrupa Şartı, Avrupa İnsan Hakları Sözleşmesi, azınlık hakları, azınlık koruması

1. Introduction

The European regional system has an important value within the international protection of human rights. The Council of Europe played a significant role for a new peaceful Europe ideal after the World War II. One part of Winston Churchill's unified Europe dream was achieved by the economic and political integration under the EU (then EC) and the other part with the integration on the basis of values dependent on human rights under the umbrella of the Council of Europe.[1]

The Council of Europe was established in 1949 on the common values such as democracy, human rights and the rule of law.[2] When a State desires to be a member of the Council it must accept the principles of "the rule of law and of the enjoyment by all persons within its jurisdiction of human rights and fundamental freedoms."[3] The European Convention on Human Rights and Fundamental Freedoms, the main instrument for the protection of human rights in the CoE, has been adopted in 1950 just after the establishment of the Council. Today all 47 members of the CoE are also State Parties to the Convention.[4] In this respect the area it covers is much larger than the EU's. However, it must be taken into account that the effectiveness of the Convention is more important than the number of its States Parties. At first, the monitoring mechanism of the Convention was essentially based on the classical duality of the Commission and the Court; but afterwards, the Commission was abolished and the jurisdiction of the

---

1 Churchill explains the role of the CoE as: "Under and within that world concept we must re-create the European Family in a regional structure called, it may be, the United States of Europe. And the first practical step would be to form a Council of Europe." Winston Churchill's speech to the academic Youth.19.9.1946. For the whole speech: http://www.unizar.es/union_europea/files/documen/Winston_Churchill-Discurso_en_.pdf, last access 09.01.2017.

2 Warsaw Declaration, 16-17 May 2005. http://www.coe.int/t/dcr/summit/20050517_decl_varsovie_en.asp, last access 09.01.2017.

3 Statute of CoE, article 3.

4 All the European States are members of the CoE except Belarus, Kazakhstan and Vatican.

Court became compulsory.[5] That compulsory jurisdiction put the Court in a special place within the regional and international human rights systems. It was the peak point of the developments on the subjectivity of individuals in public international law.

The efficient monitoring mechanism which the Convention provides is crowned by the extensive and progressive jurisprudence of the Court. The European Court of Human Rights as the supervisory organ has developed the scope of obligations under the Convention to suit the evolving situation through its increasingly extensive body of case law.[6] Although the extensive workload makes the system debilitated especially for the lengthy periods which is spent for the decisions, it also helps the case-law to become larger than the other international or regional systems'.

Even though the ECHR is the umbrella instrument for the protection of human rights within the Council, it is hard to say that the Convention is the only one in it. From the very beginning of the Council the Organization created different types of human rights instruments in a wide rage.[7] In this sense minority rights are also covered as an area of work by the CoE. The Council has two principal instruments in the field of minority rights. These are the Framework Convention for the Protection of National Minorities[8] and the Charter for Regional or Minority Languages[9].

---

5 European Convention on Human Rights, art. 32 amended with the Protocol 11.

6 **Schumann, Klaus**, *The Role of the Council of Europe, in Minority Rights in Europe, The Scope for a Transnational Regime* (ed.) by **Hugh Miall**, London, Pinter Publishers, 1994, p.91.

7 In 2012 there are 213 instruments signed under auspices of CoE. For the full list please see: http://www.conventions.coe.int/Treaty/Commun/ListeTraites.asp?CM=8&CL=ENG, last access 09.01.2017.

8 Council of Europe, *Framework Convention for the Protection of National Minorities*, 1 February 1995, ETS 157, available at: http://www.refworld.org/docid/3ae6b36210.html , last access 03.03.2017.

9 Council of Europe, *European Charter for Regional or Minority Languages*, 4 November 1992, ETS 148, available at: http://www.refworld.org/docid/3de78bc34.html, last access 03.03.2017.

Minority rights played a significant role in the history of Europe. The history of the protection of minorities in Europe dates back to the sixteenth century.[10] The growing number of new born

Nation-states directly affected minorities in the XIX. Century. In a comparison with other continents it can be easily seen that the concept of "one State for each nation" is the pure reality in Europe. Naturally this attitude created distinct groups under the different dominant cultures. Therefore, religious, ethnic and linguistic minorities appeared in almost every State in Europe.[11] It wouldn't be wise to expect that the CoE will become distant from this phenomenon.

All the human rights issues cannot be solved by a general human rights instrument. General human rights instruments are built for the protection of the fundamental human rights problems. That is why, almost every human rights system choose the way to adopt special treaties for specific matters. This guarantees to detail the normative rights and the jurisprudence for a specific group or/and specific rights.

The minority protection of the CoE is provided by the Commissions of its two principal minority instruments. It can be said that the European system is the most powerful one for the minority protection in comparison with other international or regional systems.[12] Then there is no such a special protection mechanism under any other system. On the other hand the European minority protection has its own negative points. For example the CoE creates neither a judicial mechanism nor gives a duty to the European Court on Human Rights for the supervision of minority issues. It only offers the classical report system for the monitoring of minority rights. In this way

---

10 **Alcock, Antony**, *A History of the Protection of Regional Cultural Minorities in Europe, From the Edict of Nantes to the Present Day*, London, Macmillan Press Ltd., 2000, p.1.

11 "There is no doubt that Europe is an ethnically diverse continent as a whole and there are few, if any, countries in which there are no population groups with and ethnic identity distinct from that of the country's titular nation." Mini *Guide to Ethnic and National Minority Issues*, European centre for Minority Issues, 2005, p.1.

12 **Nobbs, Katherine**, *The Effective Protection of Minorities in the Wider Europe: Counterbalancing the Security Track*, in *The Protection of Minorities in the Wider Europe* (ed.) by **Marc Weller, Denika Blacklock and Katherine Nobbs**, Palgrave Macmillan, 2008, p. 278.

the system created by the CoE can be interpreted as being better than other international or regional mechanisms but also be criticised for its less advantageous position than the ECHR mechanism.

Hence, the European minority protection is undeniable with its positive steps but there is no reason to give up the discussion to make it more effective. In this sense to discuss the possible ways of the new amendments for the minority protection or the ways of the protection under ECHR is inevitable. Even if the ECHR is a general human rights document it protects the rights and freedoms of everyone in the jurisdiction of its State Parties. This means that the individuals who belong to a minority are also protected by the Convention.[13] In that case the possibility of using the ECHR must be thought together with the special minority instruments of the CoE as an effective minority protection method.

2. Basic Notions about the Minority Rights in the European Human Rights System

2.1. The Evolution of the Minority Protection in Europe

It wouldn't be wrong to say that the first legal minorities appeared in Europe. When we put the sociological meaning aside, a minority can be emerged in certain situations. First of all the integrity of the State has to be completed. After that a distinct group must break this integrity. In that way a legal a minority can be emerged in the sense of law.[14]

The first integrated States appeared in the form of absolute monarchies in Europe. The absolute monarchies were born with the cooperation of the kings and the bourgeois to achieve their common interests in the XVI. Century. These monarchies used the religion for their integration element at first.[15] The persons who do not share the same faith were faced with their distinction after the States chose the religion as the integrity element. That is why the religious minorities became the first minorities in Europe. The

---

13 **Schumann, Klaus,** *The Role of the Council of Europe...", p.89.*

14 **Oran, Baskın,** *Türkiye'de Azınlıklar,* 5th Edition, Istanbul, Iletişim Yayınları, 2008, p.18.

15 Ibidem, p.19.

Protestants were the first minorities because they were opposed to the Catholicism, the religion of the absolute monarchy.

Firstly, the States have tried to answer these minority groups with harsh methods. Massacres like Saint Barthelemy (1572) were not uncommon. In time, the States chose the path to adopt the legal instruments for the protection of their minorities. The Edict of Nantes (1598) can be seen as the beginning of this way.[16] Afterwards the matter came into the field of international law. With bilateral or multilateral agreements, the States tried to solve the problems of the rights of their coreligionists who live out of their border. In this way the minorities became a main topic of European human rights agenda. In the years following the WWI the international protection of European minorities were tried to solve by the after war peace agreements and by the League of Nations.[17] The advantages which were provided to the victorious states can also be seen in the minority issues in that era. In this respect the minorities which have relations with a victorious state gained protection but others did not.[18] This unequal situation was one of the reasons of the WWII.

The way of the protection of the minorities by the general human rights treaties was achieved only after the establishment of the UN. It is possible to say that the minority protection after the WWII is more progressive than the earlier stages.[19] Unfortunately, the UN era has its own problems. The lack of elaboration of minority rights and the establishment of minority rights are two of them. Primarily, there is no reference to the minorities neither at the UN Charter nor in the Universal Declaration of Human Rights. However, the GA Resolution 217 C (III) of 1948 stated that the UN cannot remain indifferent to the fate of minorities. Yet this resolution did not play a role more than a wish. It is a fact that the UN era has issues of creating concrete measures for the protection of minorities. The main reason for this must be the risk of using minority problems as a threat against world peace as it was

---

16 **Alcock, Antony**, *A History of the Protection of Regional...*, pp. 5-8.

17 Ibidem, p.47.

18 **De Varennes, Fernand,** *Language, Minorities and Human Rights*, The Hague, Martinus Nijhoff Publishers, 1996, p.28.

19 Ibidem, pp. 28-29.

used before the creation of the UN. The most important instrument within the UN system for the protection of minorities is the International Covenant on Civil and Political Rights and its famous article 27. Article 27 regulates the minority rights as "In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language." Still the article 27 is open for criticism on its wording and implementation. First of all the article has no definition of minorities. Additionally the expression of "In those States in which ethnic, religious or linguistic minorities exist..." has the risk that the State Parties to declare that they don't have such minorities within their jurisdiction. Moreover, the ICCPR reduces the minority protection into the individual level. In that sense it seems that the group feature of the minorities is ignored.[20] What is more important is that the ICCPR has no special characteristics for minority protection. Only a single article of the Convention is related to the minorities. This general protection of the UN is not enough for the well-being of the minorities because the system is not supported by special minority treaties like in the other fields. The only specific UN instrument in the field of minority rights is the Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities (A/RES/47/35 of 1992). However, it was not formulated in a treaty form.

2.2. Definition of Minority

The question on a definition of the minorities, which the ICCPR avoided to answer, occupies an important place in minority law. The lack of a clear-cut definition hampers a world-wide harmonious implementation. The UN sees the importance of this question at the very beginning of the ICCPR era. In 1979, the Special Rapporteur to the UN Sub-Commission on

---

[20] **Thornberry, Patrick**, *The UN Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities: Background, Analysis, Observations and an Update*, in *Universal Minority Rights* (ed.) by **Alan Phillips and Allan Rosas**, 2nd Edition, Turku/Åbo and London, Åbo Akademi University Institute for Human Rights and Minority Rights Group International, 1997, pp. 21-23.

the Prevention of Discrimination and Protection of Minorities F. Capotorti, described minorities as "A group numerically inferior to the rest of the population of a State, in a non-dominant position, whose members -being nationals of the State- possess ethnic, religious or linguistic characteristics differing from the rest of population and show, if only implicitly, a sense of solidarity, directed towards preserving their culture, traditions, religion or language."[21] This definition is the most referred and accepted definition but still has no binding effects.[22]

When we analyse the Capotorti definition it can be seen that it has more than one element. The first one is the number criterion. A minority must be numerically inferior to the rest of the population.[23] This is a basic rule even for the sociological definition and actually is hidden in the word of minority. Secondly, it is also necessary not to be in a dominant position to be a minority. Heinze explains this criterion as socio-political non dominance.[24] Being non-dominant can be hard to determine in some areas. However, when a State uses a secret or open preference for one or more ethnic, religious or linguistic elements, one can always argue that some groups are in non-dominant position. The third element is the citizenship. This element is may be the most crucial point of the Capotorti definition. However, the ICCPR implementation has no sympathy for that element. The reason behind this might be the wish to escape from giving special rights to the real minorities by spreading the protection. In practice the Human Rights Committee can see a group as a minority even if its members have no citizenship tie with the related state. At first sight this can be a positive understanding of the minority concept. However, the groups such as migrant workers and refugees can be easily described as a minority with this approach. This so

---

21 **Capotorti, F**., *Study on the Rights of Persons Belonging to Ethnic, Religious and Linguistic Minorities*, UN Doc. E/CN.4/Sub.2/384/Rev.1, pursuant to Sub-Commission Resolution 9 (XX).

22 **Heinze, Eric,** *The Construction and Contingency of the Minority Concept*, in *Minority and Group Rights in the New Millennium*, (ed.) by **Deirdre Fottrell and Bill Bowring**, the Hague, Martinus Nijhoff Publishers, 1999, p.43.

23 **Okutan, M. Çağatay**, *Teoride ve Uluslararası Metinlerde Azınlık Tanımı*; Ankara Üniversitesi SBF Dergisi, Sayı 59-2, Nisan-Haziran 2004, pp. 61-63.

24 Ibid, p.43.

called positive approach would undermine the rights of the real minorities in one or another way. Fourthly, it is mentioned that a minority must have a distinct feature. Capotorti says that there are three basis of this distinction. These are ethnic, religious and linguistic features. In that sense the groups such as women, disabled persons, persons with different sexual orientations are not accepted legal minorities. The last element of being a minority has a subjective meaning. A group must know that it is distinct and it must also want to maintain this distinct feature. This last element is about the group consciousness on the protection and maintaining itself. It can also be said that to identify this element would be hard in some situations but practising religion and speaking a language must be understood as having this element.

2.3. What Does National Minority Mean?

The UN takes the Capotorti definition into account but its implementation is not identical with it. Even when an international organization cannot fix the definition problem in its implementation, it is not easy to call for an international definition. The problem can also be seen in the European terminology as the term of "national minority". The term of national minority has begun to be used from the League of Nations era but there is no common understanding on its meaning. There is more than one explanation of it.[25]

Firstly, it is said that the national minority means that the ethnic, linguistic and religious minorities live within a State. Even if we don't know the details of this explanation, it is obvious that the suggestion has the same three distinction elements with the definitions of the League of Nations and F. Capotorti. In this sense one can easily say that this suggestion calls the national minority as the legal minority.

Secondly, it is claimed that the national minority means a minority which has a kin state. In this definition the State where a minority lives is called as the Host State. On the other hand the State where a group of people who has the power and also ethnic, religious or linguistic similarities with the minority who lives in the host State is called as the Kin State. Csaba

---

[25] **Oran, Baskın**, *Türkiye'de...,* pp.41-42.

agrees with this definition of national minorities. However, Csaba adds some basic features such as a collective consciousness to participate political decision making in the region or the State they live without any desire to access to their kin state.[26]

Thirdly, a minority is called as a cultural minority when it has every single one of those three objective elements of the minority definition but not the subjective element. If it has subjective and objective elements together it must be called as a national minority. This suggestion for the national minority definition is the same with the Capotorti definition except its emphasize on subjective element. Moreover, the third definition apparently offers a differentiation for cultural minorities.

The last explanation for the national minorities says that the term covers all minorities except the so called new minorities (migrant workers etc.).[27] In practice the ICCPR protects the new minorities either. According to the last explanation it is hard to say that the UN understanding of minorities can be seen as national minorities.

The term of national minorities has a special place in the CoE instruments. First of all ECHR explicitly uses the term in its two different articles. One of them is the article 14 which prohibits discrimination in relation with the rights and freedoms set in the Convention. The second can be found in the article 1 of the Protocol 12, which prohibits discrimination in a general manner. Both of these articles expressly call "the association with a national minority" as the basis of discrimination. Unfortunately, there is no definition of the national minority in the Convention and the problem is left to be solved to the practice of the State Parties and the organs of the ECHR.[28]

---

26 **Kiss, Csaba G**., National Minorities in Central Europe -Definition and Typology, in Minorities in Politics Cultural and Languages Rights, (ed.) by **Jana Jana Plichtova**, Bratislava, Czechoslovak Committee of the European Cultural Foundation, 1992, p.75.

27 **Kurban, Dilek**, *Confronting Equality: The Need for Constitutional Protection of Minorities on Turkey's Path to the European Union*, Columbia Human Rights Law Review, Vol. 151, No.35, 2003, p. 160.

28 Eg. ECHR Case of *Gorzelik and Others v. Poland*, Application no. 44158/98, 17 February 2004, para. 50.

The Framework Convention is the principal instrument of the CoE for the minority protection. Although the full name of the Convention includes the term of the national minorities, there is no definition of the term in the Convention. That is why it is hard to evaluate the possible distinctions of the national minorities and minorities according to this instrument. The other special minority instrument of the CoE is the Language Charter. There can be found a definition for a minority language in the Charter. Thence, one can find an indirect definition of a linguistic minority which is a sub-group of the national minorities. Yet it still cannot be seen the details of the national minority concept in this indirect way of definition.

As a result it can be said that the national minority is the preferred terminology to describe the minorities in Europe. However, it is not transparently known what it means. For this reason the evaluation of the concept is left to the implementers. In that sense, both of the organs of the instruments and State Parties are relevantly free to determine the meaning of national minorities. Actually this reality is not so far from the general situation of the protection of minorities. Yet there is no common understanding on the term of minority itself.

3. The Protection of Minorities by General Human Rights Instruments

International human rights law protects the rights and freedoms under two different sort of instruments. The first one is the human rights instruments of general manner which have general and inclusive provisions. General human rights instruments form more than one type of rights and freedoms.[29]In the international level ICCPR and ICESCR, in the regional level African Charter, American Convention and ECHR are examples of such instruments.

This kind of instruments defines the rights and freedoms and develops monitoring mechanisms to control the implementation of them. Minority rights are a part of human rights. Consequently, it is natural to expect

---

[29] **Gemalmaz, M. Semih**, *Ulusalüstü İnsan Hakları Hukukunun Genel Teorisine Giriş*, 7th Edition, İstanbul, Legal Yayıncılık, 2010, p.1632.

regulations on the minority rights under the human rights instruments of a general manner.

However, general human rights instruments are silent in that field with few exceptions. Article 27 of the ICCPR can be remembered as one of these exceptions. UN Convention on the Rights of the Child is a special instrument on the rights of the child. However, it also has some provisions about the rights of the minorities. Articles 17 and 30 give specific rights to the children who belong to a minority group. The other international or regional instruments in general manner have no direct provisions on the matter of minorities.

Present condition of the general human rights conventions about the minority rights can be interpreted as apathy. However, these instruments can also be used by the members of the minority groups as anyone else in the jurisdiction of the relevant State Parties. As a matter of fact a general instrument can be used for the protection of the members of the minorities even if has no direct provision on the minority rights.

However, it is hard to find a specific minority perspective in such instruments. This fundamental weakness causes problems in the protection of minorities. First of all general human rights instruments do not give special rights to the minority members.[30] That is why the State Parties to the general instruments have no obligation to provide special protection to their minorities. Secondly, in the general instruments there are no specific provisions in order to protect minorities. The example of the ICCPR is unique but also open to be criticised for its lack of group protection.[31]

Nevertheless, general human rights instruments have many provisions directly related to the minorities. These provisions are always open for to be used by the members of minorities. Moreover, members of minority groups

---

30 Article 27 of the ICCPR must be thought out of this rule. In the General Comment 23 it is said that "...[A]rticle 27 relates to rights whose protection imposes specific obligations on States parties. The protection of these rights is directed towards ensuring the survival and continued development of the cultural, religious and social identity of the minorities concerned, thus enriching the fabric of society as a whole." In that respect article 27 can be interpreted as special rights. However, the article has no detailed obligation in its text.

31 **Thornberry, Patrick**, *The UN Declaration on the Rights...,* p.23.

can apply to the organs of these instruments in order to defend these rights if the instrument has such a system. This possibility is not provided by the special minority instruments yet. Secondly, the provisions of such general instruments about the prohibition of discrimination can be applied for the protection of the members of minority groups. This protection can create very effective consequences especially if the prohibition of discrimination is set up as independent from the provisions of the instrument.[32]

4. The Protection of Minorities by Specific Minority Instruments

The protection of minorities and the rights and freedoms of persons belonging to those minorities form an integral part of the international protection of human rights.[33] International community details the minority rights with the special minority instruments just like it details for the other right groups or group of persons. The instruments with special characteristics are based on a specific right or subject.[34] The special minority instruments describe the basic principles, provide a detailed right list and guarantees some rights and freedoms which cannot be secured with the general instruments. Minority instruments are set for the protection and maintenance of the distinction of minorities. The principles of the protection of divergence and multiculturalism as a method of peace in and between the states lie behind the production of minority instruments.

Minorities are numerically inferior to the rest of the population in a State. This reality makes their needs hard to be heard in the classical representation system even in the most prominent democracies.[35] Because of this reason it is a must to treat minorities different and in a more positive way from the majority. These kinds of different treatments are not covered with the general human rights instruments. General instruments are built on

---

32 Infra 6.2.2.

33 *Framework Convention for the Protection of National Minorities*, Strasbourg, 1.II.1995, art. 1.

34 **Gemalmaz, M. Semih**, *Ulusalüstü İnsan Hakları...,* pp. 1632-1633.

35 **Laponce, J. A**., *The Protection of Minorities*, Berkeley and Los Angeles, University of California Press, 1960, p. 110.

an abstract equality principle. However, this abstract equality is not always enough to preserve the existence of the minorities.[36]

Minority instruments are based on the "treat different to the different ones" principle and give legitimacy to the differential treatments. Moreover, such instruments detail the rights of the minorities and provide substantial regulations to the needs of these groups. Many of these rights which are provided in the special minority instruments are also related to one or other provisions of a general instrument. However, the rights covered by the minority instruments are always created for the needs of the minorities, thereof the implementation of these rights are more effective in practice.

Minority instruments constitute two kinds of rights. The first one is the general minority rights.[37] These rights are in fact the repetition of the rights which are already mentioned in the general human rights instruments. The main reason of this repetition is to emphasize that these rights and freedoms can be applied to the minorities as well. It is possible that the general minority rights are edited in order to emphasize the special characteristics of the minority protection. Sometimes minority instruments choose the way to contain general minority rights especially when the using of the rights and the protection of them are formed in the feature of group rights.[38] In practice general minority rights can be beneficial for the individuals who live in the jurisdiction of the States which are not signatory to the other general human rights treaties.[39]

The second type of the minority rights which are covered in the minority instruments is the special minority rights.[40] These rights are formulised for the areas when the "treat different to the different ones"

---

36 **Kymlicka, Will,** *Multicultural Citizenship A Liberal Theory of Minority Rights*, Oxford, Clarendon Press, 1995, pp. 5-6.

37 **Oran, Baskın**, *Türkiye'de...,* pp.46.

38 For example, *Framework Convention for the Protection of National Minorities*, art. 3(2) mentions the possibility to exercise the rights and enjoy the freedoms in community with others.

39 Infra. Chapter 5.1.1.

40 Special rights are also called as positive rights. See: **Schumann, Klaus**, *The Role of ...,* p.92.

principle is necessary. For that reason these types of rights create a different treatment which is distinct from the general practice. The main reason to set up special minority rights is the need to develop full and effective equality between the minorities and the majority.[41] In the human rights treaty regimes differential treatment is not always qualified as discrimination. In such systems monitoring bodies use several standards to check whether a differential treatment is discrimination or not. However, the test is made for every single case separately in the general human rights instruments. The standards are used for every case in which the applicant argues a discriminative act. On the other hand differential treatments are set up as special rights and therefore there would be no need to discuss the legality of an act based on the special rights in every case in the minority instruments. The minority treaties give this legality to special rights itself. Under the minority treaty regimes it is only possible to supervise such differential treatment between different minority groups. But again States are free to use different practices on the distribution of the rights. However, this differential distribution must be based on concrete criteria.

It is not possible to say that the provisions in the minority instruments whether general or special, give a positive obligation to the States in advance. The division between these two concepts are not relevant with positive obligations. In contrary it is about whether a right legalizes a differential treatment or not.

5. The Specific Minority Protection of the Council of Europe

The Council of Europe is the only international system which has special binding instruments for the protection of minorities. In fact the interest of the CoE on the minority protection may be followed to the Helsinki Final Act process at the end of 1970s. The issue of the protection of minorities came into the agenda of international community at that era and this caused the CoE shoulder the responsibility after 1990s.

It wouldn't be wise to review that process after 1990s without the developments of international politics in that era. In these years, world has

---

41 *Framework Convention for the Protection of National Minorities*, art. 4(2).

seen the end of bipolar system and the establishment of new countries which were appeared from the ex-communist regimes. In that period when the nation state model was aroused again, the occurrence of new minorities was not avoidable.[42]

If one part of the minority law is about the protection and the maintaining of the minorities, the other part is about providing a peaceful life of international community together. This second part was significant when the minority rights became important after the dissolution of communist bloc again. The Council of Europe chose the minority treaties as a way to reduce the possible tension and to solve the problems before they appear.

5.1. The Framework Convention for the Protection of National Minorities

The Framework Convention is may be not the first document that the CoE has adopted on minority issues but still is the most inclusive and essential one. The adoption of the Convention is the direct result of the instruction given to the Committee of Ministers by the Vienna Summit of Heads of State and Government, held on 8 and 9 October 1993, to "draft with minimum delay a framework convention specifying the principles which contracting States commit themselves to respect, in order to assure the protection of national minorities."[43] In order to draft the Framework Convention the Committee of Ministers, in November 1993, established the Ad Hoc Committee for the Protection of National Minorities (CAHMIN).

CAHMIN has considered the political commitments of the OSCE (then CSCE) in its documents and tried to change them into legal obligations. On 10 November 1994 the Committee of Ministers of the Council of Europe adopted the Framework Convention for the Protection of National Minorities. The Convention was opened for signature on 1 February 1995 and entered into force on 1 February 1998.

---

42 **Hugh Miall**, *Introduction*, in *Minority Rights in Europe*, *The Scope for a Transnational Regime* (ed.) by **Hugh Miall**, London, Pinter Publishers, p.1.

43 https://wcd.coe.int/ViewDoc.jsp?id=621771, last access 09.01.2017.

5.1.1. Becoming a Party to the Convention

The Framework Convention is described as an open instrument.[44] The meaning of it is that becoming a Party to the Convention is not based on membership to the CoE. It is clear that the reason of this is the effects of the political commitments of OSCE documents on the Convention. It was sought that the members of the OSCE which are not members of the CoE would become Parties to the Framework Convention. However, the sphere of influence of the CoE has broadened very fast after the adoption of the Framework Convention. Today almost any member of the OSCE is also member of the CoE. That is why it is possible to say that the open structure of the Framework Convention has considerably lost its meaning.

Yet the article 29 of the Convention states that "after a consultation with the States Parties to the Convention any State can be asked to become a Party with a majority vote". In that respect the open character of the Convention gives the non-European States a way to be a party to the Framework Convention. If this way is followed there would be a possibility to change the regional characteristics of the Framework Convention into an international one. However, in the present situation there are no States Parties to the Convention out of the CoE area. The 39 CoE member states are also the States Parties to the Convention.[45] Four CoE member States (Belgium, Greece, Iceland, Luxembourg) has signed the Convention but they have not ratified it yet. Another four CoE member States (France, Turkey, Andorra and Monaco) which have always had some timidity to provide minority rights and have interpreted the nation state model in a very conservative way are neither signed nor ratified the Convention. Kosovo is the only State which is not a member of the CoE but still has some kind of relationship with the Convention. The CoE has signed a special agreement with the United Nations Interim Administration Mission in Kosovo in 2004. According to this agreement Kosovo as a non-CoE member state is monitored in a special way. However, Kosovo is not a State Party to the Convention.

---

44 *Framework Convention for the Protection of National Minorities*, art. 29.

45 http://www.coe.int/t/dghl/monitoring/minorities/1_AtGlance/PDF_MapMinorities_bil.pdf, last access 09.01.2017.

5.1.2. Minority Definition of the Convention

May be the weakest part of the Framework Convention is the lack of a minority/national minority definition in the Convention. This is in fact a result of a necessity. The writers of the Convention have seen the hardship of a common agreement on a minority definition and furthermore they have predicted a possible timidity of the States according to be party to the Convention. Thereof, the meaning of the national minority has been left to the State practice and the interpretation of the monitoring organs of the Convention.[46]

At the first section of the Convention it is frankly said that everyone has the right to ask to be treated as a minority or not.[47] This choice shouldn't result a disadvantage on the individual. The matter based on a division after the recognition of a minority and the establishment of the minority rights. Principally, the existence of a minority is determined by concrete facts and the determination is not merely left to the States. The existence of an ethnic, religious or linguistic minority in a given State Party does not depend upon a decision by that State but requires to be established by objective criteria.[48] States may choose the way to give the minority rights by a domestic law regulation or by ratifying an international agreement after the minority determination process. This preference is related with the will of the State. Even if the minority rights provide advantages to the members of a minority it would be meaningless to make it obligatory that an individual to benefit from these rights after their establishment. The will of a minority group to maintain its identity and the will of an individual to benefit from the given rights are not the same thing. That is why personal preference would not affect the recognition and the status of a minority.

Normally it is not surprising to suppose that a member of a minority would benefit from the advantages of the minority rights. However, the fear

---

46 **Magdalena Syposz**. *Framework Convention for the Protection of National Minorities Opportunuties for NGOs and Minorities*, Minority Rights Group International, 2006, p.16.

47 *Framework Convention for the Protection of National Minorities,* art. 3(1).

48 General Comment No. 23: The Rights of Minorities, CCPR/C/21/Rev.1/Add.5, 08.04.1994, art. 5(2).

of exclusion from the society or the voluntary consent of an individual to be assimilated can create the situations in which the minority members do not wish to benefit from the minority rights.[49] At last the individual is free whether to benefit from the differential treatment or not. The responsibility is on the State that a decision like this will not create a disadvantageous situation. It is in fact a special kind of prohibition of discrimination which occurs from a decision to benefit from the minority rights or not. Only if a State does not create a disadvantage on the individuals who accept minority status this would encourage the unwilling individuals to benefit from the minority rights.

5.1.3. Direct Applicability

Another part of the Convention which is open to critiques is that the Convention has no power of direct application in the State Parties. The reason why the Convention was named as the framework is caused of that[50] Implementation of the Convention needs a regulation of national legislation and appropriate governmental policies. The second section of the Convention is the main operative part. This section has programme type provisions. That is to say that the State Parties can find the core articles which create the Convention in this section and they also will carry out them with domestic legal regulations or governmental policies. The objective of the Convention is identified with the articles in the second section. To reach these objectives States can ratify bilateral or multilateral treaties besides the domestic legal regulations and governmental policies. However, neither of those treaty articles can be interpreted as having a direct effect on the States.

5.1.4. General Minority Rights

It is possible to separate the rights and freedoms in the Convention into two parts as general and special minority rights. Both of these categories

---

49 **Hofmann, Rainer,** *the Framework Convention for the Protection of National Minorities: An Introduction,* in *the Rights of Minorities in Europe a Commentary on the European Framework Convention for the Protection of National Minorities* (ed.) by Mark Weller, Oxford, Oxford University Press, 2005, p.22.

50 *Explanatory Report to the Framework Convention for the Protection of National Minorities,* para. 13.

must be called as minority rights since they are covered by a minority convention. The general minority rights in the Framework Convention were written as a repetition of some rights which are included in the ECHR and other human rights instruments of a general manner. For example, the freedom of association, freedom of thought and conscience, freedom of expression in article 7; the right to manifest a religion or belief in article 8; the right to learn a language in article 14 are also protected by the ECHR.[51] The repetition of these rights and freedoms in the Framework Convention must be understood as an emphasis on the importance of them for the minorities. Secondly, there is an obligation of these rights and freedoms must be allowed to use by individuals alone or with others as the result of the article 3(2). Consequently, even if it can be seen as a repetition of the ECHR articles, the general minority rights and freedoms provide a group right status to them. Thirdly and lastly the Framework Convention is open for the ratification of non-member States of the CoE. That is why these general minority rights give a chance to apply such rights and freedoms in the States which have not bound with similar provisions of an international instrument before. This is another important side of general minority provisions.

5.1.5. Special Minority Rights

The Framework Convention covers articles which legalize the differential and mostly advantageous acts formulised for the protection of diverse groups besides the general minority rights. It is not possible to find similar provisions in the ECHR. In that sense, to promote the conditions necessary for the persons belonging to national minorities to maintain and develop their culture in article 5; to ensure that persons belonging to a national minority are not discriminated in their access to the media in article 9; freedom of use the minority language in public, orally and in writing and use the minority language between the members of a minority and in the relations with administrative authorities in article 10; the right to education in minority language in article 14 can be seen as the special minority rights.

---

[51] It is openly accepted that the articles of ECHR has been taken into account or even directly modelled by the Framework Convention. See *Explanatory Report to the Framework Convention for the Protection of National Minorities,* paras. 51, 56, 58 etc.

It is possible to argue that the nucleus of such rights can be found in the ECHR but it is hard to say that these articles of the ECHR provide special rights to minorities.

5.1.6. Interpretation of the Convention

The third section of the Convention is about the interpretation of the instrument. In this section it is written that the Convention cannot be interpreted against the territorial integrity and the political independence of a State. This provision stresses the importance of the fundamental principles of international law.[52] One of the main reasons of the states remain distance from the minority protection is the fear of a possible claim of independence in the long run. Another reason is the possibility of intervention to a State's internal issues by using its minorities. Both situations are blocked with the third section of the Convention.

Another rule on the interpretation in the third section is about the higher standards in the domestic law or the treaties to which the State is a Party. When such a situation exists the domestic law or the treaty law prevails. That is why the rules of the Framework Convention do not find a space to be used in these circumstances.[53] This provision was set up for the States which are advanced in the minority rights protection. The Framework Convention uses a careful language for making its application in a wide international area. This careful language is beneficial for the States where the minority rights protection tradition is not exist or limited. However, in the States where minorities are protected with high standards this would mean a retrogressive implementation. It is clear that such States will not be so reluctant to ratify the Convention. This indicates us that there would be a high risk for the minority protection in these States. Thereof, this provision of the Convention on the special interpretation rule is well-directed.

---

52 *Explanatory Report to the Framework Convention for the Protection of National Minorities,* para. 90.

53 Ibidem. para. 91.

5.1.7. Monitoring Mechanism

The Framework Convention does not provide an individual petition system on contrary to the ECHR. The monitoring mechanism of the Convention is based on the reporting system.[54] The responsible organ for the monitoring is the Committee of Ministers. The State Parties must submit their first reports on their legislative and other measures to give effect to the principles of Convention within one year after the Convention entered in force for them. Apart from this first reports the Convention has a periodic report and an additional report system. The additional reports are submitted after the Committee of Ministers request.[55] There is no specific time limit for the periodic reports in the Convention but in practice it was accepted that the periodic reports should be submitted in every five years. The reports are transmitted to the Secretary General of the CoE. The Secretary General submits the reports to the Committee of Ministers. The State reports are made public within one month after they were transmitted. The Convention proposes to establish an Advisory Committee which helps to the Committee of Ministers to evaluate the sufficiency of the measures taken by the State Parties.

The Rules of Procedures about the creation of Advisory Committee was prepared by Resolution 97 (10) in 1997.[56] Advisory Committee consists of 18 ordinary members. The members are elected by the Committee of Ministers from those who were proposed by the State Parties. The competence of the Advisory Committee is to examine the State reports. The Advisory Committee prepares an opinion about the measures which were taken by the State Parties after its examination of the reports. It is possible to receive information from the NGOs and other sources such as individuals. Additionally, it is also possible to invite other sources to give information with the acceptance of the Committee of Ministers. The Advisory Committee

---

54 *Framework Convention for the Protection of National Minorities,* art. 25.

55 **Hofmann, Rainer**, *the Framework Convention for...*, p.7.

56 *Rules Adopted by the Committee of Ministers on the Monitoring Arrangements under Articles 24 to 26 of the Framework Convention for the Protection of National Minorities*, Adopted by the Committee of Ministers on 17 September 1997 at the 601st meeting of the Ministers' Deputies.

may arrange meetings with the States. It can arrange meetings with the NGOs with the permission of the Committee of Ministers either. Finally, the Advisory Committee has the right to make State visits.[57]

The Committee of Ministers holds a final decision which is called as conclusion after taking the opinion of the Advisory Committee. The adequacy of the measures taken by the State is evaluated one last time. It is also possible that the Committee of Ministers choose to make a recommendation when the situation is appropriate. The conclusions and the recommendations of the Committee of Ministers shall be made public upon their adoption. Namely, these conclusions and recommendations are not dependant on the approval of the State Parties. The conclusions are made public with the opinion of the Advisory Committee. In that way the report of the Advisory Committee is made public for a second time. In the further process the Committee of Ministers is responsible of the follow up procedure but the Advisory Committee may involve to this process either.[58]

As it is seen the monitoring mechanism of the Framework Convention is about the adequacy of the measures which were taken by the State Parties. In that sense the Committee of Ministers and the Advisory Committee work together. The progressive part of this process is that the system incorporates the NGOs and individuals as well. However, this incorporation is limited to be asked their views at the process of the preparation of the Advisory Opinion. Therefore, it would be hard to compare this incorporation with the individual application. The other positive side of the monitoring process is the automatic declaration of the opinions of the Advisory Committee and the conclusions of the Committee of Ministers without any further decision or permission. Thus, the implementation of the States Parties on the minority rights can be reviewed by all the interested parties.

5.2. The European Charter for Regional or Minority Languages

The second important instrument which was prepared by the CoE on the rights of the minorities is the European Charter for Regional or Minority

---

57 **Hofmann, Rainer,** *the Framework Convention for...*, p.9.

58 Ibidem. p.13.

Languages (Language Charter). The Charter was adopted on 25 June 1992 by the Committee of Ministers of the Council of Europe, and was opened for signature in Strasbourg on 5 November 1992. It entered into force on 1 March 1998. The Charter has been started to prepare before the Framework Convention but it was entered into force a month after it. The Framework Convention needs 12 ratifications for its enforcement. This number is lower from the number which is sought by the Charter. The Language Charter seeks 5 ratifications.[59] Notwithstanding, it was taken more time than the Framework Convention to reach the necessary number. The Charter contains programme type provisions setting out the objectives which the States must fulfil. These are State obligations, not individual or collective rights, leaving the States a measure of discretion in the implementation of the objectives.[60]

The Language Charter is a special instrument for the protection of the linguistic minorities. The objective of the Charter is "the protection of the historical regional or minority languages of Europe, some of which are in danger of eventual extinction, contributes to the maintenance and development of Europe's cultural wealth and traditions". The Language Charter is open for the non-member States of the CoE like the Framework Convention. This opportunity can be emerged by the invitation of the Committee of Ministers after the enforcement of the Charter however this way has never been implied yet. At the moment there are 25 CoE member States are Parties to the Charter. 8 members of the CoE has signed the Charter but not ratified it.[61]

5.2.1. Regionalist Approach of the Charter

The Charter's approach is atypical since it separates the languages as regional and non-regional. When it is scrutinized it would be seen that both terms are covered by the term of minority languages. However, the Charter separates a language which is traditionally spoken in a region by a

---

59 *European Charter for Regional or Minority Languages*, art. 19.

60 **Phillips, Alan,** *The Framework Convention for the Protection of National Minorities: A Policy Analysis,* Minority Rights Group Internatioinal, 2002, p.6.

61 http://conventions.coe.int/treaty/Commun/ChercheSig.asp?NT=148&CM=1&DF=&CL=ENG, last access 12.05.2012.

substantial number of persons of a minority and a language which is traditionally spoken within the State but cannot be identified with a region with this differentiation.[62] The real protection of the Charter is about the regional and minority languages. In that sense, although a language has a minority language status but not historically identified with a region cannot be benefited from the protection of the Charter.[63] In the absence of a territorial base, only a limited part of the Charter can be applied to these languages. For this reason, most of the articles of the Section III which are about the protection and development cannot be implemented to the non-territorial languages. It must be remembered that the Section III is mainly formed of special minority rights. On the other hand Section II which has provisions on the principles and the objectives of the Charter can be applied to the non-territorial languages as mutatis mutandis.[64] However, it is arguable that this part of the Charter can be effective in implementation since it does not provide concrete obligations on the State Parties. Thereof, it can be said that the Charter offers a limited protection for the minority languages.

5.2.2. Definition of a Linguistic Minority

The real significance of the Charter about the minority law is hidden in its indirect linguistic minority definition. The thing which was defined as regional or minority languages is actually no more than a linguistic minority with limitations on the territoriality. In that way the Charter defines a minority language and explains what a linguistic minority is.

The first article of the Charter defines regional and minority languages as "traditionally used within a given territory of a State by nationals of that State who form a group numerically smaller than the rest of the State's population which is different from the official language(s) of that State." This definition is almost a repetition of Capotorti's definition. The number, nationality, non-dominance, different features and the will of maintenance

---

62 *European Charter for Regional or Minority Languages*, art. 1.

63 *Explanatory Report to the European Charter for Regional or Minority Languages*, para. 37.

64 Ibidem.

elements are covered with the Charter's definition. The number element is described as being numerically smaller than the rest of the State's population, nationality is described explicitly, non-dominance is described as being different from the official language(s) of that State, different feature is described as a distinct language and the will of maintenance is described as the "traditionality" in the Charter's definition.

The Charter has a more detailed formulation than the minority definition (and thereof the linguistic minority definition) of Capotorti. For example, the dialects of the official language(s) of the State or the languages of migrants are left out of this formulation.[65] Additionally, the definition of the Charter gives an unusual importance to the territoriality which is not taken into account at minority protection in general.

According to the Charter "territory in which the regional or minority language is used" means the geographical area in which the said language is the mode of expression of a number of people justifying the adoption of the various protective and promotional measures provided for in the Charter.[66] Hence, not all but most of the provisions provided in the Charter find a place to be implemented in these geographical areas. Consequently a minority language which is not spoken by a significant number of people is not availed of the essential protection of the Charter even if it is characterized as a regional or minority language. In that sense an element of the protection of linguistic minority becomes to be spoken by a significant number of people in a specific territory. This definition is dangerous not just because of separating minorities into different classes and also for giving a wide margin appreciation to the States when providing minority rights.

5.2.3. Declaration of Language(s)

The provisions which are chosen from the Section III will be applied for the regional or minority languages which are declared in the instrument of ratification, acceptance or approval of a State Party in accordance with the article 3(1) of the Charter. In other words the essential operative provisions

---

65 *Explanatory Report to the European Charter for Regional or Minority Languages*, para. 32.

66 *European Charter for Regional or Minority Languages*, art. 1(b).

of the Charter can be chosen in certain numbers and the languages to which these provisions will be applied can be determined by the State Parties. There is no rule that force to the State Parties to apply these provisions all of its declared languages alike.[67] Hence the State Parties can choose the provisions and the paragraphs of the Section III as free as they want.

The Charter does not force the States to accept Section III which has provisions about supporting and promoting the minority languages. That is why it is also possible a State can ratify the Charter only by accepting the Section II. For that reason declaring a minority language becomes an obligation only after accepting the Section III provisions. Otherwise there is no need to declare a language.

Another interesting side of the Charter is its mentioning the lesser used official languages in the languages which can be declared for the implementation of Section III.[68] A State Party may declare an official language which is less widely used on the whole or part of its territory as the language to which the Section III articles will be applied. This fact is seen problematic for two reasons: First of all the official languages has the element of the domination in the minority definition. That is why an official language cannot be recognized as a minority language. In this respect the Charter goes beyond the minority protection. Secondly, there is no territorial requirement for the lesser used official languages. As a consequence when a State Party declared a lesser used non-territorial official language the Charter can provide Section III protection to it. This may causes a wider protection to a non-minority language than a minority language since the Section III does not provide a protection for the non-territorial minority languages.

5.2.4. Optional Clauses and Limitation of Reservation

The Charter offers an optional system on contrary to the Framework Convention.[69] Accordingly the States Parties must choose at least three paragraphs or sub-paragraphs from articles 8 and 12, at least one paragraph

---

67 **Grin, François,** *Language Policy Evaluation and the European Charter for Regional or Minority Languages,* Palgrave Macmillan, 2003, pp.61-62.

68 Ibidem, p.61.

69 *European Charter for Regional or Minority Languages*, art. 2(2).

or sub-paragraph from articles 9, 10, 11 and 13. Furthermore, including these articles, State Parties must choose at least 35 paragraphs or sub-paragraphs. Additionally, the articles to which the State Parties can make reservations are explicitly mentioned in the Charter.[70] The State Parties can make reservations to the paragraphs 2 to 5 of Article 7. It is not possible to make reservations to the other articles of the Charter.

The general provisions of the Charter can be found in the Section II as the objectives and principles. This Section is also the section to which the reservations can be made. The reason to let the States free to make reservations to this Section is that the obligation of application the provisions of Section II to all languages which are defined as regional and minority languages. In other words Section II must be applied to all regional and minority languages and the non-territorial minority languages (as mutatis mutandis) whether declared or not. However, there is not such a general application for the chosen paragraphs of the Section III.

5.2.5. Operative Provisions

The third Section of the Charter has provisions about education, judicial matters, matters on the relations with administrative authorities and public services, media, cultural activities and facilities, economic and social life. No fewer than 68 concrete undertakings are listed in this Section.[71] The selected articles of the Section III must be applied to all regional and minority languages and the lesser used official languages which were declared. The protection for the regional and minority languages is not limited to the territory which these languages are spoken traditionally. Some of the articles of the Section III also provide its protection to the areas out of the territories where such languages are spoken largely.[72]

Section III uses standards such as "to provide, to encourage or to favour" of some acts. Inarguably, the obligation to provide is the most rigid one of them. The obligation to encourage and the obligation to favour of

---

70 Ibidem, art. 21(1).

71 **Grin, François**, *Language Policy Evaluation...,* p.64.

72 Eg. *European Charter for Regional or Minority Languages*, art. 8(2).

some acts are mentioned as an alternative in almost every article of the Charter. In that case the States have a right to choose the provisions on encouragement or to favour when they don't lean toward to the obligation to provide. It is obvious that this method reduces the power of the Charter. Furthermore, in some articles of the Charter it is sought that the rights has to be requested by the minority members to make the States go into the action.[73] This allows the State Parties not to act automatically.

5.2.6. Monitoring Mechanism

With its all negative and positive sides it is a fact that the Language Charter covers the most detailed provisions in its area. However, this reality is reduced with the relatively weak monitoring mechanism. In fact the monitoring mechanism of the Charter is not that different from the Framework Convention's. A report mechanism is formed in the Charter as well.[74] It should be emphasised again that this is not a quasi-judicial complaints procedure since it is based on solely reporting.[75] The first report is submitted in the first year after the Charter entered into force for the State Party. The periodic reports must be submitted in every three years. The State Parties shall make their reports public.[76] There is no explicit provision for the additional report system in the Charter. The reports are submitted to the Secretary General of the CoE. The Committee of Experts which is established according to article 17 is responsible for the examination of the reports. The organizations and the institutions which were established legally in a State Party are enabled to call attention to the Committee of Experts for the issues which are related to the application of Section III. In this way the NGOs are provided to be included to the process. These organizations also have the right to make presentations for the policies followed pursuant to Section II.

Committee of Experts examines the State Report and it also prepares a report about it. The report of the Committee of Experts is sent to the

---

73 Ibidem, art. 8(1/a/iii), art 8(1/b/iv) etc.

74 **Grin, François,** *Language Policy Evaluation...,* p.66.

75 *Explanatory Report to..*, para. 129.

76 *European Charter for Regional or Minority Languages*, art. 15(2).

Committee of Ministers with the explanations of the State on the report. The Committee of Ministers can make the report of the Committee of Experts public. However, this is not an automatic action on contrary to the Framework Convention. Consequently the criticism and the monitoring on the implementation of the States by the third parties is solely left to the decision of the Committee of Ministers.[77] The weakest side of the report proceeding is that. The Committee of Ministers makes recommendations according to the report of the Committee of Experts and the process is finalized in this way. In addition the General Secretary of the CoE is responsible to prepare a report to the Parliamentary Assembly on the implementation of the Charter in every two years. This makes the Charter the only instrument that the Secretary General takes in part in the monitoring process.

6. The Protection of Minorities with the European Convention on Human Rights

European Convention on Human Rights is the umbrella instrument which offers a general protection to the human rights and freedoms in Europe. In general it is thought that the Convention contains provisions solely on the civil and political rights. However, it also has articles related with the economic, social and cultural rights such as prohibition of discrimination, freedom of association, freedom of religion, right to education and so on. Even if some provisions of the Convention have the feature of exercising the rights with others, the protection of Convention has a method which is based on an individual protection in general. Thereof, it is not possible to find a provision in the Convention which is directed to the protection of group rights.

There is no general provision which protects the minority rights in the ECHR. For that reason persons belong to a minority can only be benefited from the protection of the ECHR as the same degree with any other individual. As Greer correctly mentioned "The Convention were originally founded on the alternative, individual rights approach which accepts the

---

77 *European Charter for Regional or Minority Languages*, art. 16(3).

existing borders of states and attempts to accommodate minority rights within a national framework of equal, non-discriminatory, individual rights, neutral on ethnic, religious, linguistic, cultural, and other identity criteria."[78] That is why it is hard to say that the Convention has a special perspective which protects and promotes the minority rights.

However, when one remembers that the monitoring mechanism which the ECHR is provided has the most effective protection in the international area it wouldn't be wise to left the minorities out of this protection.[79] "Individual application under Article 34 of the European Convention on Human Rights can be exercised by organizations or groups of individuals, provided they themselves have been victims of an alleged violation. Particularly from the late-1990s onwards, the Strasbourg institutions have responded positively to complaints from minority groups about Convention violation."[80] That is why it is a must to scrutinize the ECHR provisions and its case law and to discuss these provisions and decisions to use for the protection of the persons who belong to the minority groups.

The Convention has been amended gravely with the Protocols 11 and 14 and taken its current form. The Convention has six more Protocols which is relevant to the protection of the rights and freedoms. Therefore the Convention must be evaluated with the rights and freedoms in it and also in its Protocols. The first article of the ECHR says that "The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section 1 of this Convention". It means that the Convention provides its protection for the individuals who live in the jurisdiction of all its State Parties without a limitation to be nationals or as such. Accordingly the non-nationals, refugees and the persons belong to a minority group come under the protection of the Convention. In that sense if

---

78 **Greer, Steven**, *The European Convention on Human Rights Achievements, Problems and Prospects*, Cambridge, Cambridge University Press, 2006, p.31.

79 **Lawson, Rick,** *The European Convention on Human Rights*, in *International Protection of Human Rights: A Textbook* (ed.) by **Catarina Krause and Martin Schenin,** Turku/Åbo, Åbo Akademi University, 2009, p.423.

80 **Greer, Steven,** *The European Convention...,* pp. 32-33.

we accept that the non-nationals can be count in the minorities, they should have benefited from the protection of the Convention.[81]

The operative clauses of the Convention are written in the first Section.12 of these provisions are directly relevant with the rights and freedoms and one is about the prohibition of discrimination. In addition to these fundamental clauses there are three articles in Protocol 1, four in Protocol 4, two in Protocol 6, five in Protocol 7, one in Protocol 12 and one in Protocol 13 on the new rights and freedoms which are added to the Convention. Thereof, when the protection of the minorities by the ECHR is examined these articles must be evaluated one by one.

6.1. The Rights and Freedoms Which Can Be Linked with the Minorities

All the rights and freedoms of the Convention protect the individual members of the minorities who live under the jurisdiction of the State Parties. However, only some of these rights and freedoms are directly related to the minority rights.[82] To determine the rights which are related to the minority issues are only possible to define the minorities correctly. Primarily the minorities have different features than the majority. These differences are clustered around the language, religion and ethnicity. Essentially the minority rights are the rights to protect and maintain of these features. The minorities can live under the same conditions with the majority only when the special minority rights are provided.[83] That is why it is not necessary to review the rules which are not relevant with the aim of protection and maintenance in detail such as the prohibition of torture, slavery or right to life. Besides some of the provisions of the Convention have characteristics to help for the minority protection.

---

81 **Schumann, Klaus,** *The Role of the Council of Europe...,* p.89.

82 **Schumann, Klaus,** *The Role of the Council of Europe...,* p.90.

83 **Kurban, Dilek**, *Confronting Equality...* pp. 160-161.

6.1.1. Right to Respect for Private and Family Life

The first right of the Convention which can be related to the minorities is the right to respect for private and family life.[84] The minorities maintain their features which create their distinctions especially in their private and family lives. The interference to the private life, family life, home and correspondence may damage the will to protect and maintain the distinct features of the minorities.

These kinds of interferences can be caused of a direct attack to the minority identity or be caused by no special reasons. When the interference is caused by a direct attack to the minority identity the situation must be evaluated with the prohibition of discrimination. The interference to the private and family life of the minorities must be prevented may be more than anyone else even if there is not a direct attack. The concept of private life covers an individual's social identity which includes name, personal development and the right to establish and develop relationship with other human beings and outside world.[85] That is why it is possible that the claims on the breaches of article 8 can be brought before the European Court of Human Rights especially for the restrictions on the minority languages. Some States has a policy to interfere the using of a minority language in private and family life. As it is known that the States have no duty to follow a protection policy for the minority languages if they don't provide minority rights. However, not to have a policy for the protection of a minority language cannot be understood as the permission to interference to the use of a language in private or family life.

The article 8 of the ECHR which accommodates the right to respect for the private and family life is not absolute and has several limitations. The right to respect to private and family life can be subjected to the limitations in accordance with the law and when it is necessary in a democratic society, in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of

---

84 *European Convention for the Protection of Human Rights and Fundamental Freedoms*, Rome, 4.XI.1950, Council of Europe Treaty Series, No.5, art.8.

85 **Lawson, Rick,** *The European Convention on*..., p.405.

health or morals, or for the protection of the rights and freedoms of others. It is obvious that these limitations must be examined in every concrete case. However, it is really hard to legitimize the intervention to a language in private and family life according the second paragraph of the article 8. There cannot be created a legitimate aim for this interference especially when the reason of the intervention is not the content and just the language itself. A similar interference can be implemented for the cultural activities which are related to an issue of ethnicity. The religious and cultural practises which rest in the private and family sphere must be benefited from the protection of article 8. However, it is necessary not to forget that the religious practice is protected by the article 9 separately.

6.1.2. Freedom of Thought, Conscience and Religion

The freedom of thought, conscience and religion is important for the protection of the religious minorities. The article 9 of the Convention protects the manifestation of a religion in worship, teaching, practice and observance. Article 9 has no a minority special formulation like the other articles of the Convention. However, the content of the article is directly related to the use the minority rights as a group.[86]

The article enables that the religious practises can be manifest in public or private sphere and alone or with others. As it is known being a minority does not always result in the protection of a minority as a group. However, minority rights provide a possibility to the members of the minority to act together. In this sense to be a minority is a concept which must be thought not solely in an individual but with a group perspective.[87] That is why to enable the manifesting a religion with others will be used to protect the minorities as a group. When the article 8 of the Framework Convention about the right to manifest a religion or belief of the persons belong to the minorities is read together with the article 3(2) on the feasibility to use the rights and the freedoms within the Convention individually or with others; it is seen that the rights protected in the Framework Convention is not more

---

86 **Schumann, Klaus**, *The Role of the Council of Europe...,* p.90.

87 **Kymlicka, Will**, *Introduction*, in *The Rgihts of Minority Cultures* (ed.) by Will Kymlicka, Oxford University Press, 1995, p.1.

than that the article 9 provides. Even if the protection of the ECHR does not cover the protection and maintenance of the minorities it creates a space of freedom which may also help these aims. That is why the implementation of the article 9 protection for the minorities must not be forgotten by the members of the minorities.

Another feature of the article 9 is the protection of the rights in the public sphere.[88] The opportunity of the protection of the religious minorities in the public sphere is vital for the recognition, self-respect and the maintenance of the minority consciousness. When it is provided to bear the distinct features of the minorities from the private sphere to the public sphere it would provide the opportunity to transfer them to the new generations either. Thereof, publicity is a barrage in front of the assimilation.

6.1.3. Freedom of Expression

Language is a component of freedom of expression. Therefore the freedom of expression is linked to freedom of access to language in particular.[89] Article 10 of the ECHR indicates that everyone has the freedom of expression. This right enables to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers.

The issue includes the right to express the different features of the minorities and to receive and impart the information about this area by the members of the minorities. Holding opinions and receive and impart the information about their culture would help the persistence of these distinction for an ethnic minority. Likewise to receive and impart information about a distinct religion is also in the area of the freedom of expression even if the religious minorities are protected with the protection of article 9.

---

88 ECHR, Case of Cyprus v. Turkey, Application no. 25781/94, Judgment, Strasbourg, 10 May 2001, paras. 241-244.

89 **McDougal, M.S.,** Lasswell, **H.D., and Chen, Lung-chu**, *Human Rights and World Public Order,* Yale University Press, New Haven, 1980, p.726.

The freedom to hold opinions under this article represents rather a passive field. Actually holding opinions is not an area to which the public authorities can interfere.[90] However, when the matter comes in the scope of the receiving and imparting the information it will pass from the area of the thought to the area of practice and therefore the ways of the interference by the public authorities appears more clearly. The individual must be benefited from the protection of article 10 even if the form of expression offends, shocks or disturbs the majority.[91] Expressing the different features of the minority is a part of their minority status by nature. It would not be wise to expect that a member of a minority will develop a minority conscious in his or her inner world. Therefore, the continuance of the minority conscience will only be possible by the use of various expression methods between the members of the minorities in the social and cultural environment. The forms of the expression of the minority are not numerus clausus. All the methods of expression whether written or oral, in arts or information are protected by the article 10.[92]

The issue has a special importance for the linguistic minorities. The language is a way of expression on its own and that is why this notion is always under the risk of suppression.[93] To put the obstacles in front of the language means to hamper the expression apart from the content of the expression. It must be said that the limitations on the language is a common human rights violation in the area of the press and broadcasting. Thereof, the protection of the article 10 of the ECHR is widely used by the members of the minorities.[94] The Convention enables the freedom of expression regardless of frontiers. This is especially significant for the minorities which are spread over more than one country because when the freedom of

---

90 See **Mowbray, Alastair**, *Cases and Materials on the European Convention on Human Rights*, Second Edition, Oxford University Press, 2007, pp677-678.

91 ECHR, *Handyside v. UK*, Application no. 5493/72, Judgement of 7 December 1976.

92 Eg. *Vereinigung Bildener Künstler v. Austria*, Application no. 68354/01, Judgement of 25 january 2007.

93 **Verennes, Fernand de**, *Language, Minorities and Human Rights*, Kluwer Law International, 1996, pp. 226-227.

94 Eg. *Informationsverein Lentia and Others v. Austria*, Application no. 37093/97, Judgement, 28 November 2002.

expression is provided regardless of the frontiers the relationship between the minorities which live in different states is protected as well.[95] This possibility can be effective for the protection of minorities which have a strong kin state. For example, the possibility to access the press or the broadcasting of the kin state enables the protection and progress of the different features of a linguistic minority. The freedom of expression of the minorities enables them to use the media in the public sphere. Such means of the media answers the needs of the minorities and also helps them to protect and maintain the minority consciousness. However, the protection of the article 10 expressly allows the States asking for the licensing of broadcasting, television or cinema enterprises. In that way the minority broadcasters are required the licence procedure like everyone else.

6.1.4. Freedom of Assembly and Association

The freedom of assembly and association is protected by the article 11 of the ECHR. The freedom of assembly is a collective way that the minorities can express their distinct features from the majority. The peaceful assemblies are important not only for the expression of these different features but also important for the possibility to maintain their difference and let the needs of the minority known by the majority and the power elites. This provision may imply certain positive obligations to the Parties for the protection of the freedoms mentioned against violations which do not emanate from the State. Under the possibility of such positive obligations have been recognised by the European Court of Human Rights.[96]

The more important part of the article 11 for the minorities can be seen as the freedom of association. The minorities can systematically protect their identity by the association which they established. This is especially significant for the States where urbanization is rapid. In such States only the new methods can protect the maintenance of the minority consciousness. Establishment of associations is one of them. Furthermore, minorities are not homogenous entities. They have different ideas and understandings as the other social structures. These differentiations within the minority groups can

---

95 Compare with *European Charter for Regional or Minority Languages*, art. 11(2).

96 *Explanatory Report to..*, para. 52.

even be seen in the significant matters such as self-definition of the minorities. That is why the freedom of association helps the minorities to freely define themselves and to create multivocality in the minority groups.

Another advantage of the establishment of minority associations is hidden in the reality that a State can find an addressee with its relations to the minorities. The needs and the requests of the minorities are vital for the distribution of the rights especially when a State follows a policy to provide the minority rights. In that sense the needs and requests directed by the minority associations can be determinative for the practice of the States.

6.1.5. Right to Education

The last provision of the ECHR which can be directly related to the minority protection is the right to education of article 1 of Protocol 2. During the implementation of the rights and freedoms of the Convention, the Court has developed the most comprehensive jurisprudence for the protection of the members of the minorities in this area.

The right to education of the minority members is may be the most fundamental and problematic part of the minority issues from the very beginning of minority law. One of the main conditions for the transfer of the minority culture to the new generations, to promote this cultural inheritance and to protect the minority conscience is using the education for these purposes. However, the States generally give prominence to one ethnic, religious and/or linguistic group instead of promoting multiculturalism. These preferences have advantages for creating a conscience of a nation but also have negative effects for the minorities such as weakening against the preferred groups and also as losing their identities.

Both the rights to be educated and the freedom of education are formulated in the article 2 of Protocol 1.[97] The first sentence of the article mentions that no person shall be denied the right to education. The members of the minorities are benefited from this negatively written right. The matter which is mentioned here is the right to attend to a educational institution

---

[97] **Terzioğlu, Süleyman S**., *Uluslararası Hukukta Azınlıklar ve Anadilde Eğitim Hakkı*, Alp Yayınevi, 2007, p71.

which is existing at a given time.[98] However, the right to education in the article 2 does not specially consider the needs of the minorities in the educational field. The second sentence of the article has an approach to consider the parents instead of the real subjects of the right. According to this the State shall respect the right of parents to ensure such education and teaching in conformity with their own religions and philosophical convictions. When this formulation is analysed in detail it would be seen that this approach is open for criticism in respect of the rights of the child.[99] However, the preferences of the parents are vital for the minority rights since the maintenance of the minority heritage is only possible when the parents transfer it to their children. Accordingly, to respect to the convictions of the parents comprises the respect to the different features of the minority who do not wish to be assimilated. For this reason, to respect of the religions and philosophical convictions of parents in education prevents the indoctrination of the majority culture to the children who are members of a minority group. Article 2 of Protocol 1 is crucial for the children who belong to a religious minority. The education of the majority religion cannot be imposed to the child when the article is used. It is hard to interpret the article as a positive right which gives a duty to the State for providing an education in conformity with the religious and philosophical convictions of the parents.[100] That is why even if the State cannot provide an educational system to teach the child in conformity with the convictions of his or her parents, it has to avoid teaching the religious information other than the parents' and it has to configure the system neutral.[101] The respect to the right of parents to ensure the education and teaching in conformity with their philosophical convictions is open to be interpreted widely. Especially when the matter is related to the ethnic minorities, the cultural values can be seen as a part of the philosophical convictions.

---

98 *The Case Relating to Certain Aspects of the Laws on the Use of Languages in Education in Belgium v. Belgium,* Application no 1474/62, Judgement 23 July 1968, para. 4.

99 **Bueren, Geraldine Van**, *The International Law on the Rights of the Child*, Martinus Nijhoff Publishers, 1995, pp. 240-245.

100 Consultative Assembly, Preparatory Work on Article 2 First Protocol to the Convention.

101 **Bueren, Geraldine Van**, *The International Law...,* p. 241.

May be the weakest part of the protection for education of ECHR is the one about the language. Hence the article has no provision on the education in minority language or a provision for the teaching of the minority language. As it is expressly mentioned in the Belgian Linguistic Case the language element is not covered by the philosophical and religious convictions. Moreover the Court held that the right to education does not imply a duty on States Parties to provide subsidised education of a specific type or a specific level.[102] The education in the minority language is a matter which is regulated in detail in the minority treaties. For the protection and the maintenance of the minority adopting a minority language as the language of instruction is necessary. In some situations the States choose to teach the minority language instead of giving it a special status to be the language of the instruction. This can be caused because of the economic reasons or the political preferences. The minimum benefit for the transfer of the language to the new generations can be appeared even if the second method is chosen. However, choosing to teach a minority language is not enough for the promotion of a language. After all the Convention has no special minority rights in the field of education and it sees the languages of the minorities out of its scope. In this sense the States are become free to make preferences on the language in their educational systems.

6.2. ECHR and Prohibition of Discrimination

The ECHR expressly mentions the term of "national minorities" in its provisions about the prohibition of discrimination. This term cannot be found in the other articles of the Convention. However, article 14 and the article 1 of the Protocol 12 uses it as a basis of discrimination.

The Convention prohibits any discriminative act reasoned by the association with a national minority. The term of "national minority" is chosen to define the minorities in accordance with the European tradition. Yet the foundations of the discrimination are not numerus clausus.[103] Namely the other elements which opt out the elements explicitly mentioned in the

---

102 *The Case Relating to Certain Aspects...*

103 *Explanatory Report to Protocol No. 12 to the Convention for the Protection of Human Rights and Fundamental Freedoms*, para. 20.

articles are also protected with the term of "other status". However, the express mentioning of the national minorities in these articles is a matter which must be assessed in detail. Almost every human rights instrument have a clause which is related with the prohibition of discrimination but none of these human rights instruments calls association with a minority as the basis of discrimination except the minority treaties.[104] For this fact, one can deduce that the ECHR gives a special weight to the minority rights and protection.

6.2.1. Prohibition of Discrimination Related with the Rights and Freedoms of the ECHR

The article 14 of the Convention prohibits discrimination limited to the rights and freedoms which are protected by the ECHR. This means that the discriminatory practices based upon the association with a minority are forbidden when the members of the minority uses the rights and freedoms of the Convention.[105] The Convention has provisions directly related with the minority protection but it is hard to say that the Convention provides special minority rights. That is why the protection of the article 14 is not about the special minority rights either. However, the rights and freedoms in the ECHR which can be directly linked to the minorities must be evaluated with the principle of equality. Even if the principle of equality is not mentioned in the Convention the concept is relevant with the prohibition of discrimination.[106]

The provisions on the prohibition of discrimination in the minority instruments do not accept the preferential treatment to the minorities as discrimination.[107] Moreover, provisions on the prohibition of discrimination

---

104 **Gemalmaz, M. Semih**, *Ulusalüstü İnsan Hakları...,* p. 1641.

105 **Loucaides, Loukes G.**, *The European Convention on Human Rights Collected Essays*, Martinus Nijhoff Publishers, p.57.

106 *Explanatory Report to Protocol No. 12* ..., para. 14.

107 For example, "a difference of treatment is discriminatory if it has no objective and reasonable justification, that is, if it does not pursue a legitimate aim or if there is not a reasonable relationship of proportionality between the means employed and the aim

in such instruments are always open to the application for the distinctions between different minority groups. However, ECHR must test the legality of every different and positive practice towards the minority members in every different case. It is obvious that the aim of the protection of minorities can be used for a motive of legality when the States take a position in favour of the minorities. Yet it is not possible to propose that the protection of the article 14 can be used in the preferences between different minorities as a positive obligation for the other minority groups since the ECHR has no special minority rights.

6.2.2. General Rule of the Prohibition of Discrimination

The article 1 of the Protocol 12 has the provision which can be used for the most effective minority protection. This article prohibits discrimination without limiting it with the provisions of the Convention and it also calls the association with a national minority as a basis where discrimination is prohibited like the article 14. Since the general prohibition of discrimination is composed in the form of a Protocol its applicability is limited. Only 18 member States of the CoE are parties to the Protocol 12.[108] This low number is a sign that the States has some hesitations on the provision of the general prohibition of discrimination.

The feasibility to use the prohibition of discrimination clause without any limitation creates a steady protection for the minorities. However, this protection for the minorities is only possible in the States where the minority rights are given.[109] In other words, unless the minority rights are provided as special or general minority rights these rights cannot be monitored by the Protocol 12. States can establish the minority rights in two ways. The first way is to use of their domestic laws.

Secondly, the States can establish the minority rights by taking obligations with being a party to an international treaty. At the first situation

---

sought to be realised", *The case of Abdulaziz, Cabales and Balkandali v. the United Kingdom*, Judgment of 28 May 1985, Series A, No. 94, para. 72.

[108] http://conventions.coe.int/Treaty/Commun/ChercheSig.asp?NT=177&CM=&DF=&CL=ENG , last access 09.01.2017.

[109] *Explanatory Report to Protocol No. 12 ...*, para. 22(1).

a State enters into an obligation not to discriminate in the implementation of the rights it has given as soon as it ratifies the Protocol. For the international treaties it must be checked at first if the treaty is directly applicable or not. For example the Framework Convention specifies its provisions as the objectives and seeks that the State Parties make regulations for these objectives in their domestic law. In this sense the provisions of the Framework Convention can be monitored by the Protocol 12 only when these regulations are made. In this second situation another question can bear in mind whether the monitoring for the discrimination is available for all minority groups or not. If the international treaty offers the principle of equality between the minority groups and the State Party makes regulations according to this provision, the ECHR protection must be extended to this field as well. In this situation it is obvious that the prohibition of discrimination covers the obligation to give special minority rights which is generally seen in positive obligation form.[110]

Consequently, if the States which establish minority rights are also Parties to the ECHR Protocol 12 the minority protection reaches to the highest level which is expected from it. Thus, the rights of the persons who belong to a minority group can be protected before a mandatory international judicial authority by individual applications. At that point the only thing to criticise can be the lack of group application under the ECHR system. However, it is hard to say that this situation creates a large lacunae for the protection of the minorities.

7. Holistic Approach between the Instruments of the Council of Europe

One of the main characteristics of the international human rights law is the principle of holism.[111] [112] The principle of holism appears as the form of

---

110 Ibidem. Para.24.

111 **Gemalmaz, M. Semih**, *Ulusalüstü İnsan Hakları...,* p. 1572.

112 For the integrated human rights approach between economic social and cultural rights and civil and political rights also see: Scheinin, Martin, *Economic and Social Rights as Legal Rights* in *Economic, Social and Cultural Rights*, Second Revised Edition (ed.) by

holism and the indivisibility of the list of the human rights, normative holism between the treaties, and holism of the jurisprudence.[113] The minority rights are an indivisible part of the human rights list. Different international mechanisms use similar terminology when they provide minority rights. Furthermore, the monitoring mechanisms of the different treaties frequently refer to the organs of the other treaties.

Holism can be seen in a single human rights regime and also between different regimes. In this sense it cannot be claimed that the instruments and the monitoring mechanisms of these instruments of the CoE do not affect to each other. That is why it must not be overlooked that there is a holistic relation between the minority instruments of the CoE and the ECHR. This relationship must be evaluated in a bilateral way as the relation of the minority instruments with the ECHR and as the relation of the ECHR with the minority instruments. The holism between the jurisprudences of the minority instruments and the ECHR was examined in the above sections. Thereof, it will be referred to the normative holism hereinafter.

7.1. The Relation of the Minority Instruments with the European Convention

All of the State Parties of the Framework Convention are also the Parties to the ECHR. In this respect it is an indisputable fact that those states are bound with the rights and freedoms provided by the ECHR. However, the relation of the minority instruments of the CoE with the ECHR is not limited to this. Some of the provisions of the minority instruments have created the normative source of the holistic relation with the ECHR by instituting a direct link.

It is written that the protection of the persons belonging to a national minority is an integral part of the international protection of human rights at the first section of the Framework Convention. This general principle is the

---

Asbjorn Eide, Katarina Crause, Allan Rosas, Martinus Nijhoff Publishers, London, 2001, pp. 32-42.

113 **Schutter, Oliver de**, *The Protection of Social Rights by the European Court of Human Rights,* in *Social, Economic and Cultural Rights: An Appraisal of Current European and International Developments* (ed.) by **Peter der Auweraert**, Antwerpen, 2002, p. 209.

main reason of that the ECHR must be considered at the implementation of the Framework Convention. However, the references on the holism between the instruments of the CoE are not limited to this. The minority instruments have direct references in some of their provisions. At the beginning of the Framework Convention it is expressly mentioned that the ECHR and its optional protocols are taken into account. In the article 19 State Parties are put under the obligation to use only those limitations, restrictions or derogations which are provided for in international legal instruments, in particular the Convention for the Protection of Human Rights and Fundamental Freedoms when they were implementing the rights and freedoms of the Framework Convention. According to this article the limitations, restrictions or derogations which are not expressly formulated in the Framework Convention is filled with the rules of the international instruments but especially with the ECHR principles.[114] In this respect the Framework Convention is bound itself with the ECHR directly. Article 22 of the Framework Convention says that the 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.[115] When it is considered that all the State Parties to the Framework Convention are also parties to the ECHR it can be seen that none of the provisions of the Framework Convention can be interpreted as limiting or derogating the ECHR provisions. In this sense it is obvious that the Framework Convention gives the superiority to the ECHR. Another similar provision can be found in the article 23. Article 23 says if the ECHR and its optional protocols has a similar provision with the rights and freedoms regulated in the Framework Convention, these rights and freedoms must be implemented in conformity with the ECHR provisions. These kinds of clashes are seen mostly in the provisions of the Framework Convention which are related with the general minority rights. When the rights and freedoms mentioned in the ECHR and repeated in the Framework Convention for the interpretation of such provisions the ECHR interpretation is preferred.

---

114 *Explanatory Report to..*, para. 67.

115 *Ibidem*, para. 91.

There can also be found provisions in the Language Charter which refer to the ECHR. At the Preamble of the Charter it is said that the right to use a regional or minority language in private and public life is in concert with the spirit of the Council of Europe Convention for the Protection of Human Rights and Fundamental Freedoms. The effect of this reality can be seen at the provisions of the ECHR which can be related to the minority rights. This sentence of the Preamble actually offers a general link between two instruments. However, it is also possible to find provisions directly linked with the ECHR in the Charter. For example, article 4 of the Language Charter has a similar provision with the article 22 of the Framework Convention. It says that nothing in the Language Charter shall be construed as limiting or derogating from any of the rights guaranteed by the European Convention on Human Rights. The main difference between these two provisions is that the Charter mentions only the ECHR and not the other international treaties. The second paragraph of the article 4 says that any more favourable provisions concerning the status of regional or minority languages provided for by relevant bilateral or multilateral international agreements shall not be affected by the provisions of the Language Charter. In a comparison between the Language Charter and the ECHR it is hard to say that the ECHR has such favourable provisions on the rights of linguistic minorities as a result of the differences between a general instrument and a special minority instrument.

7.2. The Relation of the European Convention with the Minority Instruments

ECHR has no direct reference to the minority rights not just because that it is a general human rights convention but also for the reason that it has been prepared before the minority instruments of the CoE. In practice some of the State Parties to the ECHR are also Parties to the minority instruments. Therefore, it is hard to say that this situation does not affect the implementation of the ECHR. For that reason the State policies on the minority issues cannot be avoided at the implementation of the provisions of the ECHR which can be related to the minority rights. However, it does not mean that the State obligations which occurred from the provisions of the

minority instruments of the CoE can be monitored by the ECHR because all of these instruments has their own independent monitoring organs and methods. Even if there is holism between the instruments this principle has not to be interpreted that wide.

The article 1 of the Protocol 12 provides a new way to be used between the minority instruments and the ECHR. The obligations which were taken by the minority instruments can be monitored by the ECHR organs as much as the obligations affect the domestic law. This is a new perspective for the protection of minorities.

7. Strengthening the Minority Protection of the Council of Europe

It can be seen that the lack of an article in the ECHR which is related to the minority protection as a lacunae. Even though some specific articles of the Convention can be used for the minority rights, this protection cannot be called as a special minority protection. States do not enter into obligation to provide special minority protection by being a party to the ECHR.

7.1. An Additional Protocol to the European Convention?

There is an on-going discussion to add a new article to the ECHR for the protection of minorities.[116] With an additional protocol to the Convention for the protection of minorities would be beneficial for the direct applicability of the ECHR protection to the members of the minorities. The nature of the minority protection which might be added to the Convention is another issue to be discussed. It can be thought that an article like "the persons belonging to minorities shall not be denied the right to enjoy their own culture, to profess and practise their own religion, or to use their own language". This would be a similar approach of the ICCPR's protection. However, it is hard to say that this approach will be too beneficial for the minorities except giving an attention to the minority reality. The reason of this is the obligation of a general non-interference does not mean a special

---

[116] Eg. "In 1973 [The Committee of Experts] concluded that, from a legal point of view, there was no special need to make the rights of minorities the subject of a further protocol to the ECHR.", *Explanatory Report to..*, para. 2.

minority protection but a general one. The fields that such an article protects can actually be protected with the provisions of the ECHR that can be related to the minority rights.[117]

Another possibility might be the protection of the minorities with special minority rights. In this method the protection of minorities can be provided with an article which encourages the special minority protection at least. The Convention on the Rights of the Child provides a similar provision to this in its article 17. It is sure that this protection contributes to the minority rights even though the details of such measures for the encouragement of the special minority rights cannot be expressly written in a general convention.

It is hard to say that to add an optional Protocol to the Convention has no obstacles. Especially the member States of the CoE do not lean towards to the minority instruments like the other instruments. It would not be realistic to think that an optional protocol to the ECHR on the minority protection will be popular during its preparation and ratification. Secondly, an optional protocol means to add more workload to the ECtHR which already complains about it.[118] The CoE is searching for the methods to evade its workload with Protocol 14 but it seems that it has not reached to a final solution yet. The current discussion is on the new measures to add to the Convention system for reducing the workload. In that case a new protocol for the protection of minorities under the ECHR system seems a subject that is possibly open to objections.

---

117 In 1993 The Parliamentary Assembly proposed a text for an Additional Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms, concerning National Minorities and their Members. Committee of Ministers agreed to call for a new "framework convention" and also agreed to work on drafting an additional protocol. **Schumann, Klaus**, *The Role of the Council of Europe..., p.92*. However, the second agreement has never been succeeded.

118 "The Court is a victim of its own success...[W]hen the full time Court started operating, The Court's backlog grows with an astonishing 1,000 cases per month." Lawson, Rick, The European Convention on ..., p.423.

7.2. Strengthening the Monitoring Mechanisms of the Minority Instruments

Implementing the individual or group application mechanism to the minority instruments of the CoE is a way to strengthen the minority protection of the Council. It is clear that the report mechanism cannot materialize the individual based right protection. The minority instruments of the CoE is embraced the way to incorporate the NGOs to their report mechanism. However, it cannot be said that this means an individual based protection of the minority rights. Thereof, as many other international instruments made it before, it is possible to add new optional protocols to the Framework Convention and the Language Charter for the individual application or even for the group application systems. It is also possible to authorize the European Court of Human Rights for the minority protection limited to the individual application.

8. Conclusion

The protection of the minorities is a matter which shaped the European history. The CoE did not stay distant to the issue of minority rights in the XX. Century. Even if it is hard to say that there is a common understanding on the fundamental concepts of the minority rights such as a minority definition, it can be said the CoE has the most developed system in the regional or international sphere for the protection of the minority rights. The minority protection within the CoE is principally made by two minority instruments. Thereof, when one evaluates the protection of the minorities within the CoE gives most of his or her attention to these instruments. However, the possibility to use the ECHR effectively in the field of the minority rights is generally overlooked. Thinking the minority protection of the CoE limited to the minority instruments means to ignore the holism of the system and the possible benefits of the ECHR in the field of minority rights.

It is true that the minority instruments of the CoE have detailed provisions on the rights of the minorities. After all it cannot be supposed that a general human rights instrument can have detailed provisions about the minority rights, a specific field of the human rights. The field of minority

rights is separated from the general human rights theory especially with its concept of the treat differently to the different ones. However, this need of special regularization does not mean that the minority rights cannot be protected by the ECHR. Especially when the general minority rights clash with the provisions of the ECHR there is no reason not to use the ECHR. The ECHR added the general prohibition of discrimination to its rules with the Protocol 12. Accordingly for the States which are Parties to the Protocol, general prohibition of discrimination can be used to the supervising of special minority rights to the extend they accept these rights. This would be a revolution which enables the minorities to use the individual application system of the Convention. Since now none of the other systems has provided this opportunity.

Although the ECHR can be used at its present-day form for the protection of minorities there is an on-going search for a new additional protocol for the minority rights. In addition to this it is possible that to develop the monitoring mechanisms of the minority instruments of the CoE with a method which goes beyond the reporting system. In this sense it is also possible to add a new protocol to the minority instruments for the individual application system. Furthermore, the European Court of Human Rights can be authorized for this purpose by the minority instruments of the CoE. Even though the minority protection of the CoE is the most effective one in the world, it is still developing and is tried to be more effective one with new ideas. Unfortunately, it is a fact that the rapid development of the 1990s has been decelerated.

BIBLIOGRAPHY

Books and Articles

Alcock, Antony: A History of the Protection of Regional Cultural Minorities in Europe, From the Edict of Nantes to the Present Day, London, Macmillan Press Ltd., 2000.

Bueren, Geraldine Van: The International Law on the Rights of the Child, Martinus Nijhoff Publishers, 1995.

Gemalmaz, M. Semih: Ulusalüstü İnsan Hakları Hukukunun Genel Teorisine Giriş, 7th Edition, İstanbul, Legal Yayıncılık, 2010.

Greer, Steven: The European Convention on Human Rights Achievements, Problems and Prospects, Cambridge, Cambridge University Press, 2006.

Grin, François: Language Policy Evaluation and the European Charter for Regional or Minority Languages, Palgrave Macmillan, 2003.

Heinze, Eric: The Construction and Contingency of the Minority Concept, in Minority and Group Rights in the New Millennium, (ed.) by Deirdre Fottrell and Bill Bowring, the Hague, Martinus Nijhoff Publishers, 1999.

Hofmann, Rainer: the Framework Convention for the Protection of National Minorities: An Introduction, in the Rights of Minorities in Europe a Commentary on the European Framework Convention for the Protection of National Minorities (ed.) by Mark Weller, Oxford, Oxford University Press, 2005.

Kiss, Csaba G..: National Minorities in Central Europe -Definition and Typology, in Minorities in Politics Cultural and Languages Rights, (ed.) by Jana Jana Plichtova, Bratislava, Czechoslovak Committee of the European Cultural Foundation, 1992.

Kurban, Dilek: Confronting Equality: The Need for Constitutional Protection of Minorities on Turkey's Path to the European Union, Columbia Human Rights Law Review, Vol. 151, No.35, 2003.

Kymlicka, Will: Introduction, in The Rights of Minority Cultures (ed.) by Will Kymlicka, Oxford University Press, 1995.

Kymlicka, Will: Multicultural Citizenship A Liberal Theory of Minority Rights, Oxford, Clarendon Press, 1995.

Laponce, J. A.: The Protection of Minorities, Berkeley and Los Angeles, University of California Press, 1960.

Lawson, Rick: The European Convention on Human Rights, in International Protection of Human Rights: A Textbook (ed.) by Catarina Krause and Martin Schenin, Turku/Åbo, Åbo Akademi University, 2009.

Loucaides, Loukes G..: The European Convention on Human Rights Collected Essays, Martinus Nijhoff Publishers, 2007.

McDougal, M. S.: Lasswell, H.D., and Chen, Lung-chu, Human Rights and World Public Order, Yale University Press, New Haven, 1980.

Miall, Hugh: Introduction, in Minority Rights in Europe, The Scope for a Transnational Regime (ed.) by Hugh Miall, London, Pinter Publishers, 1994.

Mowbray, Alastair: Cases and Materials on the European Convention on Human Rights, Second Edition, Oxford University Press, 2007.

Nobbs, Katherine: The Effective Protection of Minorities in the Wider Europe: Counterbalancing the Security Track, in The Protection of Minorities in the Wider Europe (ed.) by Marc Weller, Denika Blacklock and Katherine Nobbs, Palgrave Macmillan, 2008.

Oran, Baskın: Türkiye'de Azınlıklar, 5th Edition, Istanbul, Iletişim Yayınları, 2008.

Phillips, Alan: The Framework Convention for the Protection of National Minorities: A Policy Analysis, Minority Rights Group International, 2002.

Schumann, Klaus: The Role of the Council of Europe, in Minority Rights in Europe, The Scope for a Transnational Regime (ed.) by Hugh Miall, London, Pinter Publishers.

Schutter, Oliver de: The Protection of Social Rights by the European Court of Human Rights, in Social, Economic and Cultural Rights: An

Appraisal of Current European and International Developments (ed.) by Peter der Auweraert, Antwerpen, 2002.

Syposz, Magdalena: Framework Convention for the Protection of National Minorities Opportunuties for NGOs and Minorities, Minority Rights Group International, London, 2006.

Terzioğlu, Süleyman S.: Uluslararası Hukukta Azınlıklar ve Anadilde Eğitim Hakkı, Alp Yayınevi, Istanbul, 2007.

Thornberry, Patrick: The UN Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities: Background, Analysis, Observations and an Update, in Universal Minority Rights (ed.) by Alan Phillips and Allan Rosas, 2nd Edition, Turku/Åbo and London, Åbo Akademi University Institute for Human Rights and Minority Rights Group International, 1997.

Varennes, Fernand de: Language, Minorities and Human Rights, The Hague, Martinus Nijhoff Publishers, 1996.

International Instruments

Consultative Assembly, Preparatory Work on Article 2 of the First Protocol to the ECHR.

European Charter for Regional or Minority Languages.

European Convention for the Protection of Human Rights and Fundamental Freedoms.

Framework Convention for the Protection of National Minorities.

Explanatory Report to the Framework Convention for the Protection of National Minorities.

Explanatory Report to Protocol No. 12 of the ECHR.

Explanatory Report to the European Charter for Regional or Minority Languages.

General Comment No. 23: The Rights of Minorities, CCPR/C/21/Rev.1/ Add.5, 08.04.1994.

Rules Adopted by the Committee of Ministers on the Monitoring Arrangements under Articles 24 to 26 of the Framework Convention for the Protection of National Minorities.

Statute of the CoE.

ECHR Case Law

Abdulaziz, Cabales and Balkandali v. the United Kingdom, Judgment of 28 May 1985, Series A, No. 94.

Gorzelik and Others v. Poland, Application no. 44158/98, 17 February 2004.

Handyside v. UK, Application no. 5493/72, Judgement of 7 December 1976.

Informationsverein Lentia and Others v. Austria, Application no. 37093/97, Judgement, 28 November 2002.

The Case Relating to Certain Aspects of the Laws on the Use of Languages in Education in Belgium v. Belgium, Application no 1474/62, Judgement 23 July 1968.

Vereinigung Bildener Künstler v. Austria, Application no. 68354/01, Judgement of 25 january 2007.

Internet Sources

http://www.coe.int/

http://www.osce.org/hcnm

http://www.echr.coe.int/ECHR/EN/hudoc

http://www.coe.int/t/dg4/education/minlang/

http://www.coe.int/t/dghl/monitoring/minorities/default_en.asp

http://www.minorityrights.org/

http://www.ohchr.org/EN/Issues/Minorities/Pages/MinoritiesIndex.aspx

http://treaties.un.org/pages/ParticipationStatus.aspx

Other Sources

Capotorti, F., Study on the Rights of Persons Belonging to Ethnic, Religious and Linguistic Minorities, UN Doc. E/CN.4/Sub.2/384/Rev.1.

Mini Guide to Ethnic and National Minority Issues, European centre for Minority Issues, 2005.