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Protection of Cultural Rights of National Minorities: Critical Analysis of the Council of Europe Legal Framework under the Capabilities Approach

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To my family
To my teachers

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Abstract

The dynamics characterizing the coexistence of numerous cultural systems within the European continent have been put under the test with increasing globalization, resulting in unprecedental scale and pace in the movement of people. Besides positive outcomes, these phenomena endangered the existence of grass-roots cultures of groups in vulnerable positions, including the national minorities. The challenges that minority groups face are not only triggered by counteractions from majority groups, state-driven resistence and growing fundamentalism, but also by modern mass-culture driven unification. That all require support for sustainable development of minority cultures. As a human rights organization with jurisdiction over 47 states, characterized with diverse cultural profiles, the Council of Europe, is the agent expected to develop the effective solution for the protection mechanism.

This research examines the Council of Europe legal framework as to its capacity to provide effective protection to cultural rights of national minorities. This question is approached from two perspectives. The legal entitlements and their normative scopes are examined based on the analysis of the four leading Council of Europe conventions, two of which are specifically dedicated to cultural rights, one to human rights and one is specific to minority rights. The research deconstructs the good practices and standards, including the requirements to the domestic legal frameworks and policy instruments, posed by the Council of Europe to ensure effective protection of cultural rights of national minorities nationally. The convergencies between invoked rights are examined under capability theory to establish the fertile functions facilitating the cultural capabilities of the rights-holders, including in cases when such fertile functionings are used by the implementing bodies to cover the legislative *lacunae*. The analysis is conducted using historical, contextual, semantic and teleological interpretations of legal acts, based on the *travaux preparatoires* to the primary regulatory sources and the implementation practice, based on reports, country opinions, and the ECtHR case-law.

The research determines strategy for the *lex ferenda* and future cultural policy frameworks. The thesis examines the changing approach of the Council of Europe to safeguard the uniqueness of the cultural identities of national minorities internationally and within the States domestic systems, and examines how it correlates with the European identity concept and the value systems that constitute the corner stone of the Council of Europe statutory system.

Abbreviations

CoE – the Council of Europe

CA – capabilities approach

CAHMIN - Ad hoc Committee for the protection of national minorities

CESCR - Committee on Economic, Social and Cultural Rights

ECHR – the European Convention on the Protection of Fundamental Rights and Freedoms (Rome, 1950)

ECtHR – the European Court of Human Rights

FCNM – Framework Convention on the Protection of National Minorities

HRBA – Human rights based approach

ICCPR – the International Covenant on Civil and Political Rights (1966)

ICESCR – the International Covenant on Economic, Social and Cultural Rights (1966)

SDG – the Sustainable Development Goals

UN – the United Nations (Organisation of)

OHCHR – the Office of the United Nations High Commissioner for Human Rights

UNESCO – the United Nations Educational, Scientific and Cultural Organization

Venice Commission – European Commission for Democracy through Law (Council of Europe)

Chapter 1

Introduction

Defining culture, heritage and the scope of associated rules on their protection and facilitation have been a challenge throughout the development of the cultural heritage law as a branch of law and an academic discipline. Despite normatively acknowledged "universality, indivisibility, interdependence and interrelatedness" of all human rights, for a considerable period cultural rights were not perceived sufficiently important to be granted equally scrupulous attention as other human rights gained (Donders: 2008, 2020, E. Stamatopoulou: 2010, May:2011, underlined by the UN Special Rapporteur in the field of Human Rights in, for example, A/73/227, A/HRC/17/3). That affected both the stage of preservation of heritage and the possibility to enjoy and develop the entitlements of the rights-holders. The damage to the sights of significance and destruction of places of worship, censorship of artistic works and attempts to alter historical narratives and political affiliations through the change of religions, languages and philosophical convictions have been instrumentalised for suppression and political domination throughout the history of mankind[1].

[1] This can be illustrated by countless examples, from the repeated attempts to impose prayers in the language of the church that would be incomprehensible to believers in countries on the further imperial orbits, e.g. Arabic for Islam followers in many non-Arabic speaking countries, Latin for many followers of Catholicism, which was supplemented with prayers in Polish at some period of time during the Rzecz Pospolita rule over the territories of the Great Dutchy of Lithuania, almost equally foreign then to many Christians outside Poland or not belonging to the elites; the significance of spiritual loss incurred after the destruction of Bamiyan Buddhas, the Palmira, Mali sacred sites, Al-Askari mosque, cultural and religious sites around former Yugoslavia, and multiple more; the grievances and civic response to the recent attempts to imposing legal bans on the display of historical flag and coat of arms, usage of some prayers, songs or visual images, the content of which is associated with contemporary oppositional movement in Belarus, as extremist; or the high-level political response within the Council of Europe political institutions to the destruction of Armenian cemeteries by the Azerbaijani forces in or at the border with Nagorny Karabakh.

The deep spiritual loss associated with the loss of material and immaterial cultural heritage proved there is more to culture than what is monetarised during restorations or in auction halls. It is the spiritual connection of various tangible and intangible cultural manifestations to individual and collective identities, the self-identification and self-perception of individuals as bearer of a certain set of values and traditions that led to revisiting the connection underlined in the Universal Declaration of Human Rights, after Kant, between cultural human rights and human dignity, and re-assertion of their intrinsic inalienability and universal relevance. Some social groups, however, are put into higher detriment from the limitations in enjoyment and development of their culture. National minorities are such groups, as in many instances, in part or in entirety, their cultures for long had to be reproduced despite active suppression by authorities, and in the absence of established infrastructures, sustainable and sufficient financial basis and in the lack of influence on the decision-making affecting their lifestyles and other components forming their identities and reflecting their values[2].

The discourse has now been changed, but uniform and efficient implementation appears to be desired, as exemplified on the basis of opinions on individual submissions complaining about violations of rights under Article 27 of the ICCPR and the UN and UNESCO state of the art assessments[3]. The search for optimal solutions has led to the

[2] In her keynote speech at the opening of the 2018 Council of Europe Conference on the occasion of the 20th anniversary of the Framework Convention for the Protection of National Minorities and the European Charter for Regional or Minority Languages, Josefina Skerk, Member of the Swedish Sami Parliament and the Legal Advisor at Civil Rights Defenders, described the inalienable connection of minority peoples to the lifestyles and places where they reside, when the cultural narratives are maintained in connection with places, and the challenges to the preservation of unwritten minority languages in the absence of a formal educational system, affirmative measures from the authorities, and effectively despite the attempted suppression attempts. The speech addresses the tangible changes in the development of minority identity and its cultural components with the change of policies, leading, in particular, to minority languages becoming an attractive employability boosting tool for representatives of the majority of the title nation.

[3] The effective shift in the institutionalised and normatively supported international narrative to cultural rights can be linked to the creation of the mandate of the Special Rapporteur in Cultural Rights at the UN, several key

development of multiple frameworks and methodologies, shifting the perspective on culture and heritage from the object-centered approach to multi- and interculturalism, human rights based approach. Simultaneously, the role that individual agency attributed in the framework of culture-formative processes is being re-examined. The result has been in recognition of individual agency in culture-related processes, the complex nature of culture, comprising identity components of all cultural groups within the state (General Comment No 23, paras. 5-7), with appreciation that cultural identities of minorities are "enriching the fabric of society as a whole" (UN HRC:1994, GC No 23, para. 9).

The Council of Europe is an international organisation of well-recognised uniqueness. This uniqueness can be traced in many respects, including the geographical scope of its jurisdictional outreach, the diversity of political, social, economic and cultural backgrounds of its Members States, as well as the established legal framework aimed at human rights protection with judicial oversight. According to the Statute of the Council of Europe, it was created with the aim to ensure greater unity and peace among the European countries sharing a set of common "spiritual and moral values", ideals and principles, which constitute their common heritage (CoE:1949, Preamble, Articles 1 and 3). These heritage-forming values and principles include the obligation to ensure the rule of law, the enjoyment by all persons within the Participating States' jurisdiction of human rights and fundamental freedoms, and sincere and effective cooperation in the realisation of the organisations' aims (CoE:1949, Article 3). The failure to comply with these fundamental principles, under the Statute, may lead to suspension of membership in the organisation, which shifts adherence to the concept of the "common European heritage" into the primary obligation of States Parties. The notion of the "common European heritage" is a *fil rouge* and a fundamental element of a number of Council of Europe documents, including the human rights instruments and the cultural *acquis*. All of them bind the notion of common

resolutions on the role of culture, including UN General Assembly Resolution 68/223 (20 December 2013) on Culture and Sustainable Development, as well as wider framework of resolutions where culture is discussed within the context of peace-building and reconciliation mechanisms, as well as in developmental programmes of the UN, including the conceptualised Sustainable Development Goals.

European heritage with the concepts of pluralism and diversity, including that of the cultural identities of peoples living in the territories of the Council of Europe States Parties.

The geographical jurisdiction includes the territories of forty-seven Member States with the population estimated to reach approximately 820 million people. The ethnic and cultural diversity pertaining to the vast jurisdiction geography has been re-enforced by the accession of States emerging from the dissolved Yugoslavia and the Soviet Union, adding to the historically developed European diversity. The "European Melting Pot"[4] was fueled with globalization and increased inter-regional and inter-continental migration, hypermobility and superdiversity of the globalised world (Bauboeck: 2017, p. 277). On the other hand, it was facilitated by pronounced insufficiency of nation states capacity to safeguard the interests of their citizens from the effects of external decisions, in view of growing demand for democratic governance, leading to the drop-down in the recognition of the credibility of political solutions, ownership of decisions, in turn affecting social cohesion and sectarianism of societies (Gray: 2018, p. 91).

The ethnic diversity in contemporary Europe comprises 'national minorities' and 'ethnic immigrants' (Kymlicka: 1995) or 'immigrant minorities' and 'indigenous minorities' (Turton and González: 2000). This diversity creates a challenge to the normative regulation that aims to achieve unity and maintain peace among Parties, on one hand, and ensure plurality, diversity and maintain uniqueness of identities, on the other hand. This challenge constitutes the core issue the Council of Europe culture and human rights *acquis* attempts to respond to. The elaboration and implementation of the norms dedicated to regulate minority rights is a litmus indicator to the compliance with the goals set for the regulation.

The challenges pertaining to safeguarding cultural rights of minorities within a diverse scope of participating entities with different political, economic and social profiles are multiple. They primarily include the

[4] The term is used as a metaphor, although it is attributed to the Eurostat project, it is not used here in relevance to the substance of the project. Eurostat. European Melting Pot. Available at: https://ec.europa.eu/eurostat/cache/digpub/eumove/bloc-1.html?lang=en

lack of compromise as to the notion of minorities, which is exacerbated by the absence of the commonly accepted term in the international law, leading to a variety of principles for recognition of groups and communities as minorities. Furthermore, the contested issues include the questioned scope of special regime for entitlements, including the necessity and possibility of providing affirmative measures to facilitate the realization of their rights, or opting for absolute equality and non-discrimination for all members of the society.

The search for best practices on ensuring peaceful co-existence of different groups within the society, despite the differences in such sensitive areas as religion, customs and traditions, as well as ideological and philosophical views, and ensuring that these rights can be effectively protected in case of violation, with consideration of all conflicting views in developing national and international political and legal systems is the primary challenge within the field. This research is dedicated to the analysis of how Council of Europe responds to these questions with respect to the cultural rights of minorities, which solutions it proposes or imposes on States Parties to ensure that its statutory aims are implemented, what legal solutions are employed to ensure effective protection of minorities' cultural rights, and what are the dynamics in implementation of the legal standards and requirements on the national level.

This Chapter is dedicated to forging the scope of research, Part 1 of Chapter 1 formulates and contextualises the research question, presents the aim of the research and will circumscribes its limitations. Part 2 of Chapter 1 further delineates the taxonomy of the research, discussing its operational definitions, the methodological and theoretical foundations, and the ways these are used to respond to research question. Part 2 discusses the theoretical basis for the critical analysis, its primary tenets related to realisation of cultural capabilities, its relation to the convergences of human rights and cultures, as well as the requirements for the normative regulation conducive to effective realisation of cultural capabilities of minority groups. Part 3 also translates the tenets of the theoretical basis into the set of indicators for the analysis of the Council of Europe legal framework, necessary for the critically discussion of its potential and limitations for the promotion of cultural rights of minority groups. Part 3 is dedicated to delineating the concepts of minorities and their cultural rights. Part 4 presents the structure of the thesis.

1.1 Scope of Reseach. Research Questions and Limitations

This research critically examines the culture-related legal framework adopted under the aegis of the Council of Europe and its implementation practice, aiming to determine the scope of cultural rights of minorities that can be effectively protected under the *acquis* and to establish the limitations of the protection regime. The critical analysis is conducted on the theoretical basis of the capabilities theory.

The critical analysis of the legal framework aims to respond to the following questions:

- whether the legal framework provides a sufficient scope of culture-related capabilities for minority groups;
- the role of values in the efficiency of the framework and the scope of protection;
- whether the framework ensures security of capabilities for rights holders;
- whether the framework facilitates agency of rights holders in determination and maintenance of their cultural identity, and provides effective basis for gaining critical knowledge and making informed choices about cultural identity;
- what are the factors that influence the opportunities for realisation of cultural capabilities of minorities under the Council of Europe legal framework? What is the influence of intersections of human rights for realisation of cultural rights of minorities? (the answer is given on the basis of analysis of fertile functioning and corrosive disadvantage of capabilities);
- based on the defined problems pertinent to the framework, to determine the vectors of actions with the potential to improve the protection mechanism currently in force.

The research examines the approaches adopted within the Council of Europe framework for safeguarding the uniqueness of the cultural identities of national minorities within the Members States' domestic systems, their correlations with the concepts of European identity and common values that constitute the corner stone of the Council of Europe statutory system, and attempts to devise whether these

concepts facilitate promotion and protection of cultural rights of minorities.

Four Council of Europe conventions regulating culture-related matters were chosen for the analysis. The general system and approaches to the concept of identity, values and heritage are examined on the basis of the European Cultural Convention and the Council of Europe Framework Convention on the Value of Cultural Heritage for Society. The analysis is conducted on the basis of the texts of the conventions, the *travaux preparatoires* or statements of the drafting committees' members, explanatory reports, the programmes launched in implementation of the conventions, as well as opinions, resolutions and recommendations of other bodies of the Council of Europe that are closely relevant to the discussed topics from the perspective of thematic coverage and regulatory scope.

The European Convention for the Protection of Human Rights and Fundamental Freedoms and the Framework Convention for the Protection of National Minorities are the primary instruments to devise and examine the scope of rights, the standards of protection and the sources for the discussion of potential normative and policy developments. The conclusions will be drawn from the analysis of the texts of the conventions, *travaux preparatoires,* and implementation practices derived from the ECHR case-law and the Advisory Opinions and the Committee of Ministers' resolutions on States Reports.

The ECHR case-law was selected on the basis of the relevance of their subject matter to cultural rights of minorities. To create an up-to-date overview of the standards and good practices in the field, as well as to complete the research gap created after the latest reviews, opinions and resolutions were chosen based on the reporting cycle, with the priority given to those adopted during the fourth and fifth monitoring cycles with the analysis of resolutions on the third cycle for a dynamic overview of the progress achieved by the States Parties in implementation of the FCNM.

The choice of instruments for the analysis is determined on the basis of their scope of action, with the aim to limit the analysis to conventions regulating rights and obligations, as opposed to the more specialised and therefore narrow instruments regulating a particular types of heritage. Therefore, the scope of research does not include the 1985

Convention for the Protection of the Architectural Heritage of Europe, the 1992 Convention for the Protection of the Archaeological Heritage of Europe, the 1992 European Charter for Regional and Minority languages, the 2001 European Convention for the Protection of the Audiovisual Heritage, the 2017 Council of Europe Convention on Cinematographic Co-production, and the 2017 Convention on Offences Relating to Cultural Property.

1.2. Methodology, Operational Definitions and Theoretical Framework

1.2.1. Methodological Framework

The research taxonomy was determined based on the methodological categorisations by Theunis Roux (2014: 174), and Terry Hutchinson and Nigel Duncan (2012: 116) elaborated for legal research. Doctrinal method is applied to conduct comprehensive analysis of the texts of the Conventions and related case-law based on interpretative texts, *travaux preparatoires* and political background documents. Critical method is used to broaden the analysis to encompass the developmental aspect of the Council of Europe legal framework under the capabilities theory. Socio-legal method is used to examine the identity component of cultural rights of minorities under the Council of Europe framework and to evaluate its capacity for culture-sensitivity.

The choice of these methods allowed to better substantiate arguments in the assessment of the legal instruments. Moreover, the methodological choices allowed to inform the research with a vast body of materials, ensuring that the legal sources are examined in consideration of nuances and complexities of the relevant social context. The latter is of particular importance, given that the research examines cultural rights, which are characterised by a multi-dimensional application, including self-determination and identity, religion, language, tangible and intangible heritage, including traditions, rituals and customs, and property rights to material and intangible cultural heritage.

The research analyses the legal framework of the Council of Europe employing semantic and teleological methods of interpretation of the conventions, political and programmatic documents. The methods

allow to determine the intended meaning of the provisions and determine their intended scope. The latter possibility is particularly important, as two of the four Conventions under analysis have the format of a framework document, and in many aspects do not provide for detailed regulation and does not establish key definitions. Furthermore, teleological interpretation is used consistently by the ECtHR and the Venice Commission for the interpretation of the ECHR and the Framework Convention on the Protection of National Minorities respectively to define the scope of the regulation and, in the case of the FCNM, to delineate the content of the missing terminology. Therefore, it was considered a due interpretative method to be applied for the present work.

Furthermore, to provide a comprehensive examination of the conventions, forming the subject matter of this research, the analysis was conducted under the contextual interpretation of the conventions within the political narrative and developments reflected in the instruments adopted by the political bodies of the Council of Europe. The historical context was drawn based on the travaux preparatoires for the FCNM and the draft additional protocol guaranteeing certain individual rights in the cultural field, in particular for persons belonging to national minorities. The analysis was carried out in order to frame the discourse on the development of cultural rights of minorities, and determine the legal arguments underlying the adopted legislative solutions.

1.2.2. Operational Definitions

The concept of development, as formulated for the purposes of capabilities theory by A. Sen (1999: p. 3), stands for "*the process of expanding the real freedoms that people enjoy*". Thus, advancement of freedoms, under the capabilities approach, serves the dual role of being the goal and the means of development (Sen: 1999, p.p. 3, 10). The definition of development focusing on human entitlements and liberties provides a more comprehensive overview of the situation of stakeholders, compared to wealth-based models, as it includes a wide range of determinants, including economic and social variables, such as public policies and institutional facilities, and political and civil rights, and other more general factors, such as modernization, technological revolutions and so on (1999: 3).

Functioning is defined as the active realization of capabilities, an action

underlying the realization of capability (Nussbaum: 2011).

Fertile functioning (concept introduced by J. Wolff and A. De-Shalit in their work "*Disadvantage*") is any functioning that contributes or directly facilitates related capabilities.

The concept of 'capability', as formulated by Amartya Sen (1999: 5, 87), stands for "the substantive freedoms an individual enjoys to lead the kind of life he or she has reasons to value" and as "alternative combinations of functionings that are feasible for her to achieve". For Nussbaum (2011), capabilities, or substantial freedoms, are a set of interrelated opportunities to choose and to act.

Corrosive disadvantage of capabilities (introduced by J. Wolff and A. De-Shalit in 2007) is a related notion that refers to functioning that undermine or lead to deprivation of capabilities.

Capability deprivation or capability failures stand for limitation of freedoms that constitute individual set of capabilities; such deprivation may be a result of public policy or individual negative conditions, such as impoverishment or bankruptcy. Capability failures are attributed by Nussbaum (2011) to discrimination or marginalization.

Capability security is a concept introduced into the capabilities theory by J. Wolff and A. De-Shalit (2007), which provides that capabilities shall be insured by public policies in a sustainable manner, ensuring their availability in the future, which grants the rights holders security in the future and protects capabilities from economically- or politically-induced risks.

The term 'competing identities' stands for plural identities pertinent to a human being or a collective, which are attributable to the "broad commonality of our shared humanity" (Sen: 2007, p.p. 4-5).

Constitutive connections are intersections and interrelations of capabilities (and rights) that lead to the change in capabilities or available opportunities.

The thesis does not attempt to define the term 'culture', however the reference to culture follows the human rights approach that reaffirms the plurality of the notion and underlines that "*cultures are dynamic human constructs, constantly subject to reinterpretation*" (A/HRC/40/53, para. 16).

The terms 'cultural elements' or 'cultural determinants' are used in the thesis interchangeably to refer to values, lifestyles, beliefs, religions, symbols, cognitive elements and norms, education, language, tangible

and intangible cultural heritage, creative activities and performance, attire and food. Cultural elements are components of cultural identities. The scope of the term is developed based on the reports by the UN Special Rapporteur in the Field of Cultural Rights and the content of the legal framework of the Council of Europe.

The term 'cultural indicators' is used in the thesis to refer to the set of developmental indicators, namely supporting civic participation and social capital; catalyzing economic development; improving the infrastructure and physical conditions for material heritage; promoting stewardship of sites and heritage; augmenting public safety; preserving cultural heritage; bridging cultural/ethnic/racial boundaries; transmitting cultural values and history; and creating group memory and group identity (Jackson and Harranz: 2002, p. 33)[5].

Cultural rights (as defined under the human rights approach by the UN Special Rapporteur in the Field of Cultural Rights (A/67/287, para. 7; A/HRC/31/59, para. 9)) imply rights protecting: (a) human creativity in all its diversity and the conditions for it to be exercised, developed and made accessible; (b) the free choice, expression and development of identities, which include the right to choose not to be a part of particular collectives, as well as the right to exit a collective, and to take part on an equal basis in the process of defining it; (c) the rights of individuals and groups to participate, or not to participate, in the cultural life of their choice and to conduct their own cultural practices; (d) the right to interact and exchange, regardless of group affiliation and of frontiers; (e) the rights to enjoy and have access to the arts, to knowledge, including scientific knowledge, and to an individual's own cultural heritage, as well as that of others; and (f) the rights to participate in the interpretation, elaboration and development of cultural heritage and in the reformulation of cultural identities.

Overlapping consensus implies acceptance of values and ideologies among various groups within a diverse society that contribute into its unification.

This chapter will proceed to outlining the primary tenets of the capabilities approach relevant to the topic and objectives of the thesis and the standards elaborated within the approach to the policy- and law-making.

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5 Jackson, M.R. and Harranz, J. (2002), Culture Counts in Communities: A Framework for Measurement. Urban Institute [online]. Available at: https://www.urban.org/research/publication/culture-counts-communities. Last accessed in November, 2021.

1.2.3. Theoretical Framework

As highlighted above, this research examines the culture-related legal and case-law frameworks of the Council of Europe from the perspective of the capabilities approach. The choice for this theoretical foundation is explained with the quality and relevance of the analytical framework the capabilities approach provides for the assessment of the development potential of legal and policy solutions. The list of capabilities developed by the capabilities theory reflects cultural heritage elements, making it a legitimate object of analysis under the approach. This relates, inter alia, to the capability 4 (senses, imagination and thought), which is related to creativity and freedom of thought, capability 5 (emotions), 6 (practical reason, which encompass liberty of conscious and religious freedoms in the classical version, and can be extended to the liberty of cultural choices and practices), as well as capability 7 (affiliation), including such human rights aspects as the freedoms of assembly and speech (the classification of capabilities is developed in Nussbaum, 2011: 372).

Furthermore, analysing this research question through the prism of the capabilities approach allows to determine what rights can be used to optimise and facilitate the protection of cultural rights of national minorities. Moreover, the capability approach provides for a ready policy-making and legislative recommendations for facilitating the development of core culture-related rights, which are compliant with the statutory goals of the Council of Europe, including the democratic governance, human rights, dignity and pluralism. Lastly, capabilities approach is well-customised for the cultural heritage discourse, as it reflects the dynamic and multifaceted networks of values underpinning cultural profiles, both with respect to individual's and groups' cultures. Thus, it reflects diversity of interests and responds to the vulnerability of multiple groups of cultural rights holders. Thus, this approach does not contradict to the organisation's axiological foundation, and complies with its activity focus on human dignity as a value, and realization of human potential as a goal to be achieved through public policy-making and the law.

The thesis applies the definition of cultural rights and undertakes the analysis of convergences between cultural rights and wider catalogue of human rights under the cultural rights approach developed by the Special Rapporteur in the Field of Cultural Rights (e.g. in A/67/287, A/HRC/31/59, para. 8, A/HRC/28/57). The use of the human rights approach is explained by the closeness of its logic and methods to the

capabilities theory. Thus, the human rights approach recognizes the interconnection of cultural rights and other human rights, heir interdependence and indivisibility within the universal human rights system (A/HRC/31/59, para. 21). Furthermore, the human rights approach to cultural rights recognizes the potential of cultural rights to constitute fertile functioning with respect to facilitation of civil and political rights, due to their "transformative and empowering" nature (A/HRC/31/59). The approach recognizes that the fertile functioning of cultural rights implementation to human rights results in "providing important opportunities for the realization of other human rights", namely creating opportunities for the realization of additional capabilities.

When applied to convergences between human rights and the protection of cultural rights of minorities, the cultural rights approach translates into the capabilities approach framework and follows the benchmarks identified within the capabilities approach for the policy- and law-making in the field of cultural rights of minorities, promotion of democracy and democratic participation, empowerment of rights-holders and mainstreaming of ownership of cultural policies, protecting cultural heritage in all its manifestations, under the fundamental goal of strengthening human potential and protection of their dignity, identity in respect of human rights.

The capabilities approach aims to comparatively assess the quality of life and to theorise about social justice (Nussbaum: 2011, 232), making it stand out within the development debate. The theory is based on two primary interconnected concepts - individual agency (which concerns both decision-making and realization of available opportunities) and the liberty of choice in determination of individual actions, and the primary goal – development, which is being pursued with the ultimate aim of living a dignified life of one's own choice. The tools for development is the realization of capabilities, which in their interconnection determine the network of choices, that can be made based on the sets of available opportunities and options. The primary tenet of the theory is that all state-generated actions are meant to empower individual development through facilitation of capabilities and extending the scope of the functional opportunities for independent critical choices (Sen: 1999, 2007, 2011; Nussbaum: 2011).

Amartya Sen and Martha Nussbaum determined and classified the lists of capabilities with some differentiation. Sen construed (1999: p. 10)

five "instrumental freedoms" that help advance "general capability" of individuals, which are political freedoms, economic facilities, social opportunities, transparency guarantees and protective security, and a wide range of "constitutive freedoms" or "substantial freedoms" that are ultimately human rights and related opportunities (1999: p. 16). Nussbaum (2011) refers to the "substantial freedoms" as "combined capabilities", which combine internal capabilities of an individual (e.g. health, fitness, intellectual and emotional capacities, etc.) and the set of externally determined opportunities and conditions (economic, political, social, etc.) and personal choices, or functioning. For Nussbaum, the central capabilities are life, bodily health, bodily integrity (3), senses, imagination and thought (4), emotions (5), practical reason (6), affiliation (7), other species, which refers to the relations with animals and nature overall (8), play as capabilities with recreational opportunities and joy (9), control over one's environment (including political and material) (9). Affiliation and practical reason serve "architectonic role" among capabilities, as they "organize and pervade the others" in the weight they play on the human dignity (Nussbaum: 2011, 438).

Sen's and Nussbaum's approaches within the capabilities theory are different in several other aspects. The primary difference lies in the field of application: Sen's approach is, first of all, an economic theory, while Nussbaum aimed to apply the theory to political and social fields. Secondly, the difference Sen's approach aims at conceptualizing and framing the capabilities approach for assessing the development potential of economic policies without defining elaboration of the set of public actions as a goal of the theory, while Nussbaum (2011) aims to develop the systematic normative theory, and distinguishes negative and positive capabilities that hinder or promote development, as well explicitly defines sets of commitments necessary for realization of capabilities. Other differences pertain to the role of emotions in formulation of public actions; as well as the approach taken towards values and human dignity, which are prioritized respectively by Sen and Nussbaum. In Nussbaum's version (2011), the capabilities approach is focused on "the protection of areas of freedom so central that their removal makes a life not worthy of human dignity", while Sen theorized the interrelations of capabilities.

The work applies the approach in its versions by A. Sen and M. Nussbaum, mutually re-enforced and supplemented. For the main

conceptual and ethical frameworks, this research addresses the theory developed by Amartya Sen, whereas the capabilities approach in Martha Nussbaum's reading, when applied in this work to the analysis of the Council of Europe legal framework, allows a wider range of possibilities for the assessment of the effects the implementation of a legal framework would entail. This choice is explained by the fact that, although the Sen's ethical and theoretical system defines the major approaches, the political theory developed by Nussbaum allows to respond to the primary question of the given research, in particular in part of the assessment of the programmatic actions and policy obligations created within the legal framework under analysis. The Nussbaum's reading of the capabilities approach defines its aim in protection of fundamental freedoms that construct dignified human existence (Nussbaum, 2011, place 360). When applied to the question on determination of interconnections between cultural heritage and human rights, this approach underlines their intrinsic convergence, as it brings forwards such conceptual constituents of cultural rights, as creative realization and identity (Nussbaum: 2011, 219, 239).

The chapter will further discuss the primary tenets of capabilities approach related to culture, cultural rights and values, and its requirements to public actions and normative frameworks. The aim of this research is to devise the sets of standards and assessment criteria to be applied in this thesis for the analysis of the Council of Europe legal framework.

Capability theory is individual-oriented (Sen: 1999, p. 11). Nussbaum (2011) underlines that it "espouses a principle of each person as an end", and its reference to groups is derivative. The primary attribute of development, under the theory, is in ensuring the realization of individual agency. Agency constitutes the key determinant of capabilities as a "constitutive part of development", implying the capacity to independently make critical and informed decisions and act in implementation of the results of such personal choices. Freedom to choose is the primary component related to the concept of agency (Sen: 1999, 2003; Nussbaum: 2011). Under the capabilities theory, freedoms are examined from the perspectives of their "evaluation" and "effectiveness" (Sen: 1999, p. 18), implying that the wider freedoms determine the measurement of success of social development ("evaluation") and that wider freedoms enhance abilities and opportunities of individuals and society to act and develop

("effectiveness"). Both Nussbaum and Sen underline the importance of agency in framing identity. Sen attributes weight to it by conceptualising the choice of identity as a human responsibility (2007: 123), rather than a 'discovery' of pre-attributed features of identity.

The realization of agency and freedoms are considered from the binary perspective: as a process that construes the freedom of actions and decisions, and opportunities, which imply the actual practical arrangements available to individuals under their personal and general social circumstances (Sen: 1999, p. 16-17). In capabilities approach, the focus is attributed to the practical implementability of rights and the possibilities provided for beneficiaries to exercises their choices, in particular with respect to their identities and cultures. The policies should assess how "the opportunity of choice would be exercised if it were available" and the scope of such opportunities (Sen: 2007, p. 116). The importance of individual choices is particularly underlined with respect to one's lifestyle and future as a precondition for realization of capabilities and its vector-setting power, achieving subjective happiness as an ultimate value, and development, which constitutes the result of effective capability realisation.

The importance of independent choice and decision in self-attribution of identity is framed as a crucial concept of Sen's capability approach. To Sen, for the effective realisation of capabilities of human beings, it should be admitted that the humanity is "diversely different" (2007: 169), and the recognition and reflection of this quality in the policy frameworks reduces the confrontational character of the world. Therefore, the crucial importance in the Sen's version of capabilities theory is attributed to the freedom to consciously and independently determine one's identity (2007: 178), which constitutes a particular freedom that should be defended by a legal mechanism (Sen:2007, p. 5).

Sen views identity not only as a natural phenomenon, but also as a social construct, which cannot be rigid, but is always fluid and developing on the basis of self-determination and self-attribution. Hence, the triggers conducive for strengthening of commonalities of identities should be reflected and facilitated through the legal framework. Capabilities approach recognises multidimensional modalities of human motivations and identities (Sen: 2007, p. 20) and considers the core issue in recognising and ensuring the plurality of human identities, which is defined under competing influences of such

factors as class, religion, culture, nationality, gender, education, profession, and ethical views.

The aim of the capabilities approach in this respect is framed in helping to avoid "solitarist approach to human identity" (2007: preface). Sen criticises (1999: 8) "narrowly defined identities", in particular those based on attribution to communities and groups, as "a terrible burden". Attribution of single identities may lead to two misconceptions, i.e. misdescription of people and the misperception that the selected identities are the only ones attributable to the people (2007: 7). The solitarist identities, arbitrarily selected and interpreted with an impetus on its belligerent nature towards other groups, when cultivated as inevitable and unique attribute of a group, are, to Sen, the primary drivers for violence and sectarian confrontation (2007: 123 - 132). This policy approach is defined by Sen as identity reductionism, which stands for narrowing the plurality of equally important identities within the plurality imminent to human beings as members of multiple groups to one, which is arbitrarily attributed primary importance (2007: 19-20). Sen distinguished two primary types of identity reductionism: identity disregard and singular affiliation (2007: 19).

Plurality of identities, under capabilities theory, allows to contradict to communitarian doctrine, which binds individuals with single identity "dictated by their group of origin" (2007: 32). Thus, social background, community and culture define the limited scope of "feasible patterns of reasoning and ethics available to the person", depriving them of access to other scenarios and ways of thinking on their identity (*ibidem*). Communitarian approach, to Sen (2007: 32), leads to inter-cultural distancing and stalls international relations. Besides, Sen considers that communitarian approach is conducive, particularly when misused, to proliferation of negative customs and traditions that contradict human rights (2007: 34), similar to cultural relativist arguments.

The notions of common humanity and historical truth form firm grounds for criticism, under the capabilities approach, of attributing certain cultural profiles and values to a certain civilisation. "Civilisational partitioning" is considered by Sen (2007: 42) to be a "pervasively intrusive phenomenon in social analysis, stifling other – richer – ways of seeing people", that creates a universal foundation for "misunderstanding nearly everyone in the world" and civilizational

clashes. Furthermore, Sen criticises civilizational partitioning *per se* for undermining the mankind "as a humanity" and ignoring diverse identities, which lead to a faulty simplification creating an artificial divide between people. Moreover, as civilizational approach ignores differences within civilisations, it creates misrepresentation of communities, while misdescription and misperception undermine the stability of world order (2007: 45-51).

Sen recognises the influence of culture on identity and behavioural choices, but opposes the perception of culture as "central, inexorable and entirely independent determinant of social predicament" (2007: 111). Thus, culture should be developed in conjunction with other related social and cultural implications. Other determinants that shall be considered include race, gender, class, profession, politics, etc. (112). Furthermore, Sen denies homogeneity of culture and underlines the importance that has to be attributed to determining and analysing the variables within the same cultural milieu (2007: 113), as well as to variations that culture undergoes as a result of interaction of culture and other determinants (e.g. with trade or migration, resulting in globalisation of culture), which are imminent as indicators for policy instruments.

Sen considered that policies that are established on differences of identities, instead of opting for peacefully converging identities within the pluralities (for Nussbaum, the focus would be in those identities that conjure positive political emotions of unity and mutual understanding), lead to intra- and inter-group conflicts. Moreover, such selective approach to humans' identities imposed without individual choice lead to "miniaturisation" of human beings and undermines peace-building programmes (2007: prologue). When the identities are selected based on cultural attributes, this, to Sen (2007: 141), leads to the creation of "uniquely partitioned world" and hinders any hope for harmony, while the denial of individual and collective choices and reasoning in distinguishing the plurality of affiliation "obscures" the diversity of the world (2007: prologue). Sen named (2007: prologue) the categorisation of people based on culture and religion the "major source for potential conflict", while the single classification determines the "flammability" of the world.

Capabilities approach underlines (Sen: 2007, p. 60) that cultural determinants can be applied in classification of groups or as a basis for

identity attribution, depending on the purposes and fields where these identities and classifications are applied. Sen warns in this respect, that building general policies on such elements may lead to ignoring the other important associations and loyalties. Sen determines (2007: 107) that cultural factors are not irrelevant to development, but must be considered in conjunction with other pertinent influences, such as social, political and economic variables. Sen also warns (2007:111) against attributing culture "the illusion of destiny", for it may produce the sense of fatality that can be "misleading and debilitating" for community and hamper developmental capacity. To Nussbaum (2013:9), a calibrated normative response that instrumentalises cultural attributes, including memories and historical narratives ensures stability of the society (2013: 10). After Nussbaum, there is a "compelling need" for culturally and historically empowered narratives in societies aspiring to justice, where ideals of state and society – for Nussbaum, liberal ideas – shall be connected with particular perceptions rooted in people's sense of their history. Nussbaum underlines that the crucial factor is the presentation of the narrative and the emotional value attributed to the historical facts, as an uncalibrated presentation may lead to the sense of national superiority and trigger radical or nationalist ideologies (2013:10).

To prevent the development of a "parochial overview" and "incitement to a regionally narrow outlook", Sen promotes (2007: 120) "mutually supportive, rather than adversarial and antagonistic policies, that are developed in a globalised world". The necessary policy response, under the capabilities theory, would be to create a sense of commonality and the capacity to propel certain constructive emotions within the society.

The link between individual capabilities and development is determined by the capabilities theory through a set of "constitutive connections", which have to be offered and effectively facilitated by the state through public actions and policies to achieve both individual and social development (Sen: 1999, p. 4). The constitutive connections include economic opportunities, political liberties, social powers, enabling conditions for individual functioning, education system, encouragement of initiatives, and institutional arrangements that ensure the possibility to participate in social choice and in public decision-making (Sen: 1999, p. 4). The key anti-development factors, to Sen, are those that hamper realization of liberties, such as poverty,

tyranny, insufficient economic opportunities, systematic social deprivation, underdeveloped public or institutional infrastructure, intolerance, repressive policies of the state (1999:3). The analysis of the interconnections of liberties and their effects are in the core of the analysis under capabilities approach. Determination of fertile functioning and corrosive disadvantages allows to identify best practices or failures of public policies (Nussbaum: 2011).

The version of liberal state construed by Nussbaum is not a neutral ideology, but constitutes an "emotionally charged normative structure with a definitive moral content" that incorporates equality and equal respect for every person, a commitment to equal liberties of speech, association, conscience, and a set of social and economic entitlements (2013:16).Nussbaum's concept of effective policies in liberal state is based on the ideas of "religion of humanity" formulated in various versions by Mill, Comte and Tagore, where aims of policies would promote improvement of living conditions for all and substitute religious and other sectarian divides (2013: 7-9). The scope of liberal policies, for Nussbaum, shall respond to the list of capabilities and promote a stable and united "just society" (2013:9).

Nussbaum concurs (2013: 4) with the conclusion of Kant and Locke that the state's primary function is in legal protection of citizen's rights. Yet, she underlines the imminent conflict between this obligation of the state towards its citizens and towards the international community in complying with some of their human rights obligations due to the intrinsic state's duty to ensure stability of the state. Discussing the means of such protection, she underlines the borderline that any government, including those pursuing liberal ideology, would run upon, as their imminent attempts to ensure the stability of the state would contradict their human rights commitments, in particular related to freedoms of speech and association. In this respect, the aim of normative attempts, including policy-making within a "decent society", which, to Nussbaum, is the one founded upon liberal ideology, would be to find the balance between measures aimed at stability and ensuring democratic nature of governance, without running into illiberal and dictatorial measures.

Cultural liberty constitutes a value and an important aspect of the capabilities approach. It is considered to form a diverse network of fertile functioning with respect to rights and capabilities of others. One

of the indirect positive influences of effectively realised cultural liberties are the benefits of cultural diversity on the society and the variety of its cultural offer. Culturally diverse society is characterised by comparatively wider scope of available cultural experiences (Sen: 2007, p. 115). However, the effects of fertile functioning of cultural liberties are also contingent and conditional to the wider scope of human rights and freedoms, in particular with the realisation of the freedom to hold opinions and consciousness, which determine the freedom of choice. For Sen (2007: 116), hindering the liberty of individual cultural choices amounts to "anti-freedom". Overall, the key idea of the minority-oriented cultural policy is that cultural liberty must not be sacrificed for the sake of diversity. Diversity is construed contingent to individual liberties, and the merits of multiculturalism must depend on the measures that are employed to ensure and sustain it.

The question of balancing the cultural policies and respective policy measures targeting immigrants are examined by Sen in his work "*Identities and Violence: The Illusion of Destiny*" (2007). He underlines (2007: 113-114) that it is crucial to draw distinction between cultural liberties, including the freedom to maintain or change one's cultural identity, and a dedication to cultural conservation at all costs. Sen acknowledges that liberal societies are expected to contribute into development of multiculturalism, including through the affirmative measures aiming at effective maintenance of immigrants' cultural identities and traditional lifestyles. However, a full understanding and guarantees of cultural liberties would imply effective policy solutions facilitating cultural adaptation of immigrants into the cultural milieu of their new state. According to Sen, the latter aspect ensures balanced and just cultural solutions. Furthermore, it is highlighted that even when the policies encompass both elements into its thematic scope, they also have to include the agency to maintain or change cultural profiles can be realised under the conditions of "informed assessment" and "critical scrutiny" by stakeholders of all available cultural alternatives (2007: 114). Thus, for Sen, effective realisation of cultural capabilities would not be in attempted "unquestioned conservation", but in the effective availability of capability to lead one's life "as they would value living", including through cultural determinants resulting from one's genuine and informed choice (2007: 114).

Deprivation of "critical knowledge and understanding of alternative lifestyles" is considered by the capabilities theory to constitute another violation of cultural liberty (Sen: 2007, p. 117). It is perceived as a failure to provide comprehensive and critical information regarding cultural options and possible manifestations of various identities, including those culturally determined, leading to separatism and inter-community divides. When the influence of multiple identities pertinent to individuals, especially young children, for example through education systems, may influence their life choices, the availability of choices and the necessity to make these choices for themselves with respect to various components of their identities, it hinders the enjoyment of cultural rights of individuals (2007: 117). This condition of implementation of cultural freedom is required to be taken into account in designing educational or other institutional systems, with reference to such cultural indicators as language, religion and religious practices, cultural history, literature, and other identity components such as nationality, ethnicity, scientific interests, policies, class, gender, occupation and other characteristics. At the same time, institutional design should ensure that no "federation of communities" is promoted within the society, as no artificial divides should be established within society, and the society should consider itself as a "community of human beings with diverse differences" (Sen: 2007, p. 118).

Propelling of division of the society into "in-groups and out-groups", with some citizens being cast as second class is also an indicator of "wrong" political endorsement, after Nussbaum (2013: 5). On the contrary, the "adequate" types of policies shall promote endorsement of "basic norms of equal respect" within the society, and fundamental liberal values. Nussbaum considers that these values have to be so intrinsically integrated into the social fabric to guarantee 'overlapping consensus' among groups with fundamentally different profiles within "a shared political space that comprises … [the state's] constitutional ideals" (2013: 6). To overcome subversion and dissent, and ensure consistency of civic order, balance between liberal values and the working conception of justice has to be established, primarily based on effective safeguards towards the freedoms of speech, religion and associations (2013:7). The evaluation of normative response is offered to be conducted through the 'circle of concern' (Nussbaum: 2013, p.p. 10-11), based on the allocation of intrinsic value to certain cultural or ideological attributes. Cultural heritage is crucial for creating the 'circle

of concern', when the aim of the normative regulation is to establish bonds between peoples of diverse backgrounds or implanting abstract principles into established or shifting ideologies. Culture and cultural heritage are thus perceived as binding instruments that can be efficiently used for constructing a stable united society based on liberal values and freedoms (Nussbaum: 2013, p. 14).

Therefore, in line with capability theory, normative and policy frameworks should aim at ensuring comprehensive cognisance of available cultural choices by rights holders, supported with affirmative actions and policy solutions that enable practical opportunities for their implementation. Institutional design shall provide skills and instruments for the rights holders to prepare themselves and effectively use all the available cultural scenarios within the given cultural *milieu*. This includes measures conducive for preservation of cultural options and changing them.

The regulatory framework, in line with the capability approach as formulated by M. Nussbaum, has to reflect the following criteria: a) its aim is to ensure stability of the society; b) to bring about unification of the society, or different states or nations under one ideological framework; c) shall promote equality in human rights; d) shall facilitate realisation of capabilities; e) shall ensure agency and independence of stakeholders (2013: 121) in implementing their human rights and capabilities. Unification of the society and creation of its common ethical and ideological foundation, after Nussbaum, has to be reflected in efforts targeted at elimination of shame and stigma, inter alia, with regard to cultural indicators attributable to various minority groups (2013: 121). Furthermore, the normative framework in a "just society" has to reflect and strive for concern for nature (2013: 121), which shall include protection of natural heritage, as well as traditional lands and lifestyles among the issues of concern for minorities. The emotional component a legal framework has to address is "propelling moral salience for national sovereignty", reflected in national aspirations and commitments (2013: 121). Its external vector should aim at international cooperation and world peace.

Nussbaum underlines that a regulatory mechanism should generate such political emotions as toleration, both cultural and religious (2013: 127, 130-133), and, respectively, contribute to pluralistic societies. Regulatory frameworks should not conjure divisive ideological

hierarchy within the society (2013: 128). Instead, it should promote cooperation within the society, which has to be elevated to form the basis for social coexistence and contribute into building overlapping consensus on social values (2013: 128). These fundamental political principles underlying regulatory framework should possess a definitive moral content (with emphasis on equality and justice), and create a consistent and "comprehensive doctrine that propels consensus" (128-130). The regulatory framework should prescribe a mechanism for "coercive enforcement" of core liberal political values and principles (2013: 132).

Framing the scope for allowed limitations of human rights commitments, Nussbaum's capability approach legitimises "historical sensitivity" that allows limitations to freedoms of speech and association (for example, in "Political Emotions" Nussbaum cites the validity of limitations on Nazi ideologies or respective associations in Germany). Nevertheless, the it is required to ensure "wide latitude for the expression of criticism" with respect to the values and goals forming national ideology. The latitude shall be compatible with the "strong public commitment to such values" inherent to any "just society" (2013: 124). Yet, Nussbaum underlines that there is no generally determined consensus as to the scope and nature of the protection of such goals, which also questions the legitimacy of affirmative measures that could be developed for vulnerable groups within the societies (2013: 125).

The capabilities theory determines that the assessment of the developmental potential of public actions or policies has to be conducted based on two factors, or reasons: a) the "evaluative reason": the assessment shall be performed to define the progress in enhancement of freedoms; b) the "effectiveness reason": the assessment shall evaluate whether development is achieved on the basis of free agency of individuals (Sen: 1999, p. 4). The latter has to be focused on the related empirically determined network of various freedoms, which act to mutually reinforce each other.

This analysis of the capabilities theory standards and requirements to public actions within the cultural domain allows to derive a set of indicators to assess the Council of Europe legal framework for protection of cultural rights. Four primary clusters of indicators are

proposed by the thesis for critical assessment of the normative regulation:

1. Opportunities for the realization of rights-holders' agency:
   1.1. opportunities for forming critical cultural choices and for their realisation,
   1.2. scope and nature of allowed public interventions into processes related to the determination of cultural choices, formation and maintenance of cultural identity,
   1.3. safeguards against identity-reductionism;
2. Opportunities for realization of culture-related capabilities:
   2.1. the scope of capabilities created and protected with the legal framework,
   2.2. fertile functioning and corrosive disadvantages of capabilities;

   [*this indicator is to be applied to the analysis of the catalogue of rights and the intersections and cross-influences of rights and freedoms; it includes the analysis of promoted institutional design, conditions for participatory approach, affirmative measures and other support measures required by the legal framework and achieved as a result of implementation practice*];
3. Conditions for functioning of a multicultural society:
   3.1. measures to ensure diversity and equality,
   3.2. capacity to facilitate stability and peace within and among diverse communities,
   3.3. measures and values employed to achieve overlapping consensus within diverse societies,
   3.4. balance between diversity and individual liberties;
4. Opportunities for development:
   4.1. potential positive and negative effects of the measures provided under the framework;
   4.2. assessment of the legal framework capacity to ensure security of the culture-related capabilities.

The proposed set of indicators aims to reflect and encompass fully the requirements and standards developed under the capabilities theory and constitutes a sustainable basis for the critical analysis. Furthermore, its logical structure ensures efficient application to the analysis of both normative and policy instruments. The attempts by the capabilities approach theorists to define a special level of protection to the rights and freedoms also add to the scope of the current research, by providing a methodological and theoretical framework for the assessment of the sufficiency of cultural heritage protection provided by the legal and policy regulations. In particular, the concepts of fertile functioning and corrosive disadvantage of capabilities (under the secure functioning approach by Wolff and De-Shalit, 2007) is applied in this work to the assessment of the scope of rights under the normative systems and related policy instruments. The secure functioning framework is, therefore, applied as a measurement tool for the sufficiency of affirmative interventions foreseen under the legal framework, and for identification of possible *lacunae* in their design. For the interests of the cultural heritage and human rights protection, the "security perspective" of the capabilities approach (Nussbaum, 2011: 488) becomes instrumental. The security perspective allows to determine whether the protection regime is sufficient and conducive to development, and whether the protection is comprehensive, implying both market security and political powers (Nussbaum: 2011, 488).

In order to frame the reference system for the further analysis, the chapter will proceed with forging a general overview of the concepts and standards pertaining to the definition of minorities in international legal framework, and will consequently discuss the methodological approaches chosen for the research.

1.3. Defining Minorities and Forging the Standard of Cultural Rights Protection for Minorities

Like the definition of culture, the definition of minorities is not normatively devised. The 1992 UN Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities qualifies minorities through the uniqueness of their identity, listing the defining components to include national, ethnic, cultural, religious and linguistic identity. There is a flamboyant variety of attempts to formalizing the definition of minorities within the academic discourse (Parker: 1993; Aukerman: 2000; Castellino: 2010). Some approaches focused on the references to cultural uniqueness of national minorities

with the entitlement to recognition in case the group is defined by equality and the will to preserve the distinction (Kymlicka: 1995). Other approaches more explicitly target the majority-vs-minority binary and the right to self-determination, without limitation to the democratic government participation, and including the definition of "indigenous minorities" through their distinctions that "threaten... the constitutional structure and external boundaries of existing nation-states" (Turton and González: 1999, p. 11, also in Castellino: 2019). The special feature among definitions of "immigrant minorities" in the effect that their identities contribute "to traditional notions of 'nation building' through the increasing homogenisation of a culturally diverse population" (Turton and González: 1999, p. 10), as well as social anthropology and sociological perspectives (inter alia, Adler: 2009; Baker: 2015).

Francesco Capotorti (1977, para. 568), the former Special Rapporteur of the United Nations Sub-Commission on Prevention of Discrimination and Protection of Minorities, considered a minority could be defined through the dimension of the group, its subordination to the majority, the specificity of identity components and the willingness to preserve the specificity. Capotorti conditioned the recognition of minorities to the requirement of nationality of the respective State. Thus, under his definition, a minority can be devised 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 those of the rest of the population and show, if only implicitly, a sense of solidarity, directed towards preserving their culture, traditions, religion or language*".[6] That definition highlighted the decisive factor that underlined the necessity of the protection of minorities – the subordination of the minorities to the majorities' governance system. The protection of cultural components forms the basis of international protection systems, as they are crucial elements constructing identity of minorities, and therefore their core existential foundation.

The challenges determined as of primary importance for the minority groups relate to finding a balanced approach to the protection of their identity. As Bergen argues (2005), the minority groups are challenged with two detrimental perspectives – the marginalization as a

[6] This approach is supported within the academic debate, e.g. as discussed in Thornberry (1991, p.171, Ferri, p. 8) concludes that non-nationals "do not have the 'identity' rights proclaimed by article 27".

consequence of maintaining their cultural, linguistic and traditional particularities, segregation resulting from the attempted mobilization of minority groups members based on collective identity and distinguished "cultural specificity", as well as with the forced assimilation on the other side of the spectrum, which follows dismantling culturally unique practices and leads to destruction of the minority's identity. The identified challenges are shared within the wider academic and international political discourse, and can be applied as a set of questions to identify the fields where the policy and normative solutions within the international standards framework, including that adopted within the United Nations.

The primary reference system to the protection of cultural rights of minorities is construed by Article 27 of the 1948 Universal Declaration of Human Rights, the 1966 International Covenant on Civil and Political Rights, the 1966 International Covenant on Social, Economic and Cultural Rights, and supplemented with the 1992 Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities. Article 27 of the UDHR provides a universal right "freely to participate in the cultural life of the community". The culture-related provisions of the Covenants were thus developed to grant legally obligatory force to the provisions of Article 27 of the UDHR, and extend its scope (General Comment 25 to the ICESCR, para. 10). The provisions of the Covenants are interpreted in General Comments, with the General Comment no 23 to Article 27 of the 1966 International Covenant on Civil and Political Rights bearing most relevance to the current discussion. Certain aspects arising from the implementation of Article 27 of the ICCPR were clarified through the soft-law jurisprudence upon individual applications submitted under the Optional Protocol, while others were examined by the Committee through the analysis of the States reports. Article 15 of the ICESCR on the right to take part in cultural rights and related general comments by the Economic and Social Council, in particular Nos 21 and 25, help delineate the legal content of cultural rights and the convergences they bear with other human rights and human values protected within the UN framework, including pluralism, diversity and human dignity, sharing the approach with the Council of Europe.

The development of a protection system for national minorities restarted within the UN system with the two Covenants after a

temporary slide of the debate. Consequentially, it developed legal framework reflecting the idea that imperative universal protection of human rights granted under the UDHR did not require any specific measures empowering specific groups (Stamatopoulou: 2007). However, the minority rights protection tools were re-introduced into the international legal framework due to the realization that lack of empowerment for groups identifiable based on ethnic, linguistic and religious attribution constituted a gap in the international human rights mechanism, undermining the legacy of the League of Nations (Capotorti, 1979, piii). The ICCPR established a prohibitive norm for States to deny individual cultural rights to persons belonging to minorities, exercised individually or in community with others, including enjoyment of their own culture, professing and practicing their own religion, as well as linguistic rights. Moreover, the scope of the provisions of the Covenant is framed to include the protection of rights of ethnic, religious and linguistic minorities.

Article 27 of the ICCPR[7] creates individual rights of persons belonging to minorities "*to enjoy their own culture, to profess and practise their own religion, or to use their own language"* that are, however, not adjusted to individual interests due to their exclusively collective dimension of implementation ("*in community with the other members of their group*"), as provided in the text of the Covenant. This has led to consideration that the rights of minorities under Article 27 of the ICCPR are collective in nature. In the Commentary to the ICCPR, Manfred Novak (2005, p.p. 656-657 cited in Ferri, p. 9) opined that Article 27 implies exclusive collective application, and underlined that the "*individual enjoyment of a minority culture, individual protection to the religion of a minority and the individual use of a minority language*" are not guaranteed by the ICCPR.

The General Comment No 23 adopted by the Human Rights Committee in 1994 explicitly defined that the rights under Article 27 are individual rights in nature, and is distinct from other entitlements under the Covenant (para. 1). The Committee underlined the

[7] Article 27 of the ICCPR reads as follows: "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."

distinction between the entitlements under Article 27 and other safeguards established by the ICCPR for equality, equal protection and prevention of discrimination (paras. 2, 4). The distinction between the entitlements under Articles 27 and 2.1. are in the scope of application, as Article 27 creates entitlements for persons belonging to minorities, as opposed to the general application of Article 2.1. to everyone within the jurisdiction of States Parties. Furthermore, Article 2.1. is different in the rights it creates, as it extends to all other rights stipulated under the Covenant, and prohibits any discrimination in their realisation. Thus, *bona fide* compliance with the non-discrimination principle cannot be used to support the failure to recognise or admit the absence of minorities in a state. The distinction between Article 27 and the two other norms lies also within the scope of entitlements it creates, as it prohibits discrimination in application of rules created within domestic legal systems. The Committee underlined that the entitlements devised under Article 27 are independent rights, aiming to "ensuring the survival and continued development of the cultural, religious and social identity of the minorities", and should be protected in their substance, avoiding confusion of its nature as supplementary to other rights or leading to alteration of its scope (para. 9).

The General Covenant No 23 addressed an important issue within the minority related debate, namely the limitation of the scope of application to citizens or long-term residents of the Member States (paras. 5.1. – 5.2.). The Committee acknowledged that to benefit from the protection assigned by Article 27 of the Covenant it was sufficient to belong to a minority, which cannot be implied to limit the provision with the conditions of citizenship, nationality, or long-term residence. The latter conclusion withdrew, to the Committee's opinion, the necessity to examine the degree of permanence that one's residence in the respective State Party should comply with to gain entitlement to protection. The Committee, therefore, extended the scope of protection to "migrant workers or even visitors in a State party constituting such minorities" (para 5.2). Nevertheless, the Committee recognized the necessity of objective criteria to be utilised to establishing the existence of minorities, to prevent arbitrary application and excessive interpretation of the margin of appreciation (para 5.2.). However, the Committee did not propose or develop such criteria in the General Comment.

As to the nature of the cultural rights, the Committee highlighted that, notwithstanding the negative formulation, the recognition of the rights cannot be uncontested, and the enjoyment of rights should not therefore be denied. The State's obligation is therefore extended to ensure that the rights under Article 27 are not violated or denied not only by States but also by the third parties. The requirement for positive measures of protection are devised on the same premise. These are prescribed both against the acts of the State itself, namely through the acts by its legislative, judicial or administrative authorities, as well as against the acts of other persons within the State's jurisdiction. The Committee conjured the dependency of the individual rights under Article 27 and the existence of the minority group. The existing interconnections are established by the Committee between the members of the minority groups, namely within the same group, between different groups, and between the members of the majority and the members of the minority groups. This argument led the recognition of the necessity for States to ensure positive measures for collective enjoyment of the right, ensuring the right of minority groups to maintain, enjoy and develop its culture, language or religion (para. 6.2.). The scope of the notion of culture and related scope of the entitlements under Article 27 was recognised (para. 7) to incorporate multiple manifestations, including the ways of life, related territorial rights, and associated activities, such as fishing or hunting, as well as the right to live in areas with special status, such as national reserves. Specifically, the linguistic rights of members of minorities, including to speak their language, was underlined to be distinguished from the procedural rights of accused persons to be provided with the interpretation at court proceedings.

As to the standard of implementation of these legal provisions, the effective integration of the legal principles into the political, social, economic and the wide developmental perspective remains a requirement to the States (Capotorti: 1979, p. iv). The Committee provided additional guidance to the implementation of Article 27 of the ICCPR in its views and communications adopted in response to the individual communications submitted in line with the Optional Protocol. Importantly, some of these concerned the relation between the limitations on entitlements under Article 27 with respect to groups and individuals. The Committee decided that the standard applicable to individual restrictions must comply with the requirements of

demonstrated reasonable and objective justification and be in public interest, or in the Committee's words "to be necessary for the continued viability and welfare of the minority as a whole", and be reasonable and consistent with Article 27 of the ICCPR (HRC in the Ivan Kitok v. Sweden, Communication No. 197/1985, CCPR/C/33/D/197/1985 (1988), para 9.2 and 9.3; also in Lovelace v. Canada). The Committee also underlined that this principle applied to conflicts created with collective entitlements for minority groups under the domestic legislation with the rights of individual members of the minority community. The Committee underlined the necessity of contextual interpretation of the scope of the individual right to enjoy one's own culture in community with the other members of the group, and opposed against its determination *in abstracto* (para. 9.3). Capotorti also highlighted the necessity to develop additional principles to substantiate the ICCPR provision, to design an international implementation methodology, and development of regional agreements to enforce the protection, of which the Council of Europe Framework Convention can be exemplary.

Article 15 of the ICESCR establishes the universal individual right to take part in cultural life, to enjoy benefits of scientific progress and the right to have the authorship rights, including moral and material interests resulting from any scientific, literary or artistic production (para. 1). The ICESCR establishes both positive and negative obligations upon states to fully ensure the realization of these rights, both through abstention from interference with the freedom to participate in cultural right that implies non-intervention into "cultural practices and with access to cultural goods and services" (GC 21, para. 6) and through positive measures aimed at "conservation, the development and the diffusion of science and culture" (para. 2), along with the obligation to respect the freedoms for scientific research and creative activity (para. 3) and acknowledge and facilitate international cooperation in the cultural field (para. 4). Positive obligations are interpreted by the CESCR to those ensuring "participation, facilitation and promotion of cultural life, and access to and preservation of cultural goods" (GC 21, para. 6). The CESCR underlines the importance of individual agency in forming cultural choices and the respective obligation of States to respect them in full respect of the pruinciple of equality, which the CESCR underlines to bear particular significance for indigenous people (GC 21, para. 7).

The notion of culture as developed based on the provisions of Article 15 of the ICESCR by the CESCR underlines the fundamentality of the inclusion and recognition of diversity (GC 21, para. 12). Culture is considered by the CESCR as a complex notion, with expressed denial of its compartmentalization, to underline its fluidity and its nature as a dynamic and evolving historical process (GC 21, para. 11). The composite nature of culture is also underlined in its encorporation of multiple identities of individuals and communities, which blend into a single notion without destroying each other. Cumulatively, these evolving mix of cultural identities, practices, beliefs and traditions is considered to constitute the "culture of humanity" intrinsically based on the idea of recognition of the concept of otherness (para. 12). This idea is intrinsically linked with the concept framed by the UNESCO Universal Declaration on Cultural Diversity and provides for genuine recognition of multi-level identities of minority groups, and their equal participation within the construction of general cultural identity of humanity, without prevalence of particular groups or state-generated cultural prevalences.

The General Comment No 21 on the right of everyone to take part in cultural life (Article 15, para. 1a of the Covenant on Economic, Social and Cultural Rights) adopted by the UN Committee on Economic, Social and Cultural Rights (CESCR) in 2009 draws the inalienable connection of cultural rights with human dignity, and underlines their fundamental importance for the positive social dynamics in the multicultural world setting (para. 1). General Comment No 21 forges the interlinkages between the right to take part in cultural life and other human rights, striking the mutual convergences with the right to education, the universal rights to self-determination and the adequate standard of living (para. 2). Moreover, in connection with educational activities, the cultural participation is linked by the Council with multiplication of individual and group values, religion, customs, language and other cultural references, fostering mutual respect and understanding.

Another universal instrument framing cultural rights of persons belonging to minorities is the Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities that was adopted in 1992 unanimously by the UN Member States (UN OHCHR: 2010). Conceptually, the Declaration reflects the vectors of

normative development highlighted for the UN mechanism. Unlike the ICCPR, the Declaration acknowledges the individual and community aspects of minority rights (Article 3). As to the principle of non-discrimination, the Declaration recognizes it only on the grounds of distinction as to race, sex, language or religion (preamble). In response to the critics of minority rights enhancement, it is seen in the Declaration as a pre-condition for social and political stability and development (preamble), while the affirmative measures are admitted outside the scope of discriminatory practices (Article 8). Establishing and maintaining contacts with people of the same or other minority groups "*related by national or ethnic, religious or linguistic ties*" abroad and within the country is recognized as a right of people belonging to minorities. The Declaration requires protection of such rights, establishing guarantees to exercise them in private or in public, and extends its scope to the right to participate in all aspects of public affairs, including cultural life, the rights to form associations and maintain contacts.

The Declaration places identity to the core of related commitments (Article 2). The Declaration requires measures safeguarding and facilitating the choice of identity, and underlines the necessity of policy and legislative measures for these aims (Article 1), subject to participatory approach to their formulation (Article 2). The declaration also calls for protective measures aimed at safeguarding identity and cultural determinants intrinsic to their identity (preamble). Article 4 creates a list of guarantees for effective implementation of their rights, including full and effective enjoyment, full equality and non-discrimination, appropriate measures for adequate opportunities to learn their mother tongue, measures related to education, promoting knowledge on minority culture components within the community, affirmative measures to develop and express their cultural background (culture, language, religion, traditions and customs), as well as to be educated about issues pertaining to general society, and the right to contribute into development. Cultural specificities are recognized admissible only upon the condition that they comply with national and international law, excluding prevalence of culturally determinable negative policy and decision-making choices (Article 4). The Declaration provides for the standard of the policies and programmes, which have to be formulated in the best interests of the persons belonging to minorities. The CESCR underlines the importance of the

preservation of distinctiveness of minority cultures in policy instruments (CSECR: 2009, GC No 21, para. 33).

Although the issues pertaining to the status of cultural rights of indigenous communities is less relevant for the evaluation of the Council of Europe legal framework on cultural rights of national minorities, the international regulation and standards developed in this area globally are nevertheless instrumental in forging principles applicable to the legal protection of minority groups. These are important to examine in light of the undergoing debates regarding the scope of persons and groups to be included into the scope of the 'minorities' concept. The standards forged within the international law with respect to indigenous people will be briefly examined in this work in order to delineate applicable principles and useful methodological and conceptual approaches. The international legal framework regulating cultural rights of indigenous people primarily consists of the 2007 UN Declaration on the Rights of Indigenous Peoples and the ILO Convention concerning Indigenous and Tribal Peoples in Independent Countries (Convention No. 169). The CESCR in its General Comment No 21 to Article 15 of the ICESCR drew upon those instruments.

The 2007 Declaration is built upon the interconnections of the concepts of equality and difference. The concept of difference is formulated as a right, both in terms of practicing difference as a quality and as a quality to be respected in others, while the contribution to diversity is a constituent of the heritage of mankind. The Declaration promotes the principle of non-discrimination, firmly condemning "*all doctrines, policies and practices based on or advocating superiority of peoples or individuals on the basis of national origin or racial, religious, ethnic or cultural differences [as] racist, scientifically false, legally invalid, morally condemnable and socially unjust*".

The 2007 Declaration is centered upon the idea of empowering the agency of indigenous people and effective participation. Article 18 conjures an entitlement to effective and full participation in decision making on all matters that affect their rights, including determination and development of development strategies (Article 23, without direct reference to, but not excluding, cultural development), as well as matters of independent administration and implementation of such policies. Consultations and cooperation among States and indigenous groups are stipulated for the development of policy and legislative

frameworks for the implementation of the rights provided in the Declaration (Article 38). The issue of identity-related rights and their cultural component is developed in international law under several approaches. The 2007 Declaration establishes the right of indigenous peoples to determine their own identity or membership in accordance with their customs and traditions (Article 33), which does not hamper their citizenship rights. The Declaration does not develop on the cultural component of identity building, but connects this right with the political and civil rights, including those of association, self-governance, institution-building, and dispute resolution (Articles 33 and 34). The possible influence of cultural relativist practices is balanced with respect to development of "*institutional structures, […] distinctive customs, spirituality, traditions, procedures, practices […] juridical systems or customs*" with the requirement of compliance with human rights standards (Article 34), while indigenous groups are entitled to determine the responsibilities of individuals to their communities (Article 35). Cultural sensitivity is provided as a prerequisite for the administrative disputes resolution mechanisms between States and the indigenous groups, with the decisions considerate of "*the customs, traditions, rules and legal systems of the indigenous peoples concerned*" in conjunction with international human rights (Article 40).

The Committee underlined (GC 21, para. 36) that measures ensuring implementation of the right to take part in cultural life should provide due sensitivity to the possibility of deep communal nature of cultural practices by this category of rights holders. The communal dimension of cultural rights is seen as an integral component of their "*natural identity*", including their existence, development and property rights, in particular to land and natural resources (2007 Declaration, preamble). The core aspect within the cultural rights of indigenous peoples from the international law perspective is attributed to the relationships of indigenous groups with the natural resources and traditionally occupied territories, including land and seashores. The adoption of the declaration was stalled due to the lack of consent among the UN Member States with respect to the initially catalogued right to control over the natural resources located on the territories under the indigenous peoples' control, along with the right to self-determination

of indigenous peoples.[8] The acknowledgment of "*values and rights*" associated with the traditionally owned or occupied territories is considered a precondition for the effective policy measures that should safeguard such entitlements of indigenous peoples as the rights to "*own, develop, control and use their communal lands, territories and resources*". The 2007 Declaration considers the indigenous people's relationships with their lands and natural resources as "*their responsibilities to future generations*" and frames strengthening of such "distinctive spiritual" relationship as a right belonging to indigenous groups (Article 25). Moreover, the legal and policy instruments are required to incorporate a protective element against misuse or misappropriation, providing an instrument of return of unlawfully occupied territories, compensation for unlawful eviction and the right to restitution (2007 Declaration, Articles 26-28).

Among specific capabilities established by the 2007 Declaration, it is the right of indigenous peoples to the conservation and protection of the environment and the productive capacity of their lands or territories and resources (Article 29). The supporting obligation on the side of the governments implies assistance programmes executed on discrimination-free basis, enforced with special effective measures against disposal of hazardous waste on the territories owned by indigenous peoples and health-related measures to avert the negative consequence of hazardous materials deployment. In line with the ILO Convention No. 169 and the 2007 Declaration (Articles 5 and 31 respectively), the heritage-related rights of indigenous peoples include: rights "*to maintain, control, protect and develop their cultural heritage, traditional knowledge and traditional cultural expressions*". The objects of these rights include various "*manifestations of their sciences, technologies and cultures, including human and genetic resources, seeds, medicines, knowledge of the properties of fauna and flora, oral traditions, literatures, designs, sports and traditional games and visual and performing arts*" (2007 Declaration, Article 31). Meanwhile, the 2007 Declaration extends the

[8] The draft declaration was elaborated based on the General Assembly Resolution 61/178 and the General Assembly resolution 49/214 of 23 December 1994. The draft declaration with the Report of the Human Rights Council were presented at the General Assembly on 30 June 2006, A/HRC/1/L10 [online]. Available at: https://documents-dds-

rights catalogue with the right to maintain, control, protect and develop their intellectual property over such cultural heritage, traditional knowledge, and traditional cultural expressions (Article 31.1). Both legal instruments underline the importance of the informed consent and effective participation of indigenous peoples in elaboration of response measures related to or affecting their heritage-related rights (2007 Declaration, Articles 31 and 32).

The specific features applicable to implementation of States' obligations on cultural rights shall also be viewed within the general standards applicable to international human rights commitments, elaborated *inter alia* in the 1991 CESCR General Comment No 3 on the Nature of States Parties' Obligations. The document defines the tripartite nature of states' obligations under the international law that is compound of the responsibility to protect, the obligation of respect and the obligation to fulfil human rights. As this specificity of obligations is also applicable to cultural heritage law, it implies that all aspects of obligations shall be respected, with the violation of one of them amounting to the violation of the commitment (Tünsmeyer: 2020 discusses the nature of the states' obligations under international cultural heritage law based on the 1997 Maastricht Guidelines on Violations of Economic, Social and Cultural Rights).

Therefore, the standard applicable to the international cultural law implies the States' negative obligations to abstain from infringement of rights (duty to respect); the duty to protect implies affording protection in the classical sense of protection of rights. This may differ in scope with respect to the duty to protect against the state intervention or from the third parties, as well as whether the protection is granted to individuals or communities, and particularities of the situations of the rights-holders. The obligation to fulfill implies the availability of the right to rights-holders and incorporates a wider scope of commitments specific to the particular entitlement in question (for the discussion of the content of the obligations under the UN system see Tünsmeyer: 2020). The latter aspect of the standard, when applied to Article 15 (1) of the ICESR, was interpreted to encompass the requirement to adopt "deliberate and concrete measures" for the realization of the right (General Comment 21, para. 45). This, in its turn, implies compliance

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ny.un.org/doc/UNDOC/LTD/G06/128/65/PDF/G0612865.pdf?OpenElement.

with the rule of law standards, including due legislative techniques and the quality of legal acts guaranteeing cultural rights, as well as facilitating participatory approach to developing policies and legal instruments. All these aspects are discussed in the thesis with application to the provisions and implementation of the Council of Europe legal framework, as it allows a comprehensive analysis of standards for legislative and policy-making processes.

In its analysis of the Council of Europe framework, this thesis will attempt to encorporate these approaches to cultural rights of minorities. Therefore, it will consider cultural rights of minorities in their wide scope and reflecting their relevance of the elements forming cultural identity if individuals. As mentioned above, cultural rights will be examined through their convergences with broader framework of human rights to devise factors that contribute or undermine their realisation from the perspective of the capabilities theory. Therefore, the thesis will employ the notion of cultural rights developed by the Special Rapporteur in the field of cultural rights. The notion is developed from the perspective of the protected elements; it is not limited to access to cultural heritage, but is guided by the notion of identity and realisation of cultural agency. These factors proove consistency of the definition with the theoretical framework of the thesis and make the concept instrumental for its purposes.

Cultural rights are delineated in several reports by the holders of the mandate of the Special Rapporteur in the field of cultural rights. The most significant work on the categorization and systematisation of the scope of the notion was carried out in the 2010 Report (A/HRC/14/36), framing the concept and legal regulation, the 2012 Reports (A/HRC/20/26 and A/67/287), which was thematically dedicated to the right to benefit from scientific progress and its applications), and the 2019 Report (A/HRC/28/57) that summarized the forging of the cultural rights approach conducted from the establishment of the mandate in 2009. This thesis will rely on the definition presented in the 2019 Report, which framed cultural rights as "rights protecting: (a) human creativity in all its diversity and the conditions for it to be exercised, developed and made accessible; (b) the free choice, expression and development of identities, which include the right to choose not to be a part of particular collectives, as well as the right to exit a collective, and to take part on an equal basis in the process of defining it; (c) the rights of individuals and groups to participate, or not to participate, in the cultural life of their choice and to conduct their own cultural practices; (d) the right to interact and exchange,

regardless of group affiliation and of frontiers; (e) the rights to enjoy and have access to the arts, to knowledge, including scientific knowledge, and to an individual's own cultural heritage, as well as that of others; and (f) the rights to participate in the interpretation, elaboration and development of cultural heritage and in the reformulation of cultural identities" (A/HRC/28/57).

This definition is useful for mapping the connections between one component of cultural rights within the extended framework of basic human entitlements, including the rights to life, health, food, housing, water and sanitation, privacy, self-determination and freedom of thought. The cultural rights approach overall underlines the indivisibility and interdependence of the entire human rights system and aims to demonstrate that placing cultural rights at the intersection of civil and political rights, economic and social rights ensures their mutual enforcement. The primary tenet of the cultural rights approach is in recognition of transformative and empowering nature of cultural rights that creates additional new opportunities for the realization of other human rights. In line with the capabilities approach, the cultural rights approach highlights that the lack of equality in access to realisation of cultural rights, exacerbated with economic and social inequalities, further hampers exercise of their civil and political rights and to negatively affects the right to development. As this research examines cultural rights of minorities from identity perspectives, the scope of cultural rights under its analysis will encorporate identity elements, including beliefs, opinions, religion and religous practices, education, language, customs, rituals and traditions, attire, food and lifestyles, and cultural heritage, including the opportunities to access relevant institutions and participate and abstain from participation in relevant activities.

1.4. The Structure of the Thesis

The thesis is divided into four chapters, introduction and conclusions. Introduction covers, besides technical methodological issues and literature, the overview of the concepts chosen as a methodological framework, including the human rights based approach to cultural rights and the capabilities theory, the standards devised based on the approaches to policy and normative frameworks, as well as an overview of the international standards pertaining to the protection of cultural rights of national minorities.

Chapter 2 is dedicated to the analysis of the of the European Cultural Convention and the Council of Europe Framework Convention on the

Value of Cultural Heritage for Society. The semantic and teleological analysis of the texts of the conventions will be supplemented with the contextual analysis of the statements and opinions of the drafting committees' members, explanatory reports to the Conventions, as well as the programmes launched in implementation of the conventions and resolutions and recommendations of other bodies of the Council of Europe that are closely relevant to the discussed topics from the points of view thematic coverage and regulatory scope. It is examined whether the concepts of the common European values and common European identities facilitate the cultural capabilities of minorities.

Chapter 3 is dedicated to the analysis of historical and conceptual backgrounds of the contemporary system of cultural rights of national minorities. The research is conducted on the basis of archival accounts, including *travaux preparatoires*, of the additional protocol to the ECHR on the cultural rights, with particular relevance to the national minorities, *travaux preparatoires* to the Council of European Framework Convention for the Protection of National Minorities, as well as the political discourse held within the Council of Europe, preceding and surrounding the elaboration of the two instruments, including the reports of different committees including the Venice Commission and other Council of Europe agencies, contributions from national delegations and the academia to the working group, and political documents, including the recommendations and resolutions adopted by the Council of Europe Parliamentary Assembly and the Committee of Ministers. The aim of the analysis is to determine the factors that influenced the decision-making related to the drafting of the instruments, to determine the scope of rights as originally circumscribed by the drafters, as well as attempts to establish the factors that prevented further developments of the instruments. Methodologically, the chapter contributes into the logical sequence and the scope of further analysis of the ECHR and FCPNM.

Chapter 4 is dedicated to the analysis of the European Convention for the Protection of Human Rights and Fundamental Freedoms and the ECHR case-law. The Chapter will aim to devise the convergences of human rights that help protect cultural rights in the absence of the particular entitlement within the catalogue of rights under the Convention. The ECHR case-law will be analysed to determine the standards and conditions of protection, admissibility standards and

protection on merits, and the standards of proof and acceptability of interference into the cultural rights of minorities. As mentioned above, the choice of the precedents was made to ensure the subject matter relevance, and the dynamic approach to show how the practice evolved. The structure of the chapter follows the contemplated structure of the additional protocol on cultural rights that had not been adopted to devise what rights initially considered for inclusion to the Convention are protected within the existing catalogue, and if additional possibilities for cultural rights protection were devised. The Chapter is divided into two parts, the first is dedicated to the foundational aspects of the protection of cultural rights of minorities, while the second part is dedicated to the analysis of the case-law practice on cultural rights. The second part is therefore divided into three subparagraphs, each dedicated to a type of culture-related rights under examination. The analysis of the case-law of the ECHR thematically follows, to the extent possible, the frame of the planned additional protocol to reflect what solutions were developed in practice by the court compared to an attempted legislative solution. As the scope of the draft protocol varied on different stages of its development, this frame allows efficient presentation of the existent case-law with several conceptual restructurisation developed within the research, mainly to enable discussion of different logical solutions and tests developed and applied by the Court, depending on the nature of the case. Critical analysis of the mechanism establishes the problematic areas of the protection system.

Chapter 5 is focused on the analysis of the Council of European Framework Convention for the Protection of National Minorities. It examines the catalogue of rights and obligations, and their nature, as well as the extension of the scope of protection under the Convention in the course of the work of the monitoring mechanism. The first part of the chapter will examine the text of the Convention in conjunction with the opinions by the Advisory Committee adopted in response to the States reports on implementation of the Convention to devise the standards of implementation. The second part of the chapter will be dedicated to the analysis of the resolutions adopted by the Committee of Ministers based on the Advisory Committee opinions, to determine the progress of the States in the implementation and politically supported requirements to States Parties in the future progress with the implementation. Structurally, the Chapter is divided into two parts.

Part one is dedicated to the analysis of the rights catalogue and the standards developed by the Advisory Committee as to its implementation. Part two is dedicated to the analysis of the outstanding recommendations issued by the Committee of Ministers and the examination of the States' practices on the implementation of the Convention. Critical analysis aims to establish the corrosive disadvantages preventing effective realisation of the rights protected under the Convention and hampering the implementation of the instrument.

Conclusion contains a brief summary of the findings of the thesis, the responses to the research questions that were drawn based on the conducted research and a critical discussion of the findings of each chapter under the indicators framework elaborated in Chapter 1. Each chapter contains brief introduction and conclusion parts to systematically present the aims of the analysis and the respective findings.

Chapter 2

The Role of Cultural Pluralism and Common European Identity in Safeguarding Cultural Rights of Minorities

The chapter analyses the potential of the European Cultural Convention (Paris Convention) and the Convention on the Value of Cultural Heritage for Society (Faro Convention) for the protection of cultural rigths of minorities. In particular, the chapter examines how the conventions utilise the concepts of cultural identity and values, how these concepts influence protection of cultural rights of minorities, and overall efficiency of the normative regulation under the two conventions. In particular, the chapter examines the inter-relations the framework converges between the European and minority cultural identities, the scope of the notion of collective identity, and the capacity of broader framework of cultural rights to facilitate their development. The analysis focuses on the cultural indicators established in the methodological framework of this work, and addresses the framework created by the Council of Europe cultural conventions for the design of domestic norms and policies. It examines the conditions that the framework creates for enabling effective participation in cultural life and decision-making, developing cultural identity and enjoyment of other cultural and culture-related rights, and the scope of cultural rights and obligations conjured by the two Council of Europe conventions within the cultural rights domain. The Conventions are contextualised within the relevant political documents by the Council of Europe agencies and programmes developed in the course of their implementation.

2.1. The 1954 European Cultural Convention

The influence of the 1954 European Cultural Convention extended beyond the regional level, but also for the development of the global standards for cultural heritage legal framework. The Convention gave rise to a number of initiatives that were consequently adopted for implementation within a wider institutional cooperation, e.g. in participation of the EU or UNESCO. It has also been significant for the development of terminological apparatus for cultural heritage regulation. Notably, the 1954 Convention was a pioneer in the

international undertaking to develop the notion of cultural heritage and impose binding obligations to its protection on states.

Importantly, the Convention and wider normative framework developed on its basis establish direct inalienable bonds between cultural heritage, identity, human rights and democratic values, attempting to design a common European cultural *milieu* characterized by diversity and peaceful coexistence of different heritages. Its influence on minority cultural identities and perspectives for effective integration into the general social fabric are the matters that this chapter will attempt to delineate.

2.1.1. Conceptual framework

Conceptually, the 1954 Convention builds upon the value system and general aims of the Council of Europe, as reflected in its statutory documents. The statutory aim of the organisation, namely the achievement of unity among the participatory States, is connected in the Convention to the purposes of protection and implementation of common axiological heritage. The common European heritage, as defined in Article 1 of the Statute of the Council of Europe, constitute democracy, rule of law, and human rights. This heritage proclaimed as a goal in the preamble of the Convention denotes the ideologies and values inbuilt as a fundamental concept of the organization. The integration of the European democratic standards into the philosophical and terminological scopes of the Convention proposes three possibilities for the interpretation of the purpose of such a choice by the drafters of the Convention. First of all, they can be considered as an ideological and political framework, within which the societies function. Therefore, the reference to their place within the concept of "common European heritage" determines the convergence of heritage and human rights. Another possibility is the three principles could be perceived as constituents of the "common European heritage" per se, which shifts them into identity forming constituents of heritage that determine values and ideologies. The third dimension is the "democratic dimension" (50 years: 2004, p. 9) of the Europe's common heritage that attributes democracy to the historical past of the region and its native concept.

The preamble of the Convention links the achievement of the democratic aims forming part of the European heritage with building a

better understanding among Member States. Considering that the Convention was drafted in the aftermath of the World War II and at the beginning of the Cold War era, and its provisions were designed to be opened for accession by non-Council of Europe States "whether they be democratically inclined or otherwise" (50 years: 2004, p. 7, Article 9 of the Convention), the democratic principles gain increased importance as a framework for a peace-building process. Indeed, the third recital of the preamble promoted a coordinated effort of Member States in pursuing a joint action to protect and promote the development of the European culture. It also allows to expand the democratic philosophy not only to the cultural cooperation, but using cultural cooperation as an instrument for international cooperation, shifting it into the framing concept for international relations. The 1954 Paris Convention places particular emphasis on the cultural cooperation, diversity and exchange to facilitate mutual understanding. Therefore, culture and democratic principles forming the axiological basis of the organization apper to gain the status and function of peace-building tools in international relations and a foundation for furthering cooperation. These principles, though formulated by the Paris Convention, under external vectors, cannot be read in denial of the internal politicy vector obligated on the Members States by the statutory documents, as their domestic implementation is a fundamental aim of the Organisation and a membership requirement. Therefore, the integration of democratic principles into the concept of heritage leads to the expansion of compliance with diversity commitment in designing the domestic policies, which implies facilitated recognition of agency and value of national minorities, in line with the internationally designed notion of culture as a composite multidimentional concept.

2.1.2. Cultural heritage and cultural diversity

Although the Convention does not define the notion of culture or heritage, and in particular abstains from explicitly developing the regional characteristics pertinent to the European heritage, its constituents can be forged based on the scope of protection and cooperation framed by the Convention. The heritage proposed for preservation, promotion and exchange includes the common history and civilisation (preamble, Article 2), languages (Article 2), cultural activities of European interest (Article 4), cultural objects insofar as they reflect "the European cultural value" and constitute "integral

parts of the common cultural heritage of Europe" (Article 5). The *ratione materiae* scope of the Convention, in the absence of the definition of cultural heritage in the document itself, can be forged through several instruments referencing the Paris Convention as their foundation. For example, the Committee of Ministers Recommendation (98)5 explicitly defines cultural heritage to encompass material and immaterial manifestations of human activities and any signs of human activities in the natural environment (appendix, Article 1, para. 1).

These categories are groundbreaking for the period the Convention was drafted. Comparatively, the UNESCO Convention for the Protection of Cultural Property in the Event of Armed Conflict (the 'Hague Convention') approached heritage exclusively in its material form, commodifying such property for the aims of protection, while the value of the objects for the communities was subsidiary (Donders, 2020). The 1972 Convention Concerning the Protection of the World Cultural and Natural Heritage was also limited to the natural and cultural heritage in their material forms, including monuments, groups of buildings and sites of "outstanding universal value from the point of view of history, art or science."

The nature of the Convention appears to be more contested when the analysis concerns the scope of cultural representation covered by its provisions. Semantically, and with the limitation determined by its title, the Convention regulates European cultural heritage. The text of the Convention, however, implies a binary approach as to the interpretation of its scope. As the Convention primarily references heritage and cultures belonging to the "European" origin[1], some authors (e.g. Fuentes: 2016) consider the Convention a clear-cut example of "Euro-nationalist strategies", where "cultural diversity exudes a character of assimilation". However, it is also valid to recognize that the formulations employed by the Convention are wide, and therefore, given the wide margin of appreciation granted on the national level, its provisions on cultural components of Member States allow interpretation and depend on national approaches. It follows that it cannot be explicitly and uncontestably limited to the heritage or culture of the title nations, although such an interpretation cannot be

effectively excluded. Article 1 of the Convention refers to efforts in safeguarding "national contributions" of Member States to the common cultural heritage of Europe. Furthermore, Article 3 requires coordination of efforts in "promoting cultural activities of European interest". Determination of the scope of national heritage components of European cultural heritage and activities of common interest in Europe implies also relevance to the people living within the jurisdiction. It can be admitted that the stakeholders are to include not only those of European national origin. The European origin in this respect is a very vague notion in itself, and could acquire a differing scope depending on the moment of time the observation is made, as discussed by Sen in the Human Rights and Asian Values (1997) and the Our Past and Our Present (2006b: p. 4879).

The attribution of interests in the development of cultural *milieu*, access and active participation in development of cultural identities would be relevant indicators to determine the legitimate rights-holders in respect to the cultural exchange processes construed by the Convention. Objects of "European cultural value" that are regulated under Article 5 can also be considered from the point of view that attribution of cultural significance can be made from various perspective, including historical relevance, production or attribution. This argument can be supported by the scope of cultural elements mentioned in Article 2 of the Convention. Cultural exchange promoted by the Convention implies exchange of knowledge on, *inter alia*, history and civilization of Participating States. Although the standards to presentation of historical narratives are not prescribed in the Convention, it can be contested that selective interpretation by the title nation can not be allowed, given the historical narratives shall be presented without distortion, as promoted by the Council of Europe. In this context, an explicit negative interpretation would be incorrect, as it would not encorporate other standards elaborated within the organisation, i.e. those requiring historical objectivity and promoting multiculturalism. However, the Convention itself cannot be recognised as establishing sufficient guarantees to the rights and interests of a vast scope of groups. The ambiguous formulation of the Convention cannot on its

[1] Article 9, while extending the right to accede to the Convention to non-members of the Council of Europe, semantically, the states allowed to accession are limited to those of European origin.

own ensure legal certainty and foreseeability of the regulation, leading to possibilities of a vast political influence on the implementation of the Convention. In the absence of requirements for inclusive approach towards cultural heritage within the 1954 Convention, the incorporation of cultures of all communities and groups living within the territory of States Parties to the Convention and under the jurisdiction of the CoE as constituting part of the notion of common heritage of Europe, and heritages of individual Members States, is possible as a result of the interpretation of the Convention within the context of other documents.

Although the 1954 Convention precedes a number of similar instruments, approaches to the determination of value can be made from the perspective of the World Heritage Convention, or the Faro Convention on the Value of Cultural Heritage for Society (2005). Applying the instrument developed within the jurisdiction of the Council of Europe, the Faro Convention, would require to accept that the notion of European cultural heritage should be interpreted as an "enlarged and cross-disciplinary concept", the need that engagement into heritage management be inclusive to "everyone in society", and the need to treat all heritages equally (preamble) leads to the conclusion that the minority heritages cannot be excluded from the generic notion of European heritage in its contemporary application. This inclusion, however, does not imply assimilation or cultural relativism, as the Council of Europe cultural instruments are primarily constructed on the principle of the "equality in diversity". The Faro Convention contains the definition of European heritage, which appears consistent with the primary concept of the Paris Convention of cultural cooperation and preservation of objects on value-based principle. The Faro Convention definition of the European cultural heritage includes all forms of cultural heritage in Europe representing "a shared source of remembrance, understanding, identity, cohesion and creativity", which supports the argument discussed above as to the determination of the subject matter of the regulation as a centre of cultural interests. The second part of the definition under the Faro Convention integrates into the notion of European common heritage the ideals, principles and values that represent the experience gained from the conflicts and create a basis for the peaceful development of the societies on the basis of democracy, human rights and the rule of law (Article 3). This approach is also consistent with the one by the

Paris Convention, underlining its axiological and intangible components. The interpretation within the context of the Faro Convention would establish a comprehensive inclusive scope of the Paris Convention *ratione materiae* that does not allow to exclude cultural components crucial to diversity and pluralism promoted and safeguarded as statutory aims of the Council of Europe.

Such normative solutions raise another aspect of the debate on 'belonging' of minority cultures into the cultural domain of kin and domicile states. The interpretation of the Convention in this respect may also depend on the domestic regulation of cultural heritage, the national regulation of cultural diversity, and the status of minority heritage determined in the national regulation. In line with the Vienna Convention on the Law of Treaties, contextual interpretation applies within the wider frame of relevant international law. It appears uncontested that the scope of obligations assigned by the Convention with respect to cultural cooperation and exchange and the affirmative measures stipulated for the matter to different cultural indicators shall extend to the heritage and culture of national minorities at least in cases and in so far as the minority groups are officially recognized by the respective State Party. Extending the scope of the Convention to the heritage of minority communities unrecognized by Member States may face diverging interpretation, as the approaches towards the requirement of official recognition developed by the ECtHR and the FCNM Advisory Committee conflict. The conflict is reflected in the fact that the former institution supports the official recognition requirement, while the latter actively promotes the abandonment of the limiting requirement within its best practice standard. Yet, the reading of the 1954 Convention in conjunction with the Statute of the Council of Europe does not allow to exclude minority contributions from the scope of the European heritage, as the former acknowledges diversity as the foundational organisational principle. This may lead to the estimated scope of *ratione materiae* application of the Convention to extend from the 'majority' title nation's heritage and the heritages of all officially recognized national minorities as a limiting formalistic interpretation, or the title nation heritage in conjunction with all heritages of all national minority communities residing in the territory of the state with some degree of permanence to allow for interlinkage and mutual influence between all these cultures. These arguments can be supported by the approaches displayed in political and

programmatic instruments adopted by the Council of Europe agencies, which will be discussed below.

The notion of identity is not explicitly defined in the Paris Convention. The only reference that could be construed from the semantic interpretation is the complex system of interconnected cultural identities developed based on the identities formed within the Participating States and effectively comprising them. The cultural identities are comprised of various formative cultural elements, including the language, history and civilization (Article 2). Historical and civilizational components are wide notions and can be interpreted to include the development of arts, crafts, tangible and intangible cultural heritage in all their manifestations, determined by the value component, which in historical terms gains its own wide interpretation. Furthermore, the preamble of the Convention incorporates the specific axiological component to the notion of identity. The European identity can thus be forged as a complex multi-layered system comprised of constituent identities formed within States and comprising a vast scope of cultural indicators, including language, tangible and intangible heritage, traditions and beliefs defining the civilization and history of the states, attributable as to the title majority, as well as to the national minorities.

2.1.3. The scope of rights and obligations

The primary aim of the Convention is to construct and guarantee cultural exchange and cooperation among Member States. This aim is implemented through various measures, including educational, cultural exchange, implying in particular the inter-state exchange in people and objects of cultural significance. The scope of measures stipulated under the Convention underlines the obligation of States Parties to "safeguard and to encourage the development of its national contribution to the common cultural heritage of Europe" (Article 1 determines the nature of the commitment as a positive obligation). Such an obligation, imperatively formulated and framed into the context of regional significance of each national cultural contribution. This effect can be considered a facilitator to forging a "European cultural denominator" for national cultural identities, affecting both

national and regional policy-making and promoting intercultural dialogue and equality.[2]

These obligations correspond to concurring entitlements of Member States to benefit from activities conducted within the cultural cooperation framework foreseen by the Convention. The other level of entitlements appears to include collective and individual entitlements of the "nationals of European States", as well as nationals of third States that have acceded to the Paris Convention. The entitlements that are included on this level include individual entitlements to benefit from the European cultural cooperation, including cultural exchange and participation in "cultural activities of European interest" under Article 3, unimpeded movement for cultural exchange purposes under Article 4, and the possibilities to benefit and participate in educational activities related to languages, cultures and civilizations of European States organized in line with Article 2 of the Convention. The entitlements of the nationals of European States under the Convention also include the right to safeguarded cultural heritage, both in its national scope under Article 1 and in its European dimension under Article 5. The scope of obligations effectively forms parts of the entitlements within the right to participate in cultural right and the right to cultural heritage, as foreseen in various Council of Europe instruments.

2.2 The 2005 Council of Europe Framework Convention on the Value of Cultural Heritage for Society

This sub-chapter will examine the approaches adopted by the Faro Convention to conceptualising culture, cultural heritage and diversity, as well as their contribution into the formation of European identity and the role of minority cultures within the normative regulation. The aim is to continue the analysis of the identity-related components of heritage and trace successful attempts to changing the features leading to the perception of heritage as a "divisive force" or "a tool for resistance and the expression of difference" (Palmer: 2009, p. 7). The convergences between culture and human rights outlined in the

[2] The Council of Europe conducted comparative analysis of cultural policies resulting in the Compendium of Cultural Policies and the European Heritage

Convention and the scope of rights holders will also be analysed based on semantic interpretation of the Convention and the extended normative and programmatic framework developed on its basis. The capabilities approach analysis will follow in the conclusions to the chapter.

2.2.1. Re-conceptualisation of cultural heritage. Culture and identity

The Council of Europe Framework Convention on the Value of Cultural Heritage for Society (Faro, 2005) was conceptualized as "a pan-European complement to UNESCO's efforts to adopt worldwide standards on cultural diversity" (50 years: 2004 p. 16). Adopted 20 years after the Paris Convention and almost simultaneously with the 2003 UNESCO Convention on the Protection of Intangible Cultural Heritage, the Faro Convention reflected the change of paradigm in conceptualization of cultural heritage and its regulation. The development of the Faro Convention was driven by the need to shift the dominance within the binary relations between society and heritage to the former (HandB, p. 17). The necessity for such a shift was dictated by the changing political and social agenda, and the requirement of a tool for effective heritage valorisation. The drafters reflected that the primary subtext under which the Convention was elaborated was the pursuit of economic sustainability, while the fundamental concepts forming the basis for the Convention were "values, rights, identity, diversity, mobility and inclusion" (HandB, p. 17). These concepts are shared as the key ideas for the minority cultural rights promotion elaborated by the UN Special Rapporteur, and are is consistent with the capability approach to development theory (Nussbaum: 2006). The Convention is constructed on a sustainable theoretical basis for designing cultural policies reflecting minority agenda.

The goals and approaches forming the conceptual basis of the Convention also reflect the changing perspective towards heritage itself, with the shift from conservation approach to the social development perspective (Therod: 2009, p. 9). The Convention aimed to grant the agency for designing the notion of culture to right-holders, ensuring diversity of cultures, and a value-based approach to heritage which was reflected in the definitions employed in the Convention. As

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values have become a "conundrum of modern society" (Palmer: 2009, p. 7), the integration of value-based approach to heritage and culture reflected that crucial paradigm shift in the heritage-related narrative. That reconceptualization entailed clashes of value-based views and interests. A number of such contested values are directly relevant to heritage, including aesthetic, historical, community and economic values. Under these circumstances, the requirement arose in narratives capable to revive "heritage consciousness", which would ensure ownership of the concept by all members and groups within society, preventing elitism in culture (Palmer: 2009, p. 8). Such narratives should also contribute into further unity of the society, preventing compartmentalization and estrangement among cultural communities.

Heritage cannot exist without community; communities are both the defining agent and the consumers of culture. The Faro Convention was an attempt to create a legal basis for such heritage-related policies that would "favour quality of life for local populations and the general public's access to culture" (Therond: 2009, p. 9). The Convention does not aim to protect or safeguard heritage, but to re-conceptualise heritage and the model of engagement with it, bringing valorization of heritage above its commodification. The Convention brings the regulation of cultural heritage closer to the general regulatory framework of the Council of Europe. As reflected in the Explanatory Report (2005, p. 5), "[t]his Convention does not supersede earlier instruments, but provides a wider social context for their provisions" and that "[…] this Convention establishes the link between human rights and heritage values in European society". Thus, it incorporates a number of provisions on the protection of human dignity, close to the ideas reflected in the Revised Charter of the Council of Europe (e.g., Articles 26, 30, 31) and reshapes and reinforces the concept of shared responsibilities for heritage, initially designed under the Paris Convention. The Faro Convention was also to facilitate integration of cultural heritage into the concept of sustainable development. That was important to achieve in particular with respect to the framing of rights and responsibilities to ensure that benefits could be achieved from heritage "as cultural capital" (Explanatory Report:2005, p.1). That aim is identified by the Convention's *travaux preparatoires* as the basis for the choice of the instrument's format, namely a framework convention, to constitute guiding principles for policy-making in the fields of culture and cultural heritage on the national level.

The Faro Convention represents one of the crucial sources within the vast Council of Europe cultural heritage *acquis* due to its contribution into the delineation of the role of heritage in common regional identity formation. In delineating heritage and identity, the Convention builds on the Council of Europe Statute and the 1954 Paris Convention. It unequivocally recognises the role of the Council of Europe's cornerstone principles - the rule of law, democracy and human rights - as the common European heritage (preamble), while underlining that people, human values and cultural diversity are in the core of it. First of all, this approach accords a special role to the three democratic principles within the concept of European heritage, explicitly naming them as particular constituents placed above other elements within the heritage formula forged in Articles 3 and 4. Moreover, the Convention utilises the parameters of value and diversity to define heritage, which enforce the agency of rights holders and thus help construe a genuine participatory approach to heritage. However, the principles of the rule of law, democracy and human rights as heritage elements are withdrawn from any value assessment tests and are attributed value by default, underlining their irrevocable prevalence.

The definition of cultural heritage adopted in the Convention can be examined from several dimensions. One dimension provided in Article 2 is of general nature, that is reflected in representation of heritage as a group of resources. The specificity lies in according individuals and communities the agency to evaluate and interpret cultural heritage, with the reference to their "constantly evolving values, beliefs, knowledge and traditions" ("value-based approach"). This provides for a possibility of a creative interaction with heritage and contributes into cultural diversity, responding to the Convention's aim. This approach is favourable to the minorities cultural heritage, as it corresponds to the realities attributable to the status of the group and the co-existance of multiple components of these cultures, including inter-relations with heritages and cultures of majority group, the kin state, and other minorities. The principle of equal treatment of heritage required by the Convention shall not be restrictively limited to private actions and interests. Heritage must be respected and taken equally first and foremost by states, as provided in the text of the Convention (Article 5 f). This norm is also a commitment to recognizing the role of heritage in promotion of peace and mutual acceptance. The concept of values defined for the purpose of heritage delineation is corroborated with the

concept of public interest associated with cultural heritage (Article 5a). The Convention creates a solution for settling possible clashes of various interests between group or groups and individuals using heritage itself as a source of mutual acceptance, through understanding and recognition of values of its intrinsic characteristics (Article 7). This approach helps to test and filter the types of heritage that do not represent substantive group significance without limiting diversity ensured by unlimited participation or decreasing cultural capital.

The conceptual difference of the Faro Convention's approach to heritage compared to the approach of the 1972 World Heritage Convention is in the determination of the value of heritage. The 1972 World Heritage Convention evaluates heritage based on its outstanding universal value. The Faro Convention recognises "vernacular" value (Therod: 2009, p 10). The intrinsic value of heritage for the 1972 Convention is based on the internal quality and the evaluation of information on the particular material object, as opposed to the primary role of rights-holders in evaluation and determination of heritage and its value in terms of the Faro Convention. This approach does not only change the conceptualisation of what heritage is, but alters also the network of correlations between heritage and other social phenomena, which, in its term, affects the scope of rights and responsibilities that govern the intertwined relationships within the "cultural environment". The value of heritage under the Faro Convention is drawn to underline that it a priori exceeds its utility (Article 10 c, reaffirmed in Explanatory Report, 2005, p. 11). However, the "heritage as luxury" approach is also excluded from the conceptual framework of the Convention, changing it from 'heritage as valuable object' to 'heritage as a resource' perspective.

One contested item arising from the semantic interpretation of the Convention's definition of heritage is the temporality principle it adopts for qualifying heritage. Under the Convention, heritage are resources "inherited from the past", which would effectively exclude newly created cultural objects from being recognized or perceived as heritage, according to the approach inherited from the 1972 UNESCO Convention Concerning the Protection of the World Cultural and Natural Heritage. However, the drafters of the Convention delineated in the Explanatory Report that the Convention does not mean to perceive heritage only as an object created in the past. It approaches

heritage from the perception of its comprehensiveness of all assets that are considered subject to bequeathing, on which behalf a decision is made to give it to inheritance to the future generations. Therefore, the reference to the past in the definition ensures the continuity in heritage-related interactions, and safeguards social cohesion by the transfer of values, historic narratives and intercommunal relationships. This approach contributes to the creation of cultural environment (within the context of Articles 8 and 9 of the Convention, see Explanatory Report, 2005, p. 10) and conjuring of the sense of ownership with respect to the development of cultural heritage, which fosters its responsible treatment and grassroots conservation efforts, as well as to the intercultural dialogue. In words of Guilherme d'Oliveira Martins, the Chair of the Faro Convention drafting group (2009, p. 43), "[c]ultural phenomena partake of this quality [of ideal objects] and cannot be fenced into "static models" or "closed precincts" but must merge with the horizon of "historical experience".

The Faro Convention is not fully spared from ambiguity of its terminological apparatus. Article 2 of the Convention does not allow to clearly establish whether its scope is extended to tangible and intangible heritage alike. According to Martens (2009), "beliefs, knowledge and traditions are mentioned as reference points for the determination of heritage, but not as heritage objects *per se*, if a narrow interpretation of its provisions is employed". Other chapters of the Convention, including those on commitments proposed to state parties, do not contain any elements that would refer to intangible cultural heritage under direct interpretation. In this sense, linguistic diversity mentioned in Article 14 within the context of information society could be considered as the only exception. The second sentence of paragraph (a) of Article 2 details that heritage comprises "all aspects of the environment resulting from the interaction between people and places through time", which can be both interpreted as a physical environment or a wider cultural environment, which would entail the understanding that the traditions, practices and religions are inalienable constituents of heritage concept. The contextual and teleological interpretations of the Convention lead to the conclusion supporting the latter interpretation. Considering that the Convention was designed and adopted two years after the UNESCO Convention for the Safeguarding of the Intangible Cultural Heritage (Paris, 2003), and aims to strengthen the value and the role of heritage to society, it

shall be understood to encompass the entire accord of heritage concepts and add a new dimension to what has already been defined. Therefore, the value approach, promotion of diversity and participatory stewardship in the absence of a precisely delineated scope of object that constitute heritage can be considered as carte blanche or an "invitation to collaborate" in defining heritage, from the inter-governmental organization to States parties and heritage communities, without limitations of the aim of the instrument.

To this point, some authors opined that the significance of the fact that the Faro Convention's value-based approach does not delineate tangible and intangible heritage within its scope may be diminished as long as it distinguishes intangible aspects of cultural heritage (Stenou, 2002; Vícha: 2014, p. 33). The Convention does not explicitly speak about protecting intangible heritage per se, but about the interpretation of particular cultural heritage through subjective perception of rights holders, and creation of a constructive regulation fostering social development and mutual respect. Noel Fohut (2009, p. 19) states that the term did raise debate among the drafters of the Convention as no pre-existing definitions would equally cover the participatory and interactive aspects of heritage. In his words, "[c]ultural heritage", in its widest sense (embracing cultural and historic environments and tangible and intangible aspects), was to be the subject of the convention".

The second dimension of heritage is specifically of regional reference and is forged to reflect the unique set of values common to the European continent. It creates, in the terminology of the Explanatory Report (2005, p. 4) – "a territorial identity". In Article 3, the European heritage is considered as a component of a unique identity that constitutes "a shared source of remembrance, understanding, […] cohesion and creativity". The definition of the European heritage is developed based on a reinforced significance of its values component, including respect for human rights, democracy and the rule of law, inherited from the experience and lessons of past conflicts and with an aspiration to "development of peaceful society". That formula was chosen to avoid uncertainty in defining heritage (Explanatory Report: 2005, p. 3) in recognition of its fluid nature, which aligns the approach with the ECHR. Contrary to the approach adopted in Article 2, the common heritage of Europe is construed of "all forms of cultural

heritage in Europe" (para a), which does not raise any debate as to the inclusion of intangible heritage. Moreover, the scope of the article encompasses, in particular, "ideals, principles and values" (para b), to which the criteria of adherence to democratic principles and the reference to conflict origin apply. The European cultural heritage openly includes heritage that constitutes a "shared source" of identity. The concepts of "a common European identity" and "a common heritage of Europe" have consistently been subject of extensive debates, as it led to the many challenges arising both from its existence and absence, including artificial homogeneity that may be construed as the consequence of the former, and the lack of sustainable basis for integration – from the latter. Fohut underlined (2009, p.20) that the drafting of the Convention collided with a protracted debate over the revision of the Treaty for the European Union and a possible adoption of a European Union's constitution. Therefore, the social discourse was dominated by searching for "a common historical or geographical fact which united all Europeans as distinct from all non-Europeans." However, the drafters opted for the approach that would underline the advantages that diversity contributed to the culture of the continent (Fohut: 2009, p. 20). The drafters of the Convention (Explanatory Report 2005, p. 3) contextualised the choice for the components of the definition by the reflection of a unique nature of the European heritage originating from "its depth and rich historical stratification, its diversity of regions and shared cultural phenomena, the products of the interaction of diverse cultures over the centuries". The definition was to enable functioning of cultural heritage as a "resource for democratic engagement", forming grounds for cultural diversity and sustainable development and creating a common cultural heritage of Europe.

Both dimensions are interconnected through the universal obligation – imposed on individuals and groups alike – "to respect the cultural heritage of others as much as their own heritage, and consequently the common heritage of Europe" (Article 4 b). Thus, through respect and admitting the universal value of individual constituent parts on the regional level, the Convention achieves harmonization of potentially conflicting attitudes to cultural heritage and acceptance of diverging values, contributing to creation of the common – European – identity based on diversity and mutual recognition. This is reinforced by the obligation imposed on the States parties to recognize the value of

cultural heritage on a jurisdictional basis, "regardless of its origin" (Article 5). This approach creates a basis for the peace-building role of cultural heritage construed by the Convention (reflected in Article 7 b and c). Educational activities in the field of cultural heritage as well as governmentally implemented measures targeted at reconciliation of contested heritage and value-based intercommunity conflicts reinforce promotion of trust and further inter-cultural dialogue. This aspect connects the Faro and Paris Conventions, also through the subsidiary sources, including the Opatija Declaration (as discussed in the previous sub-chapter), contributing to consistency of the legal framework on cultural heritage developed under the *aegis* of the Council of Europe.

The Faro Convention underlines that the concept of heritage is fluid not only due to its dependency on the interaction with heritage groups, but also due to the interaction with state. The provided set of activities aimed at valorising heritage frames the scope of possible positive interventions for states. Under Article 5b, to enhance the value of the cultural heritage states are entitled to adopt measures aimed at its identification, study, interpretation, protection, conservation and presentation. As full-fledged participation in heritage activities is recognized conditional to a certain measure of economic well-being, valorization through activities that require public investment may contribute into wider access and better maintenance of heritage, while research-related activities would promote better understanding and facilitate participation of wider communities. All these measures are therefore conducive to the development of communities, their cultural resources, and consequently to development and promotion of cultural identities. The approach to cultural heritage under Faro Convention is referred to as a "meeting point of various factors usually considered separately" (Greffe 2009: 107); while also being classified as containing a "holistic definition of cultural heritage" (Thérond 2009: 110; see also D'Alessandro 2014; Fairclough 2009), underlining the comprehensiveness of the definition of cultural heritage elaborated by the Faro Convention definition: "[i]t has no inherent time limits, nor limits of form or manifestation" (ibid.: 37).

The Convention places the concept of identity within the context of "cultural environment" that represents another unique feature of the Convention. Cultural environment is designed as a combination of the environment and environmental aspects of cultural heritage, landscape

and territorial identity. The components are bound together by the shared cultural values (Explanatory Report, 2005, p.3). Considering the values of cultural heritage in conjunction with individual-community relation and the concept of "heritage community", as well as the cultural environment, the Convention creates a comprehensive framework for a full-fledged enjoyment of cultural rights by individuals and communities, as well as the realization of heritage potential. The cultural environment concept and its European dimension as laid down in the Convention was pre-established at the 5th Session of the European Conference of Ministers responsible for Cultural Heritage in Poltoroz dedicated to Cultural heritage and the challenge of globalization. Resolution no 1 "On the role of cultural heritage and the challenge of globalization" underlined the binary nature of the European cultural environment that is expressed in combination of cultural and market values (Section 4). Among measures provided by the Resolution in the aim of enhancing cultural environment, are the ethical policies promoting authenticity and integrity of heritage and spatial planning that reflect values of cultural environment, due maintenance of established heritage and stricter quality assessment of contemporary architectural cultural production to ensure "heritage of tomorrow". The Resolution frames the cultural cooperation in developing cultural environment within the Council of Europe efforts to the fundamental democratic principles that constitute the European common heritage. Notwithstanding that the attitude set by the Resolution is less adapted to intangible heritage that is integrated into the concept of cultural environment under the Faro Convention, the Resolution is very considerate to the value dimension of material heritage. The cultural environment is therefore seen as an outstanding landscape resource that reflect cultural values of communities. This is a fundamental mark that differentiates the more developed human-centred approach established by the Faro Convention from its predecessor, the 1954 Paris Convention.

Although the approach on cultural heritage taken by the drafters of the Faro Convention contains elements and features characteristic to the 1972 and 2003 UNESCO Conventions, largely it remains unique compared to both of them. The primary divergent aspect lies within the importance given to attribution of value to heritage through participatory approach. In this sense, the Faro Convention is close to the rights-based approach as developed by the UN Special Rapporteur

in the field of cultural rights, who, on several occasions, reiterated the necessity of "a holistic, inclusive approach" to the meanings of culture, acknowledging its nature as "human constructs" (see A/67/287, para. 2, A/HRC/31/59 p.4). Moreover, the Special Rapporteur's reports stated that "culture is created, contested and recreated within social praxis, in other words through human agency, […], constantly subject to reinterpretation" (A/HRC/31/59). Being in line with this stance, the Convention creates a model under which the rights holders and cultural heritage "co-create" each other, guaranteeing the ownership of the process. While heritage represent values that shape human identities, the human identities are vital to shape, through cognizance, interpretation and evaluation, the heritage as such; while without the subjective and several objective values the cultural heritage cannot be acknowledged as such. This collaborative framework requires further analysis of the regulation on rights holders.

2.2.2. The scope of rights and measures

The Faro Convention underlines the universality of the right to participate in cultural life and binds it with the right to engage with the cultural heritage of personal choice, referencing the 1948 UDHR and the 1966 ICESCR (preamble). The Explanatory Report (CoE: 2005, p. 2) underlines that the prerequisites for the adoption of the Convention were the gaps identified in the existing legal framework related to the role of heritage in the fields of sustainable development, globalisation and the cultural identity dimension in conflicts. The Convention was planned as an instrument on cultural heritage as a development resource, and these interrelations with cultural heritage became the major subjects of regulation under the Convention. Thus, the Convention pursues the aim of utilizing heritage as a tool for sustainable development. In line with the human rights-based approach, heritage can and should be used to foster human development, and the concept of heritage as a resource, which is incorporated in the Convention's approach.

Under Article 1, it is clarified that rights pertaining to cultural heritage are "inherent" in the right to participate in cultural life. Article 4 states that cultural rights are exercised "alone or in association with others". Thus, the nature and scope of the entitlement is conventionally limited to the classical individual right that can be exercised in community with others. The Explanatory Report to the Convention (2005, p. 7)

underlines that the formulation of Article 4 also implies the right not to participate. It is underlined, however, that this implementation of this right should be the result of personal choice, and not to be imposed by any external circumstances, such as economic, political or social disadvantage, or lack of access imposed by other factors. Thus, Article 4 establishes collective and individual rights to "benefit from the cultural heritage and to contribute towards its enrichment" and the corresponding responsibility to "respect the cultural heritage of others as much as their own heritage, and consequently the common heritage of Europe", which implies the corresponding right to respect of one's heritage from any undue treatment by others. In Fohut's words (2009, p. 18), the Convention aimed to create "balanced rights and responsibilities for a shared heritage". The commitments stipulated for States parties are divided into several groups and include the correlations of heritage use and management with environment (related to quality of life) (Article 8), interaction with cultural heritage (Article 9) and responsibilities related to guarantees of access and democratic participation in heritage-related activities (Article 12), valorization of cultural heritage and heritage-related economic rights (Article 10), as well as heritage-related issues of information society (Article 14). A number of activities recommended for the State Parties appear to aim at forwarding the importance of heritage-related issues on policy-making agenda, as well fostering the role of heritage in all kinds of interdisciplinary interactions.

Notably, the Faro Convention is one of the rare international conventions that speaks about the right to cultural heritage. The formula contained in the preamble of the Convention extracts the right to engage with the cultural heritage of one's choice from the United Nations Universal Declaration of Human Rights (1948) and the International Covenant on Economic, Social and Cultural Rights (1966), assigning it a status of one of the components of the right to freely participate in cultural life in the sense of the two international documents. The conceptual and teleological boundary establishes a link with the more immediate needs of people by "[e]mphasising the value and potential of cultural heritage wisely used as a resource for sustainable development and quality of life in a constantly evolving society". The right to cultural heritage under the Convention is not absolute. Limitations are allowed but limited to those "necessary in a democratic society for the protection of the public interest and the

rights and freedoms of others" (Article 4c), which is in line with the established international standards for human rights derogation, except for the absence of the requirements that such derogation clauses have to be prescribed by law. Moreover, the right to engage with the cultural heritage of one's choice belongs to every person to the extent that the rights and freedoms of others are respected (preamble).

Another issue examined by the Convention through the bonds with heritage is democratic governance. As reflected in the Preamble, the common heritage of Europeans includes such principles as democracy, the rule of law and human rights, which intrinsically belong to the democratic governance concept. Furthermore, fostering of democratic governance is proposed to be achieved through the changing role of grassroots initiatives and players in government-led activities involving heritage (discussed in section dedicated to the Rights Holders), especially considering the reinforced roles of civil society and the agency granted to heritage community. This is seen by drafters as a prerequisite for changing the administration patterns in heritage management (HaB: 2009).

The economic rights pertaining to cultural heritage are regulated in their public aspect (activities undertaken by the public authorities in heritage valorization. Overall, the value approach is prescribed for the economic policies, ensuring integrity, values and respect to heritage and acting in the interests of sustainable development. The notion of "common European heritage" is thus construed with the capability and the aim that the "diverse local features of [the European] continent make up […] a source of prosperity, employment and quality of communal life for the local populations and their visitors" (Therod: 2009, p. 10). This concept has, therefore, a high potential to be effectively integrated into the political structure of the continent (ibid cit.). Articles 9 and 12 provide for the promotion of work, skills and knowledge, trainings and study to ensure meaningful value-based engagement with heritage. Importantly, Article 14 delineates the convergences of cultural heritage with the right to access to information and intellectual property rights, while Article 9 aims to increase "the use of materials, techniques and skills based on tradition" for contemporary application. The measures stipulated under Article 12 are directly linked to the right to participate in cultural life and democratic processes. Article 12 guarantees the right to access to cultural heritage, which is conjured as a binary safeguard for physical

access to heritage and for access to creative communities (Meyer-Bisch: 2009, p. 63). Thus, a universal right of everyone is designed to ensure participation in "identification, study, interpretation, protection, conservation and presentation of the cultural heritage", as well as in the debate on the opportunities and challenges that cultural heritage presents (Article 12). Participatory approach in Article 12 is designed to be provided not only to heritage consumers but also to the voluntary organisations, with respect to their input into the elaboration of cultural policies. Participatory approach here is designed as a catalyst for the development of all heritage-related processes, and a capability generating condition. The article also provides for affirmative measures to improve access to cultural heritage to the young and to the disadvantaged (Article 12 d). The goal of such affirmative measures are foreseen not only as aiming to grant access to representatives of vulnerable groups, but also for heritage-targeted awareness raising, including on heritage value, the requirements of maintenance and preservation, as well as related benefits. In implementing requirements under the Article, the States carry a positive obligation to take into consideration the value assigned to the heritage by the respective communities, which effectively underlines the prevalence of the role assigned to the rights-holders in determination of heritage. Interests of disadvantaged groups, including youth and various cultural groups, are reflected in fostering their access to cultural heritage and to the educational activities facilitating understanding and acceptance of cultural differences. To these aims, Article 14 stipulates the obligation to develop the use of digital technology, which is conditioned to respect of cultural heritage.

Heritage-related activities are construed as a fertile functioning to the development of other capabilities, for example education and knowledge. Under Article 13 (a), heritage is prescribed to be integrated into all levels of education as a "fertile source" for studies in other disciplines, various types of training. Moreover, cultural heritage is foreseen to become a subject of interdisciplinary analysis of heritage communities, environment and their interrelation. The Convention provides for a wide scale integration of heritage studies into the education systems, to include all levels of education, vocational training, specialized heritage professional education and formal education.

The Convention does not create "enforceable rights". This is, on one hand, a political choice made within the organization, partially explained by the necessity of a compromise. This can also be seen as a space for States to define their own concept of ensuring heritage related rights and adjust the framework to the national requirements and political – legal background. As one of the experts who participated in drafting of the Convention, Jelka Pirkovič, states, the language of the Convention was influenced by the debate on the legal strength of a future document. While the countries belonging to the "Old Europe" supported the adoption of a binding document in the form of an international convention, the "new Europe" lobbied a political agreement to be adopted as a Council of Ministers' recommendation. The lack of clarity arising from the protracted negotiations on the form allegedly led to softening of the formulations and removal of all binding commitments, save for those under Article 5 (definition of public interest, valorisation of heritage, and adoption of heritage related strategies) (Pirkovič: 2009, p. 23-24). Eventually, this lead to choosing the format of a "framework convention" that would not create binding obligations or prescribe specific set of actions (Explanatory Report, 2005). Instead, the Convention's aim was to delineate concepts that would determine the future directions in police-making, frame good practices conducive to effective development of the field, as well as areas for targeting collective responsibilities. The Convention develops measures advisable for reaching its aims with respect to each cluster of possible interventions that are shaped as recommendations.

As the Convention constitutes a set of principles for potential framing of duties and obligations to be reflected in the domestic legislation, the obligation to adopt measures gains primary importance. The responsibility to legislate is considered by the Convention as a constituent part of the responsibility to protect (Article 5). Besides policy-making responsibility, the article provides for a normative component - cultural heritage law. This conceptualises cultural heritage as a subject of a separate branch of law, which bears implementation and academic significance, and should influence choices of governance structuring and institutional design. This responsibility shall also be considered in conjunction with the concept of public interest introduced to filter the assets to be protected. Although the primary criteria for heritage under the Convention is the public perception, the

States are to ensure the right to attribute heritage and, therefore, are bound to establish a legal framework introducing proportional implementation mechanism. The legislative, regulatory and other measures recommended by the Convention are meant to ensure that rights-holders are granted access to the process of "identification, interpretation and integrated conservation of heritage" (HaB: 2009, p.26). This approach creates an effective tool for meaningful engagement of rights-holders in heritage-related processes, securing their agency in the decision-making, ensuring ownership of the process, results and the regulation, and facilitates pluralistic cultural processes.

The Faro Convention was designed to play a crucial role in catalyzing the intercultural dialogue and diversity, which public authorities are required to reflect in the reglation and governance reforms, with a crucial focus on re-visiting the governance methods related to culture in general and heritage in particular, including by means of improved legislative process. It is stipulated that the efforts should be targeted at re-shaping the concept of heritage in order to incorporate cultural environment and the need to sustain its cultural values (including material, non-material and spiritual). In this case, the public authorities are obliged to ensure that community perception is encompassed in to the value-determining acts.

2.2.3. Scope *ratione personae*

The question "who owns the past?" triggered a revolution in the approaches applied to heritage, as well as the right holders and principles that defined their co-existence. Departure from the "elitist approach" to heritage management and a democratisation shift accorded agency in heritage delineation to a wider community (Fohut: 2009, p. 17). The Faro Convention defines heritage communities as agents of interpretation, appreciation and recognition of heritage. Communities under the Convention are prevalent to heritage itself. The novelty introduced by the Convention into the normative regulation on heritage is the shift of the primacy in heritage-related processes from States and connoisseurs as the only legitimate guardians of heritage to the heritage communities. This is also driven by the connection designed under the Convention between heritage and identity and rejection of the luxury approach to heritage in favour of intrinsic value for individuals and society. The preamble of the Convention firmly

defines the process as democratic transfer of priorities and roles in engagement with heritage. There the need is recognised "to put people and human values at the centre of an enlarged and cross-disciplinary concept of cultural heritage".

However, the Faro Convention's approach brings the interaction of heritage and communities forward, extending it from the attribution to the moral, spiritual ownership, which is realised through determination and placement of cultural values. The point of departure for the Convention is the established necessity of universal (within the society) involvement in the process of "defining and managing cultural heritage", which is seen as a continuous process (Preamble). The Convention assigns both individual and collective responsibility to cultural heritage (e.g. the rights and responsibilities in Article 4, including the rights to interact with heritage and benefit from it and the obligation to respect heritage of others), integrating approach developed by the capabilities theory and employed in other international instruments, including the Nara Document mainstreaming inclusive participation in management and defining heritage.

In defining heritage community, the Convention does not opt for a strictly rigid notion, avoiding such attributes as origin, nationality, religion, age, gender, or belonging to any cultural group. The Convention also excludes ownership as a reference criterion (Article 2 a). Instead, the "value approach" is applied also to this definition, under which "a heritage community consists of people who value specific aspects of cultural heritage which they wish, within the framework of public action, to sustain and transmit to future generations" (Article 2. b). One of the drafters of the Convention stated: *"For the purpose of Faro, there was a desire to emphasise the voluntary, public nature of membership of such a community as well as the idea that heritage communities exist because their members share common values and objectives, high among which is the perpetuation of the valued heritage"* (Fohut: 2009, p.20). This approach is compliant with the conceptualisation devised by the Special Rapporteur in the field of cultural rights that acknowledged the possibility for the existence of culture as long and in so far as the respective cultural communities exist. Young people and the disadvantaged groups are accorded a special entitlement to affirmative actions. Special measures are foreseen for ensuring access to heritage (Article 12). These are seen as knowledge- and awareness raising

activities focused on value (implying the identity-forging aspect), perspectives of heritage in income-generation, as well as the requirements of heritage per se (support of maintenance and preservation of heritage, within the context of the Convention, represents identity-building activities), and the benefits which may be derived from it.

The Faro Convention Action Plan (CoE, 2021) clarifies the notion of heritage community. For the purposes of facilitating the implementation of the Convention, heritage communities are defined as "self-organised, self-managed groups of individuals who are interested in progressive social transformation of relationships between peoples, places and stories, with an inclusive approach based on an enhanced definition of heritage" (CoE, 2021). This definition implies a conscious approach by agents towards culture and their agency in culture-related processes, according them a high degree of awareness about their role in its management and related responsibilities. Such a perception can effectively lead to an increase of consolidation in communal actions and underlines an established and continuous democratic vector in implementation of the Convention's principles. Indeed, the Faro Convention Network, one of the primary outcome of the Convention and the Action Plan, is based on the premise that heritage community is sufficiently independent and informed to suffice for admitting a capability to "self-assess, monitor and evaluate their position against the Faro Convention principles and criteria", which a priori requires a calibrated attitude to heritage and in elaboration of policies and practices in compliance with the Convention. Besides an obvious recognition of the valuable qualities the heritage communities possess, such as grassroots expertise, this approach also signifies a re-evaluation of the communities' perception as full-fledged actors. For the Council of Europe framework, this attitude is not new overall, taking into consideration the system of interrelations between individuals and states established under the ECHR. However, the attitude to the non-state stakeholders is an unusual approach within the wider international legal framework on culture and overall for a sphere unrelated to criminal law and is capable of expanding the perception of individual and collective agency in the field – both a policy and a political outcome. The community involvement is realized in practice via the Faro Convention in Action platform, which serves as a common space for cooperation of the grassroots communities,

including activists, practitioners and experts, to contribute into drafting good practices and policy-making through dialogue and multi-stakeholder collaboration.

As mentioned above, the group rights perspective is traced in several definitions conjured in the Convention. Thus, European heritage is described as a "shared source" (Article 3). Article 2 incorporates the communal nature of heritage by attributing it to the people's assessment of their values. Thus paragraph b of Article 2 includes into "heritage community" "people who value specific aspects of cultural heritage which they wish, within the framework of public action, to sustain and transmit to future generations". Besides, the notion of "European common heritage" introduced in Article 3 a priori specifies the people within the European cultural/geographical areas as a separate group of stakeholders. Their role is specific and special, as their agency extends to the capacity and entitlement to defining a special category of heritage resources. As underlined by Leniaud (2009: 139), "the heritage […] grows to the extent that new 'mediators' succeed in adding further heritage categories to a list that is hedged about by criteria selected in a far from diversified or consensual fashion by routine, prejudice and conflicts of power". The logic introduced in the Convention unequivocally attributes such "heritage mediation" power to the carriers of "European values and identities", which ensures the replication and internal reinforcement of these principles through culture for eventual extrapolation to the political and economic choices of the "mediators" themselves.

At the same time, the definition given in the Convention does not include any open reference to the notion of a group, which does not nivilate individual agency within the community. The latter is reinforced by the provisions of Article 4 and the framework of rights and responsibilities towards cultural heritage, including in paragraph (a) of Article 4 that grants the right to benefit from and contribute to cultural heritage to everyone "alone and collectively". Taking into consideration the flexibility of the format of the Convention due to the lack of social and socio-political denominators as discussed above, the definition reflects the fluidity of the contemporary society characterized by multiplicity of identities and roles individuals perform throughout their lives, as well as the multicultural nature of the society and multi-level affiliations that living in Europe inflicts on its residents, considering several intertwining models of intergovernmental

cooperation (the EU, the Council of Europe, NATO, OSCE, nation states, etc) (for these, discussion by Lefebre and Laya in European Interview Series by the Robert Schuman Foundation are relevant). In this respect, the Council of Europe Steering Committee for Cultural Heritage and Landscape underlined that "the concept of the common heritage of Europe should be linked with the possible sense of multiple cultural affiliation of all human beings, both individually and collectively" (paragraph 4, Council of Europe, Steering Committee for Cultural Heritage and Landscape (CDPATEP), Some Pointers to Help Understand the Faro Convention, Strasbourg, 20 April, 2009 cited in Zagato: 2015). This notion is therefore consistent with and instrumental for the reinforcement of the stability of the "common ideological framework" and in particular such concepts as the "European autonomy and sovereignty model", though undefined, but increasingly utilized recently within the EU policy discourse, reflecting "the Union's aspiration to embody a shared political identity on the world stage" (Lefebvre, 2020). Considering that the EU's mandate in the field of culture is limited and only includes subsidiary role (Article 6 of the 2007 Treaty on the Functioning of the European Union), but the growing understanding of the necessity to form the common cultural basis for the area is increasingly discussed on the highest level, including for deepening of integration within the defense and other sectors, the Council of Europe framework's significance is reinforced. The Faro Convention has a potential to be developed and more extensively utilized in this respect, as its approach responds to the purposes and approaches highlighted in the 2016 EU strategy for international cultural relations and the 2020 Action Plan for European Democracy, that are both based on the value approach.[3]

As discussed above, in compliance with rights based approach, individuals are perceived as full-fledged actors with respect to engagement with cultural heritage. Besides individual responsibility for heritage (Article 4), the Convention provides for individual agency for identification, study, interpretation, protection, conservation and presentation of the cultural heritage, as well as to participate in debates

[3] With respect to the EU, the introduction of the cultural and value approaches into the EU policy is attributed to Federica Mogherini, former Vice-President of the European Commission and High Representative of the Union for Foreign Affairs and Security Policy, introduced this cultural approach to EU foreign policy (Gitte Zschoch, 2020).

with heritage-related agenda (Article 12). The interrelated individual-community agency is however counterbalanced by the concept of "public interest", implying the authorities' concurring attitude to the values attributed to heritage by heritage communities. This, however, does not imply the substitution of rights and responsibilities of the public with public authorities. The role of state institutions is rather restricted by the Convention and would be best described as coordination, standard-setting and control (Articles 11 – 14). As Pirkovič (2009, p. 23) notes, the "public interest" concept serves as a tool to ensure legal certainty as to the ambit of tangible and intangible objects that may be qualifies as heritage. At the same time, it does not follow from the provisions of the Convention that authorities possess any margin of appreciation as to the recognition of the communities' decisions.

The notion of heritage communities includes all Europeans as carriers of a specific common identity. How can it be dealt with those Europeans who do not support or share the values of the "common European heritage". In the concept of Faro Convention, "heritage consumers" are not counteropposed to "those obliged to maintain it", but combines rights and obligations in this respect, distributing the obligations on maintenance between the rights holders, namely heritage community, and the States. Thus, the Faro Convention's approach appears considerably more balanced, as it ensures a more just distribution on maintenance of heritage and valorisation through effective participatory approach. This approach to defining heritage community is in line with the capabilities theory in terms of unrestricted and mainstreamed participation as a condition and means to provide wider opportunities for fertile functioning to realise other capabilities. In terms of heritage community, democratic participation supports identity building, effective participation in social and cultural right, social and economic development, including through valorization of heritage, as well as generation and transmission of knowledge and optimization of educational processes. It also ensures facilitation of the agency and entitlements of minority groups, and recognition of their heritage as an equal component of national heritage and the common European heritage.

The Faro Convention specifically defines several groups that are entitled to engage with heritage under differing conditions. These include public authorities; experts, owners, investors, businesses, non-

governmental organisations (including those specialized in cultural heritage), civil society and voluntary initiatives (including those with complementary functions to those performed by public authorities (Article 11). The latter play a crucial role in the system created by the Faro Convention, and within the heritage-management system under the Council of Europe framework overall. For example, Resolution 2 of the Poltoraz package explicitly and extensively defines the wide scope of voluntary organisations' involvement into heritage-related processes, designed with the aim to build "consolidated societies". Such organisations are perceived as legitimate rights-holders, including in heritage-related decision-making processes, their human rights entitlements are reiterated for the purposes of effective dialogue, "facilitating their role of "monitoring and constructive criticism of the heritage protection policies" adopted by the authorities" (Resolution 2, para. 5). The involvement of NGOs into the heritage related initiatives by the authorities is also covered in the Opatija Declaration. The good governance in cultural policy is based under the Declaration on inclusive participation, in line with the principle of fair balance, of the private sector and civil society, which are seen as culture producers (para 3). Cultural governance is recommended to be based on an assumption of cultural dimension of all spheres of society's life, including the political, economic and social spheres.

As highlighted in the Explanatory Report (2005, p. 11), the call by the Faro Convention to grant NGOs locus standi in heritage matters needs to be implemented in practice in the view of the basic principles prescribed in the Convention for the democratic citizenship, including diversity and agency to voice criticism and influence the decisions. As mentioned above, the expert domination in the Faro Convention does not equate or lead to the elitism of heritage and its "exclusivity" with conservation as an aim in itself (Fohut, in Heritage and Beyond: 2009, p. 14). The Convention's primary aim is to ensure due democratic process with respect to regulation and management of heritage, with contribution of qualified expert opinion and representation of rights holders through civil society, as "vernacular value holders" promoting genuine diversity and democratic participation. This transfer implies the significance of dialogue between grassroots communities and heritage professionals that would allow to forge an effective and balanced coexistence of bottom-up and top-down approaches to heritage. The practical effects from re-enforcement of the role of

voluntary organisations as critics of measures introduced by the authorities can include facilitated delivery of the opinions of underrepresented groups or grassroots initiatives that are unable to voice their positions, otherwise. Another expected benefit arising from NGO's promotion of unconventional creative approaches, thus contributing to representative cultural policies and decision-making, inclusive heritage practices, as well as modernization of heritage-related techniques and elaboration of improved good practices in the field. The latter outcome directly relates to the aimed revision of the role played by cultural heritage within the context of developing information society, as provided in Article 14 of the Convention. The informal education normally practiced by civil society thus constitutes a valuable mechanism for the educational perspective of heritage – digitalization paradigm as stipulated in paragraph c of Article 14, and thus reinforces the collaboration of civil society and public authorities in the educational and heritage dimensions of developing bonds between diverse societal groups.

Despite employment of the participatory and value based approaches, the Convention does not contain any in-depth regulation of the cultural diversity concept. The Explanatory Report (2005, p. 4) underlines that the understanding of this aspect was adopted from the Universal Declaration of UNESCO on Cultural Diversity (2001). The Convention focuses on constructing conditions conducive to facilitation of economic utility of heritage that would enable harmonious and peaceful co-existence of multiple cultural communities within a shared cultural *milieu*. Aiming to facilitate cooperation of public authorities with all other actors, the Convention requires creating the legal, financial and professional frameworks, as well methodological background for the cooperation between the public authorities and non-governmental organisations (Article 11). Meanwhile, voluntary organisations are seen ash as "partners in activities" and "as constructive critics of cultural heritage policies", which implies the obligation of the authorities to collaborate with such actors and the greater weight accorded to their contributions. The Faro Convention Spotlight is one of the initiatives serving to connect the policy-makers and experts and facilitate the elaboration of implementation of good practices for the States. The initiative is executed via the Council of Europe mediation. The good practice drafting efforts predominantly strive to enable inter-cultural dialogue and participatory approach in

heritage processes. The examples of community –targeted efforts within the Faro Convention Spotlight are year-long projects on Roma communities, migrant communities and Jewish heritage[4]. Another initiatives aimed at promoting implementation of the Faro Convention is the joint CoE/European Commission project "The Faro Way: enhanced participation in cultural heritage". The goal of the project is to ensure realization of the Convention provisions on increasing the role of communities in all aspects of heritage management. The project aims to develop "people-centred, inclusive, forward-looking, more integrated, sustainable and cross-sectorial approaches to cultural heritage, and promote innovative models of participatory governance and management of heritage" (Faro Way, CoE: 2021). For this aim, the project stipulates three major areas of activities: to increase high level of commitments to the Faro Convention principles by all actors, in particular by public authorities and to demonstrate how these principles are implemented; and to establish lasting cooperation among actors for effective implementation of these principles (Faro Way: 2021). The primary realization paths provided are facilitation of ratification and implementation of the Convention, as well as establishing a "dynamic pan-European framework" through Faro Convention Network and related initiatives within the European Year of Cultural Heritage and All for Heritage.

The Faro Convention methodology used in the policy and practice development initiatives combines research and reconciliation efforts under people-environment approach.[5] The assumption that sustainable intercultural dialogue is key for achieving diversity, that can lead to reconciliation of conflicting heritage narratives, leading eventually to the elimination of inter-groups conflicts (Faro Spotlights). The projects aim to facilitate an agreement among communities. Eventually, the

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[4] Council of Europe. Faro Action Plan: Jewish Heritage. 2016. https://www.coe.int/en/web/culture-and-heritage/jewish-heritage. Resolution 1883 (2012) On Jewish Cemeteries. Parliamentary Assembly. Council of Europe [online]. Available at: http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=18723&lang=EN. Accessed in April 2020.

[5] For example, in 2016, activities in Bilbao concerned examining interconnections between heritage and migrant communities, in Viscri (a Transylvanian village with Saxon roots with predominant population of Roma origin is a UNESCO cultural site) – between heritage and Roma communities.

findings are transferred into actions, policies and practices aiming at social inclusion, education, local economic development or anti-discrimination measures (Faro Spotlights).

Considering the regional character of the document and in light of the contemporary challenges with migration and economic, ecological and health crises that Europe has been facing, the relevance of this approach cannot be underappreciated. The level of inclusion it accords to engaging with heritage is unprecedented, facilitating intercultural dialogue and diversity. Thus, the increasing dynamics of such social phenomena as migration, both within the European continent and from outside Europe, the significant diversity of religious, cultural, linguistic or educational groups within the continent, does not prevent from cultural exchange. Importantly, this formula does not stall the development of cultural dialogue in view of differing nature of relationships on migrants with the recipient states (the significance of the problem was highlighted in the 2016 report of the UN Special Rapporteur in the field of cultural rights (A/HRC/31/59, also highlighted by Therod: 2009, p. 10). Moreover, by introducing the individual and collective obligation "to respect the cultural heritage of others as much as their own heritage, and consequently the common heritage of Europe" (Article 4 b), as well as the concurrent obligation of States parties to recognize the value of all heritage on its territory, regardless of its ownership (Article 5), the Convention minimizes the risk of such side effects of normative overregulation as cultural assimilation and artificial homogenization – the concerns raised by several international instruments, including the 2001 UNESCO Declaration on Cultural Diversity.

2.3. Relevant Programmatic Developments

This subchapter will examine the programmatic documents and activities developed in extension of the aims and concepts of the Paris Convention. The overview will be conducted with respect to the key axiological areas of cultural cooperation identified above. These will include the principles contained in the programmes and political documents related to the historical teaching, and conflict prevention. The subchapter will underline the influence of the Convention on the development of political commitments and form the fields of activities of the Council of Europe political agencies.

As discussed above, the Convention constituted a corner stone for extending the Council of Europe's post-conflict activities, including in the cultural aspect reflected in optimizing public discourse and historical narratives. One of the issues in this respect is history teaching and efforts targeting the prevention of history distortion. These activities included assistance in history textbooks revision and retraining of teachers, and were initially implemented primarily in post-socialist and post-communist countries, especially in the Balkans and the Caucasus (50 years: 2004, p. 10).[6] The implementation practice was consolidated into several recommendations and resolutions of the Council of Ministers and the Parliamentary Assembly, including the Recommendation No. R (98)5 of the Committee of Ministers to member states concerning heritage education[7] and the Recommendation Rec(2001)15 on history teaching in twenty-first-century Europe and the Poltoroz Conference Resolutions package.

The Recommendation (98)5 specifically underlines the significance of heritage as educational tool for the formation of identities, diversity and peaceful co-existence of communities within Europe. It concluded, inter alia, the role of heritage as a link connecting the past and the future, as the study of heritage and eventual determination of the meaning of the past and assigning the meaning to the future. The Recommendation foresees a vast scope of measures to implement the provisions of the Paris Convention in the field of education related to heritage. It provides for additional funding, administrative and other resources to facilitate heritage education, as well as ensuring mobility for intercultural studies. The terminological apparatus of the

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[6] As reflected in the Declaration of the Regional Conference of Ministers of Education of the Caucasus countries (Tbilisi, Georgia, 2000). Other efforts included the programme "History teaching and the new initiative of the Secretary General", which assisted the republics of the former Soviet Union in developing methodologies to modernize history teaching, producing new textbooks and training teachers accordingly", as well as the projects "Learning and teaching about the history of Europe in the twentieth century" and "Education for democratic citizenship" (cited in Rec CM (2001)15).

[7] Council of Europe. Committee of Ministers. Resolution (98)5 on history teaching in twenty-first-century Europe. Adopted by the Committee of Ministers on 17 March 1998 at the 623rd meeting of the Ministers ' Deputies. Rec(98)5 [online]. Available at: https://rm.coe.int/16804f1ca1.

Recommendation frames the approaches to heritage education highlighting the necessity of educational process adjustments reflected both in methodological approaches and curriculum changes. Methodological approaches recommended by the Recommendation include active and cross-cultural approaches with interdisciplinary aspect integrating culture and education, and promoting unconventional ways of cultural expressions. The curricular adjustment would include the extracurricular and field work facilitating the discovery of heritage richness (Appendix, Article 1, paras. 2 and 4). Cultural education under the Recommendation should encompass all levels of education and informal education by heritage associations, and advises a number of facilitating measures and cooperation of administrative and educational institutions. However, the Recommendation does not provide for participatory approach or consultations on policy or normative regulation in the field of education. The document does not provide for affirmative measures targeting minorities or minority heritage studies, although the latter would not be excluded from the general empowerment provided by the framework of the document.

In 2001 the European Conference of Ministers responsible for Cultural Heritage in Poltoroz (Poltoroz resolutions) adopted two resolutions, on resolution No 1 "On the role of cultural heritage and the challenge of globalisation" and resolution No 2 "On the Council of Europe's future activities in the cultural heritage sector (2002-2005)", as well as Declaration on the role of voluntary organisations in the field of cultural heritage (Poltoroz resolutions and Poltoroz declaration). The resolutions underlined, inter alia, the necessity of developing historical education on the heritage analysis, contextualized as a cross-frontier phenomenon. This aspect of heritage was framed within the recognition of binary effects played by globalization on heritage interpretation. The Poltoroz resolutions, while acknowledging the globalization and international ownership of heritage, underlined the importance of preserving communities of all communities and the diversity of heritages (Resolution no 1 on the role of cultural heritage and the challenge of globalisation, Article 1). The Resolutions underlined the formational role of heritage to individual identity and framed individual entitlements to cultural heritage, and established a soft obligation for authorities to ensure the capability of local communities to "discover their identity and sense of belonging" with

educational and knowledge-accumulation measures on the meaning of material, linguistic and spiritual values of cultural heritage. Authenticity and integrity of heritage were considered as crucial components to be considered within heritage preservation measures. The Resolutions contain multiple reaffirmations of collective entitlements in the field of cultural heritage, representing a unique approach to the nature of rights as conventionally designed in cultural rights instruments, of soft or imperative powers. Collective rights are recognized along with identical individual entitlements, inter alia, to self-defined identities, to know their history, to shape their future through their heritage, to enjoy their heritage. Collective and individual obligations are recognized to respect the heritage of others and to consider the common interest in all heritage (Resolution no 1, Articles 1 and 2).

The Paris Convention is considered to be the attempt to render the common European heritage a constituent of the shared cultural identity for the Europeans (Bonnici: 2009, p. 56). The 1954 Paris Convention[8] and 2001 Faro Convention[9] draw particular interest in delineating the concept of the European identity and forging its cultural denominators. In this respect, the Council of Europe Steering Committee for Cultural Heritage and Landscape underlined that "the concept of the common heritage of Europe should be linked with the possible sense of multiple cultural affiliation of all human beings, both individually and collectively" (CoE CDPATEP:2009). As mentioned above, the challenge in the field lies in maintaining the balance between the cultural diversity and the 'umbrella' common heritage concept, that may either empower its constituent parts or hamper through uniformity, as "[r]educing the rich diversity would spell impoverishment and ultimately death" of cultural milieu of the Council of Europe (CoE: 2004, p 6). Therefore, the avoidance of assimilation and uniformity and facilitation of preservation of cultural uniqueness became a central component in various Council of Europe programmes and documents. One of such instruments is the Declaration on Cultural Diversity

[8] ETS no. 018, entered into force on 5 May 1955. To date, the Convention is ratified by the 47 Member States of the CoE and its three associated members, the Holy Sea, Belarus and Kazakhstan.

[9] CETS no.199, entered into force on 1 June 2011.

adopted by the Committee of Ministers at their 733rd meeting (2000). The Declaration builds upon the 1954 Convention and recognizes the established significance of cultural diversity as "a fundamental political objective in the process of European construction", constituting "a dominant European characteristic" (preamble). The declaration also acknowledges the fundamental role of the ECHR in creating instruments for the protection and fostering of cultural diversity. Overall, the Declaration aims to provide responses to challenges posed to cultural diversity preservation by globalization. Another important development construed by the 2000 Declaration is in the introduction of the notion for cultural diversity, that it determines as "co-existence and exchange of culturally different practices and [is expressed] in the provision and consumption of culturally different services and products" under the conditions of free creative expression and freedom of information (part 1), thus underlining convergences between culture and the freedoms of expression and to exchange information. Moreover, the Declaration connects cultural and linguistic diversities (part 3), forging binds with the set of linguistic rights and underlining multilingualism as a constituent of the European identity.

Refocusing of the comparison between the approaches under the Poltoroz Resolution No 1 and the Faro Convention to the influence of heritage on diversity and identity and their convergences, semantically it follows that that the Resolution no 1 recognizes that cultural heritage diversity, when duly ensured on all levels, including regional, constitutes a source of the sense of identity and belonging (para 1.d, 2). Besides, it pre-empts the Faro Convention in acknowledging the role of heritage diversity in fostering the capacity of heritage communities in global economic competition, contributing into their well-being and benefiting social cohesion and stability. The Portoroz Resolution no 1, also framed within the value approach to heritage, however, diverges from the value approach construed under the Faro Convention. The difference lies in the direction of agents' activity in determining the value of heritage. While in the Faro Convention, the value is conceptualised, delineated, and attributed by the heritage community, the value under the Portoroz Resolution no 1, is rather a self-sufficient intrinsic quality of heritage, rather similar to the 1972 World Heritage Convention. The value cannot be altered through the perception of the community and through its interaction with heritage. On the contrary, the heritage value is presented as a tool for the communities' self-

discovery. Moreover, this latter aspect presumes affirmative actions from the public authorities through education and heritage preservation and presentation activities conducive to "understanding of the material, linguistic and spiritual values of cultural heritage", which further underlines the Resolution's idea of coordinated interaction between heritage values and communities. Thus, the concept of identity-building through heritage is less independent and uncoordinated, than it is constructed by the Faro Convention. The similarity between two documents can be drafted with respect to the perception of the role of cultural environment (perceived as a constituent element of heritage in its material, non-material and spiritual aspects) values within the construct of European identity. Thus, the Resolution foresaw that cultural values should serve as "the basis of mutual understanding and contribute to conflict prevention, and counterbalance the risks of homogenisation inherent in globalization" (para 2). Moreover, values are seen as a source of creativity and standard setters for the improvement of environment. The cultural heritage of Europe is seen as an object of common and reciprocal rights and responsibilities (para 2 b).

The idea of common heritage is further developed in the Committee of Ministers' Recommendation no. Rec(2000)1 on fostering transfrontier co-operation between territorial communities or authorities in the cultural field. Moreover, the Resolution provides that the values attributed to the European cultural heritage should perform twofold safeguarding roles, namely to prevent homogenization of cultures in the context of globalization and to contribute to conflict prevention. The Recommendation stipulated that transfrontier activities help acquire transfrontier vision, while raising awareness of the diversity of cultural and historical traditions. The Recommendation is significant in developing the notion of transfrontier cultural heritage and fair treatment and enjoyment of it by different stakeholder communities, as well as joint efforts aimed at heritage maintenance, through sharing responsibilities, exchange of information and technical skills.

Article 2 of the 1954 Convention formed a basis for the adoption of the Committee of Ministers' Recommendation on History Teaching in the Twenty-First Century. The Recommendation constituted a major step on acknowledging the harmful effects of distortion of historical truth in teaching of the Holocaust and education for the prevention of crimes

against humanity. The Recommendation underlines the dependence between strengthening of mutual understanding and objective history teaching that aims to eliminate "prejudice and emphasise positive mutual influence between different countries, religions and ideas in the historical development of Europe". Moreover, it created principles aimed at prevention of history distortion for creating nationalistic dichotomies or propaganda.

Among other principles established by the recommendation, there is a principle that history teaching methodologies shall be conducive to the requirement "respect for all kinds of differences, based on an understanding of national identity" (Rec (2001)15 Appendix I). The role of history teaching is seen in "enable[ing] European citizens to enhance their own individual and collective identity through knowledge of their common historical heritage in its local, regional, national, European and global dimensions". Furthermore, it is seen as "an instrument for the prevention of crimes against humanity." (CM/Rec (2001)15 Appendix I, part 1, recital 4). The Recommendation defines theoretical apparatus for defining and classifying violations of historical objectivity, as well as principles of objective heritage interpretation. Among the misuses of historical narratives in the educational process ideological manipulations are identified as disseminating ultra-nationalistic, xenophobic, racist or anti-Semitic stances. It was underlined that compatibility of educational programmes cannot be established with the Council of Europe principles, in case any historical distortions are integrated into the discourse. The Recommendation outcasts historical manipulations reflected in such actions that allow falsification of facts, including by forged facts or concealment of some facts with highlighting the significance of others, distortion of past events for propaganda purposes, nationalistic stances forging an antagonistic inter-group dichotomy, as well as denial, omission and concealment of historical facts and records. The European dimension of historical education, as designed by the Recommmendation, shall include devising a common inter-cultural component and common historical narratives concerning cultures and heritage. The Recommendation also cites the requirement of value promotion, including human rights and democracy, and the role in "Europe construction" based on "common historical and cultural heritage, enriched through diversity" (CM/Rec (2001)15 Appendix I, part 1, recital 4). The primary stance of the Recommendation is facilitating

mutual understanding, combating prejudices and underlining constructive mutual inter-cultural influences, which should be promoted in compatibility with the Council of Europe democratic values. These aims are thus seen to be achieved through objective historical teaching free from historical manipulations and distortions. The interconnections of peace and maintaining objective historical narratives were further developed in a number of Council of Europe documents. This idea was further elaborated in the Manifesto for Multiple Cultural Affiliation, where peaceful coexistence was conjured conditioned to the careful attitude to history. The Manifesto rejects common amnesia to the past conflicts as an inappropriate development paths, and calls for attempts to understand, study, forgiveness and cultural interrelations, where democratic value-based culture occupies a crucial role, as a sustainable mode of development for Europe (paras 4-8).

The reinforced significance of intercultural dialogue and ensuring peaceful coexistence was further developed in the 2003 Declaration on Intercultural Dialogue and Conflict Prevention (Opatija Declaration). The Declaration approached culture as an agent of democracy, gaining significance under the conditions where new forms of intercultural conflicts, including xenophobia and ethnic hatred, as well as various forms of discrimination and marginalization of cultures on religious or ethnic grounds, are developing. The Declaration conjured notions of cultural democracy and cultural citizenship, implying rights and obligations of stakeholders. The document reiterated the necessity to incorporate into school curricula the illustrations of interrelations and convergences of "the historical and the contemporary influence of cultures and civilisations on each other". In this respect, the Declaration invokes mutual enforcement of cultural capabilities that implies constructive collaborations under the conditions of cultural diversity, including participation of representatives of various religious groups. Regional management of cultural diversity became under the Declaration a political issues, and therefore provides for cultural policy requirements. The Declaration conjured good governance requirements in cultural policy, which employed cultural diversity as a facilitator of individual and collective human capital growth and fostering the empowerment of civil society, as well as principles for forging the practices aimed at conflict prevention, which extend and develop the provisions of the Paris Convention employing culture as a peace-

building tool. In its conflict prevention cluster, the Declaration provided for the development of public policies fostering intercultural dialogue, as well as measures in the field of education promoting culture-sensitive programmes and culture-sensitive history teaching and mutual enforcement of various cultural components, including those pertaining to religious identities. The Declaration constructed conflict preventive set of measures within the art framework, aiming for inclusive creative processes in participation of various cultural groups. Thus, the Declaration reinforces the Convention in its approach to reconciliation through heritage and intercultural cooperation, extending its scope to the identity building aspects, defined political guidance and targeted actions in the fields of education.

The implementation of the 1954 Convention (in particular, its Article 2) gave rise to the Bologna process, the vast array of the academic exchange *aquis*,[10] and the development of other programmes and good practices on academic, professional and volunteers mobility and exchange, as well as furthering the interinstitutional cooperation in the field of education. This enforced the "unity in diversity" and multiculturalism as components of European identity, cultivated through educational activities.

[10] This includes, inter alia, the 1953 Convention on Mutual Recognition of School-leaving Qualifications for University Entrance (CETS 15), the 1997 Lisbon Recognition Convention on the Recognition of Qualifications concerning Higher Education in the European Region (CETS 165) (in cooperation with UNESCO); Recommendation of the Parliamentary Assembly on history and the learning of history in Europe (Recommendation 1283 (1996); Recommendation Rec(2003)8 on Threshold Level specifications, non-formal learning for young people and the Recommendation Rec(2000)4 that provides, inter alia, for adoption of education–related affirmative actions for Roma communities, as well as Recommendation (2002)12 of the Committee of Ministers to member States on Education for Democratic Citizenship (the latter reflected the trend of democratization of cultural heritage and approaches to its interpretation, management and conservation. The Athens Declaration of Ministers of Education of 2003 (MED 21-7) established the framework for an intercultural education policy, to be implemented for teaching within the context of cultural diversity, including religious differences. Other relevant acts include Recommendation No. R (98) 5 of the Committee of Ministers to member states concerning heritage education, Committee of Ministers Resolution (98) 4 on the cultural routes of the Council of Europe.

Another activity developed on the basis of the 1954 Convention was the European Heritage Days initiative launched in 1991 (currently implemented jointly with the EU). Besides development of grassroots cultural initiatives and promotion of social cohesion, the project aimed to facilitate the value of local cultural heritage and the right of everyone to adhere to the cultural heritage of their choosing within the context of multiculturalism and intercultural dialogue (Concept Papers). The European Heritage Days also make an important contribution to the idea of multicultural citizenship" (50 years: 2004, p. 9). The initiative also contributed into the democratization of heritage to reflect the views of the Europeans, thus modifying the concept of heritage.

The principles of the Conventions were further developed in the European Manifesto for Multiple Cultural Affiliation. The Manifesto was made public in 2007 as a result of the Project on "Cultural identities, shared values and citizenship" that originated from the 3rd Summit of Heads of State and Government of the Council of Europe's Member States. It aimed at providing a conceptual basis for reconciling the divide between various ideas of Europe, including "the Europe of States and of nations, regions and major territorial areas, north and south, western Europe and the paired central and eastern Europe", and to re-ignite the bonds drawn based on the European Cultural Convention (Guide to the Manifesto, 2007, p. 7). The European Manifesto for Multiple Cultural Affiliation developed the concept of multicultural citizenship and the role of cultural exchanges and education promoting diversity and democratic values. Inter alia, the Manifesto called for intercultural initiatives in cities and regions that "encourage dialogue between communities of different origins, and foster people's shared creativity and mutual enrichment" (para v), reiterating the significance of the European Heritage Days programme. The purpose of the drafters of the Manifesto was to reiterate that "it is no longer possible to consider questions of identity in Europe without focusing on a new key factor – multiple cultural affiliation" (Guide, 2007, p. 18). The ideals of cultural diversity were placed within the context of the Council of Europe values and objectives, including the defence of all human rights and forging democratic citizenship.

The adherence to the statutory democratic principles of the Council of Europe in acknowledgment of identity-forming role of culture and heritage on community or national level, uniting the diverse and fluent

components into a system of regional identity that can allow to provide sustainable response to the challenges posed by globalization, homogenization of cultural traditions, and human rights violations. The Convention designed under the imposing threat of the cold war constructed a basis for a resistance framework conjuring tools for response to conflicts generated on "cultural identity" divide within the territorial jurisdiction of the Concil of Europe (e.g. wars in the Caucasus and in the Balkans) due to the measures stipulated explicitly or through additional development by the political bodies aimed at achieving reconciliation through mutual recognition, respect, diversity, tolerance and pluralism.

Conclusions

Although the 1954 Convention does underline the existence of the cultural unity of different European countries, it leaves the notion of the "common European identity" undefined in its strict sense. However, the text of the Convention allows to establish the following criteria for delineating the characteristics of heritage: diversity, shared values, interest for or etiology within Europe, or value through uniqueness. The scope of objects is defined to include history, civilisation, languages, cultural activities and objects. The means through which these components are channelled include education, cultural exchange (both of objects and professionals), and preservation. Thus, the convention forges the "uniqueness in diversity" aspect of the European identity, which was designed to constitute the basis of inclusiveness for cultural policy of Europe as developed by the CoE (White Paper on Intercultural Dialogue, Council of Europe, 2008), as well as tolerance and mutual understanding through the acceptance of differences (Council of Europe: 2005 *(50 years of the ECC)*, p. 6).

The notion 'common heritage' is employed in the Convention with respect to values and principles that are attributed to the European continent. The attribution bears a civilizational and ideological references, and is formulated to underline unity, but yet specificity the uniqueness of the region from other regions and civilizations. This conceptualization of European identity is problematic on several aspects. First of all, it attributes certain values and principles to a certain region, which cannot claim sole authentic reference to its ownership (Sen: 1999, 2007). Furthermore, it provokes a selective

approach towards the elements of 'common European identity', which contradicts to the notion of multiculturalism, recognized as one of the primary aims of the Council of Europe, shifting the concept internally contradictory. Moreover, the approach effectively denies the contributions of influences by cultures and values practices by other civilizations or other geographical areas, which is effectively impossible due to historically established intercultural exchange.

The capability theory explicitly criticises geographic attribution of ideologies, identities and values, particularly and explicitly the attribution of "democratic values" to the concept of the European common heritage. A. Sen, in his works "*Development as Freedom*" (1999) and "*Identity as Violence: The Illusion of Destiny*" (2007) developed a substantial argumentative critique of such "civilizational" ideological attribution. *Inter alia*, he discussed the etiology of a number of democratic principles attributed as Western by origin and the substance of foundational values, from other regions and civilizations (*inter alia* in 1999: 227-249, 2007: 84 – 103). He claimed that such attributive attempts based on such faulty arguments lead to manipulations with cultural identities of citizens and historical truth, and provoke ideological conflicts and civilizational divides. He stated that normative and policy solutions based on such narratives are conducive to conflicts. As follows from the aims of the Convention reflected in its text and the historical background of its creation evidence of a contradiction between the stated aims of the document and the instruments it employs to reach these aims.

One argument may claim, that the attempt to create a common identity basis for the European region in that historical moment when the Convention was drafted - in the aftermath of the WWII that arose within the territory of the region - was governed by the idea and the realization of the necessity to find a common ground for mutual understanding, acceptance and peaceful co-existence, curbing hatred based on certain cultural profiles. Opting for an overarching concept of identity based specifically on the values that shall be promoted appear a logical solution. However, as supported by the Sen's arguments and the reference to identity-driven conflicts among the CoE Members States that have not been prevented by the 1954 Convention (e.g. the Caucasus, the Balkans, or the Eastern Europe, and the unresolved East-

West latent conflicts), signal that the solution does not reach its goals. The insufficient effects of the approach show upon the extension of membership of the organization and a consequent diversification of cultural portfolio of its Members, as well as with respect to external or inter-regional relations (illustrated by conflicts entailing ideological value-based and cultural identity elements between Belarus, which is a Contracting State to the 1954 Convention, and other CoE Members States). Sen's critique of the employment of normative solutions attributing certain values to a geographical region cannot be rebutted on the case of 1954 Convention. The solution does not appear successful in its contribution to creating a unified identity profile efficient for preventing value-based or ideologically-driven conflicts.

Another problem originating from the way values and cultural identity components are integrated into the 1954 Convention, which may have undermined the positive effects expected from the Convention, concerns definitions. As discussed in the Chapter, the Convention does not establish a normative definition of cultural heritage. Article 1 of the Convention requires protection and development of 'national contribution to the common cultural heritage of Europe'. This formulation is ambiguous and, in the absence of any guidance to Contracting Parties, entails a wide margin of appreciation for the States in recognising certain heritages as part of their national heritage, or denying such recognition. Furthermore, the task to determine on domestic level whether certain heritage can be recognized to bear a common European value, without any supra-national normative guidance on this account, appear vulnerable for opposing views and arbitrary assessments. This approach does not appear sufficient to comply with the capabilities theory standard for ensuring guarantees of diversity implemented on an egalitarian manner (Sen: 1999). This formulation also fails to ensure the security to cultural capabilities under the Convention, due to the lack of definitions, precise scope of obligations to protect and measures to ensure all groups equal and guaranteed exercise of their cultural choices and their effective integration into the common cultural milieu. Minority cultural heritages are not explicitly mentioned within the scope of the Convention, and no measures are foreseen for a wide definition of national heritages, which would ensure their encompassing reach. The Chapter provided a contextual interpretation of the definition, based on the contemporary legal framework, integrating the approaches by the

Faro Convention, which then bring the provisions of Paris Convention closer in line with the theoretically derived standards. Yet, the text of the Convention cannot be recognised as prescribing sufficiently foreseeable regulation on the protection of cultural rights of minorities.

The Convention establishes a narrow scope of entitlements and obligations under its catalogue, which leads to its narrow effect on the scope of capabilities for rights holders. Moreover, the provisions of the Convention are formulated from the state-focused perspective, listing obligations for States. This legislative solution can be considered from two perspectives. On one hand, this ensures a delineation of states' obligations. On the other hand, it does not define a clear scope of rights holders' entitlements, which leads to the extention of the margin of appreciation of the States to adjust the scope of the protected functioning. Thus, the right to participate in cultural life is not clearly delineated, as the provisions of the Convention allow to delineate only the right to engage in creative and educational activities, and international cultural exchange. The Convention is silent about such salient issues as measures that would secure the entitlements to practice one's culture or change it; there are no stipulated measures that would ensure cultural adjustment. The primary convergences are delineated between the obligations to promote education, inter-cultural exchange and facilitation of knowledge of cultures and histories of European countries with the protection of cultural heritage that consequently ensures cultural richness of the region. On the other hand, these commitments are foreseen as the measures strengthening mutual understanding, which was foreseen as a tool for conjuring peaceful coexistence of nations in the region, and eventually for promoting peace and stability. Such normatively prescribed correlations translate into recognition of fertile functioning role of education and knowledge to peace and stability. However, in the absence of precisely formulated standards for implementing the Convention, e.g. the requirements towards educational systems, standards for historical narratives, a wide outreach towards minority or regional languages, etc., the effectiveness of the instrument is further softened.

Although the prescription of obligations on cultural exchange, educational measures promoting understanding of other cultures, and

movement of persons for cultural exchange purposes are positive, and respond to the requirement by the capabilities theory for creating sustainable basis for understanding available cultural options. However, in the absence of the defined standards and requirements to the narratives attributed to cultures within educational and other activities, the measures under the Convention cannot be acknowledged as sufficient for enabling critical opinions on cultures, as required by the capabilities theory. Furthermore, the Convention does not explicitly create conditions for the realization of independent decision-making of rights holders pertaining to their cultural identities and realization of cultural choices. There are no measures in the Convention that would ensure participation of rights holders in any culture-formative processes, or any grass-roots influences in this field.

Thus, the Convention only partially complies with the primary requirements under clusters 1 and 4 of the indicators, and indicators within clusters 2 and 3 are considerably weakened with the contested approach towards regional ideological attribution, deficient terminological apparatus, and a narrow scope of secured capabilities. The analysis of the 1954 Convention on the basis of capability approach signals that its effect on the cultural capabilities of minorities is problematic. Primarily, the problem can be attributed to the ideological attribution of the values promoted and protected by the Convention, which is conducive to narrowing of identities and undermine peace-building nature of the instrument, to wide formulations of obligations that fail to ensure foreseeable consequences of regulation and allow wide margin of appreciation by states, to the narrow scope of commitments, the absence of affirmative measures for cultural rights of minorities, and lack of necessary definitions.

The Faro Convention approach to stakeholders is closer aligned to the capabilities approach. As the Convention reconceptualised the notion of heritage towards its meaning and value to rights holders, the agency perspective gains prevalence under the instrument. The Convention strove to shift the focus of heritage recognition from the outstanding universal value approach to the intrinsic value of heritage to communities that relate and associate with it, facilitating protection and recognition of heritage belonging to minority groups. It also perceives heritage as a facilitator of a number of human rights and capabilities,

including education, sustainable development, economic growth etc., as well as a means of democratic development, engagement of communities in culture-related processes. The Convention reflects an attempt to empower rights holders and extend their opportunities for developing cultural capabilities through heritage-related functions realized through favourable institutional design and fertile functioning resulting from the use of economic benefits of heritage. These functionings aim to forge new social bonds, enable cooperation and economic growth. Comparatively, based on the analysis of the text along with clusters 1-3, the Faro Convention provides a more development prone framework, that the Paris Convention forged. The significance of the Convention is also reflected in the creation of the concept of democratic citizenship, that would mainstream diverse cultural expressions and equal participation of various communities, ensuring the opportunities for identity choices based on critically assessed cultural options.

The Faro Convention created a fundamental tool for the design of minority-conscious and minority-favourable national legal and policy frameworks. Due to the value-based approaches to identity-building, definition of heritage and creation of cultural environment, combined with the recognized and facilitated agency of the rights-holders, the Convention designes the set of standards and principles that are meant to ensure the interests of minorities are integrated into the national frameworks as equally important beneficiaries with the rights to be respected. The Convention creates a framework requiring the recognition of diversity through acceptance, valorization and appreciation of heritage of others. The recognition of cultural diversity is one of the constituents foreseen by the Convention to the formation of a democratic society based on the rule of law and the respect of human rights that are integrated into the design of the laws and policies as fundamental values.

The forging of values within the concepts of European identity and European values in the Faro Convention is not different through formulation, but their role and scope are changed due to the introduction of other notions, primarily of heritage and heritage communities. As a result, the concept of European identity becomes more inclusive and reflects diversity and multiculturalism of its elements, attributed to the recognition of plurality of identities of heritage communities. This is a positive development for the recognition of agency of minority groups, and helps reaffirm the

significance and inalienability of their cultural contributions within the cultural fabric of Europe.

The Convention designs legislative principles to facilitate ownership of cultural processes and heritage, boosting capabilities necessary for the development of a peaceful society, and streamline valorization of cultural heritage of various communities to contribute into economic development (Article 10). Democratic governance is another value facilitated through the realization of cultural capabilities. Cultural capabilities are empowered through measures within ensuring democratic governance, as the Convention foresees opportunities for effective participation, public associations and overall facilitation of grass-roots participation, public discussion of heritage, improved access to all heritage-related activities and measures fortifying media freedoms (Articles 11 and 12). The mutual contributions of culture and development of information society are foreseen to be triggered through, inter alia, removal of obstacles for information exchange and availability of heritage-related digital contents (Article 14). The extensive set of capabilities convergencies signifies of a positive effect of measures provided under the instrument on cluster 3 and 4, which implies high potential for contributing to social development.

The crucial deficiency of the instrument is in the framework format, which implies lack of binding commitments and enforceable rights (Article 6c). Thus, the instrument provides only the areas where measures are necessary, while the choice of the precise manner of implementation is left to the appreciation of the States Parties. Although the wide scope of forged capabilities and standard setting influence of the instrument are important for the development of cultural rights of minorities, the effects of the Convention remain more important for the development of international policy programmes and interpretation of binding instruments, e.g. the Paris Convention, rather than in terms of its direct influence of cultural capabilities of minorities.

Notwithstanding the identified deficiencies of the instruments, their importance cannot be underestimated, in particular, taking in consideration the wide framework of constructive and effective programmes that were developed on their basis, as examined in this Chapter. The programs and policy documents developed on the basis of Paris Convention extend the network of fertile functionings, through which cultural potential of a nation is developed, *inter alia* through the creation of an open infrastructure for education and academic exchange, a standard for objective presentation of historical narratives, and recognition of cultural identities of resident cultural groups,

including minorities. In this model, inter-related cultural heritages boost security capabilities (Sen: 1999) by facilitating acceptance and understanding within the society, and catalyse resistance of the societies and the region to internal and external conflicts driven by intolerance, xenophobia or other related intolerance-driven social malfunctions. Interrelated cultural heritages facilitate other economic and wider development capabilities, promoting educational exchange, quality and potential of students, while a higher level education ignites social and economic development of the society. Such model of development designed based on the Paris and Faro Conventions is directly and indirectly favourable to the development of cultural rights of minorities and the groups' general well-being, as it contributes into decreasing threats to minority groups through better integration, decreased segregation and marginalization. These development targets for minority groups are crucial and constitute conditionals for the development of the society on the national and regional levels, facilitating the contribution from their capabilities to enforce the general social and cultural *milieu*.

Chapter 3

Forging the Council of Europe Mechanism for the Protection of Cultural Rights of Minorities

In 1992-1995, the process aimed at amending the framework on protection of cultural rights of persons belonging to minorities within the Council of Europe *acquis* was launched upon the initiative of the Parliamentary Assembly. An expert group was created and supervised by the Council of Europe Committee of Ministers to draft two new instruments, an additional protocol to the European Convention for the Protection of Human Rights and Fundamental Freedoms guaranteeing certain individual rights in the cultural field, in particular for persons belonging to national minorities (draft protocol), and the Framework Convention on the Protection of National Minorities. Although the draft protocol was not adopted, the preparatory work constitutes an important stage of the conceptualization of cultural rights of persons belonging to minorities. As a perspective component of the ECHR human rights protection system, the aim of the preparatory work was to elaborate a set of rights that would be defendable in front of an international judicial body, and that would have a potential to be harmoniously integrated into the existing framework of normative approaches of the Convention itself and the case-law of the ECtHR. Furthermore, the catalogue of rights should not only be politically acceptable by Member States, but also lead and guide the policy-making and *lex ferenda* in the Member States, serving as a standard setting tool, in particular in consideration of the fact that the drafting occurred during the period following resolution of ethnically driven conflicts and in anticipation of further extension of membership in the Council of Europe. The work on the protocol, both in its political and legal aspects, represent interest also from the perspective of the philosophy of human rights and the political approaches driven by the development of European historical and diplomatic profile. As the preparatory work was conducted by the legal professionals representing political bodies of a number of Member States, the process was also illustrated the approaches to heritage and identity adopted and practiced in different states of the European Continent, with distinctive inter-regional differences. The work on the Additional Protocol will be examined in the first part of the Chapter and will serve to indicate the development of the legal framework from the legal

history perspective. The research is based on the *travaux preparatoires* developed by the CAHMIN, the ad hoc committee that was in charge of the drafting process, as well as other bodies of the Council of Europe, including the Committee of Ministers, the Parliamentary Assembly and the European Commission for Democracy through Law. The first part of the chapter will examine the conceptual development of the draft protocol to follow the conceptualization of cultural rights and the notion of identity within the European cultural rights framework. The validity of the study is explained with its object's long-term effects on the normative development within the CoE human rights framework and its effects on the minority cultural reproduction and cultural rights in consequent regulations. In the context of the intensifying globalization and migration dynamic, the assessment and re-evaluation of the legal framework pertaining to the cultural rights of persons belonging to minorities gains renewed relevance. The second part of the chapter is dedicated to the analysis of the drafting of the Framework Convention for the Protection of National Minorities. The attention is focused to the contested aspects pertaining to the Convention, namely the choice of the format, the attempts to forge definitions and terms, and the rights catalogue.

The chapter will reconnoiter the ideas and processes underlying the design of the additional protocol and the FCNM based on the *travaux preparatoires* to ensure better understanding of the mechanism and the normative choices. The scope of the chapter will be reserved to the analysis of the approaches developed by the CAHMIN, Committee of Ministers, Parliamentary Assembly, the European Commission for Democracy through Law and, where relevant, the work of thematic parliamentary committees to expert groups that submitted the proposals with respect to the draft protocols or acted as *amici curiae* for particular cases examined by the ECtHR. The reasons-based approach to the historical development of the legal framework allows to establish the logic behind the legislative choices and better understand current development of political processes.

3.1. Additional Protocol to the European Convention for Human Rights and Fundamental Freedoms guaranteeing certain individual rights in the cultural field, in particular for persons belonging to national minorities

3.1.1 Prerequisites to the work on the Draft Protocol to the ECHR: Conceptualising Minority Rights

Protection of national minorities has long been considered as one of the core issues within the Council of Europe thematic jurisdiction, both within legislative and political activities.[1] The attempts to protect cultural rights of the minority communities under the ECHR dated back to 1961, when a draft amendment to the European Convention for the Protection of Human Rights and Fundamental Freedoms was first proposed by the Parliamentary Assembly Recommendation 285 (1961).[2] In contrast to later efforts on elaboration of the protective framework for minority rights, the Recommendation 285 stood out for it framed the notion and scope, although formulated as a negative obligation, of cultural rights of persons belonging to national minorities. The Recommendation suggested the following formulation of cultural rights national minorities: "*Persons belonging to a national minority shall not be denied the right, in community with the other members of their group, and as far as compatible with public order, to enjoy their own culture, to use their own language, to establish their schools and receive teaching in the language of their choice or to profess and practice their own religion*." As it

1 Based on the 1990 Report on the Rights of Minorities, among relevant documents adopted by the Parliamentary Assembly based on Committee on Legal Affairs and Human Rights reports prior to the initiation of the work on the draft protocol to the ECHR are the Resolution 136 (1957) and Doc. 731, Recommendation 213 (1959) and Doc. 1002, Recommendation 285 (1961) and Doc. 1299. Doc. 2521; Doc. 2554; Resolution 412 (1969); Doc. 2847, Recommendation 632 (1971); Doc. 3374, Recommendation 722 (1974); Doc. 3704, Recommendation 778 (1976); Doc. 4209, Resolution 679 (1978); Doc. 4580, Resolution 740 (1980); Doc. 4936, Resolution 795 (1983); Doc. 5445, Resolution 845 (1985). Additionally, nine thematic reports on the situation of specific minorities were adopted from 1971 to 1985 (seven on Jewish communities in the USSR, two on minorities in non-member States). In 1985, the Parliamentary Assembly adopted a resolution on minorities in Bulgaria (Resolution 846 (1985) and Doc. 5444), other concerned German-speaking minority in Romania, and Roma {Gypsies in the original version] and other travelers. From the beginning of 1990s, the PA was engaged into the issues pertaining to the rights of Roma and national, religious and linguistic minorities in Turkey and Cyprus (Council of Europe Parliamentary Assembly. Committee on Legal Affairs and Human Rights. Report, Rights of Minorities. 24 September 1990. Doc. 6294 [online]. Available at: https://assembly.coe.int/Documents/WorkingDocs/1990/EDOC6294.pdf. Last accessed in May 2021).

2 Council of Europe Parliamentary Assembly. Recommendation 285 (1961). Rights of national minorities. 13th Session. 28 April 1961. Draft one [online]. Available at: https://pace.coe.int/en/files/14322#trace-1. Last accessed in May, 2020.

follows from the text of the Recommendation, the negative obligations were to guarantee individual rights, subject to collective enjoyment, and pre-empting within the initial Council of Europe approach of the general stance eventually adopted by the UN in both Covenants with respect to various components of cultural rights. The decision on the advisability of such an amendment was contingent to the adjudication by the ECtHR of the case "Relating to certain aspects of the laws on the use of languages in education in Belgium".[3] The repeated examination of the issue by the expert commission received an overall negative result due to the lack of established necessity for introduction of a separate norm on national minorities to the ECHR (Council of Europe 2020, p. 19).

Nevertheless, the political discussion on the necessity to extend the catalogue of rights under the ECHR to protect cultures and interests of minorities did not cease and continued to be reflected in later Recommendations by the Parliamentary Assembly and the Resolutions of the Committee of Ministers, which were predominantly driven by the tense political situations in the region and human rights violations having ethnic grounds and the developments within the global legal framework. In 1978, the Committee of Ministers adopted the Declaration on human rights, which underlined, *inter alia*, the necessity to prioritise the extension of the ECHR catalogue with social, economic and cultural rights. The Parliamentary Assembly's Recommendation 838 (1978) On widening the scope of the European Convention on Human Rights, adopted in re-iteration of the agenda set by the Committee of Ministers, underlined the necessity to integrate into the protection framework the rights protected under the International Covenant on Economic, Social and Cultural Rights, under the condition that it will not lead to "weakening the credibility of the existing system" (para. 11). The Recommendation stipulated the criteria for [4]the

[3] European Court of Human Rights. Judgment of 27 July 1968, Series A No. 6. Available at https://minorityrights.org/wp-content/uploads/old-site-downloads/download-223-Belgian-Linguistic-case-full-case.pdf. Last accessed in May 2021. The relevance of the judgment for the advisability of elaboration of the additional protocol is discussed at p. 19 of the 2020 Explanatory Report to the Framework Convention on the Protection of National Minorities.

[4] Council of Europe Parliamentary Assembly. Recommendation 1089(1988) On improving community relations. European Days "Enjoying our

formulation of obligations that would allow inclusion into the ECHR framework. It suggested that to become candidates for the incorporation into the Convention, the rights must "fundamental and enjoy general recognition, and capable of sufficiently precise definition to lay legal obligations on a state, rather than simply constitute a general rule" (para. 12). Although the Recommendation proposed to equip the ECHR protection framework with additional tools to safeguard cultural rights, it did not include cultural rights *per se* in the narrow list of the catalogue, suggesting only vocational training among the proposed items that would relate to cultural issues. In 1988, the Parliamentary Assembly, in its Recommendation 1089 On improving community relations, voiced a suggestion to strengthen the anti-discriminatory scope of the CoE human rights mechanism with extending the scope of Article 14 of the ECHR to constitute a general anti-discrimination clause, which was not implemented.

In 1990, to summarise the work conducted during the forty years of Organization's activities, the the Committee on Legal Affairs and Human Rights was entrusted by the Parliamentary Assembly to forge and systematise the approaches to the minority issues, which resulted in 1990 in the adoption of a comprehensive report on the Rights of Minorities.[5] Initially driven by the question on possible solutions to address situation with the Muslim, Armenian, Kurdish, Arab, and Greek orthodox minorities in Turkey, the report was eventually developed to locate the strategic normative and political approaches to the issue of minorities. The Report developed a specific terminological apparatus, which included the definition of minorities and related categorisation. The report indicated a three-fold division of minorities into ethnic minorities distinguished by their race, culture and origins, religious minorities and linguistic minorities with respective distinctions; all of which were categorized by the residence in a country with differing predominant culture, religion or language (Doc. 6294,

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diversity", Strasbourg 25-27 November 1987, and related Order No. 443 (1988) on improving community relations.

5 Council of Europe Parliamentary Assembly. Committee on Legal Affairs and Human Rights. Report, Rights of Minorities. 24 September 1990. Doc. 6294 [online]. Available at: https://assembly.coe.int/Documents/WorkingDocs/1990/EDOC6294.pdf. Last accessed in May 2021.

ch.2 para. 5). The Report indicated the approach by the Venice Commission (discussed below) adopted in its Opinion on the Belgian Linguistic Case, that variations as to the determination and status of minorities on different regional levels may differ from their general nation-wide status. The report did not limit the notion of minorities to the cultural determinants and stipulated additional categorization that included minorities based on social and class distinction (the elderly, the sick, people with disabilities, children, the economically disadvantaged, migrant workers; economic minorities (the Report mentioned farmers, workers, all kinds of professions, the military, housewives, and the unemployed), political minorities and other categories based on nutrition preferences, lifestyles etc. (Doc. 6294, ch. 2, para. 6).[6]

The findings of the Report were based on the comparative analysis of the minority groups within the Council of Europe Member States, with the resulting conclusion that situation was exacerbated by discrimination resulting from the past tensions (comparatively more influential than ongoing tensions, as indicated in para. 11). The situation within the field of education and linguistic rights was characterized by the lack of sufficient facilities for learning minority languages and the necessity to provide it, although the practical lack of capacity for the provision of education in both national and minority languages was not recognized as uniformly feasible around the Council of Europe Member States (*ibidem*). The Report also underlined the established necessity to provide inclusive education for children belonging to minorities, to ensure consistent integration and social cohesion. Overall, despite a positive assessment of the situation of

6 The Report did not arrive at the single proposal of the definition, but proposed two options, the 1961 definition developed within the CoE (cited above), and the UN definition developed by the Sub-Commission on the Prevention of Dis- crimination and Protection of Minorities that extended its scope to "non-dominant groups in a population which possess and wish to preserve stable ethnic, religious or linguistic traditions or characteristics markedly different from those of the rest of the population", "should properly include a number of persons sufficient by them- selves to develop such characteristics" and provided the requirement of the bonds with the state of residency "members of such minorities must be loyal to the state of which they are nationals" (Doc 6294, ch. 2, para. 9).

minorities in Member States cited in the Report[7], which rather drastically contradicted the tone of the contemporary Recommendations adopted at the Parliamentary Assembly, the Report's recommendations, nevertheless, provided for the necessity of affirmative measures of preferential treatment and special protection.

The Report suggested measures recommended by the for ensuring the rights of minorities. The primary recommendations outlined four types of measures. The Report underlined the necessity of effective and comprehensive implementation of the ECHR and other international legal instruments, which was challenged by the scope of the catalogues of rights and implementation mechanisms. Comparatively analyzing the UN and CoE frameworks, the Report highlighted that, despite a more favourable and elaborate scope of entitlements provided by the UN framework, the lack of effective enforcement mechanism, apart from the optional reporting system under the ICESCR undermined its potential to positively affect the minority situation, whereas the ECHR could provide only general protection equal to other categories of rights holders, in the absence of the general anti-discrimination provisions and the obligatory supplementary application of Article 14. The related second recommendation proposed introduction of a general anti-discrimination provision into the ECHR. The Report underlined, however, that, considering a vast variety of minorities in the Council of Europe, it would be difficult to devise a uniformly applicable norm, covering with sufficient precision the different groups and maintaining distinction between equitable differences in treatment and discrimination (para. 19). The Report proposed elaboration of group-specific affirmative measures, both in legislative and administrative fields, aimed at protection of, inter alia, language, religion, way of life. The proposed measures were framed as affirmative, compensating deficiencies in the situations of specific groups, stipulated in cases of necessity or desirability, and should not constitute privileges or discriminatory treatment. The last priority measure was framed as a requirement to ensure contacts of members of

[7] Inter alia, the Report concluded that "[…]*it may safely be said that the over- whelming majority of minorities in our member states, whether they are ethnic, linguistic, religious or others, are satisfied with their situation, happy to live in parliamentary democracies, enjoying the protection of their fundamental rights and tolerance, which are characteristic of European society*" (Doc. 6294, para. 12).

minority groups with citizens of foreign states to which they are related (Doc. 6294, 2.iv., para. 26). The proposal concerned kin-states and in particular targeted the possibility of minorities to access places of worship or religious sites abroad. The Report underlined the work of the Council of Europe in the field of protection of minority languages within the framework of its work on the European Charter of Regional and Minority Languages, and underlined the scope be applicable to traditional "historical European languages which are markedly different from the national language or languages of the state in which they are used" (para. 36). The Report underlined that the draft Charter will provide practically applicable measures aimed at minority languages within the fields of education, public and administrative services, the courts, the media and cultural amenities, economic and social life and transfrontier relations (ibidem), and the optional nature of the planned catalogue of obligations and the discretion of the States to define the scope of languages under protection of the document (discussed in Chapter III). Referencing the motion on minority rights tabled to the Parliamentary Assembly that proposed the list of rights to be guaranteed to the minorities within the Council of Europe framework[8], the Report recommended facilitating the dialogue on the elaboration of the scope of entitlements to be granted to the persons belonging to minorities to be conducted in participation of the newly established Venice Commission, as well as within the framework of the inter-organisational cooperation with the Organisation for Security and Cooperation in Europe.

The Motion 6261 referenced in the Report was tabled to the Parliamentary Assembly on 28 June 1990 by the Austrian delegation and, largely, constituted the predecessor of the future Framework Convention, as well as a basis for the discussion in the CAHMIN of the scope of rights to be incorporated into the draft protocol to the ECHR. It was delineated as a continuity of the OSCE commitments, primarily referring to the minority-related commitments under the Helsinki Final Act, as well as Madrid and Vienna concluding documents, the latter specifically designed to protect national minorities. The motion was

8 Motion for a Recommendation. Committee on Culture, Science and Education Author: Ludwig Steiner. 28 June 1990. Doc. 6261 [online]. Available at: https://assembly.coe.int/Documents/WorkingDocs/1990/EDOC6261.pdf. Last accessed in May 2021.

specifically framed as an instrument on protection of national minorities and referred to national, ethnic, religious and linguistic minorities, without providing a definition of the term. The motion established a catalogue of minority rights, defining a vast scope of cultural or culture-related rights. The catalogue of cultural rights including the right to recognition and existence as a community, the free association with a minority without disadvantage, prohibition of discrimination in enjoyment of human rights, freedom to express, preserve and develop their ethnic, cultural, linguistic and religious identity, the right to maintain and develop their culture in all its aspects, to profess and practise their religion, in particular to worship, have access to, possess and use religious materials and carry out religious educational activities in their mother tongue, right to use their mother tongue in private as well as in public life, maintain their own educational, religious and cultural institutions, access to adequate types and levels of public education in their mother tongue, the right to establish minority protection organisations, to maintain contacts within and outside the state of residence, the right to participate in decision-making, to produce and distribute information in their mother tongue.

The work on conceptualization of the cultural rights of minorities was furthered on the level of thematic activities, in particular within the CoE work on the issues pertaining to the status of Roma. The political bodies of the Council of Europe included several activities in the field of clarification of status of particular minority communities, including Roma, as well as the work on prevention of specific crimes and negative practices, such as racism, xenophobia, antisemitism and intolerance. Among the significant documents adopted on the eve of the resumption of the work on the draft protocol on cultural rights was the Parliamentary Assembly[9] Recommendation 1203 (1993) On Gypsies

[9] Among other Council of Europe bodies responsible for the situation of the minority communities was the Congress of Local and Regional Authorities (CLRAE). In 1993 its efforts in the field were framed within the Recommendation 249 (1993) dedicated to the situation of Roma, where the CLRAE affirmed the strategy of measures aimed at facilitating the integration of Roma communities into the local communities and "and support for the expression and development of these people's identity and culture". One of the calls to the minority communities was to initiate integration measures themselves, developing networks with local authorities.

in Europe[10]. The adoption of the Recommendation was facilitated by the expanding accession of the Eastern and Central European states into the organisation, and the weighted increase of the significance of the Roma issues in the Council of Europe agenda with the admittedly aggravated situation with the outburst of racial hatred[11], intolerance and inter-community conflicts.[12] In its scope and policy discourse, the Recommendation based on the report "On minorities in Europe" that stipulated the necessity of legislative regulation and administrative measures for the protection of minority groups with respect to majority, with Roma highlighted as a potential beneficiary of facilitated protection. The Recommendation reinstated the resolute organizational aim to create "a genuine European cultural identity" (para. 1), framed within the complex and diverse European cultural landscape, comprising a vast variety of minority cultures. Roma were admitted to be "a true European minority", contributing to the European culture in diverse ways, through language, trades, crafts and music (para. 3). However, the Resolution recognized that the Roma minority "did not fit into the definitions of national or linguistic minorities" due to the lack of territorial or state attribution, originating from their lifestyle, which, besides theoretical normative challenge, translated into a growing insecurity and vulnerability of the group.[13] The Parliamentary Assembly devised that, to mitigate the situation, measures within the human rights scope needed to be employed, in particular such as

10 Council of Europe Parliamentary Assembly. Recommendation 1203 (1993). On Gypsies in Europe. 2 February 1993 [online]. Available at: http://assembly.coe.int/nw/xml/Xref/Xref-XML2HTML-en.asp?fileid=15237&lang=en. Last accessed in May 2021.

11 Simultaneously, the Declaration and Plan of Action on combating racism, xenophobia, antisemitism and intolerance which provides among other things for the creation of an ad hoc Committee of Governmental Experts was adopted within the aegis of the Council of Europe.

12 The Committee Report (Doc. 6733, 11 January 1993) estimated there were approximately from 7 to 11 millions of persons belonging to the Roma minority in the Council of Europe Member States, and be located primarily in Spain, Hungary, [then] Czechoslovakia, Bulgaria and Romania.

13 The conclusion was based on the 1984 report of the Council for Cultural Co-operation (CDCC), attributing the difficulties in devising a definition for national minorities as the lack of geographical attribution did not comply with the elaborated taxonomy of minorities. The CDCC also attributed the necessity for special protection of the group to the lack of territorial base.

guaranteeing "*equal rights, equal chances, equal treatment, to […] make a revival of Gypsy language and culture possible, thus enriching the European cultural diversity*" (para. 7). The Recommendation incorporated the comprehensive and long-term policy approach proposed by the responsible committee and the Report.[14] It suggested a set of measures aimed at facilitating the situation of the Roma, which primarily constituted cultural rights, including measures on teaching and studying traditional music, the Romanes language and establishing translation services, centres and museums of Roma culture, measures aimed at improving teaching capacity and ensuring minority sensitive education, expanding education for the minority group members with gender and children design perspective, dissemination of information, lifestyle issues, providing for the participatory approach in its design, measures facilitating dissemination of information related to the Roma communities, including those targeting human rights issues and equality. The Recommendation was responded by the Committee of Ministers, underlining the planned initiation of the CAHMIN work on the elaboration of the additional protocol to the ECHR and the new Framework Convention on the Protection of National Minorities.

The discussion on protection of national minorities was reignited within the Council of Europe political domain since early 1990s, due to the regional political developments, primarily arising from the dissolution of the USSR and the former Yugoslavia. These geopolitical processes implied potential extension of membership of the Council of Europe, which would be implicated with unresolved minority related issues, related to nation-building, self-determination, and conflicts on ethnic and religious within the territorial jurisdiction of the expanding Organisation. The growing concern with the situation of minorities in the new European realities and search for conflict resolution, including under the Dayton peace accord, resulted in political determination that the facilitation of peace building through intended through international political cooperation in the region was to be established upon the principles of tolerance, mutual recognition and respect, and

14 Council of Europe Parliamentary Assembly. Committee Report. Gypsies in Europe. Rapporteur: Mrs. Verspaget. 11 January 1993. Doc. 6733 [online]. Available at: https://assembly.coe.int/nw/xml/XRef/X2H-Xref-ViewHTML.asp?FileID=6762&lang=EN. Last accessed in May 2021.

could be achieved through the enforcement of the cultural component and its role in the identity formation. These considerations were reflected in a number of political statements adopted by the Council of Europe bodies, including the recommendations and resolutions by the Parliamentary Assembly and Committee of Ministers, the reports of special commissions and the programmatic activities of the organisation.

Seminal in this respect, the Parliamentary Assembly Recommendation 1134 (1990)[15] contributed fundamentally into the delineation of cultural rights of minorities and can be considered an antecedent of the minorities cultural rights protection system in Council of Europe. Driven by the collapse of the USSR and the undergoing cultural transformation of the newly appearing states, re-inventing their original cultural identities preponderously assimilated by the socialist rule, the Recommendation was framed on tenets of the value of diversity of identities and cultural richness, as well as intrinsic values of various components of minority cultures, their role in peacebuilding, stability and democracy. The Recommendation determined a set of minimal standards for the protection of minority rights, including in the field of cultural rights. The cultural rights of national minorities were framed based on the primary entitlement to be recognized as a minority by the State and participation in decision-making that affected the preservation and development of their identity (para, 11.4) The cultural rights per se included the rights to maintain and develop their culture, maintain their own educational, religious and cultural institutions (paras. 11. 2 and 11.3). Separate rights were specified with respect to linguistic minorities and included access to adequate types and levels of public education in their mother tongue (para. 12.2) and the right to obtain, provide, possess, reproduce, distribute and exchange information in their mother tongue regardless of frontiers (para 12.3).

The Recommendation was significant also from the perspective of its methodological contribution into the development of a regional mechanism. The Recommendation provided a terminological

[15] Council of Europe Parliamentary Assembly. Recommendation 1134 (1990). Rights of minorities. 1 October 1990 [online]. Available at:

apparatus and classification of minority groups, as well as the principles of realization of human rights obligations by the States. The Recommendation departed from the necessity to distinguish national minorities from minorities overall. It defined national minorities as "*separate or distinct groups, well defined and established on the territory of a state, the members of which are nationals of that state and have certain religious, linguistic, cultural or other characteristics which distinguish them from the majority of the population*" (para.11). These included obligations to ensure non-discrimination, calibration of affirmative measures provided by States depending on specific requirements of the particular minority groups, facilitation of inclusion and integration of minority groups into all spheres of public life without forced assimilation or geographical confinement (para. 13). The Recommendation explicitly obliged the States to "take all the necessary legislative, administrative, judicial and other measures to create favourable conditions to enable minorities to express their identity, to develop their education, culture, language, traditions and customs" (para. 13.2). The proclamation of cultural rights was reinforced by the reiterated necessity of full implementation of Article 27 of the ICCPR, guaranteeing the right to enjoy their own culture, to profess and practise their own religion, or to use their own language to ethnic, religious or linguistic minorities (para 13.5). The Recommendation reiterated the necessity to adopt a specific instrument providing protection to minority groups, specifically mentioning a special Council of Europe Convention (para. 17).

The commitment to adoption of a particular document intended to protect rights on minorities with a specific focus on cultural rights were further developed within the Parliamentary Assembly Recommendations 1177 (1992) on the rights of minorities[16] and the Recommendation 1201 (1993) on an additional protocol on the rights of national minorities to the European Convention on Human Rights. Minorities were understood by the Parliamentary Assembly Recommendations 1177 (1992) as groups sharing specific features

https://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=15168&lang=en. Last accessed in May 2021.

[16] Council of Europe Parliamentary Assembly. Recommendation 1177 (1992). Rights of minorities. 5 February 1992 [online]. Available at: http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=15211&lang=en. Last accessed in May 2021.

(cultural, linguistic, religious, etc.), who may "wish to be granted and guaranteed the possibility of expressing them" (para. 4-5). The Recommendation framed the problems related to the national minority with the historically attributable extensive diversity of groups differing by "language, culture, customs and traditions, and religious practice" (para. 1). This "mosaic of people", intrinsically mixed within the continent, hampered the possibilities of distinct geographical division of boundaries, and signified the increasing significance of reinforcing the equality and non-discrimination principles in Europe to ensure the diverse groups function under the democratic and human rights regimes established under the Council of Europe instruments, in particular the ECHR (para. 2-3).

The Parliamentary Assembly Recommendations 1177 (1992) on the rights of minorities contextualized the activities of the Council of Europe in the field of protection of cultural rights of minorities within the historical and political developments, including the vibrant political call for "the recognition, protection and indeed promotion of the rights of ''minorities'', whether these be national, ethnic and cultural, linguistic or religious", and an accumulated but unresolved legal and political problems pertaining to the situation of minorities (para. 6-8). The Parliamentary Assembly underlines insufficiency of previously adopted measures, and called upon "rapid and constructive actions", including finalization of the European charter of regional and minority languages, progressing with the drafting of the European convention for the protection of minorities, as well as an urgent adoption of the new protocol to the European Convention on Human Rights (para. 11-12). The elaboration of the additional protocol was considered by the Parliamentary Assembly a priority, as it was seen to allow an urgent solution, while the draft European convention for the protection of minorities was found to be deficient "on the question of supervisory machinery" and the resolution of that issue required wide political consensus. The Recommendation advised the initiation of the work on the protocol to the ECHR based on the initial draft submitted by the Austrian delegation to the Council of Europe at the meeting of the Committee of Ministers on 26 November 1991. The Council of Europe Commission for Democracy through Law (the Venice Commission) was proposed as one of the stakeholders for the conceptualization and preparation of the text. The Recommendation foresaw (para. 17) the finalization of the draft by 1 October 1992.

Consequently, on 5 February 1992, the Parliamentary Assembly adopted Order No. 474 (1992), by which it mandated the Committee on Legal Affairs and Human Rights (AS/Jur), the Political Affairs Committee and the Committee on Culture and Education to elaborate, in an urgent manner, "*a draft protocol on minorities to the European Convention on Human Rights and a draft mediation instrument, should the Committee of Ministers be unable to implement Recommendation 1177 (1992) by 1 October 1992*"(Order 474(1992), para. 4.[17] Within the Parliamentary Assembly, the motion was considered a "response to the Committee of Minister's inertia" due to the lack of progress in the field, following the two previous Parliamentary Assembly's requests expressed in the Recommendation 1134 (1990) nor Recommendation 1177 (1992).[18] In parallel, the Parliamentary Assembly instructed its Committee on Legal Affairs and Human Rights to continue its cooperation with other international institutions, including the OSCE (then – CSCE) and the Venice Commission, that stipulated, inter alia, a possible "study and, if appropriate, concrete proposals for an arbitration council or a European commission on minorities", thus, not limiting the prospective solutions to the ECHR amendment (Order 474(1992), para. 5).

The Venice Commission argued against the additional protocol as an alternative to the adoption of a new thematic Convention. The primary tenets of the Commission's opposition to the protocol were the consequent necessity to limit the scope of entitlements, the incompatibility of the ECHR mechanism with judicial supervision with the nature of minority group's requirements, as well as due to the fact that the majority of countries where minority issues presented primary challenges were not parties to the ECHR, while a new convention would allow non-members of the Council of Europe to accede (CDL-MIN (92)8, para. 4). The Commission invoked that "a more flexible supervision mechanism" would be better suited for protection of minority rights and address their requirements, which, it alleged, bore

[17] Council of Europe Parliamentary Assembly. Order 474(1992) Rights of minorities. 5 February 1993 [online]. Available at: https://pace.coe.int/en/files/13677/html. Last accessed in May 2021.

[18] Opinion of the Political Affairs Committee on an additional protocol on the rights of minorities to the European Convention on Human Rights. Doc. 6749. Rapporteur: Mr de Puig. 1 February 1993 [online]. Available at:https://assembly.coe.int/nw/xml/XRef/X2H-Xref-ViewHTML.asp?FileID=6779&lang=EN. Last accessed in May 2021.

primarily political rather than purely legal nature, than the judicial supervision would allow (CDL-MIN (92)8, paras. 4 (bb), 7).

The call for the urgent elaboration and adoption of the additional protocol to the European Convention on Human Rights was reiterated by the Parliamentary Assembly in its specific Recommendation 1201 (1993) on an additional protocol on the rights of national minorities to the European Convention on Human Rights[19]. The Recommendation 1201 (1993) was a fundamental conceptualization of the new additional protocol as construed by the Parliamentary Assembly based on its socio-political and legal needs assessment, grounded on the premise that only through the comprehensive recognition of rights of national minority groups and their meaningful international protection would be capable of ending "*ethnic confrontations, and thus of helping to guarantee justice, democracy, stability and peace*" (para. 12). The parliamentary committees tasked with elaborating of the draft protocol saw their task as assuring that "*The Council of Europe should therefore provide the European states with a valid and efficient standard-setting instrument which will help steer and facilitate the adoption of solutions that are acceptable to both minorities and majorities*. […]. "*It is the right to be different, the right to exercise the freedom to be oneself. It is the right to non-discrimination, the right to equality before the law. These rights must be recognised, and they must be protected*." (Doc. 6749(1993), para. 20-22). The text of the draft protocol was integrated into the text of the Recommendation, and the Parliamentary Assembly advised the Council of Ministers to develop the work on the new protocol on the basis of its text. Moreover, the Recommendation established the deadline to open the new protocol for approval by the Heads of State and Government on the forthcoming Vienna Summit scheduled for 8 and 9 October 1993 (Rec/PA/1201/1993, para. 8-9).

The draft protocol did not originally limit the catalogue of rights to cultural rights, although the diversity of cultures and cultural contributions of national minorities were framed in the draft as fundamental concepts (Rec/PA/1201/1993, para. 11-12). Moreover, the principle established for the determination of national minorities

[19] Council of Europe Parliamentary Assembly. Recommendation 1201 (1993). On an additional protocol on the rights of national minorities to the European Convention on Human Rights. 1 February 1993 [online]. Available at: https://pace.coe.int/en/files/15235/html. Last accessed in May 2021.

groups was based on the concept of cultural identity. The draft forged the rights of persons belonging to national minorities as individual rights that could be exercised both individually or in community with others (Rec/PA/1201/1993, para. 13, 18). However, that approach was contested at the final stage of the draft's preparation within the committees. The report of the Political Affairs Committee submitted to the Parliamentary Assembly and the primary drafting committee, proposed to change the approach of the document to the nature of the protected rights. The comment relied on the argument that the intrinsic nature of the rights of minorities was collective, and therefore had to be protected accordingly, as rights of communities (Doc. 6749 (1993), para. 11). The primary conceptual proposal in this respect was to amend the text of Article 3 of the draft protocol by entitling "*[e]very national minority and the persons belonging to it*" with the right to "preserve, enrich, strengthen, hand down and perpetuate their identity" (Amendment No 6, Doc. 6749(1993)). The right to recognition and protection of mother tongue was also proposed to be reformulated as a collective right with an entitlement belonging to "[e]very national minority" (Amendment No. 8, Doc. 6749 (1993)). Measures aimed at protecting "*ethnic groups, fostering their appropriate development and ensuring that they are granted equal rights and treatment with respect to the rest of the population in the administrative, political, economic, social and cultural fields and in other spheres*" were explicitly exempt from discriminatory practices (Article 12 of the protocol corresponding to para. 26 of the Recommendation).

The additional protocol, as formulated in the Recommendation 1201(1993), targeted only persons belonging to national minorities. Unlike the framework Convention on the rights of national minorities, being prepared when the Recommendation was adopted, the draft protocol proposed by the Parliamentary Assembly constructed the definition of the term "*national minorities*". The drafters referred to the attempt to define "national minorities" as a "*difficult path*", but unavoidable under consideration that the additional protocol was to entail the possibility of a judicial protection (Doc. 6742(1993), Comments) and the absence of a definition, "*would have meant opening a never-ending argument*" (Doc. 6742(1993), Comments). Driven by "*a simultaneous need for sufficient precision to avoid confusion and sufficient generality to enable judicial decisions to be adapted to the great variety of situations*", the drafters considered different options, including "*ethnic*

groups", "*peoples*", "*nations*" and "*communities*". However, all of them were admitted to imply a variety of connotations in different linguistic and geographic areas within the Council of Europe territorial jurisdiction, which made them, along with a number of corresponding variables, unsuitable for the use in the draft protocol. Furthermore, the choice of the term "national minority" was further substantiated by the existing corresponding reference in Article 14 of the Convention, which prohibited discrimination on the basis of "*association with a national minority*" (Doc. 6742(1993), Comments).

That approach was contested within the Committees involved in the preparation of the draft protocol. The Opinion submitted by the Political Affairs Committee by the Rapporteur Mr de Puig from the Socialist group, expressed conceptual disagreement with limiting the scope of the draft protocol to the national minority groups (Doc. 6749(1993)). The criticism was based on the premise that such a limitation was artificial for the European context, and would not comply with the differing political and social situation in Europe. It was mentioned that the catalogue of rights stipulated under the draft protocol could not be limited to national minorities, but should also be granted to "minority groups which, even if they do not form a compact and coherent community". The logic of the chosen approach to the definition was challenged by the argument that various minority groups united on the basis of a shared cultural, linguistic or religious heritage, but belonging to different ethnic origin, could not be defined as "national minorities". The particular example of Roma communities was used to substantiate that argument, underlining that although the group could not be denied the status of minority, considering the established connections with states they resided, and an established group identity, contrasted by explicit negation of the group itself their "national identity", without neglecting the affiliation with the state as its nationals (Doc. 6749(1993), para. 8). Furthermore, the limitation was considered unacceptable, as it would not respond to differing scale to what legal regimes in different Council of Europe member States allocated protection to minority groups. The Rapporteur highlighted that while in some countries minority groups enjoyed protection on the constitutional level, other states did not recognize the existence of

minority groups within their borders.[20] The amendments proposals, provided by the Rapporteur, concerned respective clarifications of the term, with the primary aim to clarify the scope. Thus, Article 1 was proposed to be supplemented with the clarification of *ratione personae* to include "*minorities traditionally established in a specific territory as well as groups with no specific territory and nomads. But it may on no account apply to refugees, immigrants, permanent foreign residents and stateless persons*". The criteria of coherence of the group was proposed to facilitate the clarity, in identification purposes.[21]

The definition utilized several characteristics attributable to groups for being qualified as national minorities. The attributes included the requirement of both residence and citizenship in the state, connection with the state evidenced from the "longstanding, firm and lasting ties with that state", explicit cultural distinction ("*display distinctive ethnic, cultural, religious or linguistic characteristics*"), quantitative representation in a region/or the entire state compared to the title nation ("*sufficiently representative, although smaller in number than the rest of the population of that state or of a region of that state*"), and the determination to preserve cultural identity of the group ("*motivated by a concern to preserve together that which constitutes their common identity, including their culture, their traditions, their religion or their language*") (Article 1 of the draft protocol). The drafters explicitly underlined the exclusion of aliens, migrants or refugees from the scope of the draft protocol (Doc. 6742(1993), Comments. Section 1). That was reflected in the qualifiers integrated into the definition of the term "national minority", including the residence, citizenship and established ties with the state. On the contrary, the drafters underlined the inclusion of nomadic population, including Roma (the preparatory papers apply the term "Gypsies"), due to the relative solidity of the group and the

[20] The Rapporteur eventually concluded to accept the proposed definition, but underlined that the quantitative criteria should not be introduced into the definition to avoid arbitrary exclusions (Doc. 6749(1993), para. 28).

[21] The Rapporteur proposed to amend Article 1 adding a requirement of "a minimum degree of coherence as a community and a shared sense of belonging to the group" (Amendment No 3, Doc. 6749(1993)).

prevalent formalization of the group's relationships with the state, including the citizenship and established official residence (Doc. 6742(1993), Comments. Section 1). The jurisdiction *ratione personae*, as established by the protocol, included both minorities on the level of the state and regionally (Article 13). Despite a number of established objective criteria for determination of minorities, the draft protocol recognized free agency of rights holders in attribution of belonging to the national minority groups (Article 2 of the draft protocol), withdrawing public authorities from the capacity to influence or intrude into determination of group membership (underlined in Doc. 6742(1993), Comments. Section 2). Concurrently, such choices, both positive and negative, were safeguarded from any resulted disadvantage (Article 2 of the draft protocol). The choice for the introduction of the subjective criterion related to the determination for preserving cultural identity and heritage of the group was underlined by the drafters as a substantive factor of primary importance compared to other objective qualifiers, which are otherwise insufficient for distinguishing a national minority from the rest of the population (Doc. 6742(1993), Comments. Section 1).

The intention of the drafters of the protocol was to "*do more than just provide guarantees of non-discrimination and guarantee positive rights for the persons belonging to national minorities*" (Doc. 6742(1993), para. 9). National minorities were protected from any administrative measures aimed at affecting the distribution of minority population and dis its density and representation (Article of the draft protocol). The drafting Committee highlighted the significance of the challenge created by such malpractices, and presented the normative solution of the draft protocol as a safeguarding tool against "*suppress[ion of] the expression of national identities through enforced changes of the ethnic composition of whole regions*" (Doc. 6742(1993), Comments. Section 2). The catalogue of rights opened with the right to express, preserve and develop religious, ethnic, linguistic and/or cultural identity, save from any attempted forced assimilation (Article 3, para 17 of the Recommendation). That generic right to cultural identity was excluded from the list of "substantive rights" (Articles 6-11 of the draft protocol), as, in the words of the drafters of the protocol, "*the right to a specific identity is the basis for all the other substantive rights*" ((Doc. 6742(1993), Comments, Section 2). The catalogue of substantive rights, nevertheless, encompassed other cultural rights. The substantive rights under the

draft protocol included the right to the freedom of association (Article 6 of the draft protocol), linguistic rights, to form and maintain educational institutions (Article 8 of the draft protocol), and the right to maintain unimpeded contacts "with the citizens of another country with whom this minority shares ethnic, religious or linguistic features or a cultural identity" (Article 10 of the draft protocol).

The linguistic rights under the draft protocol encompassed the right to freely use one's mother tongue in private and in public, orally and in writing, in publications and in the audiovisual sector; the right to use one's mother tongue for public and private communication, and, in some cases, for communication with public authorities, the right to a name in one's mother tongue and the right to use and display signs and inscriptions in one's mother tongue (Article 7 of the draft protocol), and the right to linguistic education of one's language and to education in one's mother tongue in public educational institutions (Article 8 of the draft protocol). Initially, the drafting committee did not include the right to be educated in one's mother tongue in public educational institutions, and provided only the right to be taught one's mother tongue (Doc 6742(1993)). In line with the drafters' comments, the provision of the original Article 8 neither included that right, not explicitly excluded it (Doc. 6742(1993), Comments, Section 3); nor did it aim to exclude the obligatory general education in the official language of the state. However, the catalogue was eventually extended with the right to receive education in one's mother tongue.[22] The catalogue of linguistic rights was also proposed to be extended with a collective right to recognition and protection of mother tongue of a national minority, as the language was seen as a "component of [the national minority's] identity and cultural heritage" (proposal from the Political Affairs Committee; Amendment No 8, Doc. 6749(1993)). Comparatively, as opposed to the framework Convention, the linguistic and educational rights were formulated in a less restrictive manner. Thus, the right to use one's names in the mother tongue was supplemented with the right to its official recognition. The right to use one's mother tongue in official communication with public authorities and the right to display signs and inscriptions in one's mother tongue

22 Council of Europe. Parliamentary Assembly. Forty-First Ordinary Session (Fourth part). Documents (working papers). Volume VI. Documents 6136-6157.29 January – 2 February 1990. Strasbourg, 1990.

were limited only with the requirement of a substantial presence of the minority in the respective region, although no qualifier was provided to estimate the "substantial numbers" of the residing minority in a region (Article 7 corresponding to paras. 20-22 of the Recommendation). Based on the Explanatory memorandum to the Report of the drafting Committee, it was impossible to develop a more precise evaluation reference, and the drafters left the matter to the prospective determination through judicial interpretation (Doc. 6742(1993), Comments. Section 3). Furthermore, the right to learn and receive education in one's mother tongue was ensured by the requirement of "an appropriate number of schools and of state educational and training establishments". The location of such educational institutions had to be adjusted to the "geographical distribution of the minority" (Article 8 of the draft protocol, corresponding to para. 23 of the Recommendation).

One of the most significant achievement proposed by the Recommendation for the domestic enforcement of agency, status and legitimacy of national minorities, as well as their historical role in the area of residency was reflected in Article 11 of the draft protocol, which entitled the national minorities to have "*appropriate local or autonomous authorities or to have a special status*". That status had to reflect and correspond to "the specific historical and territorial situation" of the minority. That right was reserved to the regions, where the specific national minority groups constituted a majority, which however did not necessarily (although probably) limit the entitlement to the most numerous national minority groups, allowing cases of regions, including those sparsely populated overall, with dense minority distribution. The Explanatory memorandum clarified that the scope of that provision was meant to also apply to the majority belonging to titular nation in minority within certain regions in the state (Doc. 6742(1993), Comments. Section 4).

The draft protocol did not allow any derogations to the rights stipulated in the protocol (Article 15 of the draft protocol prohibited derogation, except for national security clause valid for the right to maintain extraterritorial contacts), while activities of the citizens of the state Parties should not be limited by the draft protocol, except for limitations "*in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or*

morals or for the protection of the rights and freedoms of others" and when such limitations were explicitly prescribed by law (Article 14). Thus, the Recommendation construed an addition to the European Convention of Human Rights that significantly extended the agency and entitlements of national minorities in terms of protection of their cultural and heritage-related rights. The protection regime covered in particular those rights that safeguarded identity components, intangible heritage of minority groups. Taking into account that cultural rights were substantiated with a special protection regime for some civil and political rights (yet duplicating general Articles, pre-existent in the ECHR text), the Recommendation created additional empowering tools for cultural rights protection through the normative convergences with other rights.

The draft protocol was developed based on the work within standing parliamentary committees of the Council of Europe Parliamentary Assembly. Primarily, the text of the draft protocol was elaborated within the Committee on Legal Affairs and Human Rights and the Political Affairs Committee, in line with the Order 474.[23] Mr Jean-Pierre Worms, the MP representing France, of the Socialist group, was the Rapporteur presenting the original background report. The 1993 report by the Committee on Legal Affairs and Human Rights on an additional protocol on the rights of minorities to the European Convention on Human Rights expressly mentioned the organisations representing national minorities as a legitimate subject of the entitlement to lodge the applications to the European Commission and the Court of Human rights, besides individual members of minority groups (para. 7). The report comprised Explanatory memorandum by the Rapporteur that provided additional specifications to the logic of the new instrument.

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[23] Additional protocol on the rights of national minorities to the European Convention on Human Rights. Report of the Committee on Legal Affairs and Human Rights. Doc. 6742. 1403-15/1/93-2-E. Rapporteur: Mr Worms. 19 January 1993 [online]. Available at: https://assembly.coe.int/nw/xml/XRef/X2H-Xref-ViewHTML.asp?FileID=6772&lang=EN. Last accessed in May 2021. Opinion of the Political Affairs Committee on an additional protocol on the rights of minorities to the European Convention on Human Rights. Doc. 6749. Rapporteur: Mr de Puig. 1 February 1993 [online]. Available at: https://assembly.coe.int/nw/xml/XRef/X2H-Xref-ViewHTML.asp?FileID=6779&lang=EN.Last accessed in May 2021.

The Memorandum underlined that, while the adoption of a protection mechanism for the rights of national minorities was "an unavoidable obligation" on the part of international community in order to establish peace and democracy free from ethnic conflict, the development of a new protection system did not constitute a viable option, from the Parliamentary Assembly's view due to the inherent risk of creating several institutions with the parallel jurisdiction in human rights. Opting for the existing human rights protection instrument was also explained with the explicit intent to grant national minority the right to address the ECHR mechanism due to its nature and legitimacy, "*the authority and effectiveness of which are universally recognized*" ("*a desire to enable persons belonging to minorities to benefit from the only protection system of its kind in the world, the direct individual or collective petition to the European Commission and subsequently the European Court of Human Rights*" (Doc 6742(1993), para. 1). The latter reason became the basis for the Parliamentary Assembly to decline the proposal of the European Commission for Democracy through Law (the Venice Commission) to adopt a new legal instrument, instead of supplementing the ECHR.

The Committee attached utmost significance to the preparation of the draft and its timely adoption, referencing to it as "*an act of considerable importance, similar to the significance of the historic event which the Council of Europe "summit" conference will constitute*". Thus, the work was conducted in an accelerated manner, both within the Parliamentary Assembly committees and expert bodies. In the beginning of 1992, the proposal for the amendment to the ECHR was being considered by a Committee of Governmental Experts for the Protection of National Minorities, and the Parliamentary Assembly estimated it to report to the Steering Committee for Human Rights by the end of July 1993. The completion of the work over the protocol was being targeted for the Vienna Summit of Heads of State and Government in October 1993, for adoption (Doc 6742(1993), para. 3).

The development of the substance of the text by the Committees drew from a number of submissions received from the delegations, international organisations and civic institutions. Among submissions considered by the Commission for the purposes of drafting the text of the protocol, the Explanatory Memorandum by Mr Worms mentioned the proposal for a European Convention for the Protection of Minorities, drafted by the Venice Commission (March 1991); the draft

protocol to the European Convention on Human Rights, guaranteeing the protection of ethnic groups, submitted to the Committee of Ministers by the Austrian delegation to the Council of Europe; a draft declaration on the rights of persons belonging to national or ethnic, religious and linguistic minorities, by the Commission on Human Rights of the United Nations that was then under consideration before the General Assembly; a draft additional protocol to the European Convention on Human Rights, on the Fundamental Rights of Ethnic Groups in Europe, presented by the Federal Union of European Nationalities (FUEN, fourth version of 28 May 1992); the draft protocol to the European Convention on Human Rights, concerning the protection of national minorities in the CSCE participating states, submitted by Stephan Breitenmoser (Basel) and Dagmar Richter (Heidelberg) in "Europäische Grundrechte Zeitschrift" of 14 June 1991; the draft Charter of Rights of the National Minorities in the European Community by Count von Stauffenberg, Chairman and Rapporteur of the Legal Affairs and Citizens' Rights Committee of the European Parliament prepared in 1988.

However, the resulting text proposed by the Committee to the Parliamentary Assembly in 1992 did not constitute a compilation of those instruments and opinions, but was a selective set of minimal justiciable requirements, "general principles" that could, to the evaluation of the Committee, be harmoniously integrating into the conventional framework, and be effectively justiciable, complying with the requirement to the rights under the Convention being "*fundamental and enjoy general recognition, and be capable of sufficiently precise definition to lay legal obligations on a state*"[24] (Doc. 6742(1993), paras 6-7). Besides, as highlighted by the drafters, the Convention contained a vast catalogue of rights already applicable to the situations of national minorities, which did not require the extension of the catalogue in the protocol, save for the introduction of an additional anti-discrimination clause.[25]

[24] Council of Europe Parliamentary Assembly. Recommendation 838 (1978) on widening the scope of the European Convention on Human Rights. 27 September 1978 [online]. Available at: http://www.assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=14872&lang=en. Last accessed in May 2021. Summarised in the Explanatory memorandum (Doc 6742 (1993)), para. 6.

[25] The explanatory memorandum mentions only rights as formulated in the Convention (without the interpretation by the Commission and the Court):

To the drafters' consideration, the necessity of an additional provision on prohibition of all forms of discrimination with respect to national minorities denoted from the special requirement for protection of national minorities, which made the provision of Article 14 of the ECHR that was technically applicable only to violations of equality in respect to another right protected by the Convention. Thus, protection against discrimination of national minorities would become a separate and justiciable right.

In 1992, the Venice Commission prepared its Opinion on the proposal for an additional protocol to the European Convention on Human Rights concerning the rights of minorities drawn up by the Committee on Legal Affairs and Human Rights[26]. As the programmatic catalogue of rights proposed by the CDDH largely replicated its own proposal for the European Convention on the Protection of National Minorities, the comments were quite limited. The Committee, *inter alia*, criticized omission of several rights proposed in its own draft[27], which it considered fundamental for an effective international protection of persons belonging to national minorities, including the right of national

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the right to respect for private and family life (Article 8), the right to freedom of thought, conscience and religion (Article 9), the right to freedom of expression (Article 10), the right to freedom of peaceful assembly and freedom of association with others (Article 11), the entitlement to the peaceful enjoyment of possessions (Article 1 of Protocol 1), the right to education (Article 2 of Protocol 1), the right to liberty of movement and freedom to choose one's residence (Article 2 of Protocol 4), the right to enter the territory of the state of which one is a national and a ban on expulsion from it (Article 3 of Protocol 4).

26 The Council of Europe European Commission for Democracy through Law. CDL-MIN (92)8 on the proposal drawn up by the Committee on Legal Affairs and Human Rights for an additional protocol to the European Convention on Human Rights concerning the rights of minorities (AS/Jur (44) 23 and AS/Jur (44) 41). Strasbourg, 7 January 1993 [online]. Available at: https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-MIN(1992)008-e. Last accessed in May 2021

27 The catalogue of rights was amended in an attempt to adjust the instrument to the mechanism of the ECHR that, to the opinion of the drafting committee could not include general obligations by States or those arising within the minority groups or inter-community obligations (AS/Jur (44) 23 – https://rm.coe.int/09000016807b245b). That approach was counteracted by the Venice Commission in its Opinion, where it argued that general obligations of States constituted part of several provisions under the ECHR, including Article 3 Protocol 1 of the Convention (CDL-MIN (92)8, para. 5).

minorities to exist, to self-identification with national minorities and treatment in recognition of one's belonging to a minority group, and the right to leave and return to one's country.

The approach taken by the CDDH to the definition of national minority drew criticism of the Venice Commission. The Commission opined that supplementing a precise definition with a set of qualifying characteristics would lead to the lack of legal clarity and certainty in the application. Besides, the set of the components, residence, nationality and birth, proposed in the draft protocol for qualification of affiliation to a minority, was assessed as excessive by the Commission. The Commission found that the application of all three criteria conjunctively would result in excessively restrictive approach, whereas the residency requirement solely would be excessively broad and include foreigners, whose status is conventionally regulated by other legal regimes. The birth requirement was found conceptually irrelevant as a precondition for granting the status of a minority. The Commission acknowledged the sufficiency and adequacy of the nationality requirement, in compliance with the public law approach. The quantitative criterion of sufficient representation gained negative assessment as imprecise, thus granting a possibility for deprivation of rights or status based on an arbitrary application (CDL-MIN (92)8, pp. 3-5).

As evidenced from the texts of the Recommendations and the text of the draft, as well as the preparatory work of the parliamentary commissions in charge of the development of the draft protocol presented at the Recommendation 1201 (1993), the main request of the Parliamentary Assembly was in a comprehensive tool to protect wider scope of rights of national minorities. The conceptual transformation of the project was made later on the representative level, when formulation of the mandate adopted by the Vienna Summit of Heads of State and Government required elaboration of "a protocol complementing the European Convention on Human Rights in the cultural field by provisions guaranteeing individual rights, in particular for persons belonging to national minorities". That solution was criticized by the Parliamentary Assembly. In its Recommendation 1231 (1994) on the Follow-up to the Council of Europe Vienna Summit,[28]

[28] Council of Europe Parliamentary Assembly. Recommendation 1231 (1994). Follow-up to the Council of Europe Vienna Summit. 20 January 1994

the Assembly "deeply regretted" that the summit did not adopt the format and thematic scope proposed by the Assembly in its Recommendation 1201 (1993) on an additional protocol on the rights of national minorities to the European Convention on Human Rights.

3.1.2. Vienna Summit of Heads of State and Government. Formalisation of the work on the Additional Protocol

The initiative was formalized in 1993 within the Vienna Summit of Heads of State and Government (8-9 October 1993) that instructed the Committee of Ministers to draft the two legal instruments, "a framework convention specifying the principles which contracting States commit themselves to respect, in order to assure the protection of national minorities" and a protocol complementing the European Convention on Human Rights in the cultural field by provisions guaranteeing individual rights, in particular for persons belonging to national minorities".[29] The technical work on elaboration of both instruments was conducted by the Ad hoc Committee for the protection of national minorities (CAHMIN) established on 4 November 1993 by the Committee of Ministers. The Committee was composed of members nominated by the national delegations of the Council of Europe Member States, primarily representing the ministries of justice or foreign affairs legal departments. External experts and Council of Europe committees joined the Committee upon the special decisions by the Committee of Ministers. The terms of reference of the CAHMIN provided simultaneous preparation of both instruments with the deadlines in by 30 June 1994 and by 31 December 1995 respectively.[30] While the work on the Convention concluded timely

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[online]. Available at: https://pace.coe.int/en/files/15265. Last accessed in May 2021.

[29] Vienna Declaration and the Plan of Action. Decl(09/10/93) 09/10/1993.Vienna Summit of Heads of State and Government (8-9 October 1993). Annex II. National Minorities [online]. Available at: https://search.coe.int/cm/Pages/result_details.aspx?ObjectId=0900001680536c83. Last accessed in May 2021.

[30] List of Related documents: https://pace.coe.int/en/files/7454#trace-35, in particular https://assembly.coe.int/nw/xml/XRef/X2H-Xref-ViewHTML.asp?FileID=6968&lang=EN and the Council of Europe. Committee of Ministers. Decision CM/610/241194 of 24 November 1994 (related to additional terms of reference to the CAHMIN and participation of non-Member States in the additional protocol to the ECHR related to individual cultural rights, including those of national minorities) [online]. Available at:

following 9 meetings of the CAHMIN and the Committee of Ministers opened it for ratifications in January-February 1995 during the winter session of the Parliamentary Assembly[31], the work on the additional protocol to the ECHR faced several technical challenges and reinterpretations of the terms of reference.

Thus, in consideration of the terms of references, the CAHMIN established that its main task was to develop an instrument regulating universal individual rights in the cultural field, as opposed to the cultural rights reserved to national minorities, but be specifically applicable and relevant to national minorities. The Committee furthermore was challenged by the lack of determination what a reference to "cultural field" may imply for the purposes of determining the rights catalogue to be covered by the new instrument. The requirements for the scope of the new instruments were thus a catalogue of fundamental human rights in the cultural field, not limiting the existing human rights under the ECHR, formulated with sufficient precision to be justiciable and compliant with the interpretation of the ECHR by the ECtHR.[32] Subsequently, the provisional scope of cultural rights developed for potential

https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=09000016806b23f0.

[31] Council of Europe Committee of Ministers. Communication Doc. 7201. Interim reply to Recommendations 1134 (1990) and 1177 (1992) on the rights of minorities and to Recommendation 1201 (1993) on an additional protocol on the rights of national minorities to the European Convention on Human Rights (adopted by the Committee of Ministers at the 521st meeting of the Ministers' Deputies from 22 to 24 November 1994). 7 December 1994 [online]. Available at: https://assembly.coe.int/nw/xml/XRef/X2H-Xref-ViewHTML.asp?FileID=8204&lang=EN. Last accessed in April 2021.

[32] Paras. 11-12 of the Communication from the Committee of Ministers (Doc. 7316). 1 June 1995. Adopted by the Committee of Ministers on 24 May 1995 at the 538th meeting of the Ministers' Deputies [online]. Available at: https://assembly.coe.int/nw/xml/XRef/X2H-Xref-ViewHTML.asp?FileID=6968&lang=EN. Last accessed in May 2021. The Ad Hoc Committee for the Protection of National Minorities (CAHMIN). Activity Report – Situation as of 10 November 1995 – for the attention of the Committee of Ministers (13 November 1995). 1995. CAHMIN(95)22 Addendum [online]. Available at: https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=09000016806b21c7. Last accessed in May 2021.

consideration of introduction into the protocol included respect for cultural identity (the various aspects of this element are still to be defined, e.g. the right to develop one's customs and values); the right to pursue cultural activities; right to choose freely whether or not to belong to a group; the right to a name; the right to use one's language in private and in public; the right to use one's language in relations with public authorities; the right to learn a language of one's choice; the right to education (of quality, based on tolerance); the right to instruction in one's own language; the provision of adult education; the right to set up cultural and educational institutions; the protection of cultural and scientific heritage; the right of access to information and to impart information; intellectual property rights; the right of reply. The list was eventually evaluated by the CAHMIN from the perspectives of its compliance to the concepts of universality, fundamentality, pre-existence within the framework of the Convention and its Protocols, necessity and justiciability (Council of Ministers, Doc. 7316, 1995, paras 13-14).

The working group received a number of proposals for the draft protocol, from the academia and the delegations of States represented within CAHMIN. Some of them were of particular influence on the work over the protocol, especially in the view of highly contested internal negotiations, lack of agreements on crucial aspects of the future instruments, politically sensitive background of the work and narrow deadlines. One of the submissions that gained particular weight in the CAHMIN's work was the preliminary draft protocol to the European Convention for the Protection of Human Rights and Fundamental Freedoms on the recognition of cultural rights, which was prepared by a working party of the Fribourg University Centre for Interdisciplinary Ethical and Human Rights Studies following a serious of thematic colloquies (the Fribourg draft).[33] The colloquy examined cultural rights from the perspective of it being a neglected component of human rights

33 Fribourg University Centre for Interdisciplinary Ethical and Human Rights Studies. Preliminary draft protocol to the European Convention for the Protection of Human Rights and Fundamental Freedoms on the recognition of cultural rights, prepared by the working party on the follow up the 8th Fribourg Colloquy (Switzerland) (second revision August 1994) (19 August 1994) CAHMIN(94)4rev2 [online]. Available at: https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=09000016800ccea5. Last accessed in May 2021.

concept. The working group defined its task (CAHMIN(94)4rev2, p. 1-2) in forging a comprehensive list of cultural right that could be integrated into the ECHR. The working group attempted to formulate the catalogue of cultural rights, which would be universal in character, belonging to every human being and thus extendable to minorities as well. Furthermore, the working group's target was to ensure that the semantical and conceptual frameworks of the catalogue would respond to the criteria of justiciability, regardless of affiliation of the rights holders, ensuring that the protection would be granted to individuals and groups alike, without distinction as to belonging to a minority or a majority group. The rights catalogue was to respond to the test of indivisibility that would make the protection by the ECtHR possible.

The protocol drafters combatted against the idea of framing additional protocol as a set of cultural rights for minorities, based on the tenet that cultural rights were traditionally seen as a concept reserved for minority groups. That approach was as a prerequisite bound as entailing discrimination, as the division into groups or related identification with a particular group based on a selected single cultural indicator was superficial and led to dissociation. The drafters' concept was to facilitate the recognitions of multiple bounds among reference communities and indicators, forming cultural identity of an individual, preconditioned with absolute individual agency in forging collective identification. The commentary to the draft proposal underlined that binary minority-majority relations were not a sustainable category in contemporary multicultural states, and its maintenance and further integration into the legal frameworks would lead to several negative consequences, including intensification of intergroup division and discrimination. The solution for the elimination of the majority-minority distinction from reflection in the ECHR system was substantiated with the argument invoking impossibility of a sufficiently stable legal framework substantiated with concrete justiciable obligations of the states, adequately reflecting the instable, highly dynamic, multidimensional and fluent relations between minorities and majorities, further entangled with relativity of the definition of minorities relied primarily upon a quantitative component. Therefore, the sustainable solution was seen in conjuring a set of universal rights substantiated with positive discrimination measures as a tool of ensuring equality in their enjoyment.

The proposed draft protocol framed the need for its adoption with the recognized necessity to reinforce the rights already set forth in the Convention with cultural dimension. Moreover, the preamble of the draft explicitly mentioned that human rights overall, and cultural rights in particular, were both a requirement and a manifestation of human dignity, while the cultural rights per se were equated with the rights to identity. At the same time, cultural rights in the aspect of identity rights were recognized as belonging both to individuals and collectives, underlining their binary nature as both individual and group rights, regardless of the mode of their implementation. The enjoyment of cultural rights was framed along the compatibility with other human rights and fundamental freedoms with the aim of the states as international community to collectively enforce them.

The Fribourg draft was characterized by a modern wide-encompassing approach to the definition of culture. The notion of culture in its interpretation included all its components, including, besides arts, sciences and languages, also cultural attributes, values and traditions (CAHMIN(94)4rev2, p. 7). The primary basis for distinction of cultural groups was forged as similarity of living and thinking, which aimed to avoid the artificial limitation to one single indicator as a primary determinant of individuals' existential and identity choices. That approach would allow to avoid limitation the application of the protocol ratione personae to the "traditional" minority groups, which constituted a problem for CAHMIN in constructing the definition of national minorities for the FCPNM. At the same time, the definitions were not delineated as an integral part of the text of the proposal but were contained in the interpretational part, which would allow political and technical maneuver. The notion of cultural identity incorporated both the reference to the universal values and membership in cultural communities, which were interpreted as inalienable components and determinants for both the rights to individual distinction and consciously chosen identification with others (CAHMIN(94)4rev2, p. 7).

The Fribourg draft follows with the UNESCO approach in its use of a scope of culture elements and focus on promoting diversity (*inter alia* a a similar approach is used in the UNESCO framework on diversity of cultural expressions and cultural rights of minorities). In forging the notion of cultural rights, the drafters underlined the significance of cultural rights dimension of all other human rights, which pre-empted

a wide discourse on cultural component of universal human rights (without attribution to cultural relativism) significantly. The primary emphasis was made in irrelevance of distinction of cultural rights depending on the rights-holders, framing its complex nature of collective and individual rights. The Fribourg draft defined cultural rights as "*the right for everyone, without distinction, to base his cultural identity on references chosen according to the various cultural communities and heritages to which he freely acknowledges his attachment*". The uniqueness of the definition is in its philosophical framing of entitlements determined through the free and conscious agency of the rights-holders, rather than the institutional will to assign individuals and communities with the scope of politically determined scope of rights, as well as its ontological framing of convergences between the notions of identity and individual cultural reference, giving prevalence to individual self-acknowledged cultural binds that shape the identity based on free will, individual recognition and conscious accord to belong.

The catalogue of rights included two composite groups of entitlements, which encompass, however, a wider frame of capabilities and could have a potential for further conceptual elaboration as a result of the judicial interpretation. The draft recognized the right to respect for and expression of one's values and cultural traditions, framed as an individual and collective entitlement. The declared protection of values and cultural traditions was conditional to compliance with human dignity, human rights and fundamental freedoms (Article 1). This entitlement included the freedom to engage in cultural activity, the right to identify with the cultural communities, the right to discover cultures and the right to knowledge of human rights and to take part in establishing a culture governed by human rights. The freedom to engage in cultural activity included the possibility of public or private expression, and incorporated the right to speak the language of one's choice, which conceptually bound the Fribourg draft with the FCPNM approach. The possibility to speak one's language was framed as a cultural practice or cultural activity, which was interpreted by the drafters in its wide meaning to imply "*any activity which sustains and develops not only arts, sciences, languages and values but anything pertaining to way of life (such as skills, technologies, housing or mode of dress)*". The right to identify with the cultural communities was constructed on the individual agency to choose to determine a particular community

affiliation and its format. The entitlement implied the freedom to alter the choice or not to identify with any cultural community, as well as to actively determine the scope and format for maintenance of relations with the community. The drafters explicitly underlined the related agency of the community to define its membership and determine the relations with individuals, excluding the communities' obligation to accept members. The right to discover cultures was framed to encompass a negative obligation from the States not to hinder such activities. The drafters explained the necessity to introduce the provision with the necessity of protection against development of negative cultural practices or doctrines, driven by cultural relativism concept (CAHMIN(94)4rev2, p. 8).

The notion of culture in the sense of Article 1(c) implied the entirety of the diverse manifestations and types of cultures that "*together constitute the common heritage of humanity*". The right to knowledge of human rights and to take part in establishing a culture governed by human rights. The right to discover cultures and the right to knowledge of human rights and to take part in establishing a culture governed by human rights is a reflection of the interinstitutional influence of the OSCE and took origin from paragraph 9 of the 1990 Copenhagen Document. The drafters of the Fribourg proposal explained the binary nature of the proposed provision, incorporating elements of the right to education and political participation (CAHMIN(94)4rev2, p. 8). Besides the semantically distinguished negative obligation of States to obstruct knowledge of human rights, the interpretation of the provision extended it to the positive obligation to ensure the education system would be construed in the way to ensure implementation of the entitlement through inclusion of its elements into the educational curricula, while the States were given the margin of appreciation to determine the format of the educational activities. The political participation aspect included the safeguard against observance or promotion of human rights within one's culture and was framed by the drafters as a reflection of the nature of the right to a culture within a human rights framework, which constitutes another groundbreaking approach that would be developed only several decades later within the international political discourse. Article 1 (d) therefore, conceptually develops the preambular recital, transforming the connection of culture and human rights into a potentially justiciable entitlement.

The proposal developed educational rights in Article 2, which guaranteed the universal right to education. The right to an education encompassed freedom to teach and be taught one's own culture and language (Art.2.1.), to establish necessary institutions (Art. 2.2.), and the right to public support for the enjoyment and implementation of the right. The right to education, as designed by the Fribourg draft, explicitly implied to aim at "full and unrestricted development of [one's] cultural identity in a manner recognising and respecting the diversity of cultures", which de facto calibrated the entitlement to the task of application of the provisions to the needs of minority community, responding to the goals of culturally-sensitive and objective education, facilitating inter-cultural dialogue and participation. In its universality, it is also in line with the interpretation of cultural participation given to Article 15 of the ICCPR by the HRC in its commentaries. As discussed later in this work, this approach to education was also developed through practical implementation of the FCPNM by the Advisory Committee. Overall, it follows the primary tenets of the cultural rights approach to human rights, highlighting a forward-thinking and internally consistent nature of the draft. This formulation also appears a strong tool to empower inclusion, eliminating the threat of assimilation. The right to establishing educational institutions is conditioned to compliance with national regulation, but is framed as a negative obligation, the choice explained by the drafters as another safeguard for the minority empowerment (CAHMIN(94)4rev2, p. 8). Furthermore, the right to education and setting up related infrastructure, under the cultural perspective of the Fribourg draft explicitly included the positive obligation of practical support to the realization of the right, which appears to be an effective safeguard against discrimination, first of all with respect to marginalized groups and small minority groups without sufficient kin-state support or when such support may be destructive, thus construing an effective empowerment tool with an integrated soft conflict prevention dimension.

In framing the scope of safeguards against undue limitations, Article 3 of the Fribourg draft integrated a notion of "spiritual integrity" of rights-holders, which was designed to serve as an indicator of admissibility for the measures, policies, regulations, and behavior introduced within the conceptual domain created by the protocol rights. The provision prohibits to construe the rights under the protocol

as intentionally harmful or incompatible for "the physical or spiritual integrity of any individual", which could be interpreted as a further reinforcing the prohibition of negative practices that could be attempted under the cultural relativist discourse. The degrading actions are prohibited with respect to actions by individuals, groups or public authority, which appears to potentially necessitate further judicial interpretation as to the limits of protection and obligation imposed on the states. Besides the standard limitation close repeating the derogation criteria under Article 15 of the ECHR, the Fribourg draft introduced an additional safeguard that the rights set forth by the Convention shall not be limited based on the provisions of the draft protocol, which appears to follow the same anti-relativist logic. The proposal did not provide for the assessment of the potential justiciability of the construed rights, which was one of the issues CAHMIN was consistently challenged with and leading to the drastic limitations on the catalogue of rights proposed for the consideration at the end of the CAHMIN's mandate. Yet, the draft proposal modern nature and the philosophical and conceptual complexity, as well as the semantic elaboration of the document determined its potential to enrich the debate on the possible protocol. The draft was accepted by the CAHMIN as an internal working document, and was discussed during the session of the CAHMIN in November 1994.[34] However, it did not find reflection in the text of further proposals elaborated by CAHMIN.

The proposal submitted by the Austrian delegation proved one of the formative in terms of its approaches to forging the scope of obligations.[35] Unlike the majority of the legislative instruments, the Austrian proposal did not follow the identity or value driven approach, and limited the regulation to defining the minimal scope of obligations that States could determine under their consideration and be able to implement. This approach was also reflected in the determination of the rights-holders, which was limited in the document to the nationals

34 The discussion took place with Professor Decaux, who presented the draft to the Ad Hoc Committee. CAHMIN (95)5, para 6.

35 Austrian proposal for an additional Protocol in the Cultural Field to the European Convention on Human Rights with Explanatory Memorandum (16 September 1994). CAHMIN (94)22 rev [online]. Available at: https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=09000016806afb84. Last accessed in May 2021.

or citizens of the State, which did not uniformly concur with the existing scope of *ratione personae* application of other provisions of the ECHR. The proposal delineated the linguistic rights as cultural rights and followed a universal individual rights approach, potentially creating a sustainable basis for unification of standards by the future additional protocol and the FCPNM, although the draft protocol did not explicitly distinguish the minority representatives as rights holders. The substance of linguistic rights was perceived as a basic and universal cultural good. The proposed draft protocol operated the term "*language traditionally used in the territory of the State"*, which was an open provision to be supplemented with the States' determination of the languages that the protection under the additional protocol would be extended to, besides the majority language (CAHMIN (95)22 rev, p. 5). The application of the proposed protocol was open for the States' consideration *ratione loci* and as to the decision of opening the possibility to submit individual complaints, representing a state-centered approach. Although the drafters claimed established justiciability of the rights framed in the proposal, the language of the draft protocol is ambiguous, and leaves the States with wide margin of appreciation in forging the format for implementation, de facto discretionary determining the scope of obligations.

The catalogue of the linguistic rights stipulated by the proposal included the right to have one's name expressed in the language traditionally used in the individual's State and to have this name officially recognized (Article 1), the right to receive instruction in and of one's language (Article 2), and the right to use one's language in contacts with public authorities (Article 3). The right to have one's name expressed in the language traditionally used in the individual's State and to have this name officially recognized. The drafters explained the necessity of such an entitlement to the practice of forcible changes of names that existed in the past around Europe. The scope of the right was interpreted as providing a minimal standard of the guarantee, which could be further extended by the parties, contingent to existence of a more favourable legal regime in the national regulation of the States parties, in compliance with the principle under Article 60 of the ECHR. The application of Article 60 would also safeguard against limiting the scope of domestically provided entitlements to the minimal standard under the protocol (CAHMIN (95)22 rev, p.6). The right to receive instruction in and of one's language was limited in application to the languages in traditional use in the State. Furthermore, the implementation of the right in public or

publically funded private educational institutions was conditioned to the sufficient demand, with the sufficiency of the demand rendered upon the assessment by the respective States, without setting any conditions to guide the implementation. The drafters explained the necessity of the entitlement to the necessity to the respect of citizens' linguistic identity and underlined its specific significance for national minorities. The drafters, however, did not provide for the explanation how the provision could provide an effective tool against discrimination of minorities, which made the practical aspects entirely within the States' margin of appreciation. The right to use one's language in contacts with public authorities was framed to imply the entitlement to receive a response in the same language and the respective obligation upon the authorities to respond in the same language, in both oral and written forms. The States were to undertake the financial burden incurred in the course of the implementation of the right, which could not be transferred upon the applicant (Article 3 para 2). The exercise of the right was however conditioned to the quantitative sufficiency of the residents demanding the exercise of the right, their traditional residency within the respective territory that would amount to a justification of the use. The limitations of the framework of the rights catalogue corresponds to the declarations submitted by the Austrian government upon ratification of the FCPNM and appears to aim at taking best interests of the States into consideration.

3.1.3. Resumption of the Work on the Draft Protocol. II Preparatory Stage

Following the decision of the Committee of Ministers to extend the mandate of the CAHMIN for resuming the work on the additional protocol[36], the CAHMIN resumed its activities in November 1994. As reflected in the draft interim report submitted by the CAHMIN to the Committee of Ministers in February 1995[37], the CAHMIN interpreted its task as developing the catalogue of universal cultural rights with particular reference to national minorities, but not the cultural rights of minorities *per se*. The determination of the 'cultural field' was decided

36 Committee of Ministers Decision CM/610/241194, 24 November 1994.

37 The Ad Hoc Committee for the Protection of National Minorities (CAHMIN). Draft Interim Report, CAHMIN(95)5, 16 February 1995 [online]. Available at:

to be avoided as a pragmatic approach due to the lack of an official interpretation within the framework of the Council of Europe. The Committee's primary concern was the practical possibility to ensure the compliance of the newly developed rights with the progressive interpretation of the Convention by the Court and avoiding the potential for the clashing interpretations. The preliminary scope of rights identified for prospective inclusion into the draft protocol encompassed respect for cultural identity (the various aspects of this element are still to be defined., e.g. the right to develop one's customs and values); the right to pursue cultural activities; right to choose freely whether or not to belong to a group; the right to a name, the right to use one's language in public and private and in relation with public authorities; the right to learn a language of one's choice, the right to education with a specific provision for the entitlement for adult education, the right to set up cultural and educational institutions; the protection of cultural and scientific heritage; the right of access to information and to impart information; intellectual property rights; and the right of reply (CAHMIN (95)5). The rights were examined as to the justiciability correspondence to a real need whether the right constituted a fundamental right and whether the rights had been covered by the ECHR or its protocols.

However, with the resumption of mandate the Committee did not progress with consensus-building visible during the first stage of its activities, and the work, continued within smaller task groups, resulted in a number of alternative provisions, without an accord reached by the stipulated expiration of the mandate.[38] By October 1995, the CAHMIN developed the scope of 16 cultural rights, which were in the course of drafting, reviewed, as to the scope and framing, by the national delegations, supplementing them with alternative solutions for amendments. The proposals included cultural identity, cultural

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https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=09000016806b1c20. Last accessed in May 2021.

38 The Ad Hoc Committee for the Protection of National Minorities (CAHMIN). Draft articles and alternative versions for possible inclusion in a protocol complementing the ECHR in the cultural field by provisions guaranteeing individual rights, in particular for persons belonging to national minorities. CAHMIN(95)1rev.3 (third revised version), 5 October 1995 [online]. Available at: https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=09000016806b1c18. Last accessed in May 2021.

activities, right to belong to a cultural community, the right to a name, linguistic rights, rights related to education, the right to establish institutions, the right to cultural heritage, the right to access to information, the right to reply and the right to cultural property.[39] The linguistic rights included the freedom to use a language of one's choice, the right to use the one's language in relationships with public authorities, the right to learn one's language of choice or mother tongue. The rights related to education included the right to be taught of and in one's language, the right to education of high quality, the right to tolerant education and the right to adult education.

The question related to introducing the notion of cultural identity and the scope of the related programmatic regulation was a contested issue, with several proposed options, varying from the complete withdrawal of it, or maintaining the reference to cultural identity as a political declaration in the preamble recognizing it as a component of cultural rights based on the Fribourg draft approach, to the programmatic entitlement. Framing of the programmatic entitlement gained variations in forging of the substance of the respective obligations. Professor Matscher[40], the Chairman of the Sub-Commission on the Protection of Minorities of the European Commission for Democracy through Law, who participated in the work of the CAHMIN, advised the Committee for the introduction of the corresponding entitlement. His vision on the protocol was to frame it around the concept of cultural identity as a cornerstone of other cultural rights. Therefore, the right to develop cultural identity would be a central entitlement within the catalogue, potentially reinforced with a set of supporting principles

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39 The Ad Hoc Committee for the Protection of National Minorities (CAHMIN). The Collection of draft articles and alternative versions for possible inclusion in a protocol complementing the ECHR in the cultural field by provisions guaranteeing individual rights, in particular for persons belonging to national minorities, prepared by a working party of the CAHMIN and other proposals by members of the CAHMIN (revised version). CAHMIN(95)17rev, 5 October 1995 [online]. Available at: https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=090000016806b2182. Last accessed in May 2021.

40 The Ad Hoc Committee for the Protection of National Minorities (CAHMIN). Proposal by Professor Matscher. CAHMIN (95)14, 22 May 1995 [online]. Available at: https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=090000016806b1c16.

on the right to enjoy, respect and develop one's cultural identity and the right to freely decide on the affiliation with a cultural community (CAHMIN (95)14). The introduction of these provisions would serve the purpose of providing interpretational framework for all provisions within the additional protocol and prevent undue limitations of cultural rights, contradictory to their substance. The CAHMIN's frame stipulated either the obligation to respect one's identity or to ensure the right to choose one's cultural identity. The alternative notion of identity in the regulation provided for a choice between the introduction of cultural identity or distinguishing its components, implying the respect to values and cultural traditions. The former approach proposed to protect both individual and group values and traditions.

The consideration of the possibility to introduce the notion of cultural identity divided the CAHMIN, with no tangible solution eventually reached (CM (95)119, para. 18). The right to cultural identity appeared a necessary and logical consequence of the text of the Vienna Document. Moreover, the entire scope of the cultural rights was grounded on the concept of cultural identity or some of its components or indicators. Yet, the lack of a definition of cultural identity would entail the necessity to leave it to the determination of the Court on a case-by-case basis, underlying the lack of necessary precision of the provision and potentially leading to the abstinence of States parties to abandon any possibility of control over the interpretation and consequent outcome of identity-related cases.[41] The justiciability of the right to identity was contested on the ground of the political component in its scope, as well as with the estimated lack of capacity within domestic judicial systems to deal with such cases (CM(95)80, para. 30). The allegedly political nature of the provision in its synthetic form was considered prone to potentially intensifying social tensions, allowing misuse for inciting xenophobia, ethno-nationalism, tribalism, separatist and secessionism, and could not be included into the scope

41 Similar argument related to the determination of the balance of interest was raised by the Chairman of CAHMIN at the 11th meeting (CM(95)80, para. 23 and in paras 26 and 27 with respect to consequences of incorporation of cultural identity component into the scope of other cultural rights).

of jurisdiction of the ECtHR (CM(95)80, paras. 24 and 27).[42] A solution for maintaining the notion of cultural identity within the programmatic scope of the draft protocol was considered in integrating it under analytical approach as a component of other rights under the protocol, most importantly as a right for non-interference of States into the freedom to identify and be treated as a member of a group, which could be of relevance both for persons belonging to national minority and majority (CM(95)80, paras. 25-26). The evaluation of the absence of the right to cultural identity from the scope of the ECHR was also contested on the basis of the argument that norms promoting tolerance would a priori mean respect to the cultural identity (CM(95)80, para. 28)[43]. Furthermore, the right to cultural identity in its synthetic form would imply positive obligations on the States, which were difficult to foresee preemptively, which entailed high political uncertainty among delegations as to the scope and means of implementation (CM(95), para. 20). That concern led to a debated justiciability of the entitlement as such, the possibility to achieve normative balance between an overly broad formulation endangering justiciability and a legal regime conducive to censorship and limiting the freedom of opinion. Another concern arising from the broad formulation of the entitlement would be

42 The ECtHR case-law includes decisions, where the Court had to evaluate the correlation and the effects of acts of intimidation against persons belonging to minority groups (distinguished based on various cultural determinants) and cultural identity, for example with respect to intimidation of Roma - *Király and Dömötör v. Hungary*; also applicable is the decision on the case *Lewit v. Austria*, both recognized as constituting violation of Article 8 of the ECHR. *Király and Dömötör v. Hungary*, Judgment (Merits and Just Satisfaction), application No. 10851/13, 17 January 2017. Available at: http://hudoc.echr.coe.int/eng?i=001-170391. *Lewit v. Austria*, Judgment (Merits and Just Satisfaction), application No. 4782/18, 10 October 2019. Available at: http://hudoc.echr.coe.int/eng?i=001-196380.

43 Eventually, the ECtHR developed a substantial case-law supporting and developing that argument. For example, in the decision on the case *Aksu v. Turkey*, which was initiated by an applicant of Roma origin with respect to the portrayal of the community to which he affiliated in a book, the Court recognised that negative stereotyping may be considered amounting to a violation of a group's identity, as well as individual psychological state reflected in subjective self-assessment, and eventually constitute a violation of the right to private life. *Aksu v. Turkey* [GC], Judgment (Merits and Just Satisfaction), application Nos.4149/04, 41029/04, 15 March 2012. Available at: http://hudoc.echr.coe.int/eng?i=001-109577.

a practical possibility of the uniform interpretation of internally developed legal solutions by the judiciary on the supra-national level (CM (95)119, para. 19-20).

While the general CAHMIN's drafts primarily did not contain semantic framing, the proposals from the national delegations represented in the CAHMIN and external experts constituted ready solutions for the wording of the drafts on the subject matters developed by the CAHMIN. The CAHMIN received seven different proposals from six member States related to cultural identity regulation.[44] The initial proposal by Finland was closer in the conceptual frame to the concept contemplated by the CAHMIN. It stipulated the right to respect for one's customs, traditions and values constituting part of the lifestyle and cultural identity of the community (CAHMIN (95)17 rev, p. 4). Finland introduced a collective component of identity, stipulating that the protection was provided to the individual relation to an image of the community, with an open alternative to define that the individual must belong to the community to claim ownership the identity, or without the established link, broadening the possibilities of self-identification of individuals. The possibility to claim protection of a matter with a collective component granted as an individual entitlement related the proposal with the ICCPR. Switzerland proposed to protect the right to choose one's identity against attempts of forced assimilation. Finland and Switzerland provided derogation clauses standard for the ECHR and equal to that provided for the religious rights in the ECHR in Article 8. Poland proposed to grant protection to ways of life enabling "free reign" of one's identity conditioned to the respect of rights of others, which responded to the minority agenda in its programmatic scope. Malta and Turkey proposed to frame the identity components (understood within the traditional minority indicators, such as ethnic, religious, cultural and national distinctions) as a qualifying element for denigration and defamation. Italy framed the protection to cultural identity as a freedom to access public media for its expression and the right to culturally sensitive public education, the former shaped as a negative obligation of the state to refrain from the limitation of the respective right. The latter was formulated as a negative obligation not to deny the attention to one's cultural identity in public education.

44 Finland submitted two draft proposals on cultural identity.

The right to cultural activities was framed by the working group as the entitlement to exercise cultural activities in public or in private, subject to limitations as prescribed by Article 10 of the ECHR with respect to the right to the freedom of expression and information, save for the clause related to the activities of the judiciary. A version of the provision proposed by Poland extended protection regime to inter-cultural cooperation exercised with the aim of "reciprocal enrichment of both cultures". Similar limitation provisions were stipulated for the right to access to information held by public authorities. The Committee decided to discard the provision from the draft following the second reading of the text, as the majority of experts concluded the entitlement was encompassed by Article 10 of the ECHR.[45]

Article 3 of the draft protocol was foreseen to be dedicated to the right of self-identification with a cultural community, with the right to be treated as a member of a community proposed as an alternative component. The primary debate was centered around the focus of the protection regime and the agency of the rights-holders, varying from granting protection to the mixed entitlement to be treated as a member of a cultural community or to the actively determined membership. The former could be identified as an entitlement determined with a mixed agency, as the provision implied both the passive agency over the choice to be treated as a member of a community, which presumed initial conscious determination of belonging or not belonging to the community. Safeguarding the right to free affiliation with cultural community substantiated with a guarantee that entailing no negative consequences would, to Professor Matscher's view, fill in the lacuna originating from the lack of a general anti-discrimination provision under the ECHR (CAHMIN (95)14, para 2). Moreover, the protection extended to prevention of any disadvantage arising from the choice and the abstention to make the choice, to the right to change the initial determination and to be protected against forced assimilation. The latter was a simpler formulation of a right to self-identify with a cultural community, to maintain relations with the community, to alter the choice, to abstain from identification and to be protected against

45 The Ad Hoc Committee for the Protection of National Minorities (CAHMIN). Meeting Report – l2th meeting 11-15 September 1995. CM(95)119, Strasbourg, 22 September 1995 [online]. Available at: https://rm.coe.int/090000168091378c. Last accessed in May 2021.

assimilation. A related submission of Malta also contained two alternatives, proposing either a possibility opt between a positive or negative obligations of States, as well as a division between cultural communities and minorities communities, although the difference would not affect the protection (CAHMIN (95)17 rev, p. 8). The progress in the debate on the right was further hindered by the lack of agreement on the terminology, and the notion of 'cultural community' raised discontent among the delegated experts. In the absence of compromise, the ambiguity of the term was inevitable for the progress of the debate, yet the ambiguity would entail leaving the interpretation to the judiciary, which would lead to the decrease of the political control. The alternatives appeared unacceptable, as some national experts invoked potential clashes with the existing constitutional norms (CM(95)119, para. 6). A proposal from the working group to unify the three articles resulted in a right to respect for one's cultural identity, implying the right to change it and the freedom to enjoy one's culture individually or in community with others in public and in private. The provision was abandoned in the absence of political compromise (CM(95)119, para. 7). One aspect that was discussed by the CAHMIN at the initial stage upon the proposal by the experts from Finland, but that was not integrated into the draft that went for final reading, was the potential extension of protection to the right to follow a particular way of life typical to minority communities.

The alternatives proposed for framing the right to a name oscillated between granting protection against denial of using one's name or against a forced requirement to change it as a means to deny one's identity. The proposals by the Austrian delegation concerning the right to a name discussed above were examined. The consideration of the draft and the normative content was conducted in participation of members of the International Commission on Civil Status, who invoked the existing international framework for protecting the right for name, including the obligation of registration of birth and the obligation to give a name, under Article 24 (2) of the ICCPR (CM(95)80, para. 33). The relevance of the norm related to the reversion of forcibly changed name to the original was contested as repetitive compared with the scope of Article 8 of the ECHR, and the scope of the *Burghartz* and *Stjema* judgments had been brought to consideration by the

Committee during the revision of the article (CAHMIN (95)14, para. 3.1.).[46]

Framing of linguistic rights was centered around drafting provisions to comprise the freedom to use a language of one's choice, the right to use one's language in relationships with public authorities, the right to learn one's language of choice or mother tongue. The possible formulation of entitlement to use a language raised a discussion whether the protection should be granted to expression in the language of one's choice (proposed by the working group and the majority of delegations) or in the mother tongue (Malta). While the majority agreed that the scope of the entitlement should include public and private use of the language, the delegation of France considered the uninterrupted use of an alternative language could be guaranteed only in private usage, which was based on the French constitution. The compatibility of a new article protecting the right to the use a language was considered as to the scope of Article 8 and Article 10. While the resolution on the compatibility issue would be primarily with the ECtHR, the drafters underlined (CM (95)119, para. 37) that, in case of introduction, the provision should grant protection to language as a medium of expression, which would extend the scope of the convention, and be additional to Article 10. Several delegations proposed limitations on the use of a language in order to protect a language of minority. The draft submitted by the Swiss experts proposed to include protection of "minority or threatened languages", while the Belgian proposal concerned "protection of (threatened) languages" (CM(95)119, para. 42). Those were proposed to be amended with a general protection of a language, the protection of regional or

46 In principle, the scope of Article 8 is broader than the discussed at the CAHMIN and through the case law is extendable to various claims, including those driven by cultural sensitivities and forcible changes, and is applicable to the interests of diverse groups of applicants, and would in a high degree of probability lead to duplication of claims identical in substance. The relevant case-law includes, inter alia, decisions in *Juta Mentzen v. Latvia* (admissibility), application No. 71074/01, 7 December 2004. Available at: http://hudoc.echr.coe.int/eng?i=001-70407; *Henry Kismoun v. France*, Judgment (Merits and Just Satisfaction), App. No(s). 32265/10, 05 December 2013. Available at: http://hudoc.echr.coe.int/eng?i=001-139362; *Ünal Tekeli v. Turkey*, (judgment (Merits and Just Satisfaction), application No. 29865/96, 16 November 2004. Available at: http://hudoc.echr.coe.int/eng?i=001-67482.

minority languages, which would provide partial judicial protection to the scope of the European Charter for Regional or Minority Languages, as well as with 'protection of indigenous, minority or threatened languages'. The final draft compiled on the 12th meeting of CAHMIN stipulated the right of everyone to use a language of their choice in public and in private. The protection of threatened languages was incorporated into the provision within the derogation clause, among other causes, including public order and national security and protection of rights and freedoms of others. The entitlement was not extended to official education (CM(95)119, para. 47 and Appendix IV). Despite recommendations to give prevalence to the regulation of that aspect of linguistic rights (CAHMIN (95)14, para. 3.2.), the right to official communication with public authorities was excluded from the scope of the right in the majority of the proposals, as it was viewed as a separate, even more contested entitlement, potentially requiring legislative changes in the national systems. Several versions of a separate provision regulating relations with public authorities were proposed by the delegations, framed with various restrictions of territorial application, including areas of traditional residence of speakers or where they constituted a considerable proportion of population. The experts concluded that it was not possible to formulate the article in acceptably precise terms to ensure its justiciability internationally, yet ensuring sufficient flexibility to be applicable to a wide scope of situations (CM(95)14).

The difficulties in formulating the right to learn one's language arose in determining the scope and nature of the entitlement, to exclude the possibility of intersection with the scope of Articles 8 and 10, and with respect to ensuring a due reference to the regulated language. The variations included the guarantee of a right to receive instruction in or of the right to learn the language, with wider divergence in the related entitlements, including proposals for ensuring the right to establish educational institutions and the right to receive state funding for their functioning. The concern of the experts was that the provision may eventually lead to the recognition of the obligation on the States to provide education (CM(95)119, para. 50). Unified solutions were missing as to the determination of the object of the right, with options varying from extending the right to one's own language, including or

specifically focused on one's mother tongue[47], or a language of one's choice, with the latter having gained wider support of the Committee. The necessity to include the right to learn the official language of the state was raised in terms of the requirement to admit it as a fundamental right (CM(95)119, para. 52). The type of the educational system covered was also contested, with some proposals omitting it entirely, while others proposed to regulate the public compulsory schooling[48], or to include public and private education into a general term of 'compulsory education system' (CM(95)119, para. 55).

The rights to be taught in and of one's language were not initially foreseen by the Ad hoc Committee's working group, but was proposed as a separate provision by a national expert. Besides the proposal discussed above, Austria submitted an alternative version, proposing to prohibit denial of the opportunity to receive instruction in one's language within the state school system, conditioned to a strong demand and a possibility to fulfill the obligation at "reasonable conditions" (CAHMIN (95)17rev, p. 17).[49] The obligation was limited object-wise to the languages traditionally used in the respective state and *ratione loci* to the areas, where the language was traditionally used, without a reference as to the means and methodology for the determination of "traditional use". Dissenting from that approach, a proposal from the Venice Commission refuted the possibility of limiting one's right to learn one's mother tongue, but provided for a possibility of conditioning its implementation with a wide margin of appreciation granted to States. Other proposals included traditional use of the language by a substantial number of residents for the precondition of the entitlement that would be provided for a part of

47 Mother tongue was considered as an option in all proposals of the working group, and was forged as the primary object of regulation in the proposals by expert from Malta, and Proposal by Professor Matscher, (CAHMIN (95)17, p. 15).

48 Proposal by Professor Matscher, Chairman of the Sub-Commission on the protection of minorities of the European Commission for Democracy through Law (CAHMIN (95)17, pp. 15-16; CAHMIN (95) 14, para. 3.4).

49 A similar approach was proposed by the delegation of Malta, which used the condition of availability of financial and human resources for the implementation, and a habitual residence in the state as a precondition for the entitlement (CAHMIN (95)17rev, p. 17).

entire obligatory school programme.[50] The discussion around safeguarding the right to be taught in one's language focused on evaluation whether the differences existing in the educational systems of member states would allow justiciability of that right. Moreover, it was invoked that the existing provisions allowed adjudicating cases on these matters. As the Committee failed to reach consensus on the right, and "in view of the objections of principle encountered", the Committee decided to withdraw the provision from the text (CM(95)80, para. 68).

The right to a high quality education was proposed as a separate entitlement by the committee working group, but it was concluded by the majority of the experts that the formulation of the requirement would be problematic in terms of justiciability (CM (95)119, para. 10). In alternative proposals from delegations the concept of the right was delineated differently. The notion 'quality education' as such was determined by its purpose of development of cultural identity[51], individual's personality, or based on the aim of enabling individuals with access to the knowledge on human rights and the rights of others.[52] Another understanding of the concept was based on its literal interpretation of its semantics and implied accessing the highest level of education determined by financial resources of the respective State[53]. A more practical solution was made to consider 'quality education' in terms of "instruction based on the principle of tolerance"[54] (CAHMIN (95)17rev, p. 19). The proposal made by Norwegian experts contained an obligation of States to "respect the right of everyone to receive only such education and teaching which is in conformity with the principle of tolerance towards all people" (CM(95)119, para. 56). The proposal expressly prohibited the intolerance based on cultural identity, race, colour, leaving the list of possible hate speech and discrimination grounds open. The right was limited to the extent of typically performed public functions with respect to education (the limitation

50 Proposals by the delegation of Switzerland and Professor Matscher, CAHMIN (95)17, pp. 17-18.

51 Proposals by the delegations of Portugal and Norway.

52 Proposals by Portugal.

53 The proposal by the delegation of Malta.

54 Also reflected in the proposal by Norway.

was based on the conclusions of the EctHR in the cases of *Kjeldsen, Busk Madsen and Pedersen v. Denmark* and *Jersild v. Denmark)*.

The catalogue of educational rights was proposed to be supplemented by the right to adult education, initially conceptualized as a right to a life-long leaning and vocational training.[55] The aim of the proposal was to ensure achievement of secondary educational level to disadvantaged adults, particularly vulnerable in light of the contemporary changes in identity-forming processes incurred due to the changing political, economic and social paradigms. Life-long education was linked to the developmental and democratisation agenda, and therefore its availability was required to be facilitated to everyone without discrimination (CAHMIN (94) 23, p. 3). In the proposed provision, the available framework of educational facilities constituted a conditionality for granting access to continuous education to adults, which was proposed as a positive and a negative right, but did not sustain the first reading at the CAHMIN (CAHMIN (95)17rev, p. 20, CAHMIN (95)22rev). The proposal to incorporate the right to adult education was removed after the first reading at the CAHMIN (CM(95)80, para. 4), as the right did not pass the test of justiciability and fundamentality.[56] Moreover, despite the admitted lack of clarity within to the scope of the proposed right, the existing provisions of the Convention appeared to primarily cover the entitlement within the scope of Article 2 of the Protocol 1 granting the universal right to education.

The right to establish cultural institutions faced the debates of the same substance, determined by the lack of agreement as to the framing on

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55 The proposal was based on the outcomes of the conference "Adult Education and Social Change - Development for All" held in Strasbourg from 22 to 25 March 1993 conducted under the aegis of the Council of Europe. Ad Hoc Committee for the Protection of National Minorities (CAHMIN). Proposal from Patrick Bennis (Ireland) and Christiaan Colpaert (Belgium) for a provision to be included in the draft protocol complementing the ECHR in the cultural field (CAHMIN (94) 23). Strasbourg, 27 July 1994 [online. Available at: https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=09000016806b2452. Last accessed in May 2021.

56 The Ad Hoc Committee for the Protection of National Minorities (CAHMIN). Meeting Report – llth meeting 15-19 May 1995. 1995. CM(95)80, Strasbourg, 24 May 1995 [online]. Available at: https://rm.coe.int/09000016809136b3. Last accessed in May 2021.

the nature of the obligation (negative or positive), and the definition of the institutions the provision was to cover. As certain aspects of the proposed entitlement were covered within the scope of Articles 10 and 11, consideration was given to distinguishing the nature of the institutions (non-commercial or established specifically for certain function) within the text of the norm (CM (95)119, para. 14). Such an approach might yet entail an artificial and unnecessary limitation *ratione materia*. The options considered by the CAHMIN included incorporation of educational institutions into a generic notion of cultural institutions, or integrating them into the scope of educational rights (CAHMIN (95)17rev, p. 21, CAHMIN (95)22rev). The delegation of Malta proposed a closed list of institutions, limiting the scope to educational, religious, artistic, scientific, sport or health institutions, with contesting options proposing only institutions specialized in linguistic education were proposed. However, introduction of the entitlement to protection of educational institutions would repeat the scope of Article 11 of the ECHR and Article 2 Protocol 1. The Committee acknowledged that due to the clash with the development in the case law on Article 8, maintaining the provision would lead to superfluous regulation, and the agreement was reached to remove it.

The protocol was to incorporate the right to cultural heritage into the scope of human rights. The CAHMIN approached the concept of cultural heritage as limited to its material form. The scope of rights initially set by the working group initially included the right to access to cultural property and the right to use it, while some proposals interpreted the right to access as implying a States' obligation "to preserve the cultural property of a cultural community to the same degree enjoyed by the cultural heritage of the State" (CAHMIN (95)14, para. 3.5.). The discussion of the provision developed around the reasonable limitations on the right and the scope of the States' margin of appreciation in developing it, which would be delineated upon the a range of material and financial considerations, including the private property rights (CM(95)80, para. 7). Such financial and material limitations necessitated framing the scope of access as 'reasonable', or be restricted at least with respect to accessing heritage (CM(95)80, paras. 7, 9). In an attempt to address concerns related to possible financial implications, a proposal was made that the states' obligations pertaining to the fulfillment of functions related to cultural heritage should be conditioned with the aim of an explicit reference to the "*means at [State's] disposal for this purpose*". The provision explicitly

provided the States' margin of appreciation to determine the standard of implementation of the rights. Several submissions proposed to extend the initial scope of the right to cultural heritage with the right to request protection, conservation and upkeep of cultural property, subject to public interest in the cultural object.[57] Italy and the CDCC proposed to outlaw the destruction of cultural heritage of significance for those residing in the state's territory. The proposal of Italy linked the obligation of States not to destroy cultural heritage with the right to cultural identity, which was also perceived as a framework concept, incorporating the right to access to heritage (CM(95)80, para. 9). However, the explicit incorporation of cultural heritage as a component of identity created a repetition of the right to heritage with the right to identity, which opened the rights catalogue of the draft protocol (CM(95)80, para. 17),[58] and therefore required reconsideration to avoid internal contradictions within the Convention and potentially undermining coherence of case-law.

Under the Italian expert's proposal, the heritage under protection was forged to belong to both individuals and groups, residing on state's territory. The CDCC's approached the subject matter differently, proposing to grant protection to "*cultural traces of significance*", attempting to encompass intangible forms of cultural heritage and enforce the significance of protection of heritage valuable for the rights-holders in the past, of those who used to reside on the territory of the state, including current migrants or other groups maintaining lasting cultural links with the state party through heritage. The expert from

57 Proposals by Professor Economides, the delegation of Hungary. Hungarian proposal referenced the availability of resources as a frame for fulfilling the obligation.

58 For the extension of the discussion extended to the specific application to the minority rights protection, the ECtHR decision in the case *Ahunbay and Others v. Turkey* appears relevant. Although the Court denied the universal individual right to the protection of cultural heritage, it underlined the indivisible connection between an individual status of a rights-holder and the scope of the rights related to cultural heritage. In particular, the Court concluded that, based on the current state of international law, persons belonging to national minority were entitled to enjoy their own culture. *Ahunbay et Autres c. Turquie* (dec.), application No. 6080/06, 29 January 2019. Available at: http://hudoc.echr.coe.int/eng?i=001-191120. Last accessed in May 2021.

Malta proposed to protect cultural heritage from destruction, but did not limit the obligations to the protection against destruction committed by the state, as was explicitly delineated in the proposals by Italy and the CDCC. Intangible cultural heritage as an object of protection was proposed by the delegation of Poland, which proposed to protect the rights to acquire, preserve, access, study, conserve, promote and transmit heritage in its material and intangible forms (CAHMIN (95)17rev, p. 22). In another version of the proposed regulation, the delegation of Poland limited the scope of entitlements to the rights to access, use and study, in line with the national law requirements. The definition of cultural heritage was reframed to the value concept, and included any object of cultural value, forming part of the cultural heritage, which appears to imply the requirement of official recognition of the object as part of the national cultural heritage, limiting the scope of protected objects and formalizing the connections between the rights-holders, the state and cultural heritage.

One of the arguments discussed during the expert meeting on the right to cultural heritage at the CAHMIN concerned the inefficiency of human rights approach to cultural heritage. Human rights approach was considered inadequate in safeguarding an effective level of protection and preservation to cultural heritage based on the tenet that, in both aspects, the existing international instruments, such as the 1949 Geneva Convention and the 1977 Additional Protocols and the 1954 UNESCO Convention on the Protection of Cultural Property, failed to develop into effective preventive tools (CM(95)80, para. 10). Other arguments against maintaining the right to cultural heritage among the catalogue of human rights concerned the nature of the proposed entitlement, as it was closely related or constituted a cultural policy agenda, rather than an individual right (CM(95)80, para. 14).

The protocol intended inclusion of the right to intellectual property to the scope of the ECHR. The requirement of the novelty of the established law determined the phrasing of one version of the provision as an explicit extension of the protection under Article 1 of Protocol 1 to the right of every person to benefit from the protection of the moral and material interests resulting from any scientific, religious, spiritual, literary or artistic production. The right would be granted to individuals with property rights to the objects the individual is the author or to the objects that belongs to cultural heritage of the

claimant's community. The limitation of this approach was in the possibility that the party to the new protocol could have been party to the ECHR and the new protocol on cultural rights, without joining Protocol 1. Another version of the provision established an entitlement to every legal and natural person "to peaceful enjoyment of the benefit from the protection of the interests resulting from any scientific, religious, spiritual, literary or artistic production". The protection extended to both moral and material interests, and would be granted to authors and members of the community that possessed the cultural heritage. The limitations on the right included public interest and needed to be based on the established legal requirements and general international law principles (CAHMIN (95)17rev, p. 26). The provision was removed from the draft due to the clash with the scope of Article 1 of the Protocol 1, which extends to the protection of intellectual property, as well as with other international law instruments, which were recognized sufficient protection (CM(95)80, para. 21).

The draft protocol stipulated the right to reply for information distributed in press, radio and television, the directly affecting the individual. The provision explicitly mentioned periodical media, which would imply that its scope would not be extended to the information distributed within the framework of shows or programmes without an established interval publication format. During the discussion, it was decided to remove the provision from the draft, as it was admitted not to all within the cultural right field, while its particular relevance to the minorities was not established (CM(95)80, para. 20). The proposed right was, moreover, repetitive with the provisions of Articles 6, 8 and 10.[59]

By the beginning of October 1995, following two committee readings, the CAHMIN discarded ten articles, including cultural activities, the right to be treated as a member of cultural community, the right to use

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59 Part 2 of Article 10 provides for the limitations of the freedom of expression for the protection of reputation of others. Article 8 protects private and family life, and extends to correspondence, while interference with the right is prohibited, save for the legitimate reasons in the interest of "national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others", are necessary in the democratic society and are provided by the law. Article 6 guarantees the rights in trial.

the one's language in relationships with public authorities, the right to display public signs, including topographical indications, also in the minority language, the right to be taught in one's own language, the right to adult education, the right to access to information, the right to reply and the right to cultural property. The work on the formulation of the provision guaranteeing the right to cultural heritage was suspended after the first reading. The right to cultural identity was under consideration remained whether to return the provision as a programmatic right or to leave it as a political statement within the preamble, an alternative version of which was provided among four other options of general nature).

The preliminary draft protocol was to be finalized by the end of 1995, but the CAHMIN failed to reach consensus on the wording and the limited scope of rights to be included into the protocol.[60] By November 1995, following the extended consultations with the Council of Europe committees and external experts, including from the OSCE and the academia,[61] the scope of rights was extended to include the right to respect for cultural identity in the fields of media and education; the right to be treated as a member of a cultural community; the right to have public signs (topographical and other) written also in the minority

60 The Ad Hoc Committee for the Protection of National Minorities (CAHMIN). Activity Report – Situation as of 10 November 1995 – for the attention of the Committee of Ministers (13 November 1995). 1995. CAHMIN(95)22 Addendum [online]. Available at: https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=09000016806b21c7. Last accessed in May 2021.

61 The CDDH, the CDCC, the CDMM, the Commission for Democracy through Law, the High Commissioner on National Minorities of the OSCE, the Commission of the European Communities and the Holy See, Congress of Local and Regional Authorities of Europe (CLRAE). For decisions on invitations and information, see, inter alia, Decisions taken by the Ministers' Deputies at their 521st meeting regarding the CAHMIN and additional terms of reference. CM/Del/Dec(94)521. November 1994. 521 Meeting. Item 4.3 and Appendix 6. [online]. Available at https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=09000016806b23f0. Last accessed in May 2021.

language; the right to education was clarified to include the right to tolerant education and to education respecting human rights.[62]

The CAHMIN encountered a number of challenges of legal, political, and economic nature.

1. Difficulties pertaining to interpretation of the ECHR and its protocols:
   1.1. The interpretation of the ECHR by the ECtHR is not only of technical nature, but the one leading to additional extension of the scope of the conventional rights, developing the Convention "as a "living instrument, which is to be interpreted in the light of current circumstances". The challenge for the new rights to be integrated within the text of the new Protocol would appear more limited in scope than the existing one developed by the Court "through extensive and progressive interpretation" (CAHMIN(95)22, para. 17).
   1.2. Problem to identify new rights which are both of fundamental nature and are justiciable before the court.
   1.3. Potential conflict of some newly introduced rights with constitutional order of some States Parties (para. 18).
2. Political and economic challenges included:
   2.1. The problematic identification of the nature and the scope of the positive measures that could be placed upon States Parties (para. 18).
   2.3. Potential risk that "transfer of competence" (from the legislative and the executive to the judiciary) would be required with respect to some of the newly introduced rights (the right to education was named by the CAHMIN as one of those) (para. 19).

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62 The Ad Hoc Committee for the Protection of National Minorities (CAHMIN). Activity Report – Situation as of 10 November 1995 – for the attention of the Committee of Ministers (13 November 1995). 1995. CAHMIN(95)22 Addendum [online]. Available at: https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=09000016806b21c7. Last accessed in May 2021. The collection of all proposals considered by the CAHMIN is contained in document CAHMIN (95)17 rev.2 (Appendix II) [online]. Available at: https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=09000016806b1c18. Last accessed in May 2021.

The draft Protocol to the ECHR "guaranteeing certain individual rights in the cultural field" (CAHMIN(95)22, Appendix I) was developed based on the concept of the fundamental significance of identity. The Preamble of the Protocol underlined the existing differences in cultural identity, their importance from the perspective of tolerance in a democratic society. The aim of the document realized through the underlying rights under the Protocols was to protect the cultural identity of individuals. The final catalogue of rights proposed for incorporation into the Convention was limited to five and included the right to a name, the right to freedom to use language of one's choice, right to learn language of his or her choice, right to establish institutions. The right to a name encompassed the right of everyone to have and use and a prohibition of compelling someone to change the name. Besides the standard set of derogations, including the necessity in a democratic society, prevention of disorder or a crime, the protection of health or morals of others, or the protection of the rights and freedoms of others, the norm allowed limitations necessary for the performance by public authorities' of actions necessary [in the interest of family life] [regarding the civil status of persons, as prescribed by law (Article W in the Appendix I to the CAHMIN(95)22).

The norm delineating the freedom to use language of one's choice explicitly excluded individuals' relationships with the judicial authorities, other public authorities, public institutions and educational institutions from the scope of the right – the provision that will eventually be partially averted within the Framework Convention. The derogation clause to the article established an additional limitation ground "for the protection of a language" (para. 2 Article X in the Appendix I to the CAHMIN(95)22), which appears a very debatable solution with an unclear underlying logic. The right to learn the language of individual's choice was framed as a protection against hindrance from learning the language of individual's choice, in particular the mother tongue (Article Y in the Appendix I to the CAHMIN(95)22). The right to establishing institutions implied the freedom from prohibition against setting up cultural institutions, subject to classical derogation clauses (Article Z in the Appendix I to the CAHMIN(95)22).

3.1.4. Discontinuation of the CAHMIN work on the Protocol. Consequent Political Developments

The Committee concluded its work with developing the provisional text of the draft protocol and submitted it to the Committee of Ministers along with a variety of four possible scenarios for the action plan, underlining that the final decision was to be made within the political domain (CAHMIN(95)22, paras. 27). The CAHMIT offered the Committee of Ministers either to adopt the draft protocol upon the finalization of the text, or to review the Committee's terms of reference to clarify the task for development of a shortened catalogue of rights; to postpone the adoption for the future, in light of lack of assuredness within the Committee in the objective necessity of the document or the positive effect as to the individual right in case of its adoption. Another option proposed to consider a possibility to incorporate an implementation mechanism into the new Framework Convention on the rights of national minorities (CAHMIN(95)22, paras. 22-26).

The issue was examined by the Council of Ministers Deputies at the 554 th meeting held in Strasbourg in January 1996. The Ministers' Deputies decided to suspend the work of the Ad hoc Committee on the drafting of an Additional Protocol to safeguard the rights of the individual in the cultural field. However, the issue was not formally closed, as the meeting concluded with the determination to "continue reflection on the feasibility of further standard-setting in the cultural field and in the field of the protection of national minorities" (CM/Del/Dec(96)554, para. 2).[63] Nevertheless, the practical undertakings were continued in the direction of forging the modalities for implementation and oversight mechanism under the Framework Convention on the Protection of National Minorities (CM/Del/Dec(96)554, para. 3).

The decision on discontinuation of the work on the additional protocol raised discord and led to a political disagreement within the Council of Europe political bodies. The Parliamentary Assembly strongly and repeatedly condemned the decision, and continued to call for the renewal of the work on the additional protocol in a number of its resolutions supported by reports of several parliamentary standing committees. In its Recommendation 1255(1995) on the protection of the

[63] Council of Europe Committee of Ministers (A Level). Decisions adopted. CM/Del/Dec(96)554. 554th meeting of Minister's Deputies. Strasbourg. 8-10 and 15 January 1996. Agenda item 4.2 [online]. Available at: https://rm.coe.int/09000016804e06ea. Last accessed in May 2021.

rights of national minorities[64], the Parliamentary Assembly invoked the necessity for the additional protocol to the ECHR in the cultural field by provisions guaranteeing individual rights, in particular for persons belonging to national minorities, due to the necessity of substantiating the framework Convention for the Protection of National Minorities, which it qualified to as "weakly worded". To the concern of the Parliamentary Assembly, the Convention could not constitute an effective tool to protect cultural rights of persons belonging to national minorities, as *"[i]t formulates a number of vaguely defined objectives and principles, the observation of which will be an obligation of the contracting states but not a right which individuals may invoke. Its implementation machinery is feeble and there is a danger that, in fact, the monitoring procedures may be left entirely to the governments*" (Recommendation 1255(1995), para. 7). The intention of the Parliamentary Assembly was, on the contrary, to develop an instrument that could be invoked by individuals before the judiciary, and before the ECHR mechanism on the last instance (Recommendation 1255(1995), para. 8).

In its Recommendation 1285 on the Rights of National Minorities adopted in 1996, the Parliamentary Assembly underlined that the two newly adopted Conventions related to the cultural rights of national minorities – the 1992 European Charter for Regional or Minority Languages and the 1995 Framework Convention for the Protection of National Minorities – should be supplemented with "*an additional protocol to the European Convention on Human Rights setting out clearly defined rights which individuals may invoke before independent judiciary organs*" (para. 10).[65] The Parliamentary Assembly criticized the decision, expressing its "*profound disappointment*" with it, as well as hopes that the work would be resumed shortly (para. 14). The Assembly also criticized the approach taken by the preparatory committee with respect to the substance of the rights catalogue, in particular, that it had been shortened at the latest stage of drafting, as opposed to the list of rights proposed by the Assembly in in Recommendation 1201(1993)

64 Council of Europe. Parliamentary Assembly. Recommendation 1255(1995). Strasbourg, 23 January 1996 (3rd Sitting) [online]. Available at: https://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=15289&lang=en. Last accessed in May 2021.

(para. 13). Among the recommendations, issued to the Council of Ministers within the document, the Assembly requested immediate resumption and a "*satisfactory and rapid*" finalization of the draft protocol to the European Convention on Human Rights in the cultural field by provisions guaranteeing individual rights, in particular for persons belonging to national minorities (para. 16.7). The Assembly required the protocol be drafted in utmost comprehensive manner (para. 16.7.) and insisted on *"formulating the obligations incumbent on states as precisely as possible, so as to make the rights to be conferred upon individuals by states clear and justiciable*" (para. 16.8). Both Recommendations were responded by the Committee of Ministers in 1996, in its Interim reply to Recommendation 1255 (1995) on the protection of the rights of national minorities and Recommendation 1285 (1996) on the rights of national minorities.[66] The Committee reiterated that the work of the CAHMIN had been terminated. The reply did not mention the prospect for resuming the work on the protocol as it had been framed, but underlined the "feasibility of further standard-setting in the cultural field and in the field of protection of national minorities" was under its continuous reflection.

Despite the lack of further progress on the development of the instrument per se, the draft protocol in its form recited in the Recommendation 1285 (1996) was instrumentalised by the Parliamentary Assembly in several aspects of its work related to minority rights. In particular, the Assembly applied the principles and some normative provisions in its assessment of the accession requests submitted by prospective new members to the Council of Europe.[67]

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[65] Council of Europe. Parliamentary Assembly. Recommendation 1285(1996). Strasbourg, 31 January 1995 (3rd Sitting) [online]. Available at: https://pace.coe.int/en/files/15319/html. Last accessed in May 2021.

[66] Council of Europe, Committee of Ministers. Interim reply to Recommendation 1255 (1995) on the protection of the rights of national minorities and Recommendation 1285 (1996) on the rights of national minorities. Doc. 7519. Adopted on 3 April 1996 at the 562nd meeting of the Ministers' Deputies. Strasbourg, 12 April 1996 [online]. Available at: https://assembly.coe.int/nw/xml/XRef/X2H-Xref-ViewHTML.asp?FileID=7454&lang=EN. Last accessed in May 2021.

[67] The Council of Europe European Commission for Democracy through Law. Draft Opinion on the Interpretation of Article 11 of the Draft Protocol to the European Convention on Human Rights annexed to Recommendation 1201 of the Parliamentary Assembly, CDL-MIN (96) 4. Strasbourg, 21 February 1996

Moreover, the provisions of the draft protocol were integrated into several bilateral treaties.[68] The problem regarding such de facto application of Recommendation became obvious with frequent introduction of states' reservations on the application of Article 11 granting large minorities with the entitlement of local or autonomous authorities, raising concern that "the attitude towards autonomy of national minorities is still a too sensitive question in several states: one fears this scheme of cultural-autonomy-administrative autonomy succession".[69] The Parliamentary Assembly invited the Venice Commission to issue its opinion on the substance of the right and its implementation. The Venice Commission concluded that the right established under Article 11 of the draft protocol exceeded the scope of minority rights under international law, as well as the initial proposal of the Venice Commission for the right to effective participation in public and social right. The Commission established the necessity of cautious interpretation and application of Article 11 and concluded that "having regard to the present status of general international law, an extensive interpretation of the rights of minorities to have at their disposal local or autonomous authorities is only possible in the presence of the compelling instrument of international law, which is not the case here" (CDL-MIN (96)4, p. 5).

The limited interpretation of the provision was further developed on the basis of the definition of the minorities and the nature of the rights foreseen by the Recommendation. It was underlined that the Recommendation foresaw individual rights that could be exercised in community with others, which excluded a possibility of organized collective agency of a certain group. Furthermore, the Committee reiterated that Recommendation 1201 applied to long-established minority groups, as it required long lasting and firm ties with the state,

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[online]. Available at: https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-MIN(1996)004-e. Last accessed in May 2021.

68 The bilateral treaties between Hungary and Romania, Slovakia and Hungary on good neighbourly relation, treaty between Hungary and Croatia of 5 April 1995 are mentioned in CDL-MIN (96)4 (p. 4) as invoking Article 11 of the Recommendation 1201.

69 H. Klebes, Introduction to the draft additional protocol to the European Convention on Human Rights on the rights of minorities. In *Revue universelle des droits de l'homme*, 1993, page 184 cited in CDL-MIN (96)4 (p. 4).

and who possessed the nationality of the state, which excluded immigrants and refugees. The Venice Commission underlined that in the absence of the definition of a term 'region', the States had a wide margin of appreciation to interpret it, however it must be done in a bona fide manner, ensuring that interpretation does not render the article impossible to implement. In the sense of the draft protocol, the term 'region' was interpreted in the historical dimension in terms of residence of minorities and in geographical, rather than administrative, terms. It was underlined that the draft protocol did not establish criteria for defining 'in majority' to ensure application of the Article. The Venice Commission determined that in order to trigger the application of the article precise methodology should be established domestically and should be applied in terms of the historical concentrated residence of persons belonging to the minority group and their established presence in the region (CDL-MIN (96)4, p. 6).

The scope of the entitlement to "have at their disposal appropriate local or autonomous authorities or to have a special status" was interpreted by the Venice Commission separately from each other, but the overall conclusion was drawn that nothing provided in the draft protocol could affect the state structure, save for exceptions when the state structure already assumed a sufficient degree of flexibility. The interpretation of the entitlement to have appropriate local or autonomous authorities was conducted based on the European Charter of Local Self-Government, implying the entitlement to the management of a sufficient degree of public affairs in the region. In the absence of definition of the notion of 'special status', the Commission determined that, despite a wide margin of appreciation of States, the interpretation was to be given based on the primary aim of the provision, which in that case was to ensure effective participation of minorities. Accordingly, the Commission developed the substance and standards of the participatory approach to be applied to people belonging to national minorities with respect to all aspects of life, including cultural participation. The standards included consultations on all matters, when legislative or administrative measures were likely to affect them, involvement in preparatory processes as well as "implementation and assessment of national and regional development plans and programmes, likely to affect them" and effective participation in decision-making, explicitly applicable to cultural affairs (CDL-MIN (96)4, p. 8). The requirement to adjust the autonomy and special status to historical situation was interpreted as an obligation of the states to consider the traditions and history of the minority groups.

Furthermore, the provision was explained as a flexibility factor, determining calibrated approach to every specific community. The Venice Commission underlined that the scope of discretion of the States in this case should be forged based on the tests for fair balance developed by the ECtHR. While the requirement to implement the provision implied the divergence and *a priori* lack of a unified standard for the implementation of the right, it also ensured the adoption of the relevant regulation on the national level, which constituted a safeguard and a standard for the protection of the right, as the protection mechanism could be triggered in case the initial behavior was based on the law (CDL-MIN (96)4, p. 9).

The lack of political consensus and a common theoretical ground led to the lost momentum in international efforts for facilitating cultural heritage protection and the protection of cultures and traditions of minorities in particular. This chapter contributed into a comprehensive presentation of the normative developments and political efforts that surrounded forging of the contemporary mechanism for protection of cultural rights of minorities within the Council of Europe *acquis*. In the course of the development of the draft protocol, considerable work significant for the conceptualization of minority rights in general and cultural rights in particular was conducted, which can be useful for the elaboration of arguments on practically implementable and justiciable cultural rights and maintenance of cultural diversity conditioned with effective participation. The primary benefit that the success of the undertaking would have brought to the existing system of the cultural heritage protection was in granting a possibility to protect the rights before a judicial mechanism. As follows from the analysis of the Chapter, the lack of political will remained a primary dissuasive factor preventing elaboration of a binding set of commitments protecting cultural rights of minorities under supervision of a judicial institution.

3.2. Framework Convention on the Protection of National Minorities

3.2.1. Conceptualisation

The Framework Convention on the Protection of National Minorities was drafted by the CAHMIN following the instruction submitted to the Council of Ministers of the Council of Europe by the Heads of State and Government during the Vienna Summit in October 1993. The Vienna Declaration, the final document of the Summit, was construed largely on the ideas of promoting democratic governance in response to the outgoing regional conflicts, in particular those related to totalitarianism

and ethnic differences, and underlined that protection of national minorities will be integrated into the accession system as a precondition and policy agenda. In line with the Vienna Summit Declaration requirement, the Convention aimed at transforming political commitments undertaken by European governments within the framework of the CSCE, primarily of the 1990 Copenhagen Document, into legally binding obligations (preambular recital 10; Explanatory Report, para. 27). The Convention allows participation of non-Member States, which was primarily interpreted to imply the member States of the Conference on Security and Co-operation in Europe (para. 99), reflecting the decisions by the Vienna Summit (Appendix II to the Vienna Declaration). Furthermore, the Declaration reiterated the organizational commitments to facilitate social integration of lawfully residing migrants, within the system of measures dedicated to managing and controlling migration. The Vienna Summit initiated the CoE policy framework (then, foreseen as a Declaration and a plan of action) for the prevention of racism, xenophobia, antisemitism and intolerance. Due to the complexity and variety of factors influencing the domestic legislative and policy approaches with respect to national minorities, the drafters opted for the concept of the convention, primarily composed of "*programme-type provisions setting out objectives which the Parties undertake to pursue*", which, in the absence of direct applicability, would allow a wide margin of appreciation for the States parties to develop implementation measures (Explanatory Report, para. 11). The discretion of the States was perceived as a tool for achieving a calibrated policy response to the domestic challenges in each State.

In line with the terms of reference given to the Committee by the Committee of Ministers (CM/575/041193) [70], its task was to draft a convention "*specifying the principles which contracting States commit*

[70] Council of Europe. Committee of Ministers. Terms of reference of the CAHMIN on the drawing up of a framework convention and a protocol complementing the European Convention on Human Rights (ECHR) as adopted by the Committee of Ministers on 4 November 1993. DECISION No CM/575/041193, Strasbourg, 10 December 1993 [online]. Available at: https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=09000016800cce89. Last accessed in May, 2021.

themselves to respect in order to assure the protection of national minorities".[71] As it follows from the terms of reference, the initial scope of the Convention was to protect minorities, without framing any active agency of theirs in the implementation of their rights or determination of their scope. The Terms of Reference issued by the Committee of Ministers did not contain any additional programmatic guidelines or references to the goals of the document. The Convention was open to ratification in 1995 and entered into force in 1998,[72] becaming the first binding international legal instrument on the rights of minorities (CoE: 2020, p. 5).

Preparatory work on the convention was undertaken by the European Commission for Democracy through Law (the Venice Commission). The Venice Commission was tasked, in line with the recommendations of the Parliamentary Assembly, to prepare a draft text of the Convention on the protection of minorities. Its first version was adopted at the sixth meeting of the Venice Commission on 8 February 1991 (CDL (91)7) and was used by the CAHMIN as one of the preparatory documents. The draft elaborated by the Venice Commission largely created the fundamental tenets of the framework Convention, but it also had significant conceptual differences, including in the scope of rights and obligations it created. One of the most fundamental differences between the instruments developed by the Venice Commission and the CAHMIN was in the nature of framing the obligations. The draft developed by the Venice Commission

71 Council of Europe Committee of Ministers. Communication Doc. 7201. Interim reply to Recommendations 1134 (1990) and 1177 (1992) on the rights of minorities and to Recommendation 1201 (1993) on an additional protocol on the rights of national minorities to the European Convention on Human Rights (adopted by the Committee of Ministers at the 521st meeting of the Ministers' Deputies from 22 to 24 November 1994). 7 December 1994 [online]. Available at: https://assembly.coe.int/nw/xml/XRef/X2H-Xref-ViewHTML.asp?FileID=8204&lang=EN. Last accessed in April 2021.

72 The Convention entered into force after 21 States signed it on the day of opening and 12 ratifications were reached by 1998, exceeding the expectation to achieve the required minimum in 1996. Report. Special Rapporteur: Mr. Bindig, paras. 3 and 4 [online]. Available at: https://assembly.coe.int/nw/xml/XRef/X2H-Xref-ViewHTML.asp?FileID=7031&lang=EN. Last accessed in March 2021. In 1995, at its 95th session, the Committee of Ministers authorized the Explanatory Report to the framework Convention.

represented in itself a set of legally binding rules, at odds with the format of a framework convention delineating strategies of obligations and guidelines for states policies and normative regulations to be created by the parties, reflected in the Framework Convention. Secondly, and this will be discussed in more details ahead, the Venice Commission opted for a drastically different monitoring framework, providing for the right of inter-state and individual petitions and a related dispute resolution mechanism.

As its descendent, the Venice Commission's draft Convention proposed membership to the States of the Council of Europe, as well as for non-member States (Article 32). The Venice Commission draft relied upon the fundamental principles of the Council of Europe as the basis of the protection system, and the non-discrimination standards imbedded in Article 14 of the ECHR and Article 27 of the ICCPR as its basis. Human dignity and equality were mentioned as primary elements of these principles, reinforced by anti-discrimination clause under Article 4 and related entitlement to affirmative measures, which was entirely integrated into the framework Convention. The protection of minority rights was pronounced to constitute inalienable part of the general international human rights system, requiring international cooperation, implemented in the spirit of tolerance, understanding and good neighbourliness, in respect of the principles of international law, state sovereignty and territorial integrity (Article 1). Crucially dissenting from the framework Convention, the draft protected both the collective rights of minority groups and individuals belonging to such minority groups. The minority groups were to be distinguished based on the such indicators as ethnicity, language and religion, but were differentiated from the majority of population also by their culture and traditions (Articles 1 and 2). The Venice Commission proposed to define minorities as *"a group which is smaller in number than the rest of the population of a State, whose members, who are nationals of that State, have ethnical, religious or linguistic features different from those of the rest of the population, and are guided by the will to safeguard their culture, traditions, religion or language*" (Article 2).[73] The draft also recognized

73 As evidenced from the Venice Commission Opinion on the groups of people to whom the Framework Convention for the Protection of National Minorities could apply in Belgium adopted by the Venice Commission at its 50th plenary session (Venice, 8-9 March 2002), the Venice Commission will

that determination of individual membership within minority is a matter of individual choice, which should not be misused to the individual disadvantage. This safeguard was eventually transferred into the framework Convention. The Committee proposed to introduce an overarching obligation of protection against "any activity capable of threatening [the minority groups'] existence" (Article 3) along with their collective rights to respect, safeguard and develop their ethnic, religious and linguistic identity, the approach that created a foundation for the minority rights protection to leave the passive non-intervention scope and move towards the extended scope of state's obligations and guarantees, including positive obligations to protect as opposed to commitment not to harm, and democratic participation guarantees (discussed in Weller: 2005, p. 618-624). The right to international contacts across the borders between members of the minority groups was assigned a more central role by the Venice Commission, compared with the solution by CAHMIN (Article 17 in the framework Convention), as it was listed as one of the first rights in the entitlements list under the draft (Article 5).

The Venice Commission's approach eventually integrated into the Framework Convention was the recognition of the centrality for the identity concept, which was guaranteed as a right and protected by the prohibition of forced assimilation (Article 6). However, the formulation of the entitlements differs in the two instruments. The draft proposed by the Venice Commission granted the minorities the right to preserve, express and develop "*the right to cultural identity in all its aspects*" (Article 6), while the framework Convention changed the perspective, defending their right "*to preserve the essential elements of their identity*", mentioning religion, language, traditions and cultural heritage, and establishing a separate entitlement to "*maintain and develop their culture*" (Article 5). Overall, the draft developed by the Venice Commission appears to promote a protective stance, rather than a more empowering stance of the framework Convention, which also creates more ties for the cooperation and intercultural dialogue between the minority and majority groups, aiming at mutual cultural enrichment.

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abandon this approach to minorities with a more calibrated and intricate version, which will allow to ensure fair and effective participation and representation of different types of minority groups on various level of representation (discussed below).

As to the rights catalogue, the draft established linguistic rights of minorities, but the scope of the entitlements and the conditionality for their implementation were different from those eventually incorporated into the framework Convention. Thus, the draft grants the rights to free use of the minority language in public and private, and specifically attributes it to any person belonging to a linguistic minority (Article 7), without safeguarding the right to a freedom of expression in minority language guaranteed to all and the right to use and establish media for channeling such rights to expression. The right to communication in minority languages with official authorities, subject to reaching a population threshold, the draft fails to identify precisely, save for indicating "a sufficient percentage of the total population" regionally or nationwide. The corresponding obligation of the authorities to respond in minority languages is established by the draft in Article 8. Comparatively, the entitlement to official communication by the draft is more liberal and precisely formulating, allowing the States less margin of appreciation to establish when such an entitlement deserves practical response (there are no such conditionals as traditional occupation, request of the minority and the assessment of the request as "correspond[ing] to a real need" by the authorities). Besides, the obligation is formulated by the draft in absolute terms, while the framework Convention makes use of soft formulation "*the Parties shall endeavour to ensure, as far as possible, the conditions which would make it possible to use the minority language in relations between those persons and the administrative authorities*" (Article 10 of the Framework Convention). The draft contains several rather liberal provisions with respect to the right to use minority language in schooling, the effect of which was, however, limited in two respects: the right was reserved to relatively large minority groups with "substantial percentage of population", which de facto rejects the right to all other minority groups, and by the lack of clear attribution as to the threshold or other means to assess which minority groups comply with the requirement of "substantial percentage of population". The draft provides that minorities with significant percentage in general regional or national population can be entitled to schooling in minority language (with the curricula entirely designed for minority language or limited to the linguistic training, imbedded into the general curricula and provided to students) (Article 9).

One of fundamental differences that two documents bear is the monitoring mechanism. The Venice Commission proposed a monitoring mechanism consisting of a European Commission for the Protection of Minorities, forged in Chapter II of the Commission's draft. The reporting cycle provided is the draft would be shorter than under the framework Convention, the submission of implementation reports would be required from States every three years. The Committee would be in charge of providing its opinions and recommendations, the latter competence was not directly granted by the Framework Convention but added in the course of the reform of the monitoring mechanism. The draft also contained an optional complaints review mechanism. In line with the mechanism, States and individuals would be entitled to file petitions against other States parties for alleged violations of the Convention (Articles 25-26). The Committee would be entitled to review the circumstances of the case, and would be also vested with investigatory powers. The Committee's aim would be to reach friendly settlements between the parties of the dispute, but in case of the failure, a report would be submitted to the Committee of Ministers with measures proposed for the resolution of the dispute. The draft did not limit the Committee of Ministers with the prescription for the follow-up measures, which would be upon the Committee to determine. Thus, the mechanism proposed by the Venice Commission, was a more far-reaching and elaborate, and would substantially strengthen the wide formulations opted due to estimated political tensions. From the technical standpoint, the mechanism devised by the Venice Commission was almost entirely transferred into the Framework Convention. As in the current committee, the members of the commission foreseen by the Venice Commission would be recognized professionals in the field of human rights and the rights of minorities, serving in their individual capacity. The Committee would be elected for four years by the Committee of Ministers from the nominees from the list drafted from three members nominated by each national delegation, with limitations on a single-member representation of the same state. Rotation would be ensured by replacement of half of the first committee membership after half of its term. The Venice Commission stipulated the representation of States not members of the Council of Europe by allowing the respective States to nominate their representatives directly. Thus, the primary difference of the draft proposed by the Venice Commission and the Framework Convention was in the monitoring mechanism, which the Venice Commission

construed as a mix of an international quasi-judicial body and an international mediator. The framework Convention created an advisory mechanism, without a dispute resolution function.

The Framework Convention was the first item of the CAHMIN's agenda, in line with the deadlines established by the Committee of Ministers. Considering that the Convention was intended as instrument open for non-members of the Council of Europe, the CAHMIN undertook to incorporate some of the ECHR principles and obligations (1994, para. 6-7).[74] In its 1994 Interim Activity Report, the CAHMIN informed about the decision to adopt "a pragmatic approach" by proceeding with the drafting of the Convention without an agreement on the definition of "national minority" due to the impossibility of a consensus[75]. The Committee undertook to develop the scope and nature of substantive provisions, and then determine the obligations of the states. The nature of the substantive provisions was defined as "programme-type" in the sense of determining the objectives that the participating States would undertake to pursue without direct application, allowing the States a vast margin of appreciation to develop the practical implementation measures (CAHMIN (94)10, para. 9). In 1994, the Committee prepared a scope of the substantive provisions, which was not subject to considerable change, safe for several amendments in the scope of religious freedoms and removal of the clause on prohibition of ethnic cleansing. Cultural or culture-related rights constituted the majority of the initial subject matters of the Convention (CAHMIN (94)10, para. 11). The initial list comprised the right to self-determination as a member of a minority group, linguistic freedoms (use of minority languages including before public institutions, use of personal names, public display of signs and inscriptions), education rights (including the teaching and learning minority languages), cultural freedoms (including development and expression of minority culture, language and customs) and the rights to

74 Council of Europe. Ad hoc Committee for the Protection of National Minorities. Interim Activity Report. Strasbourg, 15 April 1994. CAHMIN (94)10 [online]. Available at: https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=09000016800cceb3. Accessed in May, 2021.

75 The lack of consensus to define the notion of minorities is discussed in Weller, M. (2004).

participate in cultural life and trans-frontier cooperation. A restriction clauses were stipulated selectively only for several rights.

Upon the delegation by the Committee, the preliminary draft of the Framework Convention was prepared by the CAHMIN Chairman and Vice-Chairman with the assistance by the Council of Europe Secretariat by 10 May 1994.[76] The text of the initial draft was semantically close to the version eventually approved for ratification. In the process of the debate and internal amendment, the reference to states obligations as to the implementation of the conventional principles was eliminated from the draft's preamble, which was induced by the concept of the document, while the commitment to the "*implementation of principles*" established by the Convention was introduced. The scope to the safeguards for the identity was further developed with the commitment to create conditions under which persons belonging to minorities should be able to "*express, preserve and develop*" their identity, which constituted a reinforcement of the initial declaration for enabling the promotion of identity. Furthermore, the draft convention was supplemented with the expressed recognition of a collective component of the rights, by introducing part 2 into Article 3, under which the convention could be exercised "*individually as well as in community with others*".

The initial draft did not contain a commitment to adopting measures in the fields of education, culture and the media, that were consequently introduced with the aim to facilitating respect, understanding and co-operation among all residents of the participating States. The anti-discrimination clause safeguarding this rights was introduce to ensure equal implementation, "*irrespective of those persons' ethnic, cultural, linguistic or religious identity*" as well as those aimed at protecting against violence or discrimination on ethnic, cultural, linguistic or religious grounds. Moreover, the scope of rights and freedoms under the initial draft did not contain the freedom of religion and beliefs and

76 Council of Europe. Ad hoc Committee for the Protection of National Minorities. Preliminary Draft Framework Convention for the Protection of National Minorities (prepared by Chairman and Vice-Chairman of the CAHMIN with the assistance of the Secretariat). Strasbourg, 10 May 1994. CAHMIN (94)12 [online]. Available at: https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=09000016800cceb4. Accessed in May, 2021.

the right to establish religious institutions. These commitments were integrated into the draft at a later stage as additional articles (Articles 6 and 8 of the FCNM). The initial draft inherited the obligation of the public authorities to ensure the response communication in the language of the minority, which aimed at ensuring meaningful enjoyment of the right to official communication in minority languages, to fill the gap left within the ECHR mechanism. The provision was highly contested and during discussions within the Committee it was removed and returned from the initial provision. The removal of the right was admittedly blurring the scope of the respective obligation of the authorities to ensure the response is given to the minorities in the language of the petition, however the practical implications and difficulties did not ensure concurrent efforts of the States. Restriction was also imposed on the initial formulation under the draft proposal of the right to display toponyms in minority language, which constituted a very practical yet highly debated entitlement. The version of the text was amended, to have the disjunction "or" used in initial formulation "*in regions traditionally inhabited by national minorities or by substantial numbers of a national minority*" removed, to allow the display of geographical references in minority languages to the "*traditionally inhabited by substantial numbers of persons belonging to a national minority*". Moreover, in recognition of the transboundary relevance of the right, the implementation of the provision was made conditioned to the international agreements, as well as national legal frameworks.

Radical changes were introduced into the original wording and the scope of obligations with respect to education. Initial draft imposed the obligation on the State to "*school teaching favour[ing] mutual understanding and a spirit of tolerance*" (CAHMIN (94)12, Article 10), which, despite general compliance with the CoE statutory aims, allowed substantial state intervention into all types of school teaching, while creating a broadly phrased and imprecise norm establishing an obligation. It was eventually removed from the draft, while the respective commitments were framed as an obligation to "*foster knowledge of the culture, history, language and religion of their national minorities and of the majority*" (Article 12 of the FCNM), which developed the initial para 2 of Article 10. Crucially, an additional commitment to ensure equal access to education for minorities was introduced into the draft proposal. Educational rights imposing financial obligations on the states were eliminated from the draft

proposal, in particular, the obligation for financing compulsory education for minorities was removed from the entitlements under para 2 of Article 11 (CAHMIN (94)12). The list of linguistic rights had not initially contained the reference to the obligation to study the state language, which was introduced indirectly, through the reservation withdrawing any potential effect of linguistic education related to minority cultures on the obligation to learn the official language (para 3 Article 14 of the FCNM).

Another proposal that did not sustain debates was the obligation to ensure the free movement within the territory, free choice of residence within the state and the obligation to deny entry and on collective extradition of non-citizens belonging to national minorities (CAHMIN (94)12, Article 15). These were eventually introduced in a general respect into the ECHR with additional protocols, and the discussion within the preparation of the FCNM certainly set the terrain for the further extension of the ECHR catalogue. However, in the year 1994, the article was removed entirely (CAHMIN (94)12, Article 17). Changes were also introduced into the scope of the limitations on the freedom of assembly and expression, aligning the provision with the principles under the ECHR (CAHMIN (94)12, Article 20). The text of the preliminary draft did not contain the provisions regulating the monitoring mechanism, which was elaborated consequently with the involvement of the Committee of Ministers and the Parliamentary Assembly[77].

The preliminary draft was open to the comments of the Committee of Ministers and the delegations of the member States of the Council of Europe, which offered proposals to the amendments of the text.[78] The proposals of the national delegations concerned primarily the nature of the obligations and the scope of the rights catalogue, and led to a subsequent partial revision of the draft Convention.[79] Several aspects

77 Discussed elsewhere in the present work.

78 The proposals were submitted by ten national delegations, including the Austrian, Bulgarian, Hungarian, Norwegian, Portuguese, Romanian, Slovak, Swedish, Swiss and Turkish delegations, as well as the proposals from the Council for Cultural Cooperation (CDCC).

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raised the joint concern of the delegations, including the criticism (expressed, *inter alia*, by Austria and Romania) of the clause referencing the requirements of democratic society in the prohibition of assimilation, which was removed following a heated debate and inconclusive 8/8 vote at the *ad hoc* Committee; the extension of the rights catalogue to tangible cultural heritage (Norway, Portugal), reconsideration of the nature of obligations (Hungary, Romania, Switzerland), considerations to the linguistic rights and in particular ensuring effective communication with authorities (Austria, Romania, Hungary, Bulgaria, Slovakia, Switzerland, Turkey), as well as the territorial application or *ratione personae* of various provisions (traditional inhabitance, dispersed settlements, legal residence instead of citizenship, etc.; such considerations were expressed by the majority of delegations, including Turkey that called for legal residency requirement *in lieu* citizenship). Procedural aspects also entailed significant debate, in particular, the proposal for integrating the ECtHR case law into the interpretative system of the Convention (Austria, Romania). The Bulgarian delegation also proposed a conditional extension of **activity** of the Convention *ratione personae* to the "*persons belonging to ethnical, religious and linguistic minorities or regional cultures, who traditionally live on their territories*", as well as to clarify the relationships between representatives of the minority groups in regions where one national minority would form a comparative majority, thus shifting the state-wide majority groups into a minority status. Upon the proposal by the Norwegian delegation, Article 3 was supplemented with the reference to the enjoyment of the rights under the Convention individually or "in community with others", underlining the collective aspect of the minority rights. Besides extensive criticism expressed to the concept of the draft Convention by the delegation of Romania, the delegation supported the plan to introduce the provision establishing the obligations of minorities. That proposal was counteracted by the consideration expressed by the delegation of Switzerland that criticized the draft for the failure to establish "self-executing" entitlements, but providing derogation and limitation clauses, which were proposed to be restricted to the requirements by the "overwhelming public

Convention for the Protection of National Minorities (CAHMIN (94) 12). CAHMIN (94) 14 rev. Strasbourg, 10 June 1994 [online]. Available at: https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=09000016800cceb6. Last accessed in May, 2021.

interests" and cases of "serious manifest and imminent danger". Among other aspects, primary criticism expressed by the Austrian delegation concerned the limitations in the framing of the entitlement to use minority language in communication with administrative authorities, while the national practice included the judiciary. The delegation proposed respective extension of the entitlement and simplification of the wording, eliminating some reservations, proposing implementation format and strengthening the commitment. Other proposals attempted to bring the text closer in line with the principle of equality before law in ensuring access to training in and of minority languages in private and public educational institutions. Additional proposals were made regarding the initiative to elaborate the monitoring mechanism based on provision of national expertise, at the same time the criticism was raised against the connection of the implementation of the framework Convention with the ECHR case-law principles. As follows from the overview, all elements of the entitlements and underlying procedures, both in technical and conceptual aspects, raised considerable discord among participating delegations.

The proposals for amending the rights catalogue reflected varying national political systems and approaches to resolving the minority situation, and also originated from the differences in the social and economic conditions of Member States of the Council of Europe. The Bulgarian delegation, *inter alia*, promoted the rights to inter-group association and exchange as a conflict prevention measure, which was partially reflected in the final version of Article 17 of the FCNM. The Hungarian delegation made several proposals with respect to both the material and procedural aspects of the Convention. Inter alia, the delegation proposed to explicitly determine the modes of participation in social, cultural, economic and public affairs by the requirements of the public authorities, but to have it implemented under the condition of extended local autonomy and decentralization, which aimed to increase the participation of local authorities. As there was no definite framework of the oversight mechanism elaborated by then, the Hungarian delegation also proposed a framework of the monitoring mechanism by a commission composed of independent international experts entitled to examine state reports, in communication with the representatives of the respective minorities, that would provide their conclusions to the Committee of Ministers for recommendations. This

proposal became a close model for the Advisory Committee. The delegation of Hungary also proposed a mechanism of advisory opinions to be provided by the ECtHR, upon requests by the Committee of Ministers; the proposal was explained by the similarities in wording of the provisions of the draft Convention and the ECHR. Another proposal of the Hungarian delegation, which has not been incorporated, was to insert a modified version of the Marten's clause to the draft, underlining that national minorities were under the international protection and rule "of the law of nations", until a more comprehensive international legal instrument was developed, linking the international law with the European common heritage and destiny of European nations. The proposal was based on considerations of the necessity of a "definitive instrument", which the planned FCNM was not to constitute by design, and in anticipation that the adoption of the additional Protocol to the ECHR was going to be delayed. In principle, that was an indication of the dismissive political attitude to the future frame of the FCNM.

Several proposals by the Norwegian delegations were consequently introduced into the text and to some extent widened its scope. A successful proposal concerned the introduction of a general commitment to ensuring pluralism and co-operation in implementation of the entire Convention, as opposed to separate clauses previously supplementing selective provisions, and bearing relevance to all persons, without distinction to the belonging to the majority or minority groups, and irrespective of diverse cultural indicators among minority groups. This approach aligned the Convention with other international protection systems, in particular with the OSCE Copenhagen document, which was the source of the approach and the scope of the new commitment. Furthermore, the new obligation to "*combat racial, ethnic and religious hatred, anti-semitism, intolerance, and discrimination of persons belonging to national minorities*" proposed by the delegation was incorporated in a more generalized to version "*take appropriate measures to protect persons who may be subject to threats or acts of discrimination, hostility or violence as a result of their ethnic, cultural, linguistic or religious identity*" (Article 6 of the FCNM). The wording proposed by the Norwegian delegation was integrated almost without amendments into the final Article 12 on the right to education. The Norwegian delegation's proposal aligned it with the general approach to equality and tolerance and extended the entitlements to all education

levels, forms and culturally sensitive subjects, including language and religion, and ensuring professional training of educators. The proposal to amend the provision on participation in cultural, social, economic and public affairs was partially integrated to amend the nature of states' obligations, changing it from "*favouring*" participation to the obligation implying adoption of measures to ensure it. However, the scope of participation, which was proposed to be extended by including the decisions affecting areas of residence and matters related to the minorities the individuals belong were not incorporated, which de facto limited the scope of influence of the persons belonging to the minorities to the issues directly relevant to them individually.

However, the proposed obligation to safeguard cultural heritage of the minorities, including "*monuments and places of worship*", was not integrated and, despite several further attempts, remained unaddressed in the Framework Convention and the ECHR. An attempt by the delegation of Portugal to extend protection to artistic heritage of minorities in general and architectural heritage in particular was also unsuccessful, as well as their proposal to incorporate the minority groups' values into the scope of the cultural identity safeguarded by the Convention, while further streamlining of tolerance into the wording of the Convention was successful with respect to the aims pursued through media access entitlements (reflected in para 4 Article 9 of the FCNM). The delegations of Portugal and Sweden proposed to extend the rights catalogue with the right to the freedom of religion. The proposal of Sweden was based on the Copenhagen Document, while the delegation of Portugal submitted a more extensive version, incorporating the right to change one's religion, the right to manifest religion or beliefs, to form religious organisations, and to "*manifest that religion or belief, in worship, teaching, practice and observance*" was implemented partially, re-formulated into a more generalized norm of Article 8 providing for "*the right to manifest his or her religion or belief and to establish religious institutions, organisations and associations*", closely in line with the proposal of the Swedish delegation. The delegation of Portugal supported the proposal to extend the obligations related to education in and of minority language to both public and private institutions. Furthermore, the right to participation was proposed to be extended to national, regional and local level, and conditions for effective participatory approach were established in the proposal. Although they were not integrated into the text of the Convention, the

provisions can be traced in the explanatory report to the Convention drafted by the CAHMIN.

Comments on the draft Convention were submitted by various Council of Europe agencies, including the Council for Cultural Cooperation (CDCC), the Directorate of Legal Affairs at the request of the Directorate of Human Rights[80], and the Directorate of Human Rights. The commentary directly relevant to the regulation of the cultural rights was made by the CDCC. Although it was not integrated into the draft in the original form, its effects on the conceptual framing are tangible in the final version of the Convention. The CDCC favoured introduction of a separate article dedicated to cultural rights of minorities, which it did not actively promote, however, due to the admitted mainstreaming of cultural rights throughout the draft Convention, which was recognised in the CDCC's submission. The CDCC's proposal to substitute initial reference to minorities' customs with cultural heritage as a component of minority identity in Article 5 of the Convention was accepted. However, the provision safeguarding the right of persons belonging to national minorities to determine their culture and belonging to a cultural group did not succeed, although the self-identification in determination of affiliation with a minority group is a key concept semantically originating from Article 3 of the FCNM, and is developed by the Explanatory report to the Convention.[81] As affiliation to a minority group is based on the identity concept, which includes culture as a constituent component, it appears that the Convention conclusively incorporates the philosophy of the CDCC's

80 Council of Europe Ad Hoc Committee for the Protection of National Minorities. Summary of the Main Points Raised by the Opinion of the Directorate of Legal Affairs on the Draft Framework Convention prepared by the Directorate of Human Rights (CAHMIN (94) 25). Strasbourg, 18 August 1994 [online]. Available at: https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=090000016806b2455. Last accessed in May 2021.

81 The CDCC proposed to introduce a separate Article with the obligation of States to "secure to persons belonging to national minorities the right freely to choose their own culture and the group with which they do, or do not, identify". The proposal of the CDCC underlined the fundamental aspects of the self-identification and intercultural component for the effective integration of national minorities, capable of contributing to conflict prevention and facilitating sustainable inter-group dialogue.

proposal. The same argument can be considered relevant to the CDCC's proposal to forge the entitlements in the field of education to intercultural perspective, which however follows from the wording of Article 12 in conjunction with the Explanatory report commentary, although the text of the Convention alone does not ensure the mainstreaming of the intercultural exchange, meant by the CDCC. As the proposals of the CDCC for the conceptual development of the Convention was not incorporated into the working documents of CAHMIN, it lead to official allegations of "compartmentalization" in the work of the Council of Europe on the FCNM, expressed also in the submission of the CDCC to the CAHMIN and Committee of Ministers, which, however, did not shift the political prevalence in the drafting process.[82]

The comments prepared by the Directorate of the Legal Affairs did not concern the substance of the rights catalogue, and did not bear explicit relevance for the cultural rights per se, but attempted to diminish ambiguity and substantial and linguistic contradictions within the text of the Convention. One of the few proposals that concerned the substance of the obligations undertaken by the States under the Convention concerned the derogation, limitation and restriction clauses. Although their scope was eventually limited in the FCNM to apply to a narrow scope of provisions, the wording of the derogation clauses refers to their applications to the "principles" established by the Convention. The Directorate of the Legal affairs (and some national delegations) underlined the inconsistency of derogating or limiting the application of "principles" as opposed to the conventional application to norms and tangible legal obligations. The Directorate's remark that "*[t]he obligations contained in Chapter II already allow Parties a rather wide margin of appreciation making the necessity of yet another escape clause doubtful*" followed with a logically sustainable proposal to remove the formulation in order to avoid lack of clarity, which, to the opinion of the DoLA, could not be eliminated by the reference to "*rights and obligations established by the Convention*" did not achieve political support. Besides the purely linguistic reformulations, some of the

82 CAHMIN (94) 14 rev. and related CDCC's Memorandum CN/80/MC, para. 1 page 25, proposing draft articles to the FCNM.

Comments by the Directorate of Human Rights[83] entailed conceptual changes. The examples of those could include the alternatives proposed for the formulation of the entitlement to public use of topographic indications in minority languages, which would potentially entail differences in territorial applications (traditionally inhabited administrative areas v traditionally inhabited areas) or objective requirement indicator (request by minority groups corresponding to the real need v upon request by minority groups v sufficient demand).

In August 1994, several of the national delegations submitted additional proposals with respect to framing of the monitoring mechanism.[84] The mechanism, in its structural aspect, echoed, to a large extent, the original proposal by the Venice Commission. A nine-member supervisory body appointed for the period of six years by the Committee of Ministers from the roster comprised of State-nominated experts, would be in charge of analyzing state reports on implementation practice, with an additional ad hoc member elected for examination of the reports, when the country is not otherwise represented in the Committee. The functional scope under the proposal was entirely different from the original version by the Venice Commission. The proposal provided a possibility of issuing confidential recommendations to the States, which became a special feature of the delegations' proposal. The Committee of Ministers would be entitled to determine, by a two-thirds majority, whether a resolution should be adopted on the proposed recommendations. The proposal did not contain a reference to the methodology for the evaluation of the situation or the reports, but the Explanatory report

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83 Council of Europe Ad Hoc Committee for the Protection of National Minorities. Proposals for linguistic changes to the draft framework Convention for the protection of national minorities. Document prepared by the Directorate of Human Rights. CAHMIN (94) 26. Strasbourg, 30 August 1994 [online]. Available at: https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=09000016806b2456. Last accessed in May 2021.

84 Council of Europe Ad Hoc Committee for the Protection of National Minorities. Informal proposal for further discussion in the CAHMIN submitted by the delegation of the Netherlands in co-ordination with Belgium, Germany, Hungary, Norway and Portugal. CAHMIN (94) 24. Strasbourg, 18 August 1994 [online]. Available at: https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=09000016806b2450. Last accessed in May 2021.

from the delegations referenced analysis of additional input by non-government stakeholders as sources of background information. The qualified majority requirement for deciding on Committee of Ministers' decision whether to adopt a resolution based on confidential recommendations of the Committee is clarified by the fact that such recommendations might not concern only the matters of law or fact, but imply political considerations. Furthermore, the proposal's lack of consideration to the transparency requirement was reflected in the requirement of specific request for publication of the States' reports. The draft of the Convention was finalized in September – October 1994 with the engagement of the Committee of Ministers, in line with its decisions and the extended terms of references to the CAHMIN, adopted at the 516th meeting of the Ministers' Deputies.[85] As Phillips (2013, p. 17) recollected, the Convention was elaborated by CAHMIN and negotiated with the member States *in camera*, without effective participation of NGOs or academia in its preparation, resulting in intense criticism after the Convention entered into force.

3.2.2. The Monitoring Mechanism

The criticism to the new Convention was not only external and not limited to the practitioners and the academia. The international community, including the political and expert bodies of the Council of Europe expressed their disappointment in the newly created document. One of the reports of the Committee on Legal Affairs and Human Rights of the Parliamentary Assembly Reports developed soon after the text of the Convention was finalized read that *"[…] the Framework Convention is weakly worded and formulates a number of vaguely defined objectives and principles, the observation of which will be an obligation of the Contracting States but not a right which individuals may invoke*." (Doc 7442 (1995), para. 8)[86]. From that, the Rapporteur devised the exceedingly

85 Council of Europe Ad Hoc Committee for the Protection of National Minorities. Decisions of the Committee of Ministers concerning the work of the CAHMIN at the 516th meeting of the Ministers' Deputies. Decisions CM/Del/Dec(94) 516. Strasbourg, 8 September 1994 [online]. Available at: https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=09000016806afbdd. Last accessed in May 2021.

86 Council of Europe Parliamentary Assembly Committee on Legal Affairs and Human Rights. Report on the Rights of National Minorities. Rapporteur: Mr Bindig. Doc 6442 (1995). 20 December 1995. [online]. Available at: https://assembly.coe.int/nw/xml/XRef/X2H-Xref-ViewHTML.asp?FileID=7031&lang=EN. Last accessed in May 2021.

important role of the future advisory committee, the view that was uniformly shared (Alfredsson: 1998, p. 292).

Due to the lack of compromise on a number of contested provisions, the Committee of Ministers assumed drafting the regulation of the monitoring mechanism[87]. Articles 21 – 23 on the monitoring mechanism were finalized in October 1994, and forwarded to the CAHMIN along with the explanatory report and editions of the substantive part.[88] The provisional framework for the monitoring mechanism was not detailed but rather conceptually formative, leaving its forging to the future regulation by the Committee of Ministers. Provisionally, the Committee stipulated a transparent reporting system overviewed by the Committee of Ministers as to the "*adequacy of the measures taken by the Parties to give effect to the undertakings set out in this Convention*" in the assistance of an advisory committee. The proposal also contained a separate provision for participation of non-Member States of the Council of Europe in the monitoring mechanism, subject to unspecified modalities. In its Interim reply to Recommendation 1255 (1995) on the protection of the rights of national minorities and Recommendation 1285 (1996) on the rights of national minorities, the Committee of Ministers[89] briefed the Parliamentary Assembly that, in line with the

87 In view of the lack of progress in deliberating the final version of the text, the Committee of Ministers moved the deadline and advised the CAHMIN to "*concentrate their work on solving still outstanding unsettled parts of the draft […] and to establish bilateral contacts outside formal meetings in order to find compromise solutions in respect of the articles […] causing problems*" (CM/Del/Dec(94) 516, item 4.3).

88 The amendments to the material regulation concerned the finalization of the rights to use toponyms and patronyms in the minority languages as well as the removal of the provisions prohibiting ethnic cleansing. Council of Europe Ad Hoc Committee for the Protection of National Minorities. Decisions of the Committee of Ministers concerning the work of the CAHMIN at the 517bis meeting. Decisions CM/Del/Dec(94) 517bis. CAHMIN (94)31. Strasbourg, 7 October 1994 [online]. Available at: https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=09000016806b23c4. Last accessed in May 2021.

89 Council of Europe, Committee of Ministers. Interim reply to Recommendation 1255 (1995) on the protection of the rights of national minorities and Recommendation 1285 (1996) on the rights of national minorities. Doc. 7519. Adopted on 3 April 1996 at the 562nd meeting of the Ministers' Deputies. Strasbourg, 12 April 1996 [online]. Available at:

decision of the Meeting of Ministers' Deputies (560th meeting), it was agreed to undertake the work on the implementation mechanism under Articles 24-26 of the framework Convention. For those aims, the Ministers' Deputies required clarification of the normative scope under the Convention to be conducted by an Ad hoc Committee of Experts on the Implementation Mechanism of the Framework Convention for the Protection of National Minorities (CAHMEC), which would include a representative from the Parliamentary Assembly. The CAHMEC's report was to constitute a basis for an ad hoc committee of Deputies, in participation of experts, tasked with forging a concept for the mechanism. The CAHMEC would eventually draft the normative and procedural regulation for the implementation mechanism. The Parliamentary Assembly elaborated criteria for forming the commission and the primary principles of its work (Doc 7442(1995), Explanatory memorandum, para. 7-10). The appropriate procedure for Committee's election was to be construed on the example of the European Commission of Human Rights or the European Committee for the Prevention of Torture and be elected by the Committee of Ministers from a list of names compiled by the Bureau of the Assembly from three candidates put forward by the national delegation to the Assembly. The modus operandi requirements, developed by the Parliamentary Assembly, was the explicit request that the advisory committee should be entitled to receive and accept for consideration the information from alternative sources to avoid limiting the assessment of the governments' perspective.

As the monitoring mechanism was not developed by the time the Convention entered into force, and the design of the oversight and monitoring mechanisms constituted a matter of further political and technical debate. The Convention stipulated periodic reporting by States parties that would cover legislative and practical measures to fulfill the requirements of the Convention. The information is to be reported also upon the request of the Committee of Ministers.

Article 26 of the Convention stipulated a creation of an advisory committee tasked with assisting the Committee of Ministers in evaluation of the reports. The committee's mandate and composition

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https://assembly.coe.int/nw/xml/XRef/X2H-Xref-ViewHTML.asp?FileID=7454&lang=EN. Last accessed in May 2021.

were defined as follows: "*In evaluating the adequacy of the measures taken by the Parties to give effect to the principles set out in this framework Convention the Committee of Ministers shall be assisted by an advisory committee, the members of which shall have recognised expertise in the field of the protection of national minorities*." The Convention established no further guidelines to the implementation of the provisions, save for tasking the Committee of Ministers with their forging, within one year after the Convention enters into force, which required further elaboration. The Explanatory report supplemented the conventional requirements with the transparency principle, to be extended to the procedures of the commission and the substance of monitoring, including publication of the reports (para. 97). The rules on the monitoring arrangements under Articles 24-26 of the Framework Convention for the Protection of National Minorities were finally enacted by the Committee of Ministers in its Resolution Res(97)10 on 17 September 1997 at the 601st meeting of the Ministers' Deputies.[90] The rules created the Advisory Committee of 12 to 18 ordinary members, with "the recognized expertise in the field of protection of national minorities, nominated by the States parties, but serving in their individual capacity, independently, impartially and effectively (Res(97)10, para 1 (1-6)). The ordinary members of the committee were elected from the roster maintained by the Committee of Ministers from the nominated candidates nominated by States parties via the Secretary General (para 2). The members were elected by the Committee of Ministers for the term of four years with a limit of two terms. In order to increase rotation, the term of office could be extended or shortened by two years (Res(97)10, para. 2.b.16-17). Additional members were elected for the consideration of a country's report without voting rights (Res(97)10, para. 4.19, 34). The formation of the Committee was described (Phillips: 2013, p. 30) as primarily transparent, leading to the selection of the majority of independent experts who represented a diverse range of academic disciplines with extensive profile of

90 The rules adopted by the Committee of Ministers on the Monitoring Arrangements under Articles 24-26 of the Framework Convention for the Protection of National Minorities. Resolution Res(97)10. 17 September 1997, 601st meeting of the Ministers' Deputies [online]. Available at: https://rm.coe.int/16804f9214. Last accessed in May 2021.

cooperation with NGOs and minority communities, while the gender balanced was achieved later in the process of Committee's functioning.[91]

The primary criticism to the mechanism (Alfredsson: 2000, p. 296) for the additional supervisory stage that a political body, the Committee of Ministers occupied, which was seen as contradictory to the rule of law. The Parliamentary Assembly therefore insisted on the committee's independence, transparency and entitlement to engage in "real dialogue" with the governments. The functions and scope of measures the Administrative Committee was entitled to adopt were limited to the consideration of written submission of Parties, and additional sources subject to preliminary approval by the Committee of Ministers (Res(97)10, para.5.32). Meetings with other stakeholders could be allowed upon specific ad hoc extension of mandate by the Committee of Ministers (Res(97)10, para.5.32). The Advisory Committee were not entitled to participate in the work of the Committee of Ministers. Thus, the Advisory Committee under the initial monitoring mechanism was limited in functions, working tools and the effect of its performance was characterized by low visibility, despite the publication of the reports. The reports and opinions adopted by the Committee of Ministers and the Advisory Committee should be published simultaneously.

The first Vice President of the ACFC Alan Phillips, described (2013, p. 15-42) the challenges the ACFC faced upon the start of its mandate in 1998. He noted that given the broad formulations of the text of the Convention, widely criticized by the expert community upon the adoption of the instrument, the Committee was left with the task to prove whether that feature could turn into the benefit of the Convention and could be turned into a working tool, considering its significance as the first legally binding international instrument in the field of minority rights and high international expectations. The Committee was challenged by the pre-eminent concern, in particular,

91 Although Phillips described the initial composition of the Committee as primarily independent, he also mentions that there was an understanding that some members of the Committee were "closer to the governments", while some appointees withdrew when it became clear that their nomination was considered as governmental appointment. Nevertheless, Phillips underlined that those dynamics did not hinder objective and impartial scrutiny of reports or the monitoring process overall.

expressed by NGOs, of its own independence and professionalism (2013, p. 23). The challenge was, therefore, in ensuring that the Committee could insist on the Parties approaching the Convention as a legal commitment, implying compliance with the rule of law and consistency principles in implementation practice, rather than "flexible principles and politics of convenience" (Alfredsson: 2000, p. 297). Furthermore, during the initial period of its functioning, the Committee faced the deficiency of the State parties' reports that often lacked the factual or legal information, leading to the necessity of developing reporting guidelines, reporting assistance kits and a state report outline that would ensure Article-by-Article description of the national developments (2013, p. 26 and p. 37).[92] Minimal reporting standards became necessary due to the wide formulations of the Convention, its framework format and multiple reservations submitted by the Parties upon ratification. The Committee was brought to ensure that the Parties' interpretation of the instrument would not limit its scope but broadened it, as the dominating understanding among Committee members was that "*a well-functioning monitoring mechanism could substantially contribute to overcoming some of the pitfalls of different and restrictive interpretations*" (2013, p. 26). Therefore, from its first assembly in May 1998, the Committee members undertook to act attempting to "*ensure the integrity of this unique instrument of international law*", high quality of the interpretation of the text and the highly estimated effective cooperation with the primary actors under the Convention, the States and the minority organisations, that would allow to ensure constructive work in what was estimated as a highly political domain (2013, p. 26). The Committee's primary concern was to ensure harmonized interpretation of the Convention and the processing of evidence submitted by the stakeholders in the course of reporting to develop a nuance based approach to the minority rights (Hofmann: 2001, p. 239). In 2009, the transparency measures were formalized under the Resolution CM/Res(2009)3 adopted by the Committee of

92 The significance of the reporting assistance kits to be developed by the ACFC was highlighted by Gudmundur Alfredsson during a CoE Minority Rights Seminar in Strasbourg in October 1998, who effectively conjured the future reporting format and the scope of the requirements for the reporting framework to ensure meaningful implementation of the Convention that the commitments; he recommended the test of reporting to be in the evidence that the principles of the Convention are effectively integrated into the everyday life of the communities and individuals (2000: 296-299).

Ministers on 16 April 2009 at the 1054th meeting of the Ministers' Deputies.[93] The Resolution provided for specific deadlines, of four and twelve months, when the reports by the Advisory Committee could be published, without expressed consent of the respective State and pending the publication of the opinion by the Committee of Ministers. This could be considered as an enforcement of the legitimacy of the Advisory Committee and the recognition of its significance as an independent expert body with a political weight.

The Committee's methodology on the assessment of the states' practices was developed in close consultation with the Committee of Ministers, which was meant to ensure the institutional credibility of the opinions, proving important and instrumental in the context of the initial opinions being contested by the states (Phillips: 2013, p. 38). Upon Phillips' account (2013, p. 33), the fact that the Committee was limited in its access to other sources of information by the obligation of preliminary requesting it from the Committee of Ministers was widely perceived as a form of political censorship and a limitation of the independence of the work of the Committee. That led to the Committee's address to the Committee of Ministers on abolition of limitations to seek additional information, which was approved by the Committee of Ministers with the decision adopted at its 835th meeting on 8 April 2003.[94] That decision was crucial in the development of the

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93 Council of Europe, Committee of Ministers. Resolution CM/Res(2009)3 amending Resolution (97) 10 on the monitoring arrangements under Articles 24-26 of the Framework Convention for the protection of National Minorities. 16 April 2009. 1054th meeting of the Ministers' Deputies [online]. Available at: https://www.refworld.org/pdfid/4a76e4db2.pdf. Last accessed in May 2021.

94 Importantly, the decision brought the concept of the Advisory Committee closer in line with the concept initially lobbied by the Parliamentary Assembly. In its 1996 Recommendation, the Parliamentary Assembly called for allowing the Advisory Committee to "*draw its information from a wide range of sources and to act on its own initiative; allowing the committee also to enter into a dialogue with the government of the contracting party concerned as well as with national minority groups and to publish its reports and recommendations with the authorisation of that government or, in special cases, without such authorisation*" (para 15, Parliamentary Assembly. Recommendation 1285 (1996). Rights of national minorities [online]. Available at: https://pace.coe.int/en/files/15319/html. Last accessed in May 2021).

monitoring regime and the standard setting under the Convention, as it allowed due presence of minority groups and organisations to provide their perspective though alternative reports (Phillips, 2013: 33). Currently, the submissions of minority groups' representatives and NGOs have been closely integrated into the evaluation framework and have been mainstreamed into development of the good standards under the Convention. Consequently, the monitoring methodology was further developed with ACFC's visits to the States parties upon the States' invitations. Phillips highly evaluated the effect of that methodological development, which, upon his account, "became central in monitoring the Framework Convention and ha[d] transformed the methodology into a process of engagement of government departments and civil society, including national minorities", building confidence among stakeholders, including minority groups and NGOs the Committee could directly meet with, and helping to ensure local ownership of the Committee's conclusions (2013, p. 34-35; Hofmann: 2004, p. 20). Public consultations of Parties organized within the framework of preparing the states reports with minority groups, first organized by the UK, has transformed into a good practice in the monitoring mechanism, transforming into "custom and practice", along with national conferences dedicated to the Convention (Phillips, 2013, p. 37-38).

The monitoring framework was recently revised under the Committee of Ministers' Resolution CM/Res(2019)49, that also entailed the revision of the Rules of Procedure for the monitoring body. The revision de facto reflected the change in the status of the Advisory Committee and formalized its extending role. The revised monitoring mechanism for the implementation of the Framework Convention entered into force on 1 January 2020 in line with the Committee of Ministers' Resolution CM/Res(2019)49. The current monitoring mechanism did not substantially change the organizational framework of the monitoring mechanism, but amended the functions of the Advisory Committee and extended the scope of measures within its mandate.[95] In line with the new Rules of Procedure of the Advisory

95 The current mechanism maintains the Advisory Committee composed of ordinary and additional members. The number of ordinary members is limited to 18 and cannot be less than 12 (CM/Res(2019)49, para. 1), while each State Party can be represented by one member only. Ordinary members are

Committee, it includes a Gender Equality Rapporteur, signaling the dedication to integrate gender perspective in the implementation procedures related to the framework Convention (Rule 11).

The monitoring functions in the updated version encompass examination of periodical reports submitted by States parties to the Committee of Ministers via the Secretary General every five years (1995 Convention, Article 25; CM/Res(2019)49, para. 22). The reports are made public upon receipt by the Secretary General. The reports are transmitted by the Committee of Ministers to the Advisory Committee that examines them and drafts opinions for the Committee of Ministers. The Committee of Ministers decides on the adequacy of the measures adopted by the States based on the Advisory Committee assessment, and may issue recommendations to the States with deadlines for reporting on their implementation (CM/Res(2019)49, para. 27). The opinions are published following a response comment by the State concerned, as well as the opinion and the recommendations adopted by the Committee of Ministers. In case of a 12-month failure to report, the Advisory Committee is entitled to trigger an extraordinary monitoring procedure. The decision is subject to approval by the Committee of Ministers (CM/Res(2019)49, para. 26). The Committee of Ministers resolution CM/Res(2019)49 established the working methods of the Advisory Committee for the consideration of periodic reports. These include (para. 27) the scope of competence (primary competence – adoption of conclusions, with a possibility of developing recommendations and deadlines for their implementation). The Committee was now made entitled to request additional information

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elected for a four-year term from the list of experts nominated by contracting States (CM/Res(2019)49, paras. 8, 16). One half of the membership has to be renewed every two years (para. 17). To these aims, the Committee of Ministers may decide to extend the term of office of some members up to six years, or to decrease their term of office but not less than up to two years. Each State party may nominate two eligible candidates (para 8), of which one can be elected by the Committee of Ministers (para.9). Elections are conducted in chronological order depending on the date of candidacy submission by the respective State (para. 10). If the number of candidacies exceeds the number of vacant seats, the candidates are chosen by lot (para. 15). The members of the committee are exempt from voting on opinions related to their nominating State (para. 19). Additional members participate in the work of the committee in advisory capacity and are elected for participation in examination of reports of their State party, in case it is not represented by an ordinary member (paras. 20-21).

from the State party, and seek additional information from international organisations, ombudsmen, national institutions for the promotion and protection of human rights, as well as non-governmental organizations and civil society (para. 31). Meetings with participation of the representatives of the respective States and the Advisory Committee can be initiated by either of the party during the consideration of the respective reports (para. 32). The Advisory Committee may hold country visits meeting representatives of the involved stakeholders. Country visits are organized "*complement the information received in writing or to evaluate the practical implementation of the measures taken*" (para. 35). Country visits can also be initiated on an ad hoc basis, when the Advisory Committee considers that "*a situation or development warrants an urgent examination in the light of the principles set out in the Framework Convention*" (para. 40). Such ad hoc visits are agreed upon with the Committee of Ministers, and may be substituted with the urgent request for information, if the situation so allows.[96] It is to be noted that the country visits were integrated into the methodology of the monitoring mechanism soon after its launch upon diplomatic agreements with the States Parties. In 2004, the first President of the Advisory Committee mentioned the introduction and effective implementation of that field work in member States as one of the components of the Committee's capacity to supersede the critical predictions on the FCNM implementation, improving its credibility, accessibility and quality of performance (Hofmann: 2004, p. 20). The opinion of the Advisory Committee is adopted after the exchange of comments with the State party concerned during a closed confidential preliminary procedure. The States concerned are entitled to comment on errors and omissions of factual nature, or requiring clarification (para. 37). The Advisory Committee also participates in the follow-up procedures and its members participate in the Committee of Ministers discussions on the implementation of their functions under the Convention. The views of the Committee on the good practices and standards for implementing the obligations under the Convention are reflected in four commentaries the Committee adopted since 2006 to 2016, summarizing its own approaches and decisions. The Four thematic commentaries concern the scope of application of the Convention (commentary no 4 adopted in 2016 (ACFC/56DOC(2016)001),

96 Two Participating States, the Russian Federation and Azerbaijan reserved the application of ad hoc procedure to them.

the very last one to be elaborated; no 3 (2012) dedicated to language rights (ACFC/44DOC(2012)001 rev.); no 2 (2008) on the right to participation (ACFC/31DOC(2008)001); no 1 (2006) on the right to education (ACFC/25DOC(2006)002).

Conclusions

The lack of political consensus and a common theoretical ground led to the lost momentum in international attempts to develop a framework of binding commitments on protection of cultural rights of minorities under supervision of a judicial institution. This chapter contributed into a comprehensive presentation of the normative developments and political efforts that surrounded forging of the contemporary mechanism for the protection of cultural rights of minorities within the Council of Europe *acquis*.

The analysis of the travaux preparatoires shows that the primary reason for the failed legal initiative to develop a binding legal instrument in the field was a failure to reach consensus on several crucial aspects pertaining to the scope and nature of the cultural commitments and concepts, as well as the formulation of definitions. The failured agreement during the preparatory work resulted from the lack of political will, primarily attributed to the reluctance of governments to empower minorities with the view to prevent separatist movements. However, in the course of the development of the draft protocol, considerable work significant for the conceptualization of minority rights in general and cultural rights in particular was conducted. The results of the efforts of the working group are useful for the current research, as it allows to deterine the scope of concepts used by the ECHR, EctHR and FCNM and its monitoring bodies. The questions raised during the work on two instruments can be useful for the elaboration of arguments on evaluation of practical implementability and justiciability of cultural rights.

The discourse surrounding the drafting of the additional protocol on cultural rights surfaced a number of theoretical issues pertinent to the minority cultural identity in Europe, the understanding of the minority communities and the political leverage for facilitating their legal status and influence in the democratic state- and policy-building. These issues

maintain their relevance in the current political discourse and conceptualisation efforts of expert bodies within international organisations, exemplified on the activities of the Venice Commission in the field of minority rights and political participation of the minority communities. The findings of the sub-chapter also create a further structural framework for the analysis of the ECHR protection mechanism in the field of cultural rights.

The thesis will proceed with the examination of the material aspects of the ECHR and FCNM, and analyse the interpretational inputs of the European Court of Human Rights and the Advisory Committee into the scope of rights protected under the Conventions, as well as the policy-making and legislative standards developed by the monitoring mechanisms.

Chapter 4

Protection of Cultural Rights of Minorities under the European Convention for the Protection of Human Rights and Fundamental Freedoms

This Chapter is dedicated to the analysis of case-law of the European Court of Human Rights (and to some extent of the former European Commission for Human Rights), related to cultural rights of persons belonging to national minorities, resolved by the ECtHR. The analysis will follow the conceptualization and taxonomy of cultural rights deliberated by the CAHMIN, the *ad hoc* committee responsible for the development of the Additional Protocol, to identify the extent to which the argumentation and approaches by the *ad hoc* committee have been eventually integrated into the Convention mechanism. The primary contribution of the successfully developed protocol would be in the appearance of the first regional instrument allowing to defend cultural rights before the judicial authority, thus contributing not only into the protection of individual rights, but also in technical elaboration of the cultural law doctrine within the Council of Europe jurisdiction. Nevertheless, despite the absence of the specialized normative framework, the ECtHR case-law contains precedents related to cultural rights of minorities.

The analysis will be guided by the capabilities theory in line with the established methodology, focusing on the scope of the entitlements, the nature of related obligations, the stakeholders, including the interpretation of the rights-holders recognized as legitimate beneficiaries from the protection mechanism, as well as locating convergences between human rights and cultural rights, used for enhancement of the protection. Particular attention will be paid to distinguishing the approaches and standards of adjudication, elaborated and applied by the ECtHR to safeguard equality, effective integration, facilitate dialogue and prevent discrimination. The scope of the selected case-law will attempt to cover the issues pertaining to the rights of persons belonging to national minorities, drawing from the approaches developed within the case-law related to a general scope of

rights-holders, but thematically applicable to the respective category of rights.

This chapter will examine the scope of issues that the Strasbourg institutions considered to fall within the scope of the Convention or, for the matter, not to be encompassed within the protection framework of the ECHR mechanism. It will delineate the reading given to the concepts of cultural identity, heritage, cultural traditions and related concepts and determine the extent to which they are developed within the case-law, and will aim to distil the principles and scope of their protection, attributed by the Court. The chapter will determine the intersections between cultural rights with other fundamental rights and freedoms delineated in the ECHR, and will identify where such intersections serve for mutual enforcement of capabilities due to the conjunctive application of the norms. The analysis will be structurally based on the primary matters referred to the scope of minority cultural rights during the work on the draft protocol, with additions of topics not covered by the drafters. The chapter will start with determination of the scope of application of the Convention *ratione personae* and general principles related to the obligations of the States. It will the proceed with the examination of the catalogue of cultural rights, starting from the primary concepts related to individuals, including protection of various components of cultural identity and lifestyle, and then will proceed with examining the intersections of other culture-related rights, including the protection of culture-related associations, activities, access to sites, as well as communication and education-related issues, including language and education. It will also examine the issues pertaining to the protection of cultural heritage under the Convention, and problems recognized to hamper its separate normative regulation.

The chapter will devise the standards and approaches of the Court for protection of cultural rights and the Court's requirements to national regulation and policies concerining cultural rights. These findings will be analysed under the capabilities approach. The contextual and teleological interpretation of the development of the case-law will be applied to establish the arguments behind the judicial solutions. The chapter will examine the approaches developed by the ECtHR, the European Commission for Democracy through Law and, where relevant, the work of thematic parliamentary committees and expert

groups that submitted the proposals as *amici curiae* with respect to particular cases.

4.1. Foundational Aspects of the Protection Mechanism

The European Convention does not provide the rights specific to minority groups, or cultural rights *stricto sensu*. However, the Convention, interpreted by the former European Commission for Human Rights and the Court "as a living instrument", responded and reviewed some issues related to cultural rights of persons belonging to minorities. Culture-related claims are resolved by the Court based on the existing scope of the material normative provisions of the Convention and its protocols, interpreted in line with the spirit of the Convention. The extended legal framework developed under the *aegis* of the Council of Europe is applied by the Court along with wider framework of the current international law, including the International Covenants and General Comments developed for their interpretation, and the case-law of the UN specialised agencies, to interpret the scope of the definitions and entitlements raised in the claims.

The adjudication of the cases is based strictly on the material scope of the Convention, its Protocols and in line with the case-law principles. The "general spirit of the Convention" is used as a conceptual frame for the argumentative basis. The Preamble of the Convention refers to human rights as the link between the principles of democracy, peace and justice, which are fundamental organizational goals also construed by the Statute of the Council of Europe. Democracy is forged by the Preamble as effective political process, which implies pluralism of visions and opinions, dialogue, and participatory approach in decision-making, actively streamlined by the Court in its case-law in forging the agency and scope of legitimate interests and entitlements of the rights-holders. Furthermore, the programmatic basis of the Convention encompasses "*a common heritage of political traditions, ideals, freedom and the rule of law*", which is applied within the Court's argumentation as a frame for obligations within the frame of individual entitlements to integrity, identity and its cultural components. Furthermore, as the common democratic heritage is construed as a prerequisite for collective enforcement of the Universal Declaration of Human Rights, the values, not explicitly referenced in the ECHR but provided by the Universal Declaration, including the Kantian ideas of the intrinsic worth of human person and dignity, as well as identity built on

cultural traditions and heritage, pave their way to the argumentation of the ECHR that forms the basis of its approaches to the majority of culture-related claims, as it will be discussed further in this chapter. Democracy, diversity and pluralism are evaluated by the Court in terms of their input into the social processes and the benefit they contribute into the political and social climate, with aim of bringing it further in line with the dominance of human rights. Hence, social cohesion is one of the benchmarks taken in consideration by the Court in its evaluation of domestic legal and policy guarantees, including in the fields underlining effective development of cultural identity of individuals. Forging the link between the fundamental democratic principles and culture, the Court underlined that *"[…] pluralism is also built on the genuine recognition of, and respect for, diversity and the dynamics of cultural traditions, ethnic and cultural identities, religious beliefs, artistic, literary and socio-economic ideas and concepts. The harmonious interaction of persons and groups with varied identities is essential for achieving social cohesion"* (*Gorzeik v. Poland*, para. 90). The listed cultural components, namely cultural traditions, ethnic and cultural identities, religious beliefs, artistic, literary and socio-economic ideas and concepts, are primary elements within the Court's case-law examined *ratione materiae* with respect to cultural rights of persons belonging to minorities, and will therefore be primary matters of this work.

The Commission and the Court determined the *ratione personae* and *ratione materia* scope of minority rights protection under the Convention in resolution of cases, related to self-affiliation with a particular minority, where discrimination on the based of a cultural elements pertinent to a minority affiliation was alleged. To define the scope of application of the Convention and the nature of allegedly discriminatory practices, the Court considered the nature of ethnicity and race. In devising interrelation of the two concepts, the Court determined that, in distinction from the primarily biological specification of human beings based on morphological attributions, ethnicity was approached as a social, primarily culturally determined construct that originated from "*[…] the idea of societal groups marked by common nationality, tribal affiliation, religious faith, shared language, or cultural and traditional origins and backgrounds*" (*Timishev v. Russia*, para. 55; *Sejdić and Finci v. Bosnia and Herzegovina* [GC], para. 43). The recognition of belonging to a national minority presupposes, in line with the case-law, a subjective element or agency consenting self-

attribution or respective treatment by others, which would determine the 'objective' recognition of person to belong to a minority by other individuals and in front of public agencies. Thus, the Court underlined that "objectively verifiable links" with an ethnic group, based on such cultural determinants as, for example, language, name, empathy etc., should not be viewed as restricted to the subjective elements and perception, but should be regarded as constructing objective evidence of affiliation to the group (*Ciubotaru v. Moldova*, para. 58). Thus, the regulation allowing the authorities to reject claims for official recognition of ethnic minority origin other than that registered by one's parents or the one of the title nation based on subjective and unsubstantiated grounds was not recognized disproportionate (ibid., para 58). While belonging to a minority could be acknowledged based on such cultural determinants, as a "shared language, religion, cultural and traditional origins and backgrounds" (*Sejdić and Finci v. Bosnia and Herzegovina* [GC], para. 43), it could be required for the applicant to prove the existence of respective ties (*Ciubotaru v. Moldova,* para. 56), while it was the States' obligation to ensure that was practically implementable. This approach was clarified to distinguish from delimitation of territorial jurisdiction within a State. The Commission devised that the existence of different legal jurisdictions in various geographical areas within one State did not constitute discrimination within the meaning of Article 14, recognizing that in such cases the differentiation made not being based on "association with a national minority" (app. no. 13473/87, Dec. 11.7.88; cf. similar arguments in the *Dudgeon* judgment of 22 October 1981, concerning alleged differentiation in status of homosexual acts in Northern Ireland and the rest of the U.K.).

The approach to defining the notion of national minorities and the requirements to the judicial interpretation were examined by the Grand Chamber of the Court in the case *Gorzelik and Others v. Poland*. In the case, the domestic courts rejected to recognize membership in a national minority group, as the national minority in question (Silesian) was not officially recognized in the respondent State as such. To establish the lawfulness of the interference with the applicants' right to the freedom of assembly, the Court examined the domestic definition of the notion of national minority and the foreseeability of the law on the national minorities. The Court analysed whether the interference was prescribed by law in terms of the factual presence of normative

regulation, and the quality of regulation as to its foreseeability (para. 64). The Court admitted that in light of a recognised difficulty to formulate a legal notion of minority, the absence of generally acceptable term in the international law, and the European consensus on recognition of minority attribution, reflected in the preamble of the FCPNM, the States were not obliged to introduce a particular concept of national minority in their legislation or introduce a procedure for their official recognition (para. 68). Therefore, the Court devised that the normative solution in the domestic law, establishing only as a general statutory categorization of minorities cannot be regarded insufficient, provided that the judiciary were to be interpreting the notion in the course of practical implementation (para. 69). That Court's conclusion excluded the recognition of arbitrariness, if a flexible normative approach to minorities was chosen, and admitted sufficient precision of regulation that implied a high degree of interpretation.

Article 14 of the Convention stipulates race, colour, language, religion, national origin and association with a national minority as grounds of discrimination prohibited under the Convention.[97] In the case of *Timishev v. Russia* (para. 56) the Court underlined that "[*r*]*acial discrimination is a particularly invidious kind of discrimination and, in view of its perilous consequences, requires from the authorities special vigilance and a vigorous reaction*". On several occasions, in deciding on the admissibility of cases, the Commission discussed indicators of affiliation with a particular minority. In deciding on admissibility of the case *X. v. Austria* discussed above (p. 88) the Commission also analysed what indicators, except for a language, would establish the fact of belonging of a person to a minority group. It concluded that affiliation and long established ties could indicate affiliation with national minority, even in case the minority language is not practiced. Differential treatment based on the delineated factors define the scope of protected areas, where some types of preferential treatments may lead to discrimination of a group. In its early decisions, the

97 Article 14 of the Convention provides other bases for discriminations, and reads as "*The enjoyment of the rights and freedoms set forth in [the] Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status*." The same grounds for discrimination are listed in Article 1 of Protocol 12 that prohibits discrimination in enjoyment of rights granted by law and by public authorities.

Commission clarified (*X. v Austria*)[98] the limits as to the scope of catalogue rights and rights-holders and underlined the supplementary nature of anti-discrimination clause stipulated in the Convention. The Commission underlined that the scope of minority rights protected under the Convention included cases of discrimination in enjoyment of other established rights, committed on the basis of minority attributable indicators. In its decision, the Commission stated that "*the Convention does not provide for any rights of a linguistic minority as such, and the protection of individual members of such minority is limited to the right no to be discriminated in the enjoyment of the Convention rights on the ground of their belonging to the minority (Article 14 of the Convention)*" (*X. v. Austria*, p. 92)[99]. The examination of the case as to the violation Article 14 of the Convention is not conducted separately on a uniform basis. The Court does not conduct separate violation of the principle of non-discrimination, if violation of other substantive articles is established, but "*a clear inequality of treatment in the enjoyment of the right in question is a fundamental aspect of the case*" (*Timishev v. Russia,* para. 53). Discrimination is then considered as an inalienable component of the contested practice.

Accordingly, the Court determined that, to ensure social cohesion and tolerance in light of growing differentiation within societies, the authorities were under a positive obligation to combat racism,

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98 The applicant alleged discrimination arising from the minority language census that did not allow persons belonging to a national minority by ethnic origin but not being speakers of a minority language to indicate the allegiance with a minority group. Despite admitting that the lack of option in a census to reflect affiliation with a minority a degrading treatment under Article 3, The Commission found the complaint inadmissible, having assessed that the applicant was not prevented to manifest belonging to a minority otherwise, while the aim of that particular census was in determining minority languages spoken in the country, and not to identify minority groups. Therefore, the application was found manifestly ill-founded. Although the decision mentions the absence of rights granted specifically to members of linguistic minorities, the decision was eventually interpreted and applied wider, indicating the lack of guarantees to any minority groups, save for the anti-discrimination clause mentioned above, when applied in conjunction to the violation of other rights from the ECHR catalogue.

99 The limitations *ratione personae* were reiterated in *Abdulaziz, Cabales and Balkandali v. the United Kingdom*, para. 71; *Petrovic v. Austria*, para. 22; *Sahin v. Germany* [GC], para. 85.

strengthening "democracy's vision of a society" (*Nachova and Others*, para. 145). Discrimination is established by the Court subject to demonstration of differential treatment in similar situations, and in the absence of an objective and reasonable justification (*Willis v. the United Kingdom*, para. 48). The lack of justification translates into the absence of a legitimate aim or lack of proportionality between the means applied and means pursued (*Sejdić and Finci v. Bosnia and Herzegovina* [GC], para. 42)[100], whereas racial discrimination is established in compliance with the international standards[101], when the differential treatment is based on one's actual or perceived ethnicity. The formulae applied by the Court for determination of discrimination include evaluation of the limitations as to whether there has been an interference on the applicant's right and whether the interference was justified (*Timishev v. Russia*, para 39 and 45)[102], implying that such interference shall be "in accordance with the law", pursue one or more of the legitimate aims and be "necessary in a democratic society" (*Raimondo v. Italy*, para. 39). Due to the egregious nature of the violation

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100 Established in *Andrejeva v. Latvia* [GC], no. 55707/00, 18 February 2009, para. 81.

101 In its case-law the ECtHR relied on the UN and ECRI definitions. General Policy Recommendation no. 7 on national legislation to combat racism and racial discrimination, Article 1 defines ethnic and racial discrimination as *"(b) 'direct racial discrimination' shall mean any differential treatment based on a ground such as race, colour, language, religion, nationality or national or ethnic origin, which has no objective and reasonable justification. ... (c)'indirect racial discrimination' shall mean cases where an apparently neutral factor such as a provision, criterion or practice cannot be as easily complied with by, or disadvantages, persons belonging to a group designated by a ground such as race, colour, language, religion, nationality or national or ethnic origin, unless this factor has an objective and reasonable justification*." The 1969 United Nations International Convention on the Elimination of All Forms of Racial Discrimination in Article 1 states that "*'racial discrimination' shall mean any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life*."

102 The case *Timishev v. Russia* concerned a forced migrant of Chechen origin attempting to settle in a neighbouring region and contesting ethnic discrimination in the prohibition to the residents of the Chechen Republic from obtaining permanent residence in Kabardino-Balkaria and related hindrance of applicant's children to education (para. 11, paras. 22-27).

that racial or ethnic discrimination presents in the Court's assessment and under the international law, the case-law established that, when the difference in treatment is based on race or ethnicity, the notion of objective and reasonable justification must be interpreted as strictly as possible (*D.H. and Others v. the Czech Republic* [GC], para. 196; *Sejdić and Finci v. Bosnia and Herzegovina* [GC], para. 44; *Chapman v. the United Kingdom,* minority opinion). The strict interpretation is, however, defined by the Court in almost absolute terms in cases, when the difference in treatment is based on ethnic or national grounds "exclusively or to a decisive extent". The Court admitted that such degree and motivation of interference cannot be "*objectively justified in a contemporary democratic society built on the principles of pluralism and respect for different cultures*" (*Sejdić and Finci v. Bosnia and Herzegovina* [GC], para. 44). This, however, does not mean prohibition of positive discrimination, when differential treatment is adopted for the purposes of correcting "*factual inequalities*" among different groups. In such cases, violation of Article 14 can be constituted in the failure to adopt such measures, which are de facto constitute correction of existing inequalities.[103]

The concept of rights holders in cases related to minority issues was further devised in the Grand Chamber judgment *Sejdić and Finci v. Bosnia and Herzegovina* [GC][104] with respect to attributing the status of victim and the standard of proof. The relevant argumentation was developed in evaluation of the admissibility and merits of the complaint. The Court stated (para. 43) that, besides the victims of treatment under direct application of policies or law, the concept of direct effect of the contested legal act on the rights and legitimate interests of the applicant, and therefore the right to petition the Court, could also be granted in cases when the law did not contain an individual implementation measure, but only with respect to

103 Formulated in the case "relating to certain aspects of the laws on the use of languages in education in Belgium".

104 The case was initiated by the application of high-ranked public servants in Bosnia and Herzegovina, belonging to Roma and Jewish ethnic minorities and concerned alleged discriminatory limitations on the political rights for all national minorities, based on the Dayton Peace Agreement, except for the constitutionally defined 'constituent peoples' determined in the Constitution (Bosniacs, Serbs, Croats).

contestants who "*belong to a class of people who risk being directly affected by the legislation or if they are required to modify their conduct*" (para. 28)[105]. The applicants' status and public activity were admitted by the Court as reverting them eligible for the protection under the Convention. The standards applicable to the evaluation of evidence and determination of the assessment formulae would include the checks that the "*inferences […] flow from the facts and the parties' submissions. […] proof may follow from the coexistence of sufficiently strong, clear and concordant inferences or of similar unrebutted presumptions of fact".* In this case, the strength of proof required for resolving such cases and the distribution of the burden of proof should bear intrinsic connection with the specific circumstances fo the case, the nature of the allegation and the specific rights allegedly violated. Thus, the parameters of the decision-making are not pre-set and are determined in minority-related issues on a case by case basis (*Nachova and Others v. Bulgaria* [GC], para 147), although within the framework of the formulae discussed earlier.[106] The burden of proof is, as a rule, initially brought on the applicant to show there was a difference in treatment, and afterwards is shifted upon the government to prove that the difference is justified (*Timishev v. Russia*, para. 57).

Thus, even in the absence of the definition of national minorities in the Convention or direct references to specific rights reserved to minority groups, or cultural rights, the Court's interpretation developed a set of approaches to subject-specific and rights-holders sensitive examination of related cases. The Court admits that the determination of belonging to the national minority is based on self-affilliation principle, that has to be recognized by authorities. However, the states are not obliged to strictly regulate this issue, and a vast scope of interpretation is allowed, subject to the international scruitiny. Discrimination on the basis of belonging to a minority is examined only in conjunction with other violations of rights under the Convention and may be admitted based on a wider scope of factors demonstration of differential treatment in

105 The principle elaborated in *Burden v. the United Kingdom* [GC], no. 13378/05, 33-34, 29 April 2008.

106 In the case of *Timishev v. Russia*, the Court found that in the absence of claims that the lack of evidence that the "[…] *other ethnic groups were subject to similar restrictions… [the restrictions] represented a clear inequality of treatment in the enjoyment of the right*".

similar situations absence of a legitimate aim or lack of proportionality, unless the case falls under the legal discrimination in the national law within the sense of Article 1 of Protocol 12 to the ECHR. The formulae applied by the Court for determination of discrimination include evaluation of the limitations as to whether there has been an interference on the applicant's right and whether the interference was justified. To be considered justified, the interference with rights should be admitted "in accordance with the law", pursue one or more of the legitimate aims and be "necessary in a democratic society". The standard is raised, when the difference in treatment is based on race or ethnicity, the notion of objective and reasonable justification must be interpreted as strictly as possible. The status of victim of discriminatory treatment is admitted not only with respect to directly affected individuals, but also those who risk being directly affected or is required to modify behavior by the contested law. Based on these facts and criteria, the dchapter will proceed with the examination of culture-specific issues adjudicated by the Court, related approaches to the determination of violations, and the scope of convergences of rights that allow extending the capabilities of rights-holders to defend and effectively implement their cultural rights with sensitivities necessary due to the specificities of their minority cultural requirements.

4.2. Protection of Cultural Identity

4.2.1. The Notion and scope of cultural identity. Protection of cultural identity

The notion of cultural identity is devised and protected by the Court based on its intrinsic connection with the democratic principles, to which it is a guardian (*Sejdić and Finci v. Bosnia and Herzegovina* [GC], para. 44). In the case *Chapman v. the United Kingdom*, the Court reaffirmed the developing practice to recognize the minority cultural identity as a component of universal diversity, reiterating that "*there may be said to be an emerging international consensus […] an obligation to protect their security, identity and lifestyle, not only for the purpose of safeguarding the interests of the minorities themselves but to preserve a cultural diversity of value to the whole community*" (para. 93). The Court concluded that the universal value of minority cultural identities explained the *"special needs of minorities" (ibidem)* collectively recognized in Europe, which translated into the necessity to adjust the level of protection. Thus, there is a clear correlation between the prevention of

discrimination, in particular of that based on race or ethnic origin, and the protection mechanism created within the Court's argumentation.

According to the case-law of the Court, in particular, the case of *T.S. and J.J. v. Norway (dec.*), where the Court weighed the cultural heritage and cultural identity rights of a child, counter-opposed to the measures adopted by public authorities with the aim of ensuring his best interests. The Court recognised (para. 30) that cultural identity can be interpreted to derive from the origin of rights-holders, and is conditioned with the active self-identification with the cultural group. A child's entitlement to participate in the decisions concerning their rights and life were reaffirmed to be required for consideration. Furthermore, it was recognized obligatory to accept the best interests of the child in all proceedings affecting them, based on Articles 3, 8 and 12 of the UN Convention on the Rights of the Child.[107] The agency of the child to make decisions regarding their cultural identity and preservation of ties with the cultural heritage was to be taken into consideration in evaluation of the respective measures adopted by public authorities. In the case, the Court admitted the sufficiency of efforts undertaken by domestic authorities in examining the subjective interest of the child in maintaining his cultural identity and their conclusions that were reached after weighing the lack of interest in maintaining cultural links with the country of origin against the consideration of his best interests in other fields of well-being.

The right to cultural identity was examined within the ECHR mechanism in several aspects. Cultural identity, under the Convention, could be protection as a manifestation of the right to lead a lifestyle according to one's cultural identity, as a right to free choice of cultural identity under Article 8 safeguarding the right to respect for private and family life, under Article 1 Protocol 1 protecting the right to peaceful enjoyment of property, entitlements related to religious beliefs under Article 9 on the freedom of religion, and various manifestations of the right to cultural associations under Article 11, which can be considered as normative basis serving as catalyzing factor for the development of the applicants' capabilities in cultural fields. The case-

107 Paragraph 1 of Article 8 of the UN Convention on the Rights of the Child obliges States "to respect the right of the child to preserve his or her identity, including nationality, name and family relations as recognized by law without unlawful interference."

law developed by the European Commission for Human Rights and the ECtHR supported the perception of the right to cultural identity to be justiciable only as an individual right. The possibility to extend it to minority groups was not allowed by the admissibility tests under the Convention and the case-law, as constituting *actio popularis*. In its decision on admissibility of the case *Muotka and Perä v. Sweden*, where applicants claimed discrimination of the Finnish speaking minority of a borderline district along the Sweden-Finland border arising from an interstate infrastructure development agreement, the Commission underlined that it had jurisdicition to review applications insofar as "*the applicants themselves can be said to have been the victims of the facts they complain about. The Commission cannot examine general complaints on behalf of the population*" (dec. 7.8.1988, No. 12740/87, para.1).[108]

The Court's interpretation of the notion of 'private life' under Article 8 of the Convention, primarily utilised for the protection of lifestyles as a cultural identity component, defines it as broad and "*not susceptible to exhaustive definition*" (*Ciubotaru v. Moldova,* para 49). In the case of *Ciubotaru* (para.49), the Court discerned that private life encompasses the physical and psychological integrity of a person and implies personal autonomy, which serves as a principle for interpreting the guarantees stipulated by Article 8. Protection driven by the reading of Article 8 in line with the principle of personal autonomy is granted to the individuals' personal sphere, including the right to establish details of their identity.[109] Ethnic identity was included into that scope in the case *S. and Marper v. the United Kingdom* (para. 66). The freedom to choose one's cultural identity and related positive obligation of the State to recognize the individual choice, are recognised by the Court,

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108 It was reaffirmed at the case *Ciuboratu v. Moldova* (para.31), where the Court pronounced that *"[t]he Convention does not, therefore, envisage the bringing of an actio popularis for the interpretation of the rights set out therein or permit individuals to complain about a provision of national law simply because they consider, without having been directly affected by it, that it may contravene the Convention*".

109 This argumentation is based on the interpretation developed on the basis of the cases *Pretty v. the United Kingdom*, para. 61, Y.*F. v. Turkey*, para. 33, *Burghartz v. Switzerland*, para. 24, *Christine Goodwin v. the United Kingdom* [GC], para 90, *Bensaid v. the United Kingdom*, para. 47, *Peck v. the United Kingdom*, para. 57.

but the case-law conditions the acknowledgement of the choice to its substantiation with "objective grounds", otherwise, potentially risking to entail administrative hurdles and transboundary conflicts (*Ciubotaru v. Moldova*, para. 56-57). The right, in Court's interpretation, also implies the possibility not to adopt the identity or follow the lifestyle of one's minority community. This freedom implies the requirement of abstention from cultural presumptions and stigma with respect to minority group members, and prevents the default association with minority communities.[110]

The Court interpreted that the States' obligations under Article 8 did not only included negative obligation to abstain from intervening, but also implied positive measures ensuring respect to private life, although admitting the lack of clear boundary between the positive and negative obligations and the margin of appreciation with which the states could define the fair balance between community and individual interests (*Ciubotaru v. Moldova,* para. 50). Yet, the Court assesses the measures adopted or claimed by States to guarantee rights established under the Convention as to their tangibility, efficiency and practical availability (*Airey v. Ireland*, 9 October 1979, § 24, Series A no. 32), realized through fair decision-making process, ensuring respect to the rights guaranteed (*Ciubotaru v. Moldova,* para. 51).

The early case-law contained decisions locating 'linguistic identity' within the scope of the Convention. While the Court did not support the Commission's general conclusion of discriminatory nature reflected in language-based limitations on accessing educational institutions or their design intended at minority assimilation. Violation of the right under Article 8 was recognized due to discriminatory restrictions established in particular cases that occurred where a disproportional

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110 For example, in the case of Hudorovič and Others v. Slovenia, in their partly dissenting opinion the Judges Pavli and Kūris criticized the argumentation of the government for undistinguished consideration of the minority individual and community rights with respect to the freedom of determination of their lifestyle, stating that "*[w]hile some Roma may choose to live among the majority communities, many of them may consider it important for the preservation of their identity and lifestyles to live among fellow Roma*". In the case, the necessity to contextualize and develop policies in recognition of the special status and needs of the minority groups and their identities was underlined.

disadvantage for the bearers of a particular language was established (case "*Relating to Certain Aspects of the Laws on the Use of Languages in Education in Belgium*" (Merits)). The right to education, in line with Court's interpretation, should also be interpreted in light of the provisions of Article 8 and the right to respect for private and family life, due to the requirement of a comprehensive reading of the Convention. The Court, however, concluded that this should be framed within the situational framework when measures taken in educational field affect the rights-holders' private life (para. 7). Thus, besides the requirement of direct interference with an established right, the Court recognized the scope of Article 8 in conjunction with Article 14 of the ECHR to encompass linguistic and educational claims of minority representatives. It also defined the territorially application of the entitlement to the linguistically mixed regions. Conclusions on some of the complaints within the Belgian linguistic case resulted in derivation of a general approach that led to recognition of further linguistic rights claims inadmissible within Articles 9 and 10 *ratione materiae* when allegations of interference with linguistic identity were made on behalf of children. The Strasbourg institutions reiterated that having "*the imprint of their own personality and of the culture they acknowledge as their own, take first place among the factors conditioning the education of their children, in order that their children's thinking should not become alien to their own*" was outside the scope of Articles 9 and 10 (*Inhabitants of Alsemberg and Beersel v. Belgium*, cited in Moucheboeuf:2006; p. 244*)*. The tenet of the allegation falls within its contemporary interpretation frame. The Court interpreted the role and agency of parents in influencing their children's education not through the governance and parental responsibility. The approach of the Court was framed through cultural identity, which constituted a basis of the entitlement enforced with the agency of right-holders to facilitate its replication in their children's' personality through education.[111]

111 *Travaux preparatoires*, cited by the Government with respect to the Belgian linguistic case, explained the background of the norm as "the European organs concerned never thought about linguistic problems", but "simply about conflicts on ideological and denominational matters". Consequently, the cultural and linguistic preferences of parents are in no way comprised within "religious and philosophical convictions" so that the second sentence of Article 2 (P1-2) does not safeguard "the right of parents to have their children taught in the language of their choice". The Committee reiterated that "[w]ithout seeking

The Court established, that educational preferences of the parents stipulated in para. 2 of Article 2 Protocol 1 could not be interpreted to incorporate linguistic preferences, as it would lead to distortion of the "ordinary and usual meaning" of terms "philosophical" and "religious", and amount to extending the scope of the Convention (para. 6). The Court's analysis of the *travaux preparatoires* of the Protocol also led to the conclusion that linguistic rights could not have been included there as the initial scope of the Convention did not exclude minority rights, and therefore the protection could only be implied to the State languages (Doc. CM (51) 33 final, page 3 cited in para. 6). The scope of the catalogue would not be extended by reading Article 2 Protocol 1 in conjunction with Article 14 (para. 11), this combination was to ensure that the right to education would not be restricted with discriminatory treatment based on a language. The Court concluded that any attempt to extend the guarantees of education to encompass the freedom of individual linguistic choices on an indiscriminate basis would lead to "absurd results", as it would allow anyone to claim education in any language in any Member state of the Council of Europe (para. 11).

The subjective agency in acknowledging one's cultural heritage overall and linguistic heritage in particular was expressly recognized by the Court in its case-law. In the case *T.S. and J.J. v. Norway*, the Court derived that in the absence of a personal interest of a rights-holder in their cultural or linguistic heritage, the States parties could not be considered obliged to adopt affirmative measures for facilitating the development of their cultural capability (para. 30). In this respect, the Court appears to concur the approach to the definition of minority group expressed and adopted by some Members States, requiring the active demonstration of an intent to relate to one's cultural heritage.

The principle of individual agency in acknowledging one's cultural identity is framed by the Court in various aspects, including the right to freely choose and maintain one's cultural identity (and to abandon it, accordingly), to lead one's life in accordance with the cultural identity,

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a definition of the terms "religious and philosophical" in the case, the Commission notes that the draft of the Committee of Experts "at a certain point" in the "preparatory work" made provision only for "the protection of religious opinions but that philosophical opinions were added in order to cover agnostic opinions" *(Inhabitants of Alsemberg and Beersel v. Belgium, para. A.2).*

and the right to have the choice respected by others, including the public authorities. The protection of cultural identity within the Strasbourg jurisprudence is primarily located within Article 8 of the Convention. The Court established that the failure of member States to protect private life from external intrusion constitutes a violation of Article 8, stating that the positive obligations required from States also presumed regulation adopted with the aim of private life protection within the sphere of interpersonal relations (*X and Y v. the Netherlands*; *W. v. the United Kingdom* (dec.)). Consequently, the positive obligation to protection of private life against actions by third parties is devised. This argumentation is applied in the Court's case-law to derive the conclusion that the protection of the rights of national minorities within domestic legal framework, including reflected in interference with the rights of others, is justified (*X. v. Federal Republic of Germany*, *Felderer v. Sweden*, *Zentralrat deutscher Sinti and others v. Federal republic of Germany*).

The notion of cultural identity incorporated the issue of personal security. The examination of this issue is based on cases arising within the context of hate-speech and racial discrimination. They were considered by the Court within the narrative of a collective cultural identity and the related individual sense of self-worth. In the Court's case-law developed on the matter of racial discrimination *(inter alia, R.B. v. Hungary*, para. 78; *Aksu v. Turkey* [GC], para. 58), the Court recognized that the sense of identity of a minority group and the feelings of self-worth and self-confidence of members of the group could be affected by negative stereotyping, which could result in hindrance of private life of members of the group within the sense of Article 8 of the Convention. Moreover, when examined under Article 3 in conjunction with Article 14 of the Convention, the Court considered that "*the feelings of fear and helplessness caused by the ill-treatment were sufficiently serious to attain the level of severity required to fall within the scope of Article 3 of the Convention*" (*R.B. v. Hungary*, para. 43-44). Other factors that were considered relevant to the assessment of such cases were the purpose of ill-treatment and the underlying motivation (*El Masri v. "the former Yugoslav Republic of Macedonia"* [GC], para. 196). Difference is also placed on the qualification of ethnic discrimination depending on the status of the perpetrators, as when committed by public authorities, differential treatment based on ethnic origin or race would amount to "degrading treatment" in the sense of Article 3 of the Convention (*East African Asians v. United Kingdom* (dec.)), and in any

case are admitted as aggravating circumstances in instances of ill-treatment (*R.B. v. Hungary*, para 45). With respect to the subject matter of the complaint, religious intolerance resulting in psychological suffering is admitted to fall within the scope of Article 3, also when inflicted by third parties (*Begheluri and others v. Georgia*, cited in R.B. v. Hungary, para. 45). The Court connected the negative consequence to the "certain level" of negative racial stereotyping, which requires interpretation. In the assessment of the circumstances of the case in *R.B. v Hungary*, the Court established that the actions constituting the violation were directly targeted at the applicant as a member of a respective racial group (para. 81). The scope of the related State's obligation was distinguished by the Court in the positive obligation to protect and preempt violation. In the Court's conclusion, the positive obligation implied the necessity to identify any discriminatory intent based on racial hatred and prevent it, which in the case of a failure resulted in the violation of Article 8 (para 88-90). Yet, it was established that the recognition of the compliance with obligations under Article 3 depended, in line with the Court's case-law, on the level of the threat and calibrated response of the public authorities. It was recognised satisfactorily achieved, based on the assessment of sufficiency of the surveillance, police presence and the effective lack of confrontation between the groups, which *de facto* resulted in the lack of "severe mental or psychological suffering" of the members of the minority groups under attack.

4.2.2. The Right to a Name

In its substance, the right to a name is of hybrid nature and can be considered from the cultural identity and linguistic perspectives. In the case-law of the Strasbourg institutions, the right to a name is recognized justiciable under the Convention, despite the lack of direct reference in its text. The right was admitted to belong to the scope of Article 8, based on the argument that a name creates boundaries between individuals and their families (*Burghartz v. Switzerland*). The European Commission and the Court adopted the prevalence of the concept of family for the Convention system in resolution of the admissibility of applications *ratione personae* and the determination of the victimhood, recognising indirectly affected spouses as due applicants in name-related complaints (para. 18, based on *Marckx v. Belgium*, para. 31). The Court examined complaints of gender-based discrimination in cases when the free choice to opt for a family name by one of the spouses was affected on the principle of the requirement of

"very weighty reasons" to be put forward for a justification of a difference of treatment be accepted as valid and compatible with the Convention. The Court explained admissibility of claimes with recognition of "*the advancement of the equality of the sexes is today a major goal in the member States of the Council of Europe*" (*Burghartz v. Switzerland,* para. 27). Another requirement adopted by the Court with respect to the family-related traditions is the interpretation of the Convention in light of contemporary social and political developments and "present day conditions", the importance of which were underlined for cases when discrimination could be of concern (*ibidem*, para 28). The Court established that long-standing historical traditions with respect to the choice of a name or a gender-based traditional obligation imposing the choice of a name could be considered discriminatory and was incompatible with the rights under the Convention.

Moreover, the right to a name was examined from the perspective of a right to personal development, and admitted as a component of the right to identity and fulfilment of one's personality (Commission, *Burghartz and A. Schnyder Burghartz v. Switzerland*, para. 47). As category of cases were examined under Article 8, the resolution of the cases implied analysis of compliance by States with the positive obligation to respect private life. As for all cases on Article 8, the Court tested the existence of the obligation with the fair balance test between the public interest and private interests of the applicant. The Court admitted a possibility that in each particular case the existence of an additional, besides protection from arbitrary interference, positive obligations of the States may be established based on the responsibility to respect private life, which is not explicitly defined in the Convention. The Court also examined the correlation of public and private aspects of the right to a private life and its regulation by the state. Yet, the State's interests in maintaining the unity of family was not recognized by the Court a legitimate reason for the limitation of the right to a name, including the requirement to opt for a particular name as a result of a marriage (*Burghartz v. Switzerland).*

In the case the *Niemietz v. Germany* (para. 29), the Court concluded that it was not possible to exhaust the definition of private life with the reference to "the inner circle" of the individual, as it would have been too restrictive, and required the obligation to respect for private life to encompass the right to establish and develop relationships with others. That conclusion led to extension of the notion of private life also to the

professional life of individuals, in particular those leading liberal professions, and their reputation, as an individual's scope of engagement within the professional activities could reach the extent, when determining the capacity that the person would be acting at a given moment would be impossible to establish, as the work forms inalienable part of their life (ibidem). This issue was examined by the Court in the case of *Taieb, known as Halimi v. France*, where the applicant contested the rejection by authorities to support her claim for a permission to use her former husband's name not only in professional and public field, but also in private life. The Court admitted that the possibility to use a name under which a person became well-known does relate to the notion of private life, and therefore constitutes part of Article 8 scope. Yet, the authorities' rejection was not recognized to have constituted a breach of the granted margin of appreciation, as it complied with the requirements of lawfulness, was limited and was made with the aim of protecting the interests of others. Within the fair balance test, the Court also considered relevant to estimate whether the lack of a possibility for official use of the applicant's factual name could bear any considerable inconvenience to her and affect her professional life. As the applicant failed to prove considerable damage caused in this respect, the test was admitted to be complied with by the authorities, which led to recognizing the complaint manifestly ill-founded (the court reached a similar conclusion in the case *Szokoloczy-Syllaba and Palffy de Erdoed Szokoloczy-Syllaba v. Switzerland*, in part of the argument raised by the applicants as to the effect produced by the change of the name onto their professional life).

The judgment *Stjerna v. Finland*[112] is significant for locating the right to change a name within the legal arguments underlying the provisions of Article 8, as well as the scope of allowed intervention. Inter alia, the Court recognized that the right to change the name may fall within the obligation to respect private life, due to the links created by names among members of one family, and despite the established public interest manifested in population registration. However, the Court reiterated that generally the right to change a name may be subject to limitation based on concerns of public interest, including the veracity and stability of state identification system, as well as identification of members belonging to one family, legal certainty and stability of civil

112 The case concerned a complaint that the applicant's right to private life was violated by the inability to change the applicant's surname to the original Swedish version, used by the applicant's distant ancestors.

status and social relations (also in *Henry Kismoun v. France,* para. 31). For example, the request of parallel use of two types of spelling of a foreign surname was considered contrary to the principle of legal certainty in the case *Macalin Moxamed Sed Dahir v. Switzerland.* While admitting a wide margin of appreciation belonging to the States (para. 39) the Court underlined the necessity to find a fair balance between the positive and negative obligations under Article 8 of the Convention. As the applicant's request to have his name changed invoked practical inconveniences as its primary grounds, the Court assessed the comparative frequency such inconveniences may arise with respect to the applicant's situation, as opposed to other persons living in Europe under the contemporary conditions of increased cross-frontier movement of people, entailing frequent foreign linguistic interactions (para. 42-43, also applied in *Kemal Taşkın and Others v. Turkey*).

The evaluating personal attachments with a name and one's ancestors invoked as reasons for a name change, the Court assessed the proximity of relation counterweighted with a person's self-identification with the ancestors bearing the name. The Court concluded that the personal attachment of the applicant was outweighed with the passage of time separating the ancestors and the request for adopting their name[113] (para. 43). Another criterion, diverged by the Court for the assessment of the legitimacy and proportionality of intervention with the right to private life, was constituted in a practical and effectively available alternative for the applicant to change a name. In the case, when the law of the respondent State, would provide for a possibility to change a name, despite the rejection of a particular attempt, *inter alia* by means of choosing of another version of a name or another name, the intervention could not be considered a violation of rights under Article 8 (para. 44).

The Court recognised the significance of cultural background where one was raised as a sufficient argument for requesting a change of the name (*Henry Kismoun v. France*). Yet, the assessment of the proportionality of the limitations imposed by States on the realization of the entitlement is put by the Court contingent to the practicality and

113 Under the circumstances of the particular case, two hundred years since the death of the last ancestor bearing the contested name was considered too distant in history to make the claims of personal links or "established use" within the applicant's family valid.

possibility of its implementation. The Court therefore verifies whether there are measures that constitute "the most opportune policy" made available by States to ensure the system's applicability and effectiveness for the protection of concrete rights, without rendering the opportunities abstract (*Henry Kismoun v. France,* paras. 27-30). The name change procedure was recognised by the Court undue, when the applicant's claims based on their cultural identity were disregarded by the authorities. The Court underlined that the part of the applicant's application to change the name supported with the arguments alleging cultural identity constituted the "paramount interest" for the applicant as opposed to the general considerations of public interest (*Henry Kismoun v. France,* para 36, *Garnaga v. Ukraine*, para. 41).

The ambit of Article 8, under the ECtHR interpretation, also extends to the use of official language in identification documents and the spelling of names in minority languages. In the absence of a unified standard in Europe, the Court recognised a vast margin of appreciation of States with respect to cases related to spelling. According to the Court, the margin of appreciation would be determined by the variety of circumstances in each State, including its historical, cultural, linguistic, and religious landscape (Bulgakov v Ukraine, para. 43 c). The Court's case-law, including judgments in *Mentzen alias Mencena v. Latvia, Kuharec alias Kuhareca v. Latvia, Bulgakov v. Ukraine, Baylac-Ferrer and Suarez v. France,* established principles relevant to the spelling of names of foreign and minority origins. The Court's general approach to the assessment of such complaint was that, despite the recognition of primarily private concerns of the issues, the linguistic freedom is not guaranteed by the Convention, and the spelling issues cannot be dissociated from the linguistic policies in member States. Yet, the only exception from the identified scope is the use of names spelling in official documentation and IDs (*Mentzen alias Mencena v. Latvia, Kuharec alias Kuhareca v. Latvia, Bulgakov v. Ukraine*). Based on the recognition that language is not an abstract value, the Court interpreted that the right to use a language and measures adopted by States to protect national language imply a positive obligation on States to ensure a range of individual rights for the speakers and users of the language, and therefore in the majority of cases would constitute protection of rights and freedoms of others under Article 8 para 2 of the Convention (*Bulgakov*, para. 43b). The Court concluded that in the absence of a uniform European practice, the rights of persons belonging to a

minority were respected, if the original written version was entered in their respective IDs, with the difference between the spelling adapted to the rules of the respondent State were minimal compared to the original spelling, the alterations did not prevent identification of the applicants, or if the practical difficulties entailed as a result of the changes were insignificant or non-existent (*Mentzen alias Mencena v. Latvia, Kuharec alias Kuhareca v. Latvia).*

The Court also did not exhibit cultural sensitivity to the deficiencies attributed to the changes in an attempt for unification of spelling, when one version would affect the semantics of names in a foreign country or minority languages. In the case of *Macalin Moxamed Sed Dahir v. Switzerland* (dec.), the Court supported the argumentation of national authorities that the rejection to change the transliteration of a Somalian name, which the applicant found inappropriate due to a degrading meaning it would be attributed to in Somali, was proportional in Switzerland. It was concluded that such intervention complied with the legitimate aim requirement and did not constitute a violation, as no degrading meaning would be attributed to it in any official language in Switzerland. The argument that the original name of the applicant gave rise to a perjurious nickname was not considered sufficient for recognising an undue limitation in rejection of a change request also in the case *Stjerna v. Finland*.

The Court distinguished its approaches to the cases originating from contested spelling rules and the translation of names into other languages in official documents. The necessity of the difference in approaches was devised based on the argument that variations in spelling did not affect the personal identity of the name carrier, and would still allow not only personal identification, but also the attribution of the origin of the person. The measures going beyond mere spelling adaptations, require more sensitivity to be afforded to the carrier, as they may affect the perception of historical and etymological backgrounds. In the case of *Bulgakov v. Ukraine,* the applicant contested that his name was translated into Ukrainian, although he belonged to the Russian minority, but the complaint was filed belatedly, with no official objections raised upon the receipt of the document. The Court reiterated that in that case that in line with the international standards, including the FCPNM, persons belonging to national minorities and wishing to revert their name into the original

version, differing from the form in the official state language, should be provided with effective and reasonable means to do it (para. 50). That argument being substantiated with the recognition that a name could not only be considered a means of self-identification, but also a fundamental means of personal identification within the society (para. 51). The test of fair balance and procedural guarantees in such cases were devised as aiming to guarantee that the individuals seeking to change IDs due to the wish to change names used in a linguistic form inacceptable from the identity point of view, does not dissociate individuals from important personal documents.

The Court thus recognised the possibility of States to develop principles pertaining to the use of state or minority languages in official documents, including for the purposes of personal IDs. However, the requirement to the national law to explicitly regulate the limitations, under which the rules may be applied and the consequent effects on the implementation practice, were underlined in the Court's judgment in *Güzel Erdagöz v. Turkey*. In the *Güzel Erdagöz* case, the Court recognised a violation of Article 8 on the tenet that the limitation of applicant's right to correct the spelling of the name in line with the Kurdish requirement was not based on a developed legislation. In the particular case, the absence of certain characters from the official alphabet constituted a ground, to the Court's perspective, for the legitimate rejection of the authorities to change the names into the minority names. The violation of the right to private life and discrimination were not recognised in that refusal, as applicants had effective possibility to change, adopt and use the names of minority origin (Kurdish, in that case), given their spelling would be aligned with the official alphabet (*Kemal Taşkın and Others v. Turkey).*

4.2.3. Lifestyle as a Manifestation of Cultural Identity. Interpretation of Cultural Traditions

The case-law of the ECHR mechanism related to Article 8 is vast with decisions delivered with respect to nomadic or traditional lifestyle. In 1981, the Court had to assess whether a construction of a hydroelectric plant constituted an intervention into the traditional lifestyle of Norwegian Lapps (app. nos. 9278 and 9415/81, D.R.35, 30). Notwithstanding that the case was decided against the applicants, the scope of Article 8 *ratione materia* was admitted to include minority related lifestyle challenges. The case established a precedent for the

determination of violation. It was established that the contested interference into the activities and life of persons belonging to a minority shall be justified. That approach was reiterated in cases initiated upon applications related to caravan sites for the Roma communities.[114] The case-law related to the right to lead one's lifestyle in accordance with one's cultural traditions approaches lifestyle as a manifestation of identity. The Grand Chamber judgment on the case *Chapman v. the United Kingdom* distinguished violation of the right to respect for private and family life in the hindrance to lead one's life in accordance with the cultural traditions characteristic to a minority cultural identity. Thus, the interference, in the form of a prospective eviction, with the possibility to living a traditional nomadic lifestyle, in particular living in caravans on their own land that the Court recognized "*an integral part of [the applicant's] ethnic identity as a Gypsy*". The intervention was admitted discriminatory and disproportional treatment, going "*beyond the right to respect for [the applicant's] home*", but "*affect her ability to maintain her identity as a Gypsy and to lead her private and family life in accordance with that tradition*" (para. 73). The Court's interpretation of the consequences of such a manifestation of identity in a diverging lifestyle distinguished the positive obligation to adjust the application of a general legal framework with respect to the persons belonging to minorities (*Chapman,* para. 96).[115] That conclusion was consequently integrated into the resolution of similar cases, including the *Yordanova and Others v. Bulgaria, Winterstein and Others v. France, Bagdonavicius and Others v. Russia*. In *Yordanova and Others v. Bulgaria*, the Court established the contradiction between adopting national and regional programmes on Roma inclusion. In the case, local minorities rejected to grant affirmative measures to the Roma community representatives based on the argument that "*such an attitude would amount to discrimination against the majority population*", which ran

114 The early case-law included *Powell v. UK; Smith v. UK; Van de Vin v. Netherlands, Buckley v. UK*.

115 The Court established that "the vulnerable position of Roma and travellers as a minority means that some special consideration should be given to their needs and their different lifestyle both in the relevant regulatory planning framework and in reaching decisions in particular cases (see *Chapman*, cited above, para. 96, and Connors, cited above, para. 84); to this extent, there is thus a positive obligation imposed on the Contracting States by virtue of

contrary to the national approach, where the Roma were admitted an underprivileged community and one of the socially disadvantaged groups (para. 128). The Court recognized that such the local authorities failed to integrate the consideration of the community's special requirements, while the Court considered that "*the applicants' specificity as a social group and their needs must be one of the relevant factors in the proportionality assessment that the national authorities are under a duty to undertake*" (*Yordanova and Others*, para. 129).

In the case of *Winterstein and others v. France*, the Court reiterated the unconditional connection between the cultural identity and the minority lifestyle, relevant even for the cases when persons belonging to a minority did not practice it consistently. The Court underlined that "*the occupation of a caravan is an integral part of the identity of travellers, even where they no longer live a wholly nomadic existence*". Besides, the Court recognized that interventions with the practical implementation of a lifestyle constitutes hindrance of "*ability to maintain their identity*" (para. 142), affecting not only the applicants' right to a home, but also to private life. In line with the Court's argument, there was an established link between the travellers' lifestyle and "individual's identity, self-determination, physical and moral integrity, maintenance of relationships with others and a settled and secure place in the community", and therefore the authorities' intervention hindered the possibility to "lead a private and family life in accordance with that tradition" (*Winterstein and others,* para. 143, 148).

The regulation by Article 8 for the protection of a traditional and/or culturally-determined lifestyle is based on the admission of intervention with three categories of private life, including home, private life *per se* and family life. In the case of *Buckley v. the United Kingdom*[116] (App. no. 20348/92, para. 53-54), the Court reiterated the approach established in its case-law that in order to decide whether the rights related to a home are effected in the sense of Article 8, the

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Article 8 to facilitate the way of life of the Roma and travellers (see *Chapman*, cited above, para 96)" (cited in *Winterstein and others,* para. 148).

116 The case was launched by an UK national of Roma origin on account of prosecution for unauthorised use of land in her property as a site for her caravans. The applicant complained, inter alia, that she was prevented from leading a traditional nomadic lifestyle that constituted a violation of her rights under Article 8 of the Convention.

property in question shall be perceived and used by the applicant as their home, moreover, the property had to be "lawfully established", implying that the applicants retained ownership of it, they intended to return there, "*lived in it with a view to taking up permanent residence [and] had relinquished their other home and had not established any other*".[117] In case the circumstances of the case allow to conclude that the rights to home are effected, the Court found it was not necessary to examine separately whether private or family life were affected (*Buckley*, para 55). In its assessment of specific cultural requirements pertinent to a specific minority group, the Court relied on specialized literature, including cultural, sociological and anthropological studies.

From the technical legal assessment perspective, the Court assessed the alleged violations of traditional lifestyles establishing whether interference with the rights of applicants by public authorities actually took place, whether such measures were provided by the law, whether the interference was made in pursuit of a legitimate aim and was necessary in a democratic society. As discussed above, the fact of actual interference with applicants' traditional lifestyle could be established if the measures, including legal acts, were applied to the detriment of applicants directly, without Court's *in abstracto* control of domestic legislation (inter alia, *Buckley*, para 57, *Gillow*, para. 19). Among issues invoked to constitute 'legitimate aim' of intervention were public safety, the economic well-being of the country, preservation of the environment, the protection of health and the protection of the rights of others. The necessity of measures in democratic society implied the initial State's margin of appreciation, both with respect to legal regulation and measures adopted for its implementation, varying depending on the circumstances of the case and subject to the assessment of the right at stake, importance for the individual and the nature of the activities (the principle developed from the case *Leander v. Sweden*, para. 59).

As the cases of traditional lifestyles often concerned the spatial planning regulation and implementation measures, they are therefore a valid criterion to examine for determination of the Court's approach to the scope of the margin or appreciation. In the well-established case-law related to planning regulation, the Court admitted that *"[b]y reason*

117 The approach established in the case *Gillow v. the United Kingdom,*

of their direct and continuous contact with the vital forces of their countries, the national authorities are in principle better placed than an international court to evaluate local needs and conditions".[118] Thus, the authorities were admitted to possess a wide margin of appreciation "[*i*]*n so far as the exercise of discretion involving a multitude of local factors is inherent in the choice and implementation of planning policies*" (*Buckley*, para. 75). For the cases involving private life and the concept of home, the Court's assessment calibrates the community interests to the individual interests affected in the particular case. The cases related to the right to home, including those where the traditional lifestyle is allegedly affected, are considered by the Court pertinent to personal security and well-being (*Gillow*, para. 55; *Buckley*, para. 76). Therefore, for such cases, the requirement to the procedural guarantees available to applicants are considered by the Court particularly 'material' to establish whether the States in adoption of contested measures remained within their margin of appreciation. Article 8 does not provide for any procedural requirements, and in the absence of the ready-made applicable normative regulation, with respect to cases concerning the right to home within the scope of intervention with traditional lifestyles, the Court devised that the requirement to decision-making process pertaining to the contested interference should include fairness and affording *"due respect to the interests safeguarded to the individual by Article 8"* (*Buckley*, para. 76).

The Court decided that, given the compliance with the procedural guarantees, the applicants' preferences would not necessarily take precedence over the general interest. If applied to the traditional lifestyle cases, this principle was translated into the acceptability of alternative options that in principle would comply with the nature of the tradition, notwithstanding that the applicants would prefer an alternative, but equal in substance, solution of their initial choice (*Buckley*, para. 81). In *Yordanova and Others v. Bulgaria,* the Court concluded that, although the realization of social and economic rights, including housing issues related to travellers' cases, entailed a wide

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judgment of 24 November 1986 (Series A no. 109).

[118] The Court grounds this conclusion on the long line of precedents, including *Sporrong and Lönnroth v. Sweden*, para. 69; *Erkner and Hofauer v. Austria*, paras. 74-75, 78; *Poiss v. Austria,* paras. 64-65, 68; *Allan Jacobsson v. Sweden*, para. 57, para. 63.

margin of appreciation overall, it was to be narrowed "*where the right at stake is crucial to the individual's effective enjoyment of intimate or key rights*" (*Yordanova and Others v. Bulgaria,* para. 118). The Court underlined the narrow margin of appreciation to the authorities with respect to "*intimate or key rights*", including home and lifestyle, as these aspects of Article 8 concern "*rights of central importance to the individual's identity, self-determination, physical and moral integrity, maintenance of relationships with others and a settled and secure place in the community*" (*Yordanova and Others v. Bulgaria,* para. 119). In deciding on compliance of contested measures with the limits of States' discretion, the Court also examined the scope of the sanction applied. For example, the absence of eviction request or low fines imposed on applicants for the failure to abide by orders taken in line with special planning decisions of local authorities would not be considered disproportionate (*Buckley*, para. 83-84).

4.2.4. Judicial Interpretation of Cultural Traditions

The ability to live in accordance with one's cultural traditions as a manifestation of one's cultural identity has lead the Court to a specific evaluation of the nature of minority traditions, necessitating the translation of the substance of the tradition into the terminology of civil law and the customs practiced by the majority. The Court's case-law principles require to apply the Convention in the context and nature of other international treaties, the object and purpose of the norms enshrined, and the circumstances it is being applied. The Court re-iterated that it "*has never considered the provisions of the Convention as the sole framework of reference for the interpretation of the rights and freedoms enshrined therein (…). It has long stated that one of the main principles of the application of the Convention provisions is that it does not apply them in a vacuum*" (*Demir and Baykara v. Turkey* [GC], para. 67, *Loizidou v. Turkey, para. 43*; *Öcalan v. Turkey* [GC], para. 163, *M. and others v. Bulgaria and Italy*, para 146). In the Court's case-law, the assessments of traditions, culture and their relevance to particular groups are not purely legalistic, formal or based on a general uniform approach, but are delivered on the basis of contextual interpretation. The conclusions of the Court are often substantiated, especially in the earlier judgments when the case-law approaches were under formation, with specialized

academic or practitioners' findings made in a range of related fields.[119] Interpretation of cultural traditions in the Court's case-law is based on their substance, depending on its interpretation in the kin-state, but primarily on the meaning for the concerned community.[120] The meaning of customs and traditions are often subject to translation into the normative categories of the legal regime concerned and the case-law principles developed by the Court itself, with the aim to ensure adequate assessment. Another interpretation reference for the Court is the subjective and objective validity of the tradition for the applicants (discussed above), as well as the relation and the meaning of the tradition within the context of the legal and cultural traditions of the respondent State. The scope of traditions under the Court's scrutiny includes, but is not limited to, the nomadic and indigenous people lifestyles, minority fishing, herding, hunting, residency traditions, food

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119 For example, the Court's consideration on the substance of nomadic lifestyle for the Roma community in the case Buckley v. the UK cited extracts from 'Roma, Gypsies and Travellers' by Jean-Pierre Liégeois (Council of Europe Press, Strasbourg, 1994, p. 79). Concluding that *"[t]ravelling is a need that is deeply rooted in Gypsy psychology", the Court relied on the author's conclusion that "[t]he traveller who loses the possibility, and the hope, of travelling on, loses with it his very reason for living*." In the case-law related to the inter-ethnic conflicts and the status of minorities in the former Yugoslavia, the Court relied on the publications by local and international experts participating in the drafting of the Dayton agreements in part to the assessment of the necessity of limitations on minority rights, established in the national legal framework in compliance with the Dayton agreements or being parts to them (*inter alia*, cited in *Sejdic and Finci v. Bosnia and Herzegovina* [GC]). Besides, the effects of legislative measures on particular communities in respondent States and the conditions of minorities are assessed by the Court based on local studies and international reports (e.g. 'Accommodation for Gypsies: A report on the working of the Caravan Sites Act 1968' used for the examination in the Buckley v. the UK case).

120 For example, in the case *Muñoz Díaz v. Spain*, the Court examined the validity of traditionally solemnised marriages for the Roma community. Having established that a marriage solemnised according to the Roma customs "*gives rise to the usual social effects, to public recognition, to an obligation to live together and to all other rights and duties that are inherent in the institution of marriage*", the Court based its further analysis and the translation of the social meaning of such rituals into the legal effect based on the customary perception by the community.

and dress, marriage, and other religious and cultural rituals and ceremonies.

Various aspects pertaining to minority marital traditions were examined in the judgments in the cases of *Muñoz Díaz v. Spain*, *M. and Others v. Italy and Bulgaria* and *Z.H. and R.H. v. Switzerland*. In the case *Muñoz Díaz v. Spain,* the Court recognised that relationships originating from a traditional Roma marriage ceremony and resulting in a long-established cohabitation should be recognised as equal to official civil marriage ceremony, both with respect to the factual recognition and the related legal consequences. In particular, such traditional marriage was acknowledged to entail the equal scope of civil law consequences, including pension rights to the surviving spouse, as those concluded under the official statutory formalities, established and recognized by the state. To establish the ritual's nature and the scope of consequences, the Court approached the matter from the perspective of the minority, which entailed the recognision of its compliance with requirements for officially valid. Partially, the decision was also attributed to a traditional value system of the minority, which was admittedly well-established and reflected in the society of the Respondent State. Thus, the perception of the group itself legitimased and validated the subjective perception of the ritual by the persons belonging to the minority group, and equated the legal consequences of the ritual and official procedure (para 56, ECHR). The relevance of the individual perception of the applicant was taken into consideration by the Court to the extent sufficient to recognize that "*[the applicant's] conviction that her marriage, solemnised according to Roma rites and traditions, was valid*" and entailed the official recognition of the rite.

To establish the balance between the State's margin of appreciation and the applicant's interests rooted in cultural identity, the Court contextualized the identity of the individual as a member of the minority community and the accessibility of alternative solutions under the requirements existing in the Respondent State in the applicant's situation. This approach led to the recognition of impossibility for the applicant to opt for an official statutory procedure, because at the time of her marriage the law required obligatory Catholic rite. As the Catholic rite was incompatible with the applicant's Roma identity, the recognition of impossibility was devised. It was, therefore, concluded that the existing alternatives would have prevented the applicant from

maintaining her cultural identity and the membership in the Roma community, and would have violated her freedom to religion (para. 57). The subjective perception of the validity of her civil status that prevented her for opting for a civil procedure after the amendments of the domestic legal framework was accepted by the Court as complying with the due faith requirement, based on the unchanged recognition of her status validity by her community. Moreover, the validity and consequences of the applicant's status were not contested or considered contrary to the domestic legislation by the community (para. 59). The subjective conviction was then contextualized by the Court within the applicant's sense of minority identity and the community's established status within the society of the respondent State. The Court highlighted that "*the importance of the beliefs that the applicant derives from belonging to the Roma community – a community which has its own values that are well established and deeply rooted in Spanish society*", creating the basis for recognition of validity of minority cultural traditions (para. 56). The Court admitted that "*the force of the collective beliefs of a community that is well-defined culturally cannot be ignored*" (para 59, ECHR).

The Court reiterated the significance of individual perception of cultural traditions also for their effect of the law and its implementation. The Court does not recognize the fact of belonging to a national minority as a ground for the withdrawal of the obligation to comply with national legislation, including statutory requirements to procedures related to civil status of individuals. Yet, the Court admitted that the application of national legislation may require adjustments with respect to rights-holders belonging to a national minority (*Muñoz Díaz,* para. 61). With respect to the Roma community, the Court elaborated a specific case-law principle that the vulnerable position of the Roma required special consideration to their needs and different lifestyle in regulatory framework and in its implementation (*Buckley*, para. 76, 80,84). For the matter of assessment, given the violation of Article 14 is invoked by applicants, the Court examines whether the difference in treatment is based on the minority status, and whether in designing policy or legislative measures, the States duly consider and reflect in their decision-making the cultural specificities of the group.

The Court recognises that misuse of cultural tradition as a basis of deprivation of safeguards required by the Convention, as well

culturally or ethnically driven presumption or stigma, could amount to a violation of the Convention. In the case *M. and Others v. Italy and Bulgaria*, the Court did not support the respondent State's perception of a cultural tradition, in that case a Roma traditional marriage, as an argument for the lack of effective investigation of alleged ill treatment of a spouse. In the case, the authorities' argument that alleged rape and forced deprivation of the freedom of movement of a child spouse de facto could be considered acceptable as relationships within a marriage concluded under traditional Roma rites. The misperception of the Roma traditions and stigma in that case resulted in a failure of authorities to conduct medical examination of the victim and a failure to conduct effective investigation into the circumstances of the case. These were recognized by the Court as a procedural violation under Article 3 of the Convention, and considered in line with the prohibition of degrading treatment. To assess the validity of applicants' interpretation of a customary marriage as a slavery, the Court concluded that such interpretation cannot be objectively proven on two tenets, namely the individual will for entering into the marriage and the nature of the ceremony and related rites. Besides establishing that in the applicant's situation the elements of the crime of slavery could not be convincingly established, the Court also examined the nature of a bridal ransom under the Roma marriage tradition. The Court concluded that a bridal ransom in the amount transferred to the family of the bride in that particular case could be equated to a generally practiced tradition of gifts to a bride's family, and could not be considered as a payment for a slave purchase, that would imply the transfer of ownership over a person and treatment of the person as an object of a deal.

The case is illustrative to the differences in interpretation of customary traditions by the ECtHR and the national judiciary, as the domestic conclusions were also reached based on the translation of the consequences of Roma traditional rituals. The authorities of one of the respondent States in charge of the investigation, in their assessment of the allegations of kidnapping and rape, relied upon the assessment of the photos of the marriage, their perception of the nature of the ritual that took place and the scope of related behavior that could be considered acceptable. The domestic authorities denied to investigate the allegations based on the fact of the actual marriage ceremony proven by the photos of the event, the testimony of the victim and the

alleged perpetrators, and an alleged transfer of the bridal ransom. The authorities concluded that, given the alleged perpetrators chose to remain silent as to their role in alleged kidnapping, that the circumstances "concerned a Roma traditional marriage" and the fact that the victim's father was photographed receiving a ransom as part of a traditional ritual, no allegation of kidnapping and eventual ill-treatment could be valid. The court, following a hasty examination, concluded that, although the photos presented in proof of the ceremony, depicted a ceremony "rather grim for Roma traditions", the traditional understanding of the consequences of a "traditional marriage" could not be challenged. Eventually, that perception of a traditional marriage led the domestic court to refrain from further examination of details of the alleged violations, including ill-treatment and rape, forced participation in criminal activities by an underaged, which implies the perception of consequences as natural and acceptable for the ethnic group in question and could be explained by a mere fact of the deal initially carried out between the related families. That approach depicted a misperception of ethnic profile of minority groups and the outcomes of their cultural traditions that CoE legal framework, including the FCPNM and the ECHR, attempted to combat through, inter alia, consistent application of a culture-sensitive approach to the substance of adopted decisions and recommendations. Avoidance of stigmatizing minority groups and sensitive approach to the nature of their customs and community requirements in special approach are among the most often repeated recommendations by the Advisory Committee for the FCPNM, and, as demonstrated in this chapter, are integrated in the ECHR adjudication.

The limits on recognition of a traditional rite as a formal act within the public legal domain, which may entail legitimate effects within the sense of administrative or civil law, was revisited by the court in the case *Z.H. and R.H. v. Switzerland*, where another aspect of the riot consequence was placed under scrutiny. No States' obligation to recognize the fact or arising legal consequence of a foreign religious marriage ceremony was distinguished by the Court in that case, as the alleged marriage was concluded among the spouses, one of which being underage to participate in a legitimately recognized marriage. The Court established that the Convention cannot be interpreted as to extend Article 8 and impose on States an obligation pertaining to the recognition of "a marriage, religious or otherwise, contracted by a 14-

year old child" (para 44), contrary to the international la. In that case, the perception, acceptance and recognition by both applicants of the validity of the union was not considered sufficient to recognize the measures adopted by the respondent State disproportionate or overall contradictory to the spirit and aim of the Convention.

The case-law generated from the claims by persons belonging to various religious groups are representative in several aspects pertaining to the analysis of the notion of cultural identity and cultural traditions, and their intersection with social rights. The applications were examined by the Commission and the Court within the scope of Article 9 of the ECHR. Overall, the Strasbourg institutions took the view that not all limitations on practices originating from the religious manifestations may constitute interference with the freedom of thought, conscience and religion, and Article 9 does not protect all acts determined by religion (*Arrowsmith v. United Kingdom* (dec.), p. 142). Religious practice, as interpreted by the Strasbourg institutions, does not encompass "*an act which does not directly express a belief, even though it is motivated or influenced by it*" (*Karaduman v. Turkey* (dec.)). For a violation to be recognized, a practice had to be qualified as "*an essential part of a manifestation of a religion*". Moreover, the applicants should not voluntary choose to join institutions or engage into actions, where general rules regulating public behavior would require strict compliance, implying the necessity to change the religiously required behavior. Thus, in the admissibility decision in the case *X. v. United Kingdom* (No. 8160/78) the Commission concluded that the positive obligations could be expected from the States with respect to compliance with Article 9 (part 1). However, the scope of positive obligations did not extend to the requirements of authorities to adjust social requirements. For example, work schedule was not obligatory for adjustment to an employee's religious practices, unless the adjustments had been negotiated upon entering the employment.[121] Article 9 (1), in

121 Despite the case being supplemented with references interpreting the Muslim devotees' obligation to attend Friday prayer, the conditions for compliance, the recognition of a repeated failure to attend as a sin, and the comparative sanctioning, including death penalty in some countries, the Committee considered that in view of the applicant's ability to choose an alternative workplace that would have better accommodated his religious beliefs and his decision to maintain employment where it was not possible, did

the aspects related to holding and manifestation of religion, was not devised to guarantee prevalence of the religiously required attire over a dress-code in a secular educational institution (*Karaduman v. Turkey* (dec.)). In another early decision in the case *X. v. United Kingdom (*No. 7992/77), the Commission examined the compatibility of the road traffic safety requirements with the scope of allowed limitations for the freedom of religion under Article 9 (part 2). The Commission established that the road traffic requirements not adjusted to religiously required attire did not contradict the rights under Article 9 in part that allows limitations that "*are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others*". The Commission considered that obliging religious devotees to comply with measures provided to ensure their safety was justified for the protection of their health, and therefore the penalization of the devotees for failing to abide by the safety measures did not constitute an unjustified limitation or a breach of the Convention.

Furthermore, in a number of cases, behavior triggered by the manifestations of cultural identity and cultural traditions, including those induced by religious beliefs, were weighed against the interests of other members of society, including non-believers. The Commission acknowledged that some practices determined by religion, even that of the majority, can bring pressure on those who do not profess a religion or non-believers. In such cases, institutionally adopted measures for limiting religiously determined behavior constitute a safeguard against religious fundamentalism and its intervention into the rights of others. The Commission acknowledged the measures aiming to ensure "*harmonious coexistence*" among holders of different religious beliefs, "[*e]specially in countries where the great majority of the population owe allegiance to one particular religion*", proportionate and are in line with the allowed limitations introduced *"to ensure respect for the rights and freedoms of others" (Karaduman v. Turkey)*. The consideration of voluntary subscription to participate in activities that imply circumvention of religious manifestation is valid, unless the restrictive requirements imposed within the framework of such practices or institutions are implemented in a discriminatory manner. The

not provide that the applicant did not have a possibility to practice his religious in general and did not constitute an interference with the right to religion.

difference in treatment on the ground of religious beliefs was recognized a violation of the Convention (Article 9 in conjunction with Article 14 *in the case of Hoffmann v. Austria*), where the Commission reiterated the incompatibility of automatic discrimination of members of one religious community with the values of a pluralistic democracy (*Hoffman,* para. 102).

4.3. Linguistic Rights

Linguistic rights *per se* are not regulated by the Convention, apart from related safeguards against discrimination on the basis of language under Article 14 and Article 1 of Protocol 12 and those provided for procedural entitlements under Articles 5 and 6 of the Convention. However, these do not extend to the choice of language or the use of one's own language, as established by the extensive case-law rejecting to acknowledge language-based discrimination (*X and Y v Belgium, Bideault v France, Arnau v Spain*). Similarly, the Court did not recognise the entitlement to use one's language in communication with authorities, as is protected – for the matter of comparison - under the scope of the Framework Convention (*Inhabitants of Leeuw-St-Pierre v Belgium*; *Clerfayt, Legros and others v Belgium*). The Commission concluded that the explicit reference to the rights related to the use of language provided in Articles 5 and 6 entailed that these are the only entitlements that were meant to be incorporated into the Convention, as the conclusion to the contrary would not allow an explanation of the existence of specific norms under Articles 5 and 6. Furthermore, the Commission established that the use of languages other than the official language of the region or the state is not protected by the Convention even in the regions where the majority spoke another language or the minority group considered as such nationwide were the majority in the respective region. The case-law also established a particular interpretation of the scope of the Convention admitting the absence of linguistic guarantees for performance in public institutions. The claims of discriminatory treatment were not admitted, as the Court did not recognize them in conjunction with a violation of the rights under the Convention. The principle was consequently reconfirmed in the case *Fryske Nasjonale Partij and others v. Netherlands*, where the Commission underlined inapplicability of Articles 10 and 11 to guarantee the right to use the language of one's choice in administrative matters, and the discrimination on the basis of the language, unless it could be established that the applicants had been

prevented to use the language in other circumstances. The case was important with respect to framing the limits of Convention's applicability in terms of linguistic freedoms converging with political rights.

Attempts to protect the linguistic rights of persons belonging to national minority within the ECHR framework in the field of political life were successful if not always on merits, but at least resulting in procedural admissibility, and were therefore assessed by the Court. In the case *Şükran Aydın and Others v. Turkey*, criminal sanctions imposed for electoral campaigning in a minority language were considered to constitute a breach of the right to the freedom of expression. Despite admitting the margin of appreciation for the States in regulating the use of language in political setting, the Court established incompatibility of blanket restriction on the use of minority language subject to criminal sanction with the values of democratic society. The special role of the choice for a minority language in political context was forged by the Court for its function to serve as an adequate and calibrated medium for delivering political campaign messages. As information was recognized as a primary value of electoral campaign, and without exchange of information, the campaign objectives cannot be achieved and the right to receive and impart information cannot be meaningful, if the use of language of choice was limited by criminal sanctions (para. 55). Violation of Article 10 was established in sanctioning for a passive behavior in *Semir Güzel v. Turkey*, when the use of a minority language was not prevented in political settings by a third party, who was punished for the failure to act. The latter was not required by the law to ensure foreseeability. The Court recognized that the failure to hamper the use of a minority language could be considered a form of expression of an opinion, and was therefore protected under the Convention (para. 39 – 41).

The linguistic rights of minority groups were further examined in conjunction with political rights (participation in elections as a candidate) within the scope of Article 3 Protocol 1 (the right to free elections) in the case *Podkolzina v. Latvia*. Violation of the Convention was admitted based on the incompatibility of the procedure, which led to the rejection of applicant's candidacy based on the insufficient knowledge of the state language, to the requirement of legal certainty and fairness. The legitimate interest in the case was assessed as a criterion for forging the scope of the State's margin of appreciation in

rejection of the right guaranteed under the Convention. The measures adopted to ensure the appropriate language proficiency of MPs within a state's legislative body applied to a candidate belonging to a linguistic and ethnic minority, with the aim to ensure efficient institutional performance, was admitted to fall within the scope of a legitimate interest.

The early case-law of the ECtHR explicitly recognized that the right to education in a specific language was not covered by the Convention within the scope of Article 8 or Article 2 of Protocol 1, which only extended to national languages. In the Belgian linguistic case, the Court stated that "*the right to education would be meaningless if it did not imply the "right to be educated in the national language or one of the national languages*". Yet, the interpretation of the Convention partially incorporated some categories of cultural and linguistic rights into the scope of the Strasbourg human rights mechanism. In its judgment *Eğitim ve Bilim Emekçileri Sendikası v. Turkey*, the Court discerned that Article 10 "*encompasses the freedom to receive and impart information and ideas in any language*" (para. 71). Protection of linguistic rights of persons belonging to minorities within the scope of Article 10 extends to the creative expression in minority languages and dissemination of literally production in minority languages, or limitations of dissemination of information in minority languages. The case-law related to cultural rights includes decisions to recognize violation of the freedom of expression in cases when sources of information in minority languages were not made available in penitentiary institutions (e.g. Kurdish newspaper prohibited in Turkish prisons, as in the case of *Mesut Yurtsever and Others v. Turkey*). The right to receive cultural information, including as entertainment TV shows transmitted via satellite, in native and minority language was confirmed in the case of *Khurshid Mustafa and Tarzibachi v. Sweden*. In assessing the necessity of interference with the applicants' right to receive information in their mother tongue the Court underlined (para. 44) that the possibility to receive information covering cultural expressions for an immigrant family was of crucial importance, as it allowed them to "*maintain contact with the culture and language of their country of origin*". The Court's assessment covered weighting other possibilities for the applicant to receive similar information and other possibilities to install equipment, as well as considerations of safety related to the installation as opposed to the importance of the applicants' right to receive information in their

mother tongue. The assessment concluded that in light of a narrow margin of appreciation with respect to the right to receive information, the lack of fair balance afforded in consideration of the case, and the incompatibility of the public interest as compared to the applicants' private interests in the case, the State failed to comply with their positive obligation to protect the right to information.

The possibility of artistic production in minority language was recognized violated in *Ulusoy and Others v. Turkey*, where the applicants, actors in the Kurdish theatre in Istanbul, complained that their productions were banned by the authorities allegedly for the performances in the Kurdish language that threatened with hindering public order and incitement to separatism. The ban was alleged to be based on actors' criminal record for pro-PKK activities. The Court discerned that Article 10 granted guarantees of freedom of expression to everyone, without distinction as to the aim of the information produced or the format of individual engagement or the role performed (para. 24). The conclusion extended to the nature of information and the medium, as they required protection in order to ensure that the rights of others to receive and disseminate information were not affected (the findings were based on the established case-law not related to minority issues, but developing the elements of the protection of the freedom of expression *per se*, including *Otto-Preminger-Institut v. Austria*, paras 40 and 43; *Bowman v. the United Kingdom*, para. 33).

The Court's test of legality included the presence of normative regulation and the quality of the law, including accessibility and foreseeability of the laws (para. 31). The examination whether the aim pursued by the authorities through the restrictions imposed was legitimate recognized several aims that could satisfy the legitimacy test for Article 10, including the prevention of crime and the defense of public order. However, the Court considered that as the measures were applied to a creative piece, the test needed to be conducted in light of artistic freedoms affected, in particular the freedom to receive and communicate information and ideas ensuring exchange of cultural and political ideas (para 42). Therefore, the necessity of the measures in democratic society were decided by the Court in light of the argument that cultural production contributes to the exchange of ideas crucial to a democratic society (based on the conclusion adopted in *Müller and*

Others, para. 33). The Court underlined that in view of the importance of cultural exchange and creation for the democratic society, any limitations on artists' activities should be carefully measured, although could not be considered prohibited within the ambit of Article 10. The Court did not recognize that measures adopted with these legitimate aims with respect to cultural productions could be recognized as necessary in democratic society. The use of a minority language considered by the authorities as a tool for threatening public order and the application of the national law by the domestic courts to motivate a ban of an artwork based on the language used was considered by the Court from the perspective of the clarity of domestic legislation, which was concluded to fail to provide the limits of the margin of appreciation for clear prediction of authorities' decision (para. 53), and did not create effective safeguards against possible abuses. The Court did not establish the evidence that the play in Kurdish could provide any platform for propaganda of violence or any other harmful effect that could justify the prohibition. These arguments led to the conclusion that the interference could not be considered necessary in democratic society (para 54-55).

Another category of cases, related to linguistic rights of minorities, and closely interlinked with the right to education, concerns the availability of educational institutions for learning minority language, and the relevant policies and regulation allowing to pursue the development of one's identity as a member of a minority group by learning the language of the group. The test elaborated by the Court to establish violation of the convention included the legitimate aim pursued by the activities and the employment of legitimate means to achieve the aims. With respect to the linguistic rights in the Belgium linguistic case, the intervention with the right was admitted by the Court to attempt achieving a legitimate aim (linguistic unity of a unilingual region) through the proportional means (linguistic programmes and policies adopted in Belgium). The conclusion of the Court in that particular case was that the difference of treatment of different languages in regions with different linguistic structure of the population was not discriminatory and was not disproportional to the requirement of public interest.

4.4. The Right to Education

The right to education is regulated under Article 2 Protocol 1 to the Convention. Conceptually, the Court distinguished education and teaching, limiting teaching to the transfer and multiplication of knowledge, while defining education under a value-based approach as the "*process whereby, in any society, adults endeavour to transmit their beliefs, culture and other values to the young*" (*Campbell and Cosans v. the United Kingdom*, para. 33, cited in ECHR Guide, CoE:2017, p. 28). Article 2 Protocol 1 is interpreted by the Court based on the *travaux preparatoires* to the Convention, as a norm protecting against the intervention with the right to education, while there is no obligation on the States to provide education guaranteed by the Convention.[122] Based on the similarity of the formulation of the norm, the Court drew that the right to education incorporates "*the most fundamental values of the democratic societies making up the Council of Europe*" (*Timishev v. Russia*, para. 64). The Court also devised that, in the absence of prescribed limitations and the fundamental importance of the right in a democratic society, no restrictive interpretation of the article would be consistent with the aim and purpose of the provision, while limitation of the right to education is incompatible with the Convention (*Leyla Şahin v. Turkey* [GC], no. 44774/98, para. 137; *Timishev v. Russia,* para. 64, 66).

The case-law of the ECtHR on the right to education for persons belonging to national minorities incorporates the rights to access to educational institutions and the right to benefit from the results of the education.[123] Established case-law on Article 2 of Protocol 1 initially explicitly mentioned only the elementary schooling set as a standard of basic guarantees in the field of education, which is evaluated by the

122 Docs. CM/WP VI (51) 7, page 4, and AS/JA (3) 13, page 4, cited in the case "relating to certain aspects of the laws on the use of languages in education in Belgium", para. 3.

123 For example, in cases *Kjeldsen, Busk Madsen and Pedersen* v. Denmark (para. 52), *Timishev v Russia* (para. 63), as well in the case "relating to certain aspects of the laws on the use of languages in education in Belgium (paras. 3-5), the ECtHR underlined that the States have a positive obligation to ensure a universal "*right of access to educational institutions existing at a given time and the possibility of drawing, by official recognition of the studies which he has completed, profit from the education received*".

Court to be of "*primordial importance for a child's development*" (*Timishev v. Russia*, para. 64).[124] Indeed, the established case law on Article 2 of Protocol 1 underlined that besides the elementary schooling initially set as a standard of basic guarantees in the field of education[125], the scope of the provision developed to include secondary and higher education.[126] The ECtHR also recognized adults as rights-holders under Article 2 Protocol 1.[127] The scope of Article 2 of Protocol 1 also incorporates cultural specificity as a component of the entitlement to education, which can be interpreted as a standard for any educational system, underlying the normative framework of the rights of parents to determine educational modalities of their children in compliance with their cultural background.[128]

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124 Inter alia, European Commission on Human Rights decision *Sulak v. Turkey* (admissibility), application No. 24515/94, 17 January 1996. Available at: https://hudoc.echr.coe.int/eng#{"itemid":["001-2669"]}. Last accessed in May 2021.

125 Inter alia, European Commission on Human Rights decision *Sulak v. Turkey* (admissibility), application No. 24515/94, 17 January 1996. Available at: https://hudoc.echr.coe.int/eng#{"itemid":["001-2669"]}. Last accessed in May 2021.

126 The right to secondary education was recognized, *inter alia*, in *Cyprus v. Turkey* [GC] (judgment), application no. 25781/94, 10 May 2001. Available at: http://hudoc.echr.coe.int/eng?i=001-59454. The rights pertaining to higher education are discussed in *Leyla Şahin v. Turkey* [GC] (judgment), application no. 44774/98, 10 November 2005. Available at: http://hudoc.echr.coe.int/eng?i=001-70956. Last accessed in May 2021.

127 The scope of rights-holders of the right to education was admitted to include everyone wishing to benefit from it, including adults, in, inter alia, *Velyo Velev v. Bulgaria* (judgment), application No. 16032/07, 27 May 2014. Available at: http://hudoc.echr.coe.int/eng?i=001-144131; *Ponomaryovi v. Bulgaria* (judgment (Merits and Just Satisfaction), application No. 5335/05, 21 June 2011 Available at: http://hudoc.echr.coe.int/eng?i=001-105295; *Hirst v. the United Kingdom* (no. 2) [GC], (judgment (Merits and Just Satisfaction), application no. 74025/01, 6 October 2005. Available at: http://hudoc.echr.coe.int/eng?i=001-70442. Last accessed in May 2021.

128 Article 2 Protocol 1, Convention for the Protection of Human Rights and Fundamental Freedoms. Council of Europe, EST no 5. 4 November 1950, entered into force 3 September 1953. Available at: https://www.echr.coe.int/Documents/Convention_ENG.pdf. The relevant ECtHR case-law includes, *inter alia*, with respect to minority culture sensitive education *Valsamis v. Greece* (judgment (Merits and Just Satisfaction)), 18

The interpretation given in the case to the nature and scope of the obligations under Article 2 of Protocol 1 discerned that, based on the semantic interpretation of the provision, the norm implied a negative obligation of States to abstain from intervention. Furthermore, the negative formula implied that the States parties could not be considered obliged to regulate or enable the individual's approach to education and material facilities. The conclusion was drawn upon the *travaux preparatoires*[129], that reflected the intentional correction of the initial draft of the Parliamentary Assembly to remove the positive formula and withdraw the positive obligation to enable education from the States. The Commission's report in the case, considered and cited by the Court in its judgment, underlined that despite that restrictive formulation the Convention's aim was to guarantee the universal right to education, effective and implementable, in line with the Court's case-law, which would imply that the provision should be implemented in conditionality with the socio-economic capacity of the State (Commission report cited in *Inhabitants of Alsemberg and Beersel v. Belgium* (*Merits*). In its analysis of the scope of the right to education based on the *travaux preparatoires* to the Convention (Docs. CM/WP VI (51) 7, and AS/JA(3)13), the Court concluded that, although the Convention prescribes the entitlement which includes the obligation of the States to provide the 'means of instruction' but does not distinguish as to the choice of language of teaching, yet it would make the right to education meaningless, if there were no implication that the rights-holders be granted an opportunity to be education in the national

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December 1996. Application no. 21787/93. Available at: http://hudoc.echr.coe.int/eng?i=001-58011; *Folgerø and Others v. Norway* [GC] (judgment (Merits and Just Satisfaction)), application no. 15472/02, 26 June 2007. Available at: http://hudoc.echr.coe.int/fre?i=001-81356; *Campbell and Cosans v. the United Kingdom* (judgment), application no. 13590/88, 25 February 1982, Series A no. 48, Available at: http://hudoc.echr.coe.int/eng?i=001-57771. Last accessed in May 2021.

129 Based on *travaux preparatoires* (Docs. CM/WP VI (51) 7, page 4, and AS/JA (3) 13, page 4), the Court discerned that the negative formulation indicates "*that the Contracting Parties do not recognise such a right to education as would require them to establish at their own expense, or to subsidise, education of any particular type or at any particular level. However, it cannot be concluded from this that the State has no positive obligation to ensure respect for such a right as is protected by Article 2 of the Protocol (P1-2). As a "right" does exist, it is secured, by virtue of Article 1 of the Convention, to everyone within the jurisdiction of a Contracting State.*" (*Inhabitants of Alsemberg and Beersel v. Belgium*, (Merits)).

language or in one of the national languages. Therefore, the scope of the entitlement was interpreted to include "access to [existing] educational institutions", the possibilities of rights-holders to "draw profit from education" (obtaining official recognition of qualifications), and requires the regulation on the exercise of these rights to be adopted.

Article 2 Protocol 1 ensures the possibility of parents to opt for their children's education corresponding to their religious beliefs and philosophical views, substantiated by the respective positive obligation of the States. The Court did not recognize the obligation of States to create educational institutions complying with specific beliefs to constitute a component of Article 2 of Protocol 1. Article 2 of Protocol 1 was interpreted by the Court as not ensuring the right to public subsidies for private educational establishments. The position was developed in early case–law and remained consistently applied to later complaints. In the Belgian linguistic case, the Court also reiterated that the States' obligation under Article 2 Protocol 1 requiring respect to the parents' rights to choose the education for their children in compliance with their own beliefs does not include linguistic choices and does not entail the obligation to provide for such educational possibilities. The Court stated that "*[t]he object of these two Articles [Art. 14 and Article 2 Protocol 1], read in conjunction, is […] to ensure that the right to education shall be secured by each Contracting Party to everyone within its jurisdiction without discrimination on the ground, for instance, of language. […] Furthermore, to interpret the two provisions as conferring on everyone within the jurisdiction of a State a right to obtain education in the language of his own choice would lead to absurd results, for it would be open to anyone to claim any language of instruction in any of the territories of the Contracting Parties*." (para. 11). Yet, the Court interpreted Article 2 Protocol 1 as reserving the possibility for the States to introduce obligatory education, both public and private, subject to a satisfactory standard confirmation (in *Konrad and Others v. Germany* (dec.). the Court recognized the complaint initiated by parents who wished to educate their children domestically).

The interpretation of the prohibition of discrimination with respect to education in minority languages was made by the Court in cases that concerned restriction on access to education or its continuation. Thus, undue limitation of the rights under the Convention was admitted in

cases when schooling in minority language conducted on a lower level of education could not be continued further on the next educational level due to the lack of such schools, as in the case of schooling in Greek in Northern Cyprus above primary level in the case *Cyprus v. Turkey (para. 44)*, where a violation of Article 2 of Protocol 1 was established. The Commission established that the lack of possibility for the children to continue their education in their language in the Northern Cyprus drove the families to send them to continue their education in conformity with their religious and philosophical convictions, in the Southern part, from where they could not return after the completion of studies, leading to the separation of families (para. 44). Besides, the primary schools did not have access to textbooks as a result of censorship and "vetting procedure". The Court accepted the conclusion that the possibility of receiving education for the Greek Cypriots that would be in conformity with their cultural and ethnic traditions in the Southern part of the island did not ensure the appropriateness of the limitation imposed, given the inability of the children to return to the place of residence of their families, as well as the failure of the authorities to provide continuing education for the levels above primary schools, in substance amounted to a denial of the right to education (para 275, 278). In *Sampanis and Others v. Greece,* that concerned discrimination suffered by the Greek citizens in Greece, the harm arising from the denial of education based on the ethnicity and language was recognized originating from the denial of school enrollment on ethnic grounds.

A violation of the Convention was established when the attempt to gain access to learning of a minority language entailed punishment, as in *İrfan Temel and Others v. Turkey*, when applicants were subjected to suspension from classes for requesting optional courses of the Kurdish language at their university. In their petition to the university authorities, the students invoked their constitutional right to receive education in their mother tongue, which for them was Kurdish. They requested optional language courses to be provided in pursuit of democratisation of the country and in an attempt to cover a long-standing gap in possibility of persons belonging to the Kurdish minority to develop their culture and language (para. 8). The university administration subjected the students to disciplinary sanctions, considering their petition as an activity inciting "*polarization on the basis of language, race, religion or denomination*" (para. 20). The Court

considered that the circumstances of the case and the related complaints of the applicants about infringement of their freedom of speech and expression and the right to education fell within the scope of Article 2 Protocol 1 read in conjunction with Article 10, and did not raise issues within Articles 7 and 9 of the Convention. The Court discerned that in the absence of an exhaustive list of legitimate aims drawn for Article 2 of Protocol 1, the test on the compatibility of the imposed limitations and possible impairment of the right to education was to establish, if the relationship between proportionality of the aims and means was achieved (para. 41). The proportionality of the measures was assessed by the Court from the perspective of the freedom of expression curtailed following the restriction of the right to education in a minority language, without attempting to undermine security or resort to violence at the university (para. 43). The Court reiterated that the freedom of expression is recognized as a cornerstone in democratic society, constituting a basis for the "progress and individual self-fulfillment", it is implied to encompass both innocent ideas and those that "shock, offend or disturb", including by demanding pluralism, tolerance and broadmindedness (para. 44). The acceptability of disciplinary measures applied within an educational institution were limited by the Court to remain within the ensured right, not undermining or preventing its enjoyment. The disciplinary sanctions for a petition to be granted an opportunity to learn one's minority language were therefore not admitted by the Court as reasonable or proportionate, and constituted violation of the right to education (paras. 46-47).

Several aspects of education in minority language and issues pertaining to attribution of the responsibility of states for the established violations of the Convention were examined by the Court in the case *Catan and Others v. Moldova and Russia.* The subject matter of the complaint was constituted in the closure of schools, where official state alphabet was used, in Transnistria (Moldova) by the MRT forces. The limitations of the right to education were accompanied with harassment and insult of the students and the families, police searches of students, requests to withdraw from the schools, confiscation of books in Latin scripts, confiscation of school premises and vandalism of the school buildings. The Court admitted the violation of the students' rights to access to education on several premises. The students who attended the MRT-approved schools were receiving education in the

language that was not recognized officially and was obsolete, which, in the absence of higher education institutions in the "MRT" and the lack of teaching in that language anywhere else, would de facto deprive students of the effective possibility to continue their education (para. 141).

The Court admitted that the alleged acts fell within the scope of Article 2 of Protocol 1. The negative obligation of the States not to deny the right to education under Article 2 of Protocol 1 was applied by the Court in its interpretation given in the Belgian linguistic case (paras. 3-4) as encompassing the positive obligation to ensure access to educational institutions (para. 137). The Court also underlined that the requirement of granting effectively implementable rights, when applied to education, should guarantee the rights-holders a possibility to benefit from the education by receiving an official recognition of the training completed. The efficient entitlement to education is also determined by the Court to imply the possibility of the rights-holders to be educated in the national language or one of the national languages (all principles devised in the Belgian linguistic case (merits), para. 3, reiterated in para. 137-138). The second part of Article 2 Protocol 1 is interpreted by the Court from the perspective of the requirements within democratic society, where the entitlement of parents to their children's education to be compliant with their religious and philosophical convictions, would encompass the entitlement to pluralistic education. Such entitlement to pluralistic education should be substantiated with a positive obligation of the State to guarantee that the information disseminated in the process of education and the curriculum are delivered in "a critical, objective and pluralistic manner" (para. 138, based on the conclusions drawn in the early general case-law on Article 2-1, including, *inter alia*, *Kjeldsen, Busk Madsen and Pedersen*, para. 50, 53; *Folgerø*, para. 84). In *Leyla Şahin* v. Turkey [GC] (paras. 134 and 136) these principles were interpreted to be applicable to primary, secondary and higher levels of education. The Court determined the margin of appreciation allowed to States in such cases to depend on the level of education, increasing with the increase of the grade of education, and is applied in inverse proportion to the importance of the education for the rights-holders and general society (*Ponomaryovi v. Bulgaria*, para. 56).

Thus, in the *Catan and Others v. Moldova and Russia case,* the Court admitted that the closure of the schools using the Moldovan as a language of tuition interfered with the rights of students to receive their education in the state language and their mother tongue, as well as their parents' rights to have their children educated in line with their philosophical convictions (para. 143). The Court recognized that by complying with the MRT's authorities' requirement to study at the schools where the Cyrillic script was used, the students would be put at a disadvantage for being educated in the language not practiced anywhere else except for MRT, and for being educated using outdated teaching materials. The Court applied the test of legitimate aim of the intervention pursuid but concluded it could not be established, as the measures pursuid a political aim of Russification of culture of the Moldovan community in Transnistria (para. 144). The Court concluded that, in consideration of the fundamental importance of education for the future success and personal development of the children, it was impermissible for the "MRT" authorities to interrupt their education with "the sole purpose of entrenching the separatist ideologies" (para. 144).

The question of attributing the responsibility for violation of the Convention constituted a separate issue for resolution by the Court. Thus, it found the military and political support to the unrecognised Moldovian Republic of Trandsdniestria (MRT) exercised by the Russian Federation, and considered Russia *de facto* responsible for the actions committed by the "MRT" authorities (paras. 38-42, 85). The Court reiterated the primacy of the territorial approach to the jurisdiction but reiterated that it could be extended extraterritorially in extraordinary cases (as in *Banković*, para. 67), one of which being effective, direct or indirect, control over a territory outside its borders as a result of lawful or unlawful activity (para. 106). The Russian Federation's jurisdiction was admitted in that case. The Court recognized applicable the conclusion reached in the *Ivanţoc and Others v. Moldova and Russia*, where the Court admitted that the scope of effective measures that the Moldovan government could take in the territory of "MRT" was limited with the absence of effective control over the territory (para 109). When assessing the responsibility of Moldova, the Court recognized its jurisdiction and weighed the fulfillment of the State's positive obligation under Article 2 of Protocol 1, establishing that the measures undertaken by the Respondent State sufficed to qualify for

the obligation assessment and ensured the applicants access to educational institution, as well as the possibility of the applicants to continue their education in the state language (para. 146-148).

The scope of Article 2 Protocol 1 was also interpreted to cover attempted indoctrination in education, both with respect to civic and religious matters. Religious education was included into the scope of Article 2 Protocol 1 and Article 8. In line with a well-established case-law, students belonging to minorities are recognized to be entitled to withdrawal from religious education, not in compliance with that of their own or their parents (*Kamell and Hardt* v. Sweden, *Aminoff* v. Sweden, *Angelini* v. Sweden). The Strasbourg institutions based their examination of the validity of the claims for withdrawal from educational institutions or classes required due to their parents' convictions on the weighted assessment whether the convictions invoked as grounds for such withdrawals run contrary to the children' right to education. The right to education is recognized to prevail over the convictions of others. The Commission interpreted the origin of the entitlement for withdrawals taking roots from the States' obligation to respect religious or philosophical convictions. Therefore, the proportionality test of methods applied to the aim pursued is relevant to assess the validity of a rejection for withdrawal. The Commission considered, that in cases when the content and methodology of an educational course could not be considered insulting to the religious or philosophical convictions, the rejection to grant a withdrawal is reasonable and a related complaint is manifestly ill-founded.

The issues pertaining to civic education were examined in the case of *Kjeldsen, Busk Madsen and Pedersen* in 1976. In the application, the parents of school age students, complained against the legislation issued by the public authorities, introducing compulsory sex education into the curriculum of Danish schools. The applicants alleged violation of their rights under Article 2 para 2 of Protocol 1 of the Convention, as contradictory to their beliefs as Christians. In deciding on the complaint, the Court examined and reaffirmed the conclusion by the normative intension drawn from the *travaux preparatoires*, that the respect to parents' convictions with regard to the education of their children had to be ensured by the States within the framework of public education, safeguarding pluralism in education. This obligation could not be substituted with a possibility of children to be educated

privately, which, however, could not be disregarded as an efficient tool, given the private schooling was subsidized in the State concerned in implementation of their positive obligations under the Convention in "fulfilling the functions assumed by it in regard to education and teaching" (para. 50, Article 2 Protocol 1). The Court's approach to the assessment of claims that certain educational courses provided within compulsory institutionalized educational settings contradicted to religious or philosophical beliefs of parents was based on the test measuring whether the information distributed within the course is presented in "objective, critical and pluralistic manner".[130] The failure to comply with the test leads to the recognition of the State's obligation to grant an exemption from the class, with no obligation to provide for an alternative (*Folgerø*, para.102, *Grzelak* v. Poland, para. 105, also applied in *Kjeldsen, Busk Madsen and Pedersen*). In this regard, the Court, reiterated the *Folgerø* case approach, aligning the interpretation of the norm under Article 2 of Protocol 1, when the standard of objective, critical and pluralistic teaching, should be applied to all cases covering minority education. In assessing the fair balance allowed by the design of the curriculum, the Court considered the possibility of preventing value-judgment by teachers that could influence the beliefs professed by parents that they wished to transfer to their children, and the effective and affordable possibilities of alternatives to public schooling. Based on the weighted guarantees provided by the respondent State, the Court considered that the measures adopted by the government in limitation of rights of the applicants under Article 2 of Protocol 1 were not disproportionate and did not constitute violation of the rights to education, private life and non-discrimination.

The case-law of the Court includes cases where the examination of academic freedoms is made through the convergence with cultural identity and other individual rights, including the freedom of expression. In the case *Aksu v. Turkey* [GC],[131] the Court examined

130 *Inter alia* in *Appel-Irrgang v. Germany (dec.)., Hasan and Eylem Zengin v. Turkey; Mansur Yalçin and Others v. Turkey, Folgerø and Others v.Norway [GC].*

131 The case was initiated by an applicant of Roma origin concerning a what appears an anthropological, historical and socio-economic study of the Roma communities in Turkey and several dictionaries published with governmental subsidies that create denigrating image of the group. The Court approaches Roma from the perception that "as a result of their turbulent

whether an academic research dedicated to a minority published as a scientific source constituted a violation of private life of a person belonging to that minority for alleged intentional insult and an attack on the applicant's cultural identity. In *Aksu* case, the Court examined allegation of a violation of Article 8 in conjunction with Article 14. As mentioned above, discrimination is established in the case-law when rights-holders are subjected to differential treatment in relatively similar situations without an objective and reasonable justification, which implies that the difference in treatment pursues a legitimate aim or displays proportionality between the means employed and the aim pursued. The Court approaches ethnic discrimination from the perspective of a positive obligation of States to employ all means to combat racism and reinforce democracy through the perception of diversity as a source of enrichment (inter alia, in *Timishev* v. Russia, para 56, discussed above). For the majority of cases where discrimination is invoked, including in education and private life questions, the applicant is required to provide prima facie evidence of the difference in treatment producing discriminatory effect or having discriminatory intent. In *Aksu*, neither the intent nor effect of the publications were recognized established.

With respect to establishing the status of victim of the applicant in the case, which primarily raised the arguments of general nature alleging their debasing effect on the minority group generally and on the applicant as a member of the group, the Chamber recognized the victimhood based on the outcomes of the domestic procedures, which de facto confirmed the applicant as the affected party. The Grand Chamber, however, re-examined the applicant's status, reiterating its independence from the domestic courts' conclusions (paras. 49-54). Despite the lack of direct intention to target the applicant as exposed in the publications, the Court considered necessary to approach the status of victim "in a flexible manner", as the scope of the complaint allowed to consider the applicant a victim.

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history and constant uprooting the Roma have become a specific type of disadvantaged and vulnerable minority, that requires special protection" (D.H. and Others, para. 182, applied as the fundamental tenet for the examination in the absolute majority of cases concerning the Roma).

The Grand Chamber approached consideration of the convergence of identity and private life as a complex notion based on the principle of personal autonomy, incorporating various aspects of one's identity, including individual's ethnic identity (the conclusion was based on the arguments in *S. and Marper* v. the United Kingdom [GC], para 66; *Ciubotaru v. Moldova*, para. 49). The Court reapplied the conclusion of the established case-law that negative stereotyping of the group could affect, under certain conditions, the group's sense of identity, self-worth and self-confidence, collectively and individually (para. 58). In that respect, the State's negative obligation of non-interference with private life was admitted to be sustained with a positive obligation to provide safeguards for effective respect of private life, implying the protection against third-party interference (para. 59). The allegations in the case of *Aksu* were assessed as constituting the latter claim in the failure of the government to perform its positive obligation to protect against the third party's interference. The Court examined the substance of the complaint from the perspective of the fair balance between private and public interests, reflected in the conflict between the applicant's right to private life counterpoised to the freedom of expression of the public based on the hierarchy of the rights safeguarded by Articles 8 and 10 (*Timciuc* v. Romania (dec.), para. 144). As discussed above, the case-law interprets Article 10 from its essence as the foundation of democratic society, which implies that the freedom of expression also construes dissemination of ideas that shock or insult. The margin of appreciation in the case-law is a narrow one (para. 67), and the *Aksu* case required its revision to assess for the presence of the violation. Another perspective accorded by the Court to the examination of the issue was the academic freedoms (para. 71), which required consideration of the limitations to the academic freedoms to be applied narrowly. In the presence of the effective domestic system to receive legal remedy, and the fair balance afforded to the consideration of the case by domestic courts, the Court concluded that there was no violation of the Convention.

In the case *Cox v. Turkey*, the Court assessed the legitimacy of the expulsion of a university professor from the respondent State for sharing opinions on Kurdish and Armenian issues, allegedly threatening national security. The Court examined the intervention from the authorities from the perspective that it limited the applicant's freedom of expression. The Court assessed the intervention as to their

lawfulness and the necessity in the democratic society counterbalanced to the freedom of expression being a foundation of every democratic state. As the domestic courts failed to indicate the substance of the misdeeds committed by the applicant that had led to the applicant's expulsion and that the courts failed to consider that expulsion affecting fundamental rights of the applicant, the Court recognised the intervention failing to satisfy the requirement of necessity in democratic society. Therefore, the violation of Article 10 was established.

4.5. The right to the freedom of association with cultural or religious purposes

The right to the freedom of association is established by Article 11 of the ECHR. The provision is applicable to all organisations, including cultural, that bear a private law nature. The organization of public law nature are excluded from the scope of the protection. The scope of Article 11 includes the rights of persons belonging to minorities to form associations with the aim of development and promotion of their culture. The *Gorzelik and Others v. Poland* [GC] case is important for the delineation of the place and role of associations created by and for minority groups with cultural purposes, and in particular with the purpose of developing their collective identity. In the case, the Court defined cultural associations through their statutory purposes, and distinguished associations created for the purposes of "*protecting cultural or spiritual heritage, pursuing various socio-economic aims, proclaiming or teaching religion, seeking an ethnic identity or asserting a minority consciousness*" (para. 92). The Court asserted that the role of cultural associations for democracy is comparable to political parties, as they ensured meaningfulness of pluralism, implying genuine recognition and respect for "*diversity and the dynamics of cultural traditions, ethnic and cultural identities, religious beliefs, artistic, literary and socio-economic ideas and concepts*". These factors were recognized by the Court to be essential for social cohesion, as they informed and enabled "*harmonious interaction of persons and groups with varied identities*", being prerequisite of social cohesion and peaceful and healthy functioning of integrated society.

The Court underlined the significance of cultural associations in a pluralistic society also for their input into enabling grassroots participatory approach intrinsic for direct democracy. The Court

stating that "*where a civil society functions in a healthy manner, the participation of citizens in the democratic process is to a large extent achieved through belonging to associations in which they may integrate with each other and pursue common objectives collectively*" (*Gorzelik and Others* v. Poland [GC], para. 92). In this respect, in a number of key decisions, the Court maintained that one's possibility to form cultural associations was inalienable to the possibility of persons belonging to national minority to discuss their ethnic identity. The reflection on one's identity, including that based on origin, imbedded into the notion of individual autonomy, constituted the cornerstone of the universal right to the freedom of expression, and in this perspective, the right to assembly for cultural purposes was *de facto* an instrument for ensuring and realisation of the right to the freedom of expression (*Tourkiki Enosi Xanthis and Others* v. Greece, para. 56). The connection of the freedoms of expression and association was also discussed from the perspective of democratic participation in the *Gorzelik* case, where the Court underlined that a cornerstone democratic principle of pluralism could only be meaningfully implemented if associations are enabled to freely disseminate ideas and opinions, triggering public discourse of socially valid issues, and therefore the Court devised that the protection of the freedom of expression, including the freedom to hold and express opinions, constitutes an objective of the freedom of association, within the meaning of Article 10 of the Convention (para. 91).

In the case *Sidiropoulos and Others v. Greece* the Court developed the scope of protection granted to associations representing minority groups, in particular, to promote their culture and traditions. The applicants, who claimed to be of Macedonian origin and maintain Macedonian national consciousness, alleged that the rejection to register their organization, created for the promotion of minority cultural values, by national courts was discriminatory and violated their rights under Article 11 of the Convention. The Court distinguished that the aim of the applicants concerned promotion of regional special characteristics, which was their legitimate right as inhabitants of the region for "historical as well as economic reasons" (para. 44). The Court substantiated the finding of a violation of Article 11 of the ECHR also referencing the OSCE commitments, under which, Greece undertook to ensure the right to form associations with the aim of protecting "*cultural and spiritual heritage*" (para. 44).

In the judgment on the case *Tourkiki Enosi Xanthis and Others v. Greece* (similar argumentation and conclusions were used in the case *Emin and others v. Greece* with respect to the freedom of association of women belonging to the Muslim minority in Greece), the Court established that the democratic principles required protection of cultural diversity in line with the standards under the international law, as well as ensure tolerance to such historically established diversity (para 51). The Court did not find the threat to territorial integrity in organisations established by minorities in activities promoting their cultural and spiritual heritage. The dissolution of the organization that had functioned without causing threat to the national order of the respondent State for over fifty years, was not recognised proportionate and could not be substantiated with reference to the statutory documents or activities of the association that would detract from the scope of its statute. The Court proclaimed that the wide scope of the freedom of expression underlying and intrinsically linked to the freedom of association included the freedom to express shocking views with respect to one's own ethnic identity, which could not, however, be assessed as a threat to public order by the public authorities.

In *Gorzelik and Others v. Poland* [GC], a case launched with respect to a refusal to register domestically a minority group association seeking to develop and preserve their cultural identity as a distinct group, the Court reiterated the importance of various cultural and religious associations, including those created with the aim of promoting cultural and religious heritage, "*seeking an ethnic identity or asserting a minority consciousness*" (para. 92). The refusal of the registration by the domestic courts was made on the basis that the Silesian national minority, which the applicants claimed to be members of, did not constitute a minority in Poland. The decision to reject registration was based on the argument of prevention of public disorder by anticipating a possibility of a national minority members to circumvent electoral law. The Court agreed with that argumentation of the national courts that the rejection served a legitimate aim of protecting democratic institutions on the tenet of a potentially disruptive effect of the positive outcome of the registration that could be misused by the applicants or other members of similar ethnic groups. The test whether the interference was necessary in democratic society was approached by the Court from the standard that the right to associations was a hallmark for democratic society and pluralism, only compelling

reasons under strict judicial supervision could justify interference (para. 88).

The application of that principle of case-law was adjusted by the Court to the situation of minorities with the additional test aiming to ensure that 'fair and proper treatment of minorities' is balanced to the attempts to avoid abuse of the rights and the 'dominant position' of the minority (developed in *Young, James and Webster v. the United Kingdom* (judgment of 1981, para 1963); applied and developed in the case of *Chassagnou and Others v. France* [GC], para. 112; *Gorzelik*, para. 90). The importance of the freedom of association for national minorities was recognized by the Court as a tool not only to preserve their rights but also to "*express and promote its identity"* (para. 93). That, however, could not eliminate the necessity of balance with the positive obligations of States under Article 1 to guarantee the rights and freedoms of others within their jurisdiction, and could also be limited under the standard derogation clauses. The assessment criteria for the validity of interference for the freedom of associations for national minorities was developed by the Court under the formula of 'pressing social need', while an interference should also comply with the standard proportionality test (para 94-103). This requirement restricted the traditionally applicable interpretation of the 'necessity in democratic society'. The weighted assessment of the domestically imposed restrictions and the statutory documents of the association in the *Gorzelik* case led the Court to conclude that the reference to the national minority status of that group, which had not been officially recognized with respect to the Silesians, constituted an attempt to abuse the formation of a cultural organization for perspective gaining undue electoral privileges, and therefore the interference was recognized proportionate.

The standards for the realization of the right of persons belonging to minorities to peaceful assembly and association with cultural purposes was discussed in the cases *Stankov and the United Macedonian Organisation Ilinden v. Bulgaria* and *Sidiropoulos and Others v Greece.* Both complaints alleged violations of the rights under Article 11 based on the rejections to hold peaceful assemblies or registering an association of minorities based on considerations that they would threatened the unity of the nation or the public order. In both cases the Court established the violations. In the *Stankov* case, the prohibitive measures

concerned the blanket ban on commemorative assemblies, which the Court examined under Article 11 in conjunction with Article 10, as the main purpose of the prohibition was directed against the messages that could be delivered and therefore concerned the freedom of speech. Those was rejected based on the reasons of threat to public order and constitutional unity of the state, endangering public order. The Court did not recognize proportionality of the restrictions as the associations' statutory documents and aims rejected violence and called upon cultural purposes. The Court underlined that the prohibition of registration to the organization could not be automatically considered as a valid reason to introducing a blanket ban on the assemblies. In its assessment of the justification for the choice of the measures, the Court did not recognize that demands for the recognition of a minority expressed with some degree of separatism to constitute threat to territorial integrity, and also reiterated that even if separatist ideas could be automatically attributed to some members of the association, which attempted to facilitate recognition of a national minority, that could not justify a ban on assemblies and restrictions on the freedom of assembly. In its assessment of the nature of the planned assembly, the Court did not agree that politically sensitive issues on the agenda of the organization during the planned meeting could not accord a wider margin of appreciation to the authorities as to the choice of the measures to respond. As the ban preemptively suppressed also the freedom of expression, fundamental for democratic society, the restrictions were not recognized as compliant with the tests of necessity in democratic society and proportionality, given that under the Court's case-law, the freedom of assembly was protected also with respect to opinions that are not uniformly shared within the society. As the primary instrument of democracy was dialogue, the Court reiterated that interference with the rights related to expression of a group promoting minority consciousness could not be justified in democratic state (para. 89-90).

The case of *Sidiropoulos and Others v. Greece* was initiated by applicants who claimed to be of Macedonian ethnic origin and decided to register an association with the objective to develop Macedonian cultural, intellectual and artistic development of its members and other inhabitants of the region, where they resided, but the registration was rejected (para. 8). The rejection was made on the basis that the organization would attempt to recognise the existence of a Macedonian

minority in Greece (para 11). The Court considered the interference with the right to form an association and pursue the statutory aims of their organization (para. 31). In examining the justification of the interference, the Court took into the consideration the ethnic tensions in the Western Balkans region and admitted that the protection of national security constituted a legitimate aim for the interference with the rights in that case. However, the assessment of the necessity in a democratic society did not demonstrate supportive evidence that the cultural organization of a minority group would pursue the disruption of the constitutional order and territorial integrity of the respondent State, and therefore an intervention with the group's right to form an association aimed at protecting their spiritual and cultural heritage could not be considered consistent with democratic society standards and ran contrary to international commitments of the respondent State (para.44). Considering the general framework of the then unresolved name conflict between Greece and the North Macedonia, the Court reiterated that the intentions pursued by an association could not be framed beyond the statutory lines, based on the established case-law of the Court. Therefore, it could not be established that the aims of the organization could extend beyond cultural development of the region (45-46). The Court reiterated the inadmissibility of preemptive bans on associations without due substantiation, in the presence of a possibility to dissolve an organization in case of evidence of malicious activity, therefore the interference with the rights was admitted disproportionate to its objectives.

4.6. Cultural Rights Related to the Freedom of Religion

Examination of the issues pertaining to religious traditions, manifestation and observance by the Court is, on one perspective, based on the tenet that the freedom of religion and religious diversity are pertinent in democratic society. On the other hand, the Court's approaches are based on a set of formal conclusions by the former Commission, and therefore bound with its assessments, and which are currently under reconsideration, as will be discussed below. Another factor that is accounted in resolution of religion-related cases on alleged minority rights violations is the maintenance of the balance between facilitation of the minority capabilities and ensuring the majority interests are not disproportionately interfered. Designing proportionate interference as to the legitimate aim pursued by the measures is yet

another factor of general importance for policy-making in the field of religious freedoms, which is challenged by the sensitivity of the subject matter of the regulation and the extensive scope of matters that religious issues converge with. Specific religious traditions affect the way people behave, process or filter facts and information, the way they dress and what they eat, not to mention the deep effect religious norms leave on the identity and philosophical world views of individuals, and occasional intolerance the unfamiliar ones may trigger. When these issues concern minority groups, the sensitivity rises due to the remaining social and economic vulnerabilities of different etiologies. In the ECHR case-law, the religion-related rights of persons belonging to minority encompass the possibility to worship, teach, practice and observe religion, within the meaning of Article 9 of the ECHR. The rights can be enjoyed individually or in community with others. The Court's case-law includes issues pertaining to accessing places of worship, participating in religious rites and services, and observance of religion.

The case of *Karaahmed v. Bulgaria* that concerned an attack on Muslim worshippers during their prayers near a mosque by nationalist party supporters raised a question of the balance that was required under Article 9 to ensure the religious freedoms of religious minority and civil and political rights, including the freedom of assembly and expression. The Court approached the question whether the actions considered an intervention with the right to the freedom of religion from the requirement to counterbalance the three conflicting rights in the case (the rights to freedom of expression, freedom of peaceful assembly, the right to freedom of religion, respectively regulated under Articles 10, 11 and 9). In the absence of the hierarchy of these rights under the Convention and established requirement of equal scope of obligations on the States to protect them, the Court established that the applicable test is to consider the prevalence of one of the rights in a tolerant and pluralistic society and the effective provision of a fair balance when restrictive measures are applied with respect to one of the rights (para. 92, 95). Based on the principle applicable to religious ceremonies and the scope of respective positive obligation (developed in the case of *Krupko and Others v. Russia)*, it was recognized that positive obligation to protect participants in religious ceremonies conducted without a preliminary authorization of the authorities remained, as long as the ceremony remained peaceful (para. 98). The Court underlined that, in

the absence of its capacity and jurisdiction to decide when a demonstration could or should be prohibited by public authorities, in the case of a known anti-Muslim programme of a political party, its intention to demonstrate in front of a mosque during worship should have led the authorities to ensure their positive obligation to protect would be effectively performed to minimize the risk of violence. The minimal scope of the implementation of the obligation to protect was admitted in the requirement to ensure sufficient policing of a demonstration (para. 100). The Court concluded that no proper balance was achieved by the authorities in their measures to ensure *"effective and peaceful"* exercise of rights both of the demonstrators and the worshippers, as well as the lack of subsequent response to the events, which indicated the failure of the respondent State to comply with its positive obligations under Article 9 (para 111).

The consideration whether the treatment of worshippers by the demonstrators constituted ill-treatment in the meaning of Article 3 in conjunction with Article 14 for religious basis was examined by the Court from the perspective of severity and the effect it could place on the applicants. The Court approached the assessment from the tenet that to amount of a violation under Article 3, the actions should be of minimal level of severity. Thus, the violation of Article 3 could be considered in actions that humiliate or debase individuals diminishing their human dignity, arousing anguish, fear and or inferiority to the extent of undermining one's resistance, physical or psychological; while discrimination in conjunction to Article 3 is recognized in actions that "*attain a level of severity such as to constitute an affront to human dignity*" (para. 72-73). The positive obligation of states to protect against actions inflicted by third parties calibrated to the nature of religion-based attacks is triggered by both physical and psychological ill-treatment (para. 73). Under the Courts' case-law, the thresholds for moral sufferings under Article 3 was considered reached when inflicted through protracted (two months) intimidation and personalized attacks and threats (as in the case of *P.F. and E.F. v. the United Kingdom* (dec.)) or physical attacks of severe intensity, personal searches and other measures targeted at forcing the victims to act against their will (as in the case of *Members of the Gldani Congregation of Jehovah's Witnesses and Others v. Georgia*). The one-time short event, although leading to some bodily harm and interrupted religious ritual, was not admitted to reach the level of severity to qualify for a violation of Article 3.

Limitation of access to places of worship or misappropriation of property belonging to minority religious institutions were matters of Court's scrutiny in several cases. Hampered access to places of worship in the territory of Northern Cyprus for Greek Cypriots due to persecution, limitation on movements and transfer of property titles on Church-owned land to the Muslim religious trust were examined in the case *Cyprus v. Turkey* [GC], (paras. 179, 241-247). The interests affected in that case included access to places of worship through general and specifically calibrated restrictions on movement of persons belonging to a minority in that area (Orthodox and Maronite Greek Cypriots) under the conditions of armed conflict, as well as resulting from the termination of appointment of religious personnel in the area, and the property interests of a religious institution. The former aspect was considered within the principles applicable to the restrictions on observance of a religion (para. 245-247), in so far as the restrictions on the freedom of movement "considerably curtailed" the possibility of the residents in the region to access the places of worship, which was also considered relevant in other aspects of religious life (para. 245).

Limitation of access to places of worship was one of the grounds upon which discrimination was established in the case *Izzetin Doğan and Others v. Turkey* [GC], in which Turkish citizens practicing the Alevi faith claimed discrimination of their religious freedoms, reflected in law and practice, as compared to the followers of the Sunni Muslims. The manifestations of discrimination on religious grounds constituted the inability of the followers of Alevi faith in Turkey to access their places of worship, e.g. after the closure of the Dervish monasteries and tombs, during the secularisation reforms, as well as the failure of the authorities to provide religious services to the Alevi devotees (para. 89). Another manifestation of discriminatory interference with religious freedoms was reflected in the abolition of certain ecclesiastical offices and prohibition of the use of religious titles of religious leaders (para. 52)[132] The Court established that the substance of the claim was the approach of the authorities to equate Alevi faith and Sunnism, as opposed to the sought recognition of it as a separate 'order' within

132 European Court of Human Rights. *İzzettin Doğan and Others v. Turkey [GC],* application No. 62649/10, judgment (Merits and Just Satisfaction), 26 April 2016. Available at: https://hudoc.echr.coe.int/tur?i=001-162697. Last accessed in June 2021.

Islam (para. 90), which disregarded specificities of their faith and infringed their right to the freedom of religion. In that respect, the established approach of the Court is based on the interpretation of the substance of the Article 9 of the Convention to recognize the autonomous existence of a religious community as its fundamental tenet, as it is based on the perception of specific religious riots by its devotees as having divine origin and the compliance with the rules bears for the devotees a sacred mandatory value (para. 93).

The significance of the autonomous existence of religious communities for the purposes of the Convention is also enshrined in its intrinsic validity for pluralism and democratic order, and guarantees effective enjoyment of the rights by the rights-holders. The latter implies the reading of Article 9 in conjunction and mutual reinforcement with Article 11, guaranteeing the freedom of association (para. 93, reiterated in cases initiated by the Jehova churches against Austria, France and Georgia). The Court's case-law reiterated that separate reading of Article 9, without the right to association, entails weakening of the individual freedom of religion (also in *Sindicatul "Păstorul cel Bun" v. Romania [GC]*, para. 136), and leads to detrimental effects on manifestation and observance of religious beliefs. The collective aspect of manifestation of a religious belief is recognized in the Court's case law as primary aspect of religious beliefs under the Convention is recognized by the Court from the semantic interpretation of Article 9 that prescribes collective forms of manifestation, including worship, teaching, practice and observance.

However, as discussed above, the protection granted under the Convention is not absolute and depends on the nature of the manifestations and the presence of direct causal link with the authentic belief (para. 104). The State's discretion in this respect is admitted by the Court to extend to the determination of legitimacy of certain ways of expression and manifestation of religion (para. 107). Yet, the substance of relationships of power and social dynamics in democratic society are not admitted to encompass the entitlement or the positive obligation of the State to unite different religious communities under a unified leadership, in particular when the communities are expressly opposed to such unification (para. 108). Forceful unification of religious communities under a unified leadership could be admitted a violation

of Article 9, while the State's obligation in ensuring peaceful co-existence of communities should be implemented (discussed above).

As in resolving the cases related to co-existence of communities, conflicts on relations between religious communities and States are approached by the Court from the prevalence of pluralism and tolerance as fundamental principles forming the basis of the democratic society, requiring a balance between minority groups and majority interests, reflected in genuine recognition of diversity, including "*dynamics of cultural traditions, ethnic and cultural identities, religious beliefs and artistic, literary and socio-economic ideas and concepts*" (para. 109). The religious diversity is therefore perceived as a source of enrichment for democratic society. The natures of guarantees under Article 9 of the Convention are interpreted by the Court from the perspective that they need to be implemented in an effective and practical (as per the case-law formula that "*the Convention is designed to guarantee not rights that are theoretical or illusory*", discussed above in *Folgerø and Others* and *Kimlya and Others*, etc.). The Court devised that the reading of the Convention that would allow States' discretion to narrow the interpretation of the notion of religious denominations encompassing only traditional denominations, in exclusion of marginalizing non-traditional and minority forms, would contradict to its formational principles. Such approach, if accepted as falling within the margin of appreciation of the State would undermine the system of protection, to the Court's view, to the extent that the rights under the Convention would shift purely theoretic (para. 114). De facto, such interpretation would curtail implementation of the right through a denial of the religious nature to a denomination. Following this logic, the Court admitted that the denial of Alevi faith recognition of its religious nature, including hampering the institutional separation, the rights under Article 9 were interfered.

The case-law of the Court related to observance of religious beliefs includes cases on state recognition and registration of religious confessions in a non-discriminatory basis, as well as recognition and regulation of civil and administrative consequences of their activities. The primary tenets under which the Court approached such cases were the insurance of impartial attitude of States to all aspects of functioning of religious institutions, including non-discrimination to the confessions followed by minority population, and the substance of the

beliefs professed. The recognition of religious freedoms in all their manifestation should be inclusive and aim at facilitating tolerance and acceptance in society. The cases that raised various aspects of civil and administrative consequence of religious activities were approached by the Court from the perspective of impartiality with respect to the administrative aspects (including the obligation of states to equally apply the norms on taxation of religious donations, levying of exemptions on utility charges for the places of worship and non-discriminatory application of employment regulation). On the other hand, the general approach to the civil consequences of religious activities expressed in the case-law of the Court did not suggest default recognition of the positive obligation of States to acknowledge or accept them as official, as long as these are practiced on a uniform indiscriminate basis. The margin of appreciation for the regulation of State-church relationships lies of the State and remains wide, but within the principles of the Convention and the nature of democratic society and subject to international scrutiny.[133] As highlighted above, the principles applied to the beliefs that demonstrate cogency, cohesion and importance.

In the recently adjudicated case of the *Ancient Baltic Religious Association Romuva v. Lithuania*, the Court examined the tenets of equality in public recognition of a pagan faith as a religious association. The applicant organization was a religious umbrella association for several old Baltic pagan religious communities. The applicant's request to be registered as a religious association under the domestic law of the respondent State, which would entitle them to conduct rites with officially recognized civil consequences, and provide religious education at general educational institutions. The request for the registration was rejected by the parliament, after the tenets of the beliefs the association followed were contested during the parliamentary debate on the substance (paras. 131, 134). The Court

133 As reflected in the case-law on Article 9 and Article 9 in conjunction with Article 14 of the Court, including judgments in the cases of *Metropolitan Church of Bessarabia and Others v. Moldova, Savez crkava "Riječ života" and Others, İzzettin Doğan and Others v. Turkey, Bayatyan v. Armenia [GC], Church of Scientology Moscow v. Russia, Association Les Témoins de Jéhovah v. France, Cumhuriyetçi Eğitim ve Kültür Merkezi Vakfi v. Turkey, Members of the Gldani Congregation of Jehovah's Witnesses and Others v. Georgia, Metodiev and Others v. Bulgaria, Svyato-Mykhaylivska Parafiya v. Ukraine.*

approached the consideration of the interference with the right from the need to examine whether the decision to reject the application was made in line with the state's obligation to remain neutral and impartial in matters of religion, as well as whether the decision was safeguarded with the existing legal remedy instruments. The established and recognized status of communities professing old Baltic faith in the respondent State that devised from their legal registration or inclusion into national religious beliefs censuses entailed the conclusion that the applicant association's activity was religious in substance and the refusal of the authorities constituted a prohibition of religious activity, rather than an institutional status or legal personality (paras. 116-119; paras 76, 120).

The difference in treatment, in particular, was assessed by the Court by the domestic practice of registering religious associations professing traditional beliefs with lower number of devotees than the applicant organization professing non-traditional beliefs (para. 129-131), with no objective or reasonable explanation (para. 132). The Court underlined that the domestic approach to the resolution of questions of co-existence of different religious confessions and beliefs should be based on the tenets of pluralism necessary and fundamental in democratic society, with the States' positive obligations in this respect extending to activities maintaining public order, 'religious harmony and tolerance' among competing groups and visions (para. 143). The Court underlined that the State's margin of appreciation could not be adjusted, depending on the nature of the religious belief in question, and should remain equal as to the traditional and non-traditional beliefs, and this difference in beliefs could not justify the difference in treatment (para. 146), as long as the activities and aims of the association do not expressly contradict to the interests of society, public order and security. The violation of Article 14 in conjunction with Article 9 was therefore established in the case.

Another aspect of religious cultural traditions is examined within the case-law on access to traditional food, including the kosher food, as well as the related issues pertaining to the acceptability of traditional means of animal slaughter. The example of the case-law is the Grand Chamber's judgment *Cha'are Shalom Ve Tsedek v. France* [GC], where the Court established that the failure to ensure community's access to traditionally prepared food can be considered a violation of the

freedom to manifest religion in observance within the scope of Article 9. The case was launched by a Jewish organization that complained about violation of Article 9 on account of a rejection of access to animal slaughterhouse for ritual killings of animals to comply with the religious requirements under Kashrut. The association also alleged violation of Article 14 for discrimination against another Jewish organization that was granted access. In the case the Court established that the applicant association was a due subject under the French law to be qualified for the ecclesiastical activities it claimed to perform. The activities sought by the associations were recognized to fall within the notion of the 'observance' aspect of religious freedoms under Article 9, which shifted it an admissible object of the Court's examination. To establish the proportionality of limitations imposed on the applicant, the Court examined whether the restrictions on the scope of actors allowed to conduct contested activities constituted a legitimate aim. In that assessment, the Court devised (para. 77) that the strict standards imposed for production of kosher food and the discrepancy between the procedures legally provided for regular production of meat and the procedures employed for the production of kosher meet shifted the increased supervision over the process to the level of public interest. The Court established that the procedures for meat production employed by the applicant organization were identical to those employed by the primary producer of kosher meat, while the difference was construed in the certification and control, which, however, carried comparatively lower importance for the general consumers (para. 79). Therefore, the Court concluded that the test of the proportionality for the intervention into the religious freedoms manifested in prohibitions of certain rituals, including ritual slaughter for food purposes could be recognized not in compliance with the Convention in case the normative prohibitions on ritual animal slaughter renders produce prepared in line with religious requirements totally inaccessible for the religious groups concerned (para. 80). To decide on the compliance with proportionality, the Court examined submissions of Jewish community and established that the required standard of certification of meat could be achieved through reliable alternative sources of traditional religious judiciary, while the community was not deprived of access to the kosher produce. Those conclusions led the Court to establish that there was no interference with applicant's right, and in the view that all limitations were compliant with the lawfulness and pursued a legitimate aim of ensuring public health (para 84), the Court

pronounced there was no violation of the applicant's rights under Article 9 with respect to observance.

The Court underlined that the religious dimension of Article 9 constituted one of the "*most vital elements that go to make up the identity of believers and their conception of life, but it is also a precious asset for atheists, agnostics, sceptics and the unconcerned*" (*Eweida and Others,* para. 79), which explained its significance for pluralism and democratic society. The individual right to religious belief is absolute under the Court's reading of the Convention, safe for the aspects of the right that affect the rights of others. The Court classifies that apart from the conscientious aspect of the right, namely the religious convictions *per se*, the religious rights also encompass the freedom to manifest one's belief, alone and in private and to practice in community with others and in public (*Eweida,* para. 80). The latter imply direct effect on the rights of others and can be limited under para 2 of Article 9 in cases when such limitations are established in the law, necessary in a democratic society and pursue legitimate aims. Under the Court's case-law, the obligations of the States, both positive, implying protection of the right from the actions of the public authorities or third parties, as well as negative implying the prohibition of intervention, are triggered with respect to religious beliefs, which "*denotes views that attain a certain level of cogency, seriousness, cohesion and importance*"[134], which then implied an absolute acceptance, impartiality and non-intervention of the state into the substance of the beliefs and the manner of their manifestations (*Eweida,* para. 81)[135]. However, the notion of 'manifestation' of a religious belief is not interpreted to include all activities or omissions influenced by the belief, and is limited to those that directly express the belief and are 'intimately linked' to it, including rituals forming generally recognized worship practices, with the possibility to form a 'direct nexus' of logical argumentation that is

134 The conditional was developed in *Bayatyan v. Armenia [GC]; Leela Förderkreis e.V. and Others v. Germany; Jakóbski v. Poland*, cited in para. 81 of the *Eweida and others*.

135 That argument applied to a case on the rights of persons belonging to a national minority was developed based on a general case-law on Article 9, including, as cited by the Court, the cases of *Manoussakis and Others v. Greece; Hasan and Chaush v. Bulgaria [GC]; Refah Partisi (the Welfare Party) and Others v.*

analysed by the Court on a case-by-case basis (*Eweida,* para. 82). In such cases, the applicant would be spared of the burden of proof to show that their actions were mandated by the manifestation of their faith (*Eweida,* para. 82). The Court's case law excluded the positive actions or abstentions that bore remote connection with the belief from the scope of actions protected under Article 9.[136] The acceptability of the interventions into the rights are thus verified through the tests of proportionality and fair balance between the rights of others and individual manifestation of the religion (*Eweida,* para. 85*; S.A.S. v. France [GC],* para. 157*)*.

The lack of respect or sensitivity to religious traditions that should be manifested in everyday life of individuals, or unreasonable expectations as to such sensitivity, give rise to a vast variety of cases, challenging matters as religiously dictated clothing, performance of professional duties and observance of religion, and display of religious symbols in public institutions. Overall, these matters are admitted by the Court to belong within the scope of Article 9. In the case of the S*.A.S. v. France*, the Grand Chamber recognized that traditional religious clothing is the manifestation of a cultural identity and therefore should be given importance due to its contribution to the pluralism *"that is inherent in democracy"* (*S.A.S. v. France* [GC], para. 120)[137]. The relevant approaches of the Court were based on the requirements of proportionality, ensuring the diversity of views and maintaining a secular nature of public institutions. Specific decisions continuously replicated in the Court's case-law include early Commission's decisions with respect to the Muslim headscarves, such as *Karaduman v. Turkey*. The Commission set the precedent approach that prohibition on wearing the Islamic headscarf were within the State's acceptable margin of appreciation, if headscarves were found incompatible with the pursued aim of protecting the rights and

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Turkey [GC]; *Cha'are Shalom Ve Tsedek v. France* [GC]; *Leyla Şahin ; Pichon and Sajous v. France (dec.)*.

136 The case-law applied to substantiate the argumentation in the Eweida case includes the cases of *Skugar and Others v. Russia (dec.); Arrowsmith v. the United Kingdom*; *C. v. the United Kingdom; Zaoui v. Switzerland*.

137 Other cases related to religious attire are *Belcacemi and Oussar v. Belgium*; *Dakir v. Belgium*.

freedoms of others, public order and public safety. In the case of *Karaduman*, the prohibition of headscarves at universities was admitted to fall within the scope of limitations under Article 9, if the measures were adopted to ensure the rights of non-believers or those who did not manifest the religion, ensuring peaceful coexistence of students of different confessions. These principles were eventually integrated into the assessment of university's measures on banning religious symbols being recognized as due limitations (*Sahin*, para. 111). The principles applied to religious clothing and approaches to the assessment of the related limitations imposed at the places of work or study with respect to persons belonging to a minority community are based on the general argumentation and principles developed by the Court on Article 9. The foundational principles could be illustrated based on the cases of *Eweida and Others v. the United Kingdom, Leyla Şahin v. Turkey, Dogru v. France, Ebrahimian v. France,* and *Ahmet Arslan and Others v. Turkey.* The part of the application in the *Eweida and Others v. the United Kingdom* relevant to the religious rights of persons belonging to national minorities concerned visible wearing of a cross at a workplace by a Coptic Christian of Egyptian descent living in the UK. The uniform rules obligatory at the applicant's place of employment under the contract provided some adjustments for visibly worn religious symbols of several religions (e.g. turbans and in some cases bracelets for the Sikhs, and hijabs for the Muslims). The attempts by the applicants to wear a cross were not authorized by the management and led to sanctions against the applicant, who complained about religiously motivated discrimination and violation of her freedom of religion. The approach used by the Court in the cases of the religious attire, including in the case of *Eweida*, differs from the earlier approaches by the Commission and the Court discussed above with respect to religious rituals at odds with the compliance with professional obligations. As such, these issues are approached by the Court from the perspective that the removal of the conflict between the manifestation of religions through closing should not *per se* require resolution implying the change of the place of employment (*Eweida*, para. 83). The cases invoking the conflict of manifestation of religion reflect the weighed approach of the Court to the assessment of proportionality of intervention with consideration of a number of other variables, including gender and the field of employment, implying adjustment of the proportionality tests employed.

The scope of legitimate restrictions on the right to wear religious symbols was examined within adjudication of cases *Leyla Şahin v. Turkey* [GC], *Dogru v. France* and *Ebrahimian v. France.* In adjudicating the cases, the Court forged an effective approach to the assessment of interventions, in light of the requirements of gender equality and maintenance of secularist nature of public administration. In the case of *Leyla Şahin v. Turkey,* the applicant, a practicing Muslim from a religious family, was denied presence at the examinations at a secular university because of the Muslim headscarf she was wearing. Due to the inability to follow her studies in observance of the required manifestations of her religion, the applicant had to move to continue her education in another country. The proportionality test examining whether the interference with the right to wear a scarf as a recognized practice in manifestation of the applicant's religion included legality, a legitimate aim and necessity in a democratic society. The legality of the restriction was established by the Court based on the general foreseeability of the norms in force, that, although not explicitly mentioning the particular religious attire at a higher hierarchy acts, required the lower-level regulation to prohibit all religious symbols reflected in attire. The legitimate aim reflected in ensuring a uniform secular nature of an educational institution in respect to the rights of others was admitted by the Court as relevant. The application of the general standards developed to qualify intervention as necessary in a democratic society the Court examined the substance of the State's obligations under Article 9, reiterating that "*State's role as the neutral and impartial organiser of the exercise of various religions, faiths and beliefs, […] this role is conducive to public order, religious harmony and tolerance in a democratic society*" (para. 107), which therefore implied that the obligation of the States under Article 9 would not be limited to the blanket removal of the source of tension from the social interaction, but to create conditions under which various social groups could coexist in the spirit of dialogue. The specificity of the domestic context within which the members of the society function is accepted as a tenet for a wide margin of appreciation of States developing measures that regulate the relationships of the State and religion (para. 109). The delimitation of the discretion granted to the State with respect to religious freedoms, in particular their manifestation through symbols, is governed by the nature of the relationships at stake, which imply the necessity to consider the need to protect the rights and freedoms of others, to preserve public order and to secure civil peace and true

religious pluralism (para. 110). The basis for the restriction, secularism and equality (para. 112) applied in recognition of the State's neutrality, implying the guarantees and manifestation of rights of men and women without discrimination (para 116-117) were considered by the Court valid for the restrictions to be adopted. In assessing whether the measures were proportionate, the examination was conducted into the process of elaboration of the university rules, information of the students on the grounds and aims pursued by the rules, as well as the possibility of unhindered manifestation of the religious beliefs by the students outside the secular educational institution. The Court admitted the authorities complied with the requirement of proportionality in development and implementation of the rules (paras. 116-123).

The case of *Dogru v. France* was launched upon an application by a school student practicing Islam, who wore a headscarf, on account of her expulsion from school for the failure to remove the scarf during sports lessons. The Court considered that secularism was a constitutional principle in France, and its founding principle (para. 72). The protection of secularism therefore falls within the area enjoying higher degree of protection in the society in question, compared to the attitude given to religious freedoms, in particular in public educational establishments. Therefore, the margin of appreciation to regulate the relationships between the state and the church is wide but should be implemented in line with the principles under the Convention (para. 72). The balance of public in private interests in the case was considered satisfied, in particular as the individual measures imposed on the applicant were disciplinary in nature, followed her refusal to abide by the institutional rules and in principle originated from the consideration of safety during particular educational activities rather than on the basis of religion. The authorities' argument that the measures were limited in scope to a particular class, attempts were undertaken to establish dialogue with the right-holder and the time for consideration was given and due safeguards accompanied the administrative proceedings, as well as a possibility for the applicant to continue education by correspondence, sufficed, to the Court's view, to the consideration of proportionality and ensured due balance of various interests (para 74-75).

The margin of State's appreciation in granting exemption from compulsory educational activities on religious grounds was examined in *Osmanoğlu and Kocabaş v. Switzerland.* Although the case was examined within Article 9, the Court applied approaches developed with respect to Article 2 of Protocol 1, which the Court admitted applicable as *lex specialis* in the case, despite the lack of ratification of the additional protocol by the respondent State. The contested restrictions concerned the rejection of the authorities to exempt the daughters of the applicants, Muslim devotees, from attendance of compulsory mixed swimming classes on religious basis. Disciplinary penalties were imposed on both the parents and the children for the breach of parental responsibility under the national law and for the failure to attend obligatory classes respectively. One of the contested aspects of the national court's decision was that the integration of foreigners into the societal realities of the respondent state was placed above the freedom of belief (para. 59). The tenet that availability of private education would supply the purpose of proportionality was in that case challenged by the argument that the neglect of the religious identity of the foreigners that would impose on them the necessity to educate their children in private institutions would undermine the purpose of socialization that was invoked by the respondent State as the aims for the restrictive measures. The Court considered that the interests of the secularism, gender equality and the purposes to ensure effective integration of representatives of different cultural and religious backgrounds, aiming to prevent marginalization and social exclusion, constituted legitimate aims for the interference with the right to manifest religion. The Court underlined that, in assessing the proportionality and balance of competing interests in the fields of education, religion within the context of the special social situation of foreigners and persons belonging to minorities, the issues of integration and school education adopt fundamental significance (para. 96). Therefore, the interests of the children in effective integration and comprehensive education takes prevalence over the parents' wish for their children to be freed from compulsory classes (para. 97), in line with the prescribed curriculum of obligatory sports education designed with consideration of interests of all social and welfare status of pupils, as required for compulsory education (para. 100). The Court devised that attendance of mixed sports classes pursued an aim wider than providing certain skills, but attempted to grant the children the possibility to participate in a developing activity with all other pupils,

without exceptions on the basis of their origin or religious views of their parents (para. 98, 100).

The approach used to the interventions into wearing religious symbols as a form of manifestation of a religious belief by employee of a private institution is illustrated by the *Eweida* case. The Court considered that in counterbalancing one's right and desire to manifest a religious belief in a democratic society, which, in its 'healthy' version "*needs to tolerate and sustain pluralism and diversity*" (*Eweida*, para. 94), to a company's legitimate intention to create and communicate a corporate image through a uniform attire, it is not proportionate to accord more weight to the latter, since the religious values are fundamental in their nature. In concluding on the breach of the Convention, the Court also assessed the lack of evidence of a detriment suffered by the company's image by other pre-authorised religious symbols worn and the eventual possibility to amend the dress-code rules (para. 95), as well as the impact of the particular symbol on an individual's professional image, which was not considered affected by the symbol display.

The compatibility of restrictions on the manifestation of religious beliefs through religious clothing worn in public spaces was examined in the case of *Ahmet Arslan and Others v. Turkey.* The applicants in the case belonged to a minority group within the Islam confession that mandated wearing distinct traditional clothing manifesting membership in that group. The applicants were penalized for wearing the traditional religious attire in the streets following a religious ceremony in the mosque. In line with the methodology established in the case-law, the Court considered whether the interference with the possibility to wear traditional religious clothing was proportional measuring the aim pursued, namely the preservation of the conditions of "living together" as an element of the "*protection of the rights and freedoms of others*" in a democratic society. In that respect, formally, the limitations complied with the aims of protecting public safety, prevention of disorder and the protection of the rights and freedoms of others, as established in the case-law raising similar issues (paras. 45-48). However, the consideration of proportionality, applied to the circumstances of the *Arslan* case, when the limitations were applied for wearing specific religious attire on the streets, did not equate to the limitations imposed with respect to public establishments, where the aim of religious neutrality and maintenance of the secular image took

prevalence over individual considerations as to the manifestation of religious identity (paras. 47-49). The Court considered that the manifestation of the religion by the specific attire in public places did not display evidence of threat for public order, or other forms of pressure on others, therefore not affecting interests of third parties (paras. 50-51). Those arguments created the basis to admit the violation of Article 9 of the Convention.

The practice to display religious signs in public buildings constituted another topic of Court's review. In the case of *Lautsi v. Italy*, the Grand Chamber assessed the scope of State's obligations in the performance of functions in relation to education, and confirmed that it extended to incorporate all functions of public authorities, including the setting of the premises (para. 63). Yet, the States possessed the margin of appreciation in developing the approaches to bring it in conformity with the philosophical and religious views of parents. The Court underlined that the openness of schools for pupils of other religious denominations and the lack of evidence of preferential treatment by the teaching staff did not allow to conclude that intolerance was practiced against followers of other beliefs, non-believers or those following other philosophical views (*Lautsi,* para. 74). The Court did not recognize the margin of appreciation exceeded the limits and therefore found there was no violation of the Convention.

The *Lautsi* case demonstrates the oscillation within the case-law development dynamics and the conflict of approaches to the interpretation of the influence of cultural symbols in different settings. The initial decision by the ECHR section on the *Lautsi* case, recognising the violation by authorities to ensure religiously unbiased educational process aiming at instilling the capacity of critical thinking in students and free from attempted indoctrination (para. 56). However, the decision was quashed by the Grand Chamber upon review, which recognised the confessional neutrality of the crucifix symbol. In its evaluation of the case, the Grand Chamber did not recognise the established causal link between the display of crucifix in classrooms and its potential influence over identity and mindset of students (paras. 66 – 72), while abstaining to exemine the meanings that crucifix was charged as a symbol (para. 66). This decision raised a number of culture-related issues that were either avoided to be given a pronounced assessment in the decision. From one perspective, the

decision defines individual perception of religious symbols as a flexible variable with indication of resistence to some symbolic or doctrinal meanings. On another perspective, the decision appears to give a relative weight to different religious symbols. While the Grand Chamber's pronounced decision not to examine the entire scope of meanings a symbol of one confession delivers (para. 66) was adopted with respect to the circumstances in the *Lautsi*, in other cases the logic of the Court led to the assessment of the meanings and influences on others (as discussed above for the attire-related cases).

The example of a differing approach by the Court to the assessment of the meanings and influences of religion-related symbols on the example of the *Dahlab v. Switzerland* case (a critical assessment of the Court's approach exibited in this case is given inter alia in *Al Tamimi*: 2017). In *Dahlab*, which concerned the prohibition to wear hijab by a teacher in elementary school, the Court engaged into the assessment of the influence of the symbol of children's conscience, and the meanings that hijab delivered. The Court established that *hijab*, being a "powerful external symbol", constituted intervention with the the freedom of conscience and religion of children, contradicted to the principle of gender equality and could bear "proselytising effect". The Court underlined that the influence on the students was particularly significant due to their early age, when the exposure to the symbol occurred. This age sensitivity aspect was, however, not reassed in other cases related to the freedom of religion and wearing of religious symbols in public places, which integrated the *Dahlab* decision as their theoretical foundation. For example, in the *Sahin* case discussed above, the influence of religious attire through the culttural and value-based meaning of it was not differentiated or considered as an aspect of comparatively lower significance based on a higher degree of critical perception of information by the rights-holders belonging to elder age groups. In the majority of cases, the Court's assessment concerned the search of balance that needed to be ensured among groups maintaining differing value systems, effect on pluralism and public order in democratic society. The lack of unified approach to the assessment of various symbols demonstrated on the example of the three cases hinders the objectivity of application of the culture-sensitive approach, shifting the balance of equality in determination of meanings and freedoms of manifestations of different religions.

4.7. The Right to Cultural Heritage

The right to the protection of cultural heritage, in particular with respect to the entitlements of persons belonging to minorities, is not part of the ECHR and in not included into its scope through interpretation, which the Court explicitly underlined in its case-law.[138] The question whether the catalogue of rights of the Convention, through amendment or case-law interpretation, should be extended to encompass individual rights to the protection of cultural heritage, in a practical terms applicable to specific objects and manifestations, was examined by the Court in its decision on the case of *Ahunbay and Others v. Turkey*[139]. The applicants alleged violation of rights under, *inter alia*, Article 8 of the Convention, originating from the ongoing destruction of archaeological sites representing historical and cultural interest from flooding caused by an infrastructural project. The violated interests included "the right to know the cultural heritage as well as to freely share cultural knowledge" (para. 16). In examination of the admissibility of the complaint, which was eventually denied *ratione materiae*, the Court reiterated that the Convention was always interpreted within the relevant framework of the international law in line with the Vienna Convention on the Law of Treaties (para. 21). The examination of the international regulation on the right to access to cultural heritage did not allow the Court to devise the existence of a common European approach to the need of its protection as a universal individual right to the protection of cultural heritage within the scope of the Convention (para. 24). Recognizing the international consensus on the "*protection of cultural rights of national minority and the right of indigenous peoples to conserve, control and protect their cultural heritage*", the Court underlined the intrinsic interrelation of cultural heritage rights and the status of individuals as belonging to minority groups or indigenous people (para. 23-24). Although the Court denied the universal individual right to the protection of cultural heritage, it underlined the indivisible connection between an individual status of a rights-holder and the scope of the rights related to cultural heritage.

The case *Ôstergren and others v. Sweden* raised a similar issue. The applicants alleged unlawful expulsion from the traditional Sami community and withdrawal of corresponding entitlements to reindeer-herding and fishing in the Sami communal lands under special legal

138 *Syllogos Ton Athinaion v. The United Kingdom (dec.).*

139 European Court of Human Rights. *Ahunbay et Autres c. Turquie* (dec.), application No. 6080/06, 29 January 2019. Available at: http://hudoc.echr.coe.int/eng?i=001-191120. Last accessed in May 2021.

regime. The question was whether the entitlements to customary rights related to reindeer breeding and fishing of persons originally belonging to the Sami minority and enjoying them based on immemorial family usage could be terminated with one's expulsion from the Sami village community. The termination of the rights was equated by the applicants with the possibility to practice their culture. The claim was framed as an allegation of violation of Articles 11 and Article 1 of Protocol 1 the Court did not recognize the substantiation of the claim under Article 11, as it recognized the nature of Sami village as a public association similar to that of an institution, which are exempt from the scope of Article 11 (*Ôstergren and others,* para. 6). The principle of calculation of admissibility *ratione temporis* was clarified, as, although the Commission did not explicitly recognized the fact of the deprivation of property rights, the requirement that the complained had to be lodged after the entry into force of the domestic legal act by which the entitlements were affected, rather than depending on any consequences arising after the deprivation of the entitlements. In the case of *Syllogos Ton Athinaion v. The United Kingdom*, the association with statutory functions in protection and maintenance of monuments and works of arts historically connected with the city of Athens contested the actions of the UK with respect to the retention of the Parthenon Marbles and the rejection of the UNESCO mediation proposal as constituting a breach of their rights under Article 8 as hampering their statutory activities. Other complaints alleged breaches of Articles 9, 10, 13 and Article 1 of Protocol 1. The Court did not recognize the alleged lasting violation to bring the claims within the scope of the Convention *ratione temporis* (as the removal of the monument occurred over 150 years prior to the date the Convention was drafted), or *ratione materia*, as the Convention and the case-law did not contain norms and principles, under which individual rights to cultural heritage protection could be invoked.

The protection of natural heritage, land and the possibility of its traditional use by indigenous people was denied admissibility to the protection under the Convention in the case *Hingitaq 53 and Others v. Denmark*. The subject matter of the case was the complaint by the Greenland tribe of the Inughuit people who lost the possibility to access, use and control to their traditional land, including the traditional fishing and hunting areas, as well as the relocation of a church originally situated in their land, to another region which originated from the construction of an US military base and the related

Inughuit's eviction. Although no violation was found with respect to property rights, the arguments in its foundation are valid for the understanding of the approach to the determination of the scope of Article 1 Protocol 1. The Court underlined that the examination of expropriation cases is based on the perception of *in rem* rights as instantaneous and cannot be interpreted to refer to a continuous violation (para. A). In *Turgut and others v. Turkey*, the Court stated that "[t]*he protection of nature and forests, and, more generally, the environment, is a cause whose defence arouses the constant and sustained interest of the public, and consequently the public authorities. Financial imperatives and even certain fundamental rights, such as ownership, should not be afforded priority over environmental protection considerations, in particular when the State has legislated in this regard*" (para. 90, also in *Hamer v. Belgium*, para. 79). The protection of the natural heritage in particular is not regulated, but protected indirectly through the notion of public interest legitimizing interference with private entitlements in the sense of the Convention*(Kyrtatos v. Greece,Fredin v. Sweden (no. 1),* 18 February 1991, *Hamer v. Belgium, Turgut and Others v. Turkey).* Furthermore, the protection of environment is recognized as a legitimate aim for the States and within their obligation for protection, subject to the general principle applicable to the property rights under the Convention that within the otherwise wide margin of appreciation of the State, fair balance remains to be maintained between public and private interests and the scope of intervention be calibrated accordingly (*Lazaridi v. Greece*, no. 31282/04, para. 34, *Holy Monasteries v. Greece*, para. 75). The expropriation of property may give rise to the application of Article 9 with respect to the properties belonging to religious institutions, in case the contested property is designed and used for religious worship (*Holy Monasteries v. Greece*, paras. 86-89).

Overall, the cultural heritage related issues admissible for the Court's assessment are primarily related to the property ownership titles, for example the failure to compensate for expropriated property with the status of cultural heritage (*Debelianovi v. Bulgaria*) or the assessment of compensation for an expropriated building listed as architectural heritage (*Kozacıoğlu v. Turkey [GC]*). The Court recognized that cultural heritage protection constitutes a legitimate aim for interference with the rights of individuals. The Court devised compliance with the "legitimate aim" requirement in interventions made for the purposes of heritage protection that included control of art market (*Beyeler v. Italy, James and Other, Kozacıoğlu v. Turkey [GC], Prince Hans-Adam II of Liechtenstein v. Germany).* In these cases, the Court reiterated that the State's wide margin of appreciation in determination of the scope of

measures undertaken in public interest for the protection of heritage is based on political, social or economic interests and is recognized acceptable, unless they manifestly lack reasonable foundation (*Kozacıoğlu v. Turkey* [GC], para 53; *James and Others*, para. 46).

The Court developed the principles with respect to the notion of cultural heritage and effective conditions for access, possession and ownership-related claims. In *Kozacıoğlu v. Turkey,* the Court underlined a complex nature of entitlements under Article 1 Protocol 1 to be comprised of interconnected principles of peaceful enjoyment, limited possibility for deprivation of property and the State's entitlement to control the use of property in compliance with the principle of general interest (para. 48). To comply with the requirement of justified deprivation, the expropriation has to be lawful and be conducted in public interest. The Court's established approach in the case-law recognized protection of a country's cultural heritage to constitute a legitimate aim for expropriation of cultural property, including built heritage classified as such (*Kozacıoğlu v. Turkey*, para. 53). In *Beyeler v. Italy*, the Court underlined a wider capacity of the state to claim ownership of works of art belonging to cultural heritage of all nations lawfully in its territory, with the aim "*to facilitate in the most effective way wide public access to them, in the general interest of universal culture*" (para. 113). The legitimate interest in the former concept has to be ensured with the compliance with the "fair balance" between public and private interests and be based on the law (paras. 107-119). Based on the 'fair balance' interpretation in the *Beyeler* case, the undue enrichment by one party and the situation of uncertainty constitute possible forms of its violation, later developed with respect to immovable property, inter alia, in the case of *Kozacıoğlu v. Turkey*. The State's obligation in that respect were admitted to include ensuring its sustainable use, the protection and promotion and be based on political, economic and social considerations (para. 53), which entails wide margin of appreciation on the States. Additional requirements applicable specifically on the property of cultural value is its conservation, as well as "*sustainable use, have as their aim, in addition to the maintenance of a certain quality of life, the preservation of the historical, cultural and artistic roots of a region and its inhabitants"*. These specific features of cultural property were admitted to construe its essential value, which substantiated the State's positive obligation to protect and develop the

cultural components of such property and promote the cultures they belong (*Kozacıoğlu v. Turkey* [GC], para. 54).[140]

The compensation was an instrument to ensure the balance between public and private interests and should account for the property's "architectural and historical features and its rarity" (para. 55). Insufficient compensation could not be considered a valid argument to challenge the transfer of the ownership title. Yet, the consideration that as a result of the transfer one party bore a disproportionate and excessive burden would imply that the fair balance between public and private was not achieved (para. 56, 63). The disproportionate interference would be admitted if the property is compensated with a lesser amount than reasonably incurring from its value, subject to acceptable decrease of the market price allowed in case of the expropriation with the aim of ensuring public interest, which includes protection of the historical and cultural heritage (para. 64). The proportionality principles required consideration of the special features of the property in determination of the compensation costs incurred after expropriation. The system of evaluation should not place a party, State in particular, in distinct advantage (para. 70). The difficulties in calculating the commercial value of a property with "cultural, historical, architectural and artistic value, which depends on the historical and cultural value and rarity that has no analogue on the market, was acknowledged by the Court, but not deemed appropriate for a justification for complete disregard of reflecting it (para. 67). The system of evaluation of the compensation for built cultural property should not entail the loss of maintenance costs for owners of buildings of artistic significance and loss of advantage that would reasonably be assumed in the ownership of such property (para. 68).

In 2019, the Grand Chamber adopted two judgments, *Sargsyan v Azerbaijan* and *Chiragov and others v. Armenia,* to various extends covering issues related to cultural heritage, including in intangible forms, and the influence of armed conflict on access to and enjoyment of cultural heritage. With the two judgments the Court clarified several aspects within the spectrum of issues covered by the notion of "cultural heritage", intangible cultural heritage of an individual, in particular,

140 *Beyeler*, para. 112; *SCEA Ferme de Fresnoy v. France* (dec.),; *Debelianovi v. Bulgaria*, no. 61951/00, para. 54; *Hamer v. Belgium*, no. 21861/03, para. 79.

and its compatibility with the scope of Article 8. Both cases were raised in respect of applicants' displacement and deprivation of property in the course of the Nagorno-Karabakh conflict, leading to the examination of matters related to self-determination of minorities, the nature of the conflict and promotion of peaceful settlement. Cultural heritage in the cases was examined in different perspectives: in *Sargsyan*, cultural heritage was one of the subjects of the claim, as it were through intangible cultural ties with ancestral burial sites, their physical integrity, the lack of information as to the condition of their preservation and the impossibility of access that the applicant claimed would substantiate his ties with his motherland, as well as the lasting nature of the violation under Article 8 of the Convention. In the case *Chiragov and others v. Armenia*, the Court recoursed to the analysis of treatment of Armenian cultural heritage by the Azerbaijani authorities to contextualize human rights violations and provide evidence for the ethnic discrimination (para. 30). The Court substantiated the statement of the ongoing state propaganda of ethnic hatred towards the Armenian population with the continuing destruction of Armenian cultural heritage, naming the destruction of the Jugha necropolis the "*most barbaric manifestation*" (*ibidem*). The role of culture was also examined in bilateral relations between a secessionist entity and the controlling state, for the analysis of the nature of the Nagorno-Karabakh region and the attribution of responsibility for the violations (concurring opinion of Judge Motoc). In the case of *Sargsyan*, the Court acknowledged the intangible bounds formed with intangible heritage that the places of memory constituted for a person. The Court admitted that the notion of private life encompassed the cultural and religious ties an individual may maintain with the land where the burial sites of one's ancestors were located, and recognised that the deprivation by the State of the applicant's access to their relatives' graves and home constituted a continuing breach of applicants' right of Article 8. Overall, when questions related to the restitution of property or land are concerned, the ECtHR applies the UN Pinheiro Principles and guided the States to be led by the principles in resolving the contested property issues.[141] In its case-law pertaining to contested property titles,

141 ECOSOC, Principles on Housing and Property Restitution for Refugees and Displaced Persons (the Pinheiro Principles), UN Sub-Commission on the Promotion and Protection of Human Rights, June 2005, E/CN.4/Sub.2/2005/17 [online]. Available at:

allegations of illegal occupation of immovable property and expropriations, the Court' general stance, including in conflict situations, was to prescribe the redress mechanisms and preventive measures (*inter alia* in *Broniowski v. Poland, Xenides-Arestis v Turkey*), while the *Demopoulos (*para.50*) v. Turkey and Xenides-Arestis v. Turkey* (para. 37) judgments underlines improvements brought along with the adoption of the regulatory framework on restitution of property in Northern Cyprus.

Conclusions

The chapter displayed that a number of rights that had been proposed for the incorporation into the draft protocol, have been examined within the case-law of the ECtHR. However, the lack of the normative regulation left some of the issues incompatible with the Convention on technical grounds, due to inadmissibility *ratione materiae*. One of the most significant example is the right to cultural heritage. It remains excluded from the Convention's scope, although partially covered under the scope of Article 1 of the Protocol 1 with respect to material manifestations. Crucially, however, the system leaves destruction of sites of cultural significance within the vast margin of State's appreciation, and does not allow direct claims arising from deprivation of access or enjoyment of intangible cultural heritage. Furthermore, a vast scope of linguistic rights remains excluded from the protection under the Convention, including as an intangible cultural heritage, a cultural identity element, a manifestation of a linguistic diversity in a state, or an educational tool in a monolingual state. Linguistic rights can be protected only in so far as other rights expressly included into the rights catalogue of the ECHR, for example electoral rights, freedom to impart and receive of information, or a freedom of opinion, are claimed.

The analysis of the Court's case-law allowed to deconstruct a vast network of rights convergencies the Court forges for facilitating the protection of cultural rights. These intersections reflected in conjunctive or supplementary application of various provisions can be considered as areas of mutual empowerment of capabilities ensuring effective possibilities for the protection of rights, and contributing to social

https://www.unhcr.org/protection/idps/50f94d849/principles-housing-property-restitution-refugees-displaced-persons-pinheiro.html.

cohesion. The relevant examples can be drawn from the field of implementation of the right to the freedom of religion (Article 9). The wide margin of appreciation in devising measures regulating religion is counter-posed by the Court's contextual interpretation of the Convention. For these aims, the Court supplements the standards devised for the assessment of interventions under Article 9 with the principles developed for other provision relevant as *lex specialis*, also in cases when their violation is not invoked or did not occur. This approach extends the scope of cultural rights that can be protected within the Court's jurisdiction. For example, Article 10 is applied in conjunction with Article 9 for cases concerning religious ceremonies, while Article 2 of Protocol 1 is applicable for cases when religious traditions affect educational process. Article 8 is applicable when the private life of individuals is concerned (e.g. in cases concerning nutrition traditions and attire in public spaces), while Article 1 Protocol 1 is applied for cases when religious property is concerned, for example when deprivation of access to religious sites or expropriation of land belonging to religious institutions hinder performance of religious practices. Article 3 is instrumentalised in conjunction with Article 8 when ill-treatment of religious devotees is alleged. Article 9 is applied in conjunction with Article 11 when the freedom of religious association is affected.

As established in the thesis based on the analysis of the case-law and the *travaux preparatoires* of the Convention and the draft additional protocol on cultural rights, the primary culture- and heritage- related rights of national minorities that may enjoy protection under the ECHR, even in the absence of the specific provisions, include:

1. Cultural identity and related issues;
2. A limited scope of linguistic rights;
3. The right to education;
4. Religion-related cultural rights of minorities;
5. The right to form associations with cultural or religious purposes;
6. The right to protection of ownership of material cultural heritage.

The convergences of human rights facilitating the protection of cultural rights of minorities under the ECHR include the following intersections:

- Cultural identity and related issues are related with the right to respect for private and family life, personal integrity and freedoms (prohibition of torture under the ECHR), freedom of thought, conscience and religion, freedom of expression and the right to property. A number of aspects pertaining to cultural identity are connected with the right to education, in particular with respect to linguistic rights in education perceived as a process of forming cultural identity of individuals and maintaining ties with the cultural group they belong, but for the methodological consideration, these were examined separately.
- Linguistic Rights imply intersections with the right to respect for private and family life, the freedom of expression, the right to education, as well as the right to free elections with respect to the use of minority languages in electioneering.
- The right to education, as mentioned above, has wide intersections with rights related to the cultural identity rights. The direct relation is the right to education protected under the ECHR.
- Religion-related cultural rights have a direct reflection in the provisions on the right to the freedom of religion; it is interconnected with the freedoms of thought and consciousness, as well as with the freedom of expression, the right to respect for private and family life, the right to education, freedom of assembly and association, and the right to property.
- The freedoms of culture-related assembly and association has a direct reflection in the right to the freedom of assembly and association. It has developed intersections within the educational and religious fields.
- Violations of all the interconnected rights could be invoked in conjunction with Article 14, or independently, depending on the circumstances of a particular case.

The convergences, both thematic and regulatory, can be summarised as follows in the table below (the convergences correspond to recognised admissibility *ratione materiae*, but not necessarily to the established violations). The interconnections related to discrimination are not reflected there, and the Court's approach to discrimination of minorities in the cultural field will be briefly summarised below.

The intersections are summarised in the table below:

Framing Issue	Components that can be protected under the ECHR	Provisions of the ECHR utilised for protection
Cultural identity and related issues	the right to identity, the right to a name (including spelling of names, changing name etc., using a particular language in official documents), the right to lead a particular lifestyle (e.g. nomadic lifestyle) and the right to maintain and practice specific cultural traditions (intersections with the freedom of religion);	Article 8 (the right to respect for private and family life) Article 3 (prohibition of torture) Article 9 (freedom of thought, conscience and religion) Article 10 (freedom of expression) Article 11 (freedom of association and assembly) (in particular, entitlements to collective identity established based on the interpretation of Article 11 in conjunction with the FCNM) Article 1 Protocol 1 (the right to private property)
Linguistic Rights	creative production,	Article 8 (the right to respect for private

	education, political activities	and family life) Article 10 (freedom of expression) Article 2 Protocol 1 (the right to education) Article 3 Protocol 1 (right to free elections) Limited applicability: Article 9 (freedom of thought, conscience and religion) Article 11 (freedom of assembly and association)
Right to Education	including academic freedoms, and education-related standards, including curriculum, compliance of education to the requirements compliant with minority linguistic and cultural specificities	Article 2 of Protocol 1 (the right to education) Converging with: Articles 9 (freedom of thought, conscience and religion) Article 10 (freedom of expression) Article 11 (freedom of assembly and association)

		Article 8 (the right to respect for private and family life)
Religion-related cultural rights	religious traditions, manifestation and observance, implying access to the places of worship, participating in religious rites and services, and observance of religion, conflicts on relations between religious communities and States, state recognition and registration of religious confessions, traditional food and attire, performance of professional duties, display of religious symbols in public institutions; the right to food.	Article 9 (freedom of thought, conscience and religion) Converging with: Article 3 (prohibition of torture) Article 8 (the right to respect for private and family life) Article 10 (freedom of expression) Article 11 (freedom of assembly and association) Article 1 Protocol 1 (the right to private property) Article 2 Protocol 1 (the right to education)
The right to form associations with cultural or religious purposes	Creation of organisations, associations with the aim of development and promotion of	Article 11 (freedom of assembly and association) Converging with:

	minority cultures/ promotion of the culture of the area where the minority groups reside	Article 8 (the right to respect for private and family life) Article 9 (freedom of thought, conscience and religion) Article 10 (freedom of expression) Article 2 Protocol 1 (the right to education)
The right to protection of cultural heritage	not protected beyond material aspect of the property rights, individual rights to cultural heritage explicitly recognised to fall outside the scope of the Convention *ratione materiae* property rights (including unlawful expropriation, compensation for expropriation, maintenance of material heritage, etc.)	N/A Article 1 Protocol 1 (the right to private property)

The analysis conducted in this chapter allowed to answer the question of the thesis aiming to devise the standards of practical justiciability of cultural rights of minorities, and the scope of protection granted by the

ECHR. It was established that the Court's approach to the cases related to minority cultures aims to safeguard the due balance between facilitation of the minority capabilities and ensuring that the majority interests are not disproportionately interfered. Designing the model of proportionate interference is one of the areas where the Court displays a culturally-sensitive approach, yet attentive to the general social interests in the political, social and economic fields, safety and public order, and strives not to construe an excessive cultural relativist stance in its indirect normative and policy guidance. The protection granted under the Convention is, therefore, not absolute and depends on the nature of the cultural manifestations and is conditioned with the scope of limitations under the Convention and a demonstrated presence of direct causal links between the authentic cultural tradition and their individual manifestations are required, be it lifestyle issues or religious freedoms. In most culture-related issues the States are recognized to possess a vast margin of appreciation, save for the freedom of expression, yet this is conditioned with judicial supervision and calibrated and adjusted to the individual circumstances. The Court examined a number of factors pertinent to the resolution of individual situations, including the availability of alternative options to enjoy rights and freedoms, and in cases these are unavailable, the limitations are considered disproportional. A significant place in Court's analysis of interventions into culture-related rights is granted to the examination of their legality, ensuring the legal framework creates a regulatory space allowing the stakeholders to foresee the consequences of the law, and locate and adjust their behavior accordingly.

The analysis of the normative and case-law formation related to cultural rights of minorities conducted in this chapter allows to conclude that the Court's vision and practical efforts aim to promote the development of minoity groups. The Court promotes participatory approach in all aspects of the cultural rights implementation, and places applicants' cultural identity as a benchmark of considerable weight, when measuring the fair balance in interventions with cultural rights. Cultural traditions and rites are examined from the perspective of individual significance and interpreted under culture-sensitive approach based on the original meaning to the community in question, however the practice is marred with inconsistencies in the assessment of meanings and influences of some religious symbols. The latter questions the objectivity of the culture-sensitive approach as

implemented by the Court. Positively, in the absence of specific guarantees of cultural rights of persons belonging to national minorities, the Court reaffirms in its case-law the necessity to recognize the minority cultural identity as a component of universal diversity and that the universal value of minority cultural identities explained their *"special needs"*, marking the shift towards "substantive equality" (Ringelheim: 2008), which translated into the necessity to adjust the level of protection to members of such groups, including to their culture as manifestations of their identity. Overall, the dynamics of the application of culture-sensitive approach by the Court is indicative of the transition towards recognition of the weight of culture and cultural identities in the implementation of human rights and the standards to be applicable to the obligations by the States Parties. The transit follows the developed in the global international law approaches, highlighting the axiologiocal connections between dignity, identity and cultural heritage with international development and realisation of human rights (A/HRC/17/38, UN Doc A/72/155, A/73/227, A/HRC/40/53).

Among the issues that would negatively influence the perspectives of the minority groups representatives to gain protection to their cultural interests are the lack of explicit inclusion of cultural rights into the catalogue of the Convention. The possibility to defend one's right solely on the basis of judicial interpretation of material norms leads to the lack of foreseeability of the regulation, and makes the protection system difficult to comprehend for the applicants, possibly discouraging them from attempting to employ the mechanism. On the other hand, the complex logic of the Court's reasoning may in practice render it difficult for the applicants to assess their chances and perspectives of the case. Furthermore, the scope of the admissible cases ratione personae in culture-related cases is mostly limited to individual interests (save for cases related to the freedoms of assembly and associations) and minority groups traditionally established within the respondent states. Furthermore, the bar of the initial burden of proof in culture-related cases tends to be high and difficult to provide for individuals, in particular for cases related to education and religiously determined behaviour. These impediments, taken in conjunction with the inadmissibility of some rights *ratione materia* and some applications *ratione personae* renders the protection system unable to sustainably and effectively ensure security of cultural capabilities of minorities.

The analysis of the ECtHR case-law shows that in adjudication of cases related to cultural rights of minorities, the Court's assessment is based on two primary tenets: safequarding principles and values of democratic society, and its own jurisdictional boundaries under the material normative regulation. The contested issues between public and particular minority interests, both collective or individual, are resolved in favour of the minority representatives in so far as they relate to a democratic principle (primary maintenance of diversity and pluralism, prohibition of discrimination, or the rights crucial for the functioning and facilitiation of a democratic political order within the society). This principle is valid for the rights of the cultural and religious associations, assemblies, artistic of political speech, etc. The significance of democratic values is the cornerstone of the decisions of the Court, and its interests determine the scope of acceptable limitations of human rights. Direct causal link between cultural interests and the possibilities of realising the rights protected under the Convention is needed to trigger the protection mechanism. When special and additional culturally determined opportunities for the realisation of human rights protected under the Convention are required, as a rule, such requirements would be supported by the Court. However, when such requirements contradict democratic values, the prevalence would be assigned to safeguarding democratic values. In resolution of such clashes, the Court aims to strike due balance between private and public interests, prevent undue limitation of rights that are not required by interests of a democratic society.

Yet, it is important to highlight, that the Convention constitutes an efficient instruments that insures realisation of individual agency in determination of cultural identity. This is valid and effective to a vast scope of cultural determinants of identity, including traditional lifestyles, religious choices, attire, food and dwellings, performance of rituals and following cults (save for a number of linguistic opportunities, as indicated above). Individual agency in adopting cultural identity and opportunities to gain culture-related knowledge and form identity-related opinions are the requirements of the capabilities theory respected by the Convention. However, when values dictated by cultural identity clash with democratic values, and cannot be supported with the interests of pluralism or attributed to discrimination, the democratic values will bear prevalence under a rough summary (inevitably oversimplified) of the Court's logic.

Chapter 5

Protection of Cultural Rights of National Minorities under the Council of Europe Framework Convention for the Protection of National Minorities

The Council of Europe remains a pioneer in developing a specialized binding legal framework with oversight mechanism for the protection of rights of national minorities, with strong impetus on cultural rights. The Framework Convention for the Protection of National Minorities remains the only international convention dedicated specifically to the rights of persons belonging to national minorities. The scope of its action *ratione loci* covers a diverse range of countries, with differing political and cultural profiles. Yet, the Convention has for long remained one of the most criticized instruments, which extended to literally all aspects of its design: the catalogue of rights, the scope *ratione personae*, wide margin of appreciation granted to the Contracting States in the choice of implementation measures, and deficiencies in the design of the supervisory mechanism. In his analysis published anon the Framework Convention entered into force, Gudmundur Alfredsson (1998, p. 292) subjected the Framework Convention to severe criticism, having identified functional shortcomings of the instrument in its programmatic formulations. He claimed, inter alia, that "*the limited scope of special measures called for to eliminate discrimination and to achieve dignity and equal rights, weak wording and frequent qualifications in the text, the absence of group rights, a monitoring instance relying only on the examination of States reports, political control over the monitoring body, and the apparent opening for States to arbitrarily identify minorities which are entitled to protection under the [Framework Convention], thus implying the rejection of other groups*". These shortcomings made him call the convention "a frame an incomplete painting", and effectively summarized doubts and disappointments, prevailing within the academia, political and practitioners' circles after the failure to develop the additional protocol on cultural rights of minorities, with the implementation mechanism of judicial protection, became clear (Weller: 2005, p. 615). Despite the strong criticism, Alfredsson,

nevertheless, did allow a possibility of worthwhile functioning of the FCNM by the role that the Advisory Committee could potentially play through its effective performance, stating that "[*i*]*n the meantime, effective supervisory functions for the AC are one way for the Council of Europe to play a meaningful role in the field of minority rights*" (Alfredsson: 1998, p. 292). From the perspectives of semantics of the text and based on the analysis of the institutional design, this criticism is difficult to contest. Yet, it appears that Alfredsson's provision was valid also in terms of the objectivity in giving credit to the Advisory Committee, as it did manage to respond to each point of the initial criticism to the FCNM and even, in some aspects, to compensate for the weaknesses of the design of the Convention and to expand its own powers, the role and the institutional and expert legitimacy. The Advisory Committee itself acknowledged that, since its adoption, the Framework Convention has become a primary tool for the contracting States to protect minorities through creation of appropriate conditions for accessing cultural resources, cultural expression and recognition of difference, thus ensuring pluralism "*in a way that carefully balances broader societal concerns with individual rights*" (ACFC (2016), p. 3).

This Chapter will aim to examine the scope and efficiency of the framework, and the added value the system created both for the protection of cultural rights of persons belonging to minorities, the development and maintenance of their cultural identities. The provisions of the text of the FCNM and the approaches developed by the Advisory Committee will be analysed based on the cultural rights approach and the capabilities theory, to assess the potential effects on the status of the rights holders, on the choice of the legislative procedures mainstreamed by the mechanism, on the policy-making achievements, and, from a general perspective, on the background that it creates for the proliferation of minority identities and their cultural components. The rights catalogue will be scrutinized as to the scope of cultural rights and the related obligations of the States. The Advisory Committee's country opinions and Committee of Ministers' country-specific resolutions marking the completion of evaluation cycles for the respective States will be examined to devise the developmental vectors that the interpretation of the Convention and its implementation have given to the state policy and legislative solutions. These conclusions will be drawn based on the Opinions developed from the beginning of the functioning of the supervisory mechanism, while the analysis of the

policy dynamics and implementation of earlier recommendations will be based primarily on the reports from the Third and Fourth Monitoring Cycles. The choice allows to complete the gap in examination of the Advisory Committee practice and the Committee of Ministers' oversight, creating the contemporary overview of the state of affairs in cultural policy development techniques in Member States.

5.1. The FCNM: The Catalogue of Rights and Implementation Patterns

5.1.1. Application *ratione personae* and *ratione loci*. The nature of obligations under the Convention

As discussed in the second part of chapter 2, due to the lack of a uniform approach in the international law and the absence of the political consensus within CAHMIN, it was impossible to agree on the definition of 'national minorities'. As the result of the CAHMIN's 'pragmatic approach'[142], the Framework Convention operates without the ready terminology. The framework Convention does not delineate any definition developed within the framework of other international organisations, despite the reference to the principles of these documents (Explanatory report, para. 26). This was considered to blur the scope of its application, leaving a wide margin of appreciation to the Member States for filling the gap and defining the personal application. Alfredsson (2000: 296) stressed that the elements of the definition of minorities, including objective characteristics, self-identification and several generations long association with the respective country or territory were sufficiently established in the international law to open the issue for consideration of states, as the existence of minority was not a question of law, but a "question of fact related to definition elements". Therefore, introducing into a legal instrument a possibility for the states to select groups to whom the protection will be applicable, in particular through the requirement of citizenship or introduction of additional criteria with reservations or

142 According to the Explanatory Report to the Convention, the Committee opted for a "pragmatic approach" to avoid the definition and to allow the Parties to proceed based on the principle of recognition. The lack of consensus on the primary definition started to become evident on the initial stage of the forging the Convention, and was admitted in the Report of the Standing Committee on Human Rights to the Committee of Ministers of 8 September 1993, discussed in part 1 of the chapter.

declarations, would destroy the purpose of the instrument (Alfredsson: 2000, p. 296). In its Thematic Commentary No 4, the Advisory Committee explained the lack of definition to the term "*persons belonging to national minority*" by the difference in conceptual approach of the Convention. Instead of attempting to identify the rights holders, the Committee considered that Convention attempted to identify measures required for the management of diversity by means of national minority rights protection (ACFC: 2016, p. 3). Hence, the design of the Convention "as a living instrument" that requires ongoing interpretation and evaluation of practical solutions in place, for the purpose of adjusting the measures to the contemporary challenges posed to societies in the process of development. The lack of the definition of the rights holders and a narrow approach of the Convention to cover only national minorities constituted another ground for criticism during the elaboration and upon the entry into force of the Convention. This solution not only diminished the significance of the 'underdeveloped' terminological apparatus, but strengthened the requirements towards the obligations from the States. The Advisory Committee contested the interpretation arising from the lack of definition of the rights holders that the participating States could discretionary apply the Convention as contradictory to the principle *pacta sunt servanda* and the Vienna Convention on the Law of Treaties. The due interpretation is to apply the Convention to the rights holders in need of protection under the specific conditions in the respective Member States, underlined as an acceptable approach in line with the interpretation of international law of treaties developed by the ECHR mechanism (ACFC: 2016, p. 5). That approach drove the logic of the Advisory Committee with respect to its assessment of the margin of appreciation enjoyed by States in their approaches to nationally developed legal definitions of national minorities, which was required to comply with Articles 31 and 33 of the Vienna Convention of the Law of Treaties, and in line with the principles set forth within the Framework Convention, including the good faith, non-interference and good neighbourly relations within the cooperation in national minority rights protection. The Committee underlined that in its activities on monitoring implementation of the Convention, it encouraged participating States to define rights holders with respect to particular provisions of the Convention, and to develop measures in an inclusive, but context-specific manner, reflecting the requirements of particular groups (ACFC: 2016, p. 3).

The national minorities are distinguished in the Convention through the particularities of their identity components, including ethnic, cultural, linguistic or religious differences, which, however, do not on their own entail the creation of a national minority (Explanatory report, para 43). The Convention primarily targets the obligation of the states related to individual rights, addressing them to the "*peoples belonging to national minorities*". Thus, crucially, the 1995 Convention delineates the rights of minorities as individual rights, that could be exercised under the Convention "*individually as well as in community with others*" (Article 3). The Explanatory report underlines that the recognition of collective rights was not provided under the Convention (para. 13 and 37). The Explanatory report uses wide interpretation of the term "others" to extend to "*persons belonging to the same national minority, to another national minority, or to the majority*" (para. 37). In this respect, the regional regulation provides equal protection to individual members[143] of the group as granted by the international legal framework, Article 27 of the ICCPR in particular. The 1995 Framework Convention equates the entitlements of persons belonging to minority groups with the scope of rights of the majority[144], but does not provide for the definition of either group, except for listing the qualifying indicators diversifying the minorities (language, ethnicity, religion, and culture). The Convention does not distinguish between members of minority groups depending on their affiliation with the state, and the term the Convention operates with ("national minority"), may lead to binary interpretation, either that the Convention implies protection of members only of those minority groups members who has an established formal affiliation with the state, or may include aliens who are present at the national territory of the member State of the Council of Europe. Among rare references to the status of the rights holders, Article 6 forges the obligation of States "*to promote mutual respect and understanding and co-operation among all persons living on their territory, irrespective of those persons' ethnic, cultural, linguistic or religious identity, in particular in the fields of education, culture and the media*". Although not an express reference to the status of rights holders, the provisions of

143 The Explanatory Report states that the collective aspect of the rights only deals with individual rights enjoyed in community with others (para. 13).

144 In his seminal report on the rights of minorities, F. Capotorti (1979, p.iii) expressed concern that the normative scope of the ICCPR did not encompass the issue of oppressed majorities.

Article 6 do not appear to impose limitation based on the type of residency or citizenship status. Article 9 extrapolates the entitlements for the freedom of expression in minority languages under the Convention to be applied extraterritorially, "*regardless of frontiers*", which extends the protection additionally both *ratione personae* and *ratione loci*. The Convention grants individuals who belong to a national minority the possibility to opt whether to be considered and treated as a member of the national minority or not, without implying the capacity for subjective attribution to the groups. The States, however, are not prevented from regulating the issue in national law.

Despite the explicit reference of the other international law sources within the text of the Convention as framing sources, the interpretation of the Convention in conjunction with these legal instruments is not conducted consistently in terms of application of the particular legal formulas elaborated on their basis. Based on the provisions of the Vienna Declaration, it appears the formalization of the status is intended, but does not limit protection to nationals only. Furthermore, due to the principles established by the ECHR (another cornerstone of the Framework Convention mentioned in its preamble) that equal protection of the human rights mechanism is granted to foreigners within the jurisdiction of the member State. However, the analysis of the Articles 19 and 23 of the Convention led the commentators to the FCNM to the agreement that the application of the ECHR to the interpretation of the FCNM is limited to the setting of minimal standards with respect to the rights and freedoms set in both instruments, and does not extend on the determination of the scope (Machnyikova:2005, p. 199; Hannikainen: 2005, p. 528; Hilpold: 2005, pp. 563, 567). The standard setting role of the ACFC has displayed itself vividly in the consistent suspension of the semantically drawn limits to the FCNM provisions reflected in the Committee's recommendations to states parties, thus de facto withdrawing the FCNM from the approaches established by the ECHR and the Court with respect to analogous rights and freedoms, in order not to limit the possibilities of more extensive domestic legal and practice-oriented interpretations.[145] The safeguard for this approach against restrictive interpretation is provided both in the text of the Convention and the interpretation of

145 The Explanatory Report withdraws the provisions of the Convention from the interpretation of the ECHR bodies.

the ACFC prohibiting implementation standard below the minimal level (Berry: 2012, p. 20). The requirement of compliance with other sources of international law opened a debate on the concurrence of the scope of the FCNM and Article 27 of the ICCPR, which is exempt from any limitations in line with the interpretation by the HRC General Comment no. 23, while the limitations on the FCNM are at the same time framed to accord with the ECHR.

The interpretation of the application of the Convention *ratione personae* from the teleological perspective was given by the Venice Commission in its Opinion on Possible Groups of Persons to which the Framework Convention for the Protection of National Minorities could be applied in Belgium.[146] The Commission did not support a *stricto sensu* numerical approach of the UN Human Rights Committee developed in the views *on Ballantyne, Davidson and McIntyre v. Canada (CCPR/C/47/D/359/1989 and 385/1989/Rev.1 (1993))*[147], and adopted a balanced approach based on comparative role in the decision-making. In line with the Venice Commission interpretation, the Framework Convention would not extend to the numerically smaller communities with minority identity (common ethnic, cultural, linguistic or religious features and an intention to preserve their common heritage) in case they are well-represented in decision-making on a certain level of administrative division. The Commission devised local, regional and state level of analysis for minority representation, as well as dominant and co-dominant position a community could occupy based on the weight of its influence (para. 7-13). The Commission deconstructed that the notion of national minorities, in the sense of the Convention, can encompass only those groups that find themselves in vulnerable position in comparison to the majority or other minority groups that are in the position of power (para. 6). The numerical criterion was not perceived there an intrinsically considerable criterion to estimate

146 Council of Europe, Commission for Democracy through Law. Opinion on Possible Groups of Persons to which the Framework Convention for the Protection of National Minorities could be applied in Belgium. CDL-AD(2002)001-e. Venice, 8-9 March 2002 [online]. Available at: https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2002)001-e.

vulnerability, in particular in situations or geographical areas, when decision-making is concentrated in the hands of a minority. The dominant and co-dominant statuses of the communities are distinguished from the groups granted with a special status or under affirmative measures regime. They are active agents of the decision-making and effectively running or co-running the government of the respective area (para. 8). The assessment of the status of the group therefore is to be conducted on each level of the group's representation or where it may require protection (para. 15).

The absence of the definition gave rise to the development of several approaches on the national level to the determination of the rights holders under the Convention, considering the vast margin of appreciation granted upon ratification. One of the solutions adopted in some States parties was to launch calls for the minority groups to identify themselves as wishing to enjoy the protection under the Convention (ACFC (2012), p. 6). It also resulted in a number of declarations submitted by States parties upon signature or ratification of the Convention, leading to i various approaches and differing scope of application of the Convention, depending on the national jurisdiction.[148] In a number of such declarations, the parties provided their interpretations of the term, based on the national legal framework or existing groups. Thus, the two major categories of the definitions provided by States parties framed the notion of minority groups either by provision of the term or by enlisting the minority groups. The latter allows to draw the State-based perspective on the existing minorities within the Council of Europe territorial jurisdiction, as well as to establish the scope of application of the Convention. Thus, based on the declarations submitted by the States Parties upon ratification, among national minorities recognised by the States parties in their territories there are:

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147 The HRC concluded that Article 27 of the Covenant extends to the groups in vulnerable position on a State-level, based on the semantic interpretation of the text of the article.

148 This approach was criticised by the Russian Federation in its Declaration contained in the instrument of ratification deposited on 21 August 1998: "*The Russian Federation considers that none is entitled to include unilaterally in reservations or declarations, made while signing or ratifying the Framework*

- The German minority in South Jutland of the Kingdom of Denmark[149] (Denmark);

- The Danes of German citizenship and the members of the Sorbian people with German citizenship; extended application of the Framework Convention to members of the ethnic groups traditionally resident in Germany, the Frisians of German citizenship and the Sinti and Roma of German citizenship[150] (Germany);

- the Frisians[151] (the Netherlands);

- the citizens of the Republic of Macedonia who live within its borders and who are part of the Albanian people, Turkish people, Vlach people, Serbian people, Roma people and Bosniac people[152] (North Macedonia).

- the autochthonous Italian and Hungarian National Minorities, the members of the Roma community, who live in the Republic of Slovenia[153] (Slovenia).

- Sami, Swedish Finns, Tornedalers, Roma and Jews[154] (Sweden).

Convention for the Protection of National Minorities, a definition of the term "national minority", which is not contained in the Framework Convention."

149 Declaration contained in a Note verbale from the Permanent Representative of Denmark dated 22 September 1997, handed to the Secretary General at the time of deposit of the instrument of ratification, on 22 September 1997.

150 Declaration contained in a letter from the Permanent Representative of Germany, dated 11 May 1995, handed to the Secretary General at the time of signature, on 11 May 1995.

151 Declaration contained in a Note verbale from the Permanent Representation of the Netherlands deposited with the instrument of acceptance, on 16 February 2005.

152 Declaration contained in a letter from the Minister of Foreign Affairs of the Republic of Macedonia (FYROM, now North Macedonia), dated 16 April 2004, registered at the Secretariat General on 2 June 2004.

153 Declaration contained in a Note Verbale from the Permanent Representation of Slovenia, dated 23 March 1998, handed to the Secretary General at the time of deposit of the instrument of ratification, on 25 March 1998.

- Several states explicitly admitted the absence of national minorities in their territories (Luxembourg[155], Malta[156], Liechtenstein[157]). Spain declared no national minorities within its territory, but extended the application to the "*Spanish citizens of the "comunidad gitana" (roma, gipsies) although these citizens do not constitute a national minority*"[158].

Definitions of the term 'national minority' based on the declarations by States parties[159] to the Framework Convention included the references to the national legal definitions or criteria the groups were to be characterized with to be qualified as minorities. The reference to the national legal frameworks for the purposes of defining minority groups were made by Austria, while Belgium undertook to develop the national legal definition. The definition submitted by Austria was de facto composite and, besides a reference to the groups within the scope of the Law on Ethnic Groups[160], stipulated a list of qualifying criteria, including citizenship, settledness, linguistic specificity and established unique ethnic culture. All States, but one, that submitted declarations with definitions of the term "national minorities" stipulated citizenship or nationality as the primary factor for granting the protection under the Convention.[161] The Russian Federation explicitly criticized exclusion

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154 Declaration contained in the instrument of ratification deposited by Sweden on 9 February 2000.

155 Declaration contained in a letter from the Permanent Representative of Luxembourg, dated 18 July 1995, handed to the Secretary General at the time of signature, on 20 July 1995.

156 Declaration contained in the instrument of ratification, deposited by Malta on 10 February 1998.

157 Declaration contained in the instrument of ratification deposited by Liechtenstein on 18 November 1997.

158 Communication contained in a Note Verbale from the Permanent Representation of Spain to the Council of Europe, dated 14 November 2016, registered at the Secretariat General on 15 November 2016.

159 Belgium declared that the notion of national minority will be defined by the government. Reservation accompanying the signature of the instrument on 31 July 2001.

160 Volksgruppengesetz, Federal Law Gazette No. 396/1976.

161 Austria, Estonia, Latvia, Luxembourg, North Macedonia, Poland, Switzerland.

from the scope of the Framework Convention of the persons who permanent residents in the territory of States who previously had a citizenship but were arbitrarily deprived of it, without clarification as to the scope of application with respect to the national law.[162]

In a distinguished approach, Latvia[163] extended the application of the conventional regime to non-citizens and apatrides, and those who do not belong to minority but identify themselves with the minority that qualifies by the its definition of a minority within the meaning of the Convention. Both non-citizens and apatrides are nevertheless required to be permanent and legal residents of the country to enjoy the protection under the Convention. These special extensions of the protection regime are not absolute under the Declaration by Latvia, but is applicable to the cases free from limitations under the national legislation. Another country that did not expressly require citizenship to qualify national minorities was North Macedonia[164]. Most States required established settledness of the peoples belonging to national minorities in the country or its particular region. Some of the participating States stipulated a qualifier for evaluation of the established geographical presence of such groups. These included length of stay, e.g. "*traditional presence*" for Austria[165] and "for *generations*" in Estonia, and "*for numerous generations*" in Luxembourg. Unqualified residence in the country was mentioned by Poland[166] and North Macedonia[167].

Some States reiterated the connection between the minority groups and the state by the requirement of established ties with the country or the

162 Declaration contained in the instrument of ratification deposited on 21 August 1998.

163 Declaration contained in the instrument of ratification deposited by Latvia on 6 June 2005.

164 Declaration contained in a letter from the Minister of Foreign Affairs, dated 16 April 2004, registered at the Secretariat General on 2 June 2004.

165 Declaration contained in the instrument of ratification deposited on 31 March 1998.

166 Declaration contained in a Note Verbale, handed at the time of deposit of the instrument of ratification on 20 December 2000.

title nation. Thus, Latvia[168] required an explicit and self-declared connection of minorities to the title nation ("*who… consider themselves to belong to the State and society of Latvia*"). Whereas the Estonian and Swiss definitions stipulated an established nature of such connection ("*longstanding, firm and lasting ties with Estonia*" and "*long-standing, firm and lasting ties with Switzerland*"). In a unique case, Poland also underlined that the provisions of the Convention would be extended to cover "*to protect national minorities in Poland and minorities or groups of Poles in other States*".[169] The Committee did not accept the argument the government of Denmark presented in substantiation of the denial of protection to the Roma minority, based on the absence of "historical or long-term and unbroken association" with the country, stating that it represents "partly… immigrants and partly…refugees". The Committee underlined that, given the established long-term presence of Roma in Denmark, "*extending the provisions of Framework Convention to Roma in areas such as promotion of culture (Article 5), language teaching (Article 14), fostering knowledge of Roma culture and history among the majority population (Article 12), and effective participation in public life (Article 15) would contribute to the successful integration persons belonging to the Roma community into the majority of Danish society. […] also contribute to the better understanding of diversity in society and increase its cohesion*" (ACFC, Fourth Monitoring Cycle, Compilation of Opinions, p. 14; the Committee recommended the Government to extend this approach to the Faroese and the Greenlanders). The Advisory Committee criticized the approach of states for introducing distinctions between groups based on the absence or presence of such connections (ACFC (2016), p.15). The quantitative correlation between the majority and the minority groups, both on nationwide and regional dimensions, was only invoked by Switzerland. The legislative solutions creating categories or hierarchies of minority groups in practice lead to the

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167 Declaration contained in a letter from the Minister of Foreign Affairs, dated 16 April 2004, registered at the Secretariat General on 2 June 2004.

168 Declaration contained in the instrument of ratification deposited on 6 June 2005.

169 Declaration of Poland contained in a Note Verbale, handed at the time of deposit of the instrument of ratification on 20 December 2000. At the same time, the request for minority rights enjoyment by the Polish community in Austria was rejected by the Austrian authorities due to the lack of "uninterrupted and traditional residence" (cited in ACFC (2016), p.13).

differentiation of the scope of rights that vary depending on the ties recognized with respect to a particular community, which cannot be attributed to objectively assessable factors and therefore may lead to unjustified differentiation in treatment.

In its opinions, the Committee repeatedly calls upon harmonization of the national legislation within different branches to ensure consistent implementation, without creating a discriminatory "side effects" on any group of population. As explained by the first President of the Advisory Committee (Hofmann: 2004, p. 21), in evaluation of the *ratione personae* application of the Convention, the Committee evaluated each State Party's approach as to the compliance with the international law requirements and on the account of any discriminatory effects the approach may cause on any minority group. In case the incongruence is identified, the parties may be recommended to hold consultations with the respective minority groups for a potential review of the approach. Hofmann (2004: 21-22) reiterated the Committee's recommendation for the article-by-article approach as a methodology for adequate adjustment of domestic regulations to the differing scope of rights as designed by the Convention. In its third cycle report reviews on Article 3, the Committee underlined the need for the equal legal protection of various minorities with respect to several State parties, including Albania, Armenia, Bosnia and Herzegovina, Bulgaria, Croatia, Poland. Albania was criticized for the failure to recognize several national minorities, who have expressed a wish for recognition and protection of the FCNM, such as the Egyptians and Bosniacs, were not included into either of the legally established categories of minorities divided into "national" and "ethno-linguistic", resulting in discriminatory treatment (III Monitoring Cycle, Opinion Compilation, Article 3, p.4). A similar differentiation was indicated arising from the participation in representative council, the Co-ordinating Council for National and Cultural Organisations of National Minorities, giving the representatives of the 11 minorities a comparative advantage over those not represented in the Council, to lobby their needs and influence the decision making process, in Armenia. The Committee also underlined that despite the margin of appreciation of the States parties to determine the scope of application of the Convention ratione personae, "*this must be exercised in accordance with the general principles of international law and the fundamental principles set out in Article 3 [of the FCNM*]", "[i]n particular, …*the implementation*

of the Framework Convention should not be a source of arbitrary or unjustified distinctions" (IV Monitoring Cycle, Opinion Compilation, Article 3, p.3).

The Committee recommended a "flexible approach" to the issue of recognition of national minorities, which could supplement objective but "frequently incomplete" data from the census used as a tool to review the adequacy of the applications for minorities recognition (mentioned with respect to the recognition of the Egyptians and Bosnics by Albania, recognition of Polish minority by Austria etc.) (III Monitoring Cycle, Opinion Compilation, Article 3). Bosnia and Herzegovina was criticized for the distinctions made by categorization of persons not belonging to expressly listed national minorities as "others", including for creating a sense of marginalization and subjective perception of inferiority (III Monitoring Cycle, Opinion Compilation, Article 3, p. 18). Croatian approach to excluding the category of "Muslims" from expressly identified minorities, resulting in denial of protection under the FCNM, was subject to similar criticism (III Monitoring Cycle, Opinion Compilation, Article 3, p. 23). Similar problem was raised with respect to Cyprus, where some communities, including the Armenians, Latins and Maronites, attempted to change their status from "religious groups" recognized in national law, and inflicting obligation to affiliate with one of the two constitutionally recognized communities of Greek Cypriots or Turkish Cypriots, to ethnic or national minorities, compatible with the international commitments of the State and adequately reflecting their identity (III Monitoring Cycle, Opinion Compilation, Article 3, pp. 26-27). In its IV Monitoring Cycle Opinion on Cyprus, the Committee raised the issue of the recognition of the Roma as Turkish Cypriot community and associating them with the Muslim religious group, despite the lack of open consultation with the representatives of the community, contrary to legal requirements and practice applied for other minority representatives. It recognized that the legal division on ethnic lines, deeply embedded into all aspects of the life of the state, "*interfered with the rights of individuals to freely self-identify*".

The analysis of state reports led the Advisory Committee to establish that such legislative solutions in practice tend to result in re-distribution of states' jurisdiction over the population in their territories. That conclusion was based on the practice when the states "outsourced" some or most elements of minority rights protection

residing on their territory to another state upon acknowledging the existence of ties of such minority groups with the kin state (ACFC (2016), p.15). An example of such practice was reviewed by the Advisory Committee with respect to Albania (e.g. in its third monitoring cycle Compilation of Opinions on Article 3, p. 4), as Albanian national law differentiated minority groups into the national minorities (those with the kin-state connection) and ethno-linguistic (without such binds, the group included the Roma and Aromanians/Vlachs). This practice is evaluated as contradictory to the principle of sovereignty of states over all population residing on its territory, while the Committee required due respect to the right of minority groups to enjoy favourable regimes provided by other states. In line with Article 17, this should not be accompanied with overreliance on the third parties' assistance in rights guarantees (ACFC (2016), p.15).

Another qualifier delineated in the declarations by States concerned cultural specificity of the national minority *per se*, explicitly distinguishing it from the title nation. Austria[170] provided that such groups should qualify by linguistic specificity and established unique ethnic culture. Cultural components of difference highlighted by Estonia included "*ethnic, cultural, religious or linguistic characteristics*" and required explicit distinction from the majority. Latvia distinguished minority groups based on "*culture, religion or language*". Luxembourg[171] provided for continuous maintenance of "*distinctive characteristics in an ethnic and linguistic way*". Among the states who provided definitions, no cultural specifications were required by Poland and North Macedonia. Switzerland[172] followed a differing approach, having underlined the presence of a common identity of minority groups, reflected in "*their culture, their traditions, their religion*

170 The Declaration included "Groups […] which live and traditionally have had their home in parts of the territory of the Republic of Austria and which are composed of Austrian citizens with non-German mother tongues and with their own ethnic cultures".

171 Declaration contained in a letter from the Permanent Representative of Luxembourg, dated 18 July 1995, handed to the Secretary General at the time of signature, on 20 July 1995.

172 Declaration contained in the instrument of ratification deposited on 21 October 1998.

or their language". The Advisory Committee reiterated the importance that such "identity markers" are attributed based on the voluntary self-identification of individuals and free from presumptions (ACFC (2016), p.16). The risks associated with disregard of these two principles are forced inclusion or exclusion of groups or individuals from the protection framework, when the cultural markers are attributed without consent of affected minority representatives. Cultural attribution based on presumption, including on the basis of names, language or religion, may also appear discriminatory (ACFC (2016), p.16). The Committee reiterated that approach in a number of opinions, including the criticism to the affiliation of the Roma to the Turkish Cypriot community based on "attributable identification rather than personal choice" without prior consultation (IV Monitoring Cycle Compilation of Opinions, p. 10). The Committee underlined that "the association of persons with a specific group based on visible or linguistic characteristics or on presumption is not compatible with the Framework Convention". The Committee's approach not only prevents discrimination, but also creates a due framework for elaboration of effective policies and laws. Cultural critiques based on the flawed methodologies or misinterpretation of cultural traditions, and respective rights-holders behavioural choices, can give rise to developmental policy failures, relevant in particular to the minority issues due to power asymmetries, as shown by Sen on the example of the UK's assistance failure to India during the Bengalese famine due to cultural bigotry (2004: 47) or Haragin's case study on international food assistance to Sudan flawed due to misplaced agency of rights-holders in certain social distribution practices (in Rao and Walton (eds.), 2004). The Committee's approach to cultural determination serves as a preventive benchmark such policy solutions, when identified in the course of monitoring and averted by means of recommendations.

Several countries also introduced the criteria of **agency** for preservation of the group's distinct cultural heritage that construed their common identity. Among those, Estonia provided that national minority groups were to driven "*by a concern to preserve together their cultural traditions, their religion or their language, which constitute the basis of their common identity*". [173] Latvia definition followed the same logic, save for a more

173 Declaration contained in the instrument of ratification, deposited on 6 January 1997.

limited catalogue of cultural determinants ("dis*tinguished culture*" *per se*, as well as religion and language). As mentioned above, Switzerland gave prevalence to the notion of identity and required the agency in safeguarding identity ("*guided by the will to safeguard together what constitutes their common identity, in particular their culture, their traditions, their religion or their language*"). All the countries that followed the agency logic underlined the independent commitment of the groups to undertake efforts to safeguard their cultural heritage or identity, without mentioning the cases when minority groups were expressly driven by the requirement or will to receive protection or assistance from the state authorities. In effect, these clauses indirectly signal about the developing minority cultures-sensitive approach on the national level. The clause evidences that the legislation is shaped around diversity recognition. It also implies that the States recognize their obligation to safeguard the minorities' identity components, as they have been declared upon the States' request and shall therefore be integrated into the social fabric of the state and guaranteed with affirmative measures. The effects of the declarations are subject to the ongoing review by the Advisory Committee, which continuously reiterated the necessity of their reconsideration in light of changing circumstances (ACFC (2016), p. 11). The Committee follows up on such changes, when reflected in national legislation, through periodic country reports and gives its assessment as of its influence on minority groups and their adequacy within the monitoring. The Committee's assessment approach includes evaluation whether the scope of measures is determined in compliance with the good faith requirement and does not give rise to inter-community discrimination (ACFC (2016), p. 11).

Among the approaches criticized by the Advisory Committee as contradictory to the principles of the Framework Convention is the formal recognition requirement (ACFC (2016), p. 12) imposed by some participating States for granting individual access to minority rights. For example, in its Fourth Monitoring Cycle Opinion on Denmark, the Advisory Committee underlined that "*the application of the Framework Convention does not necessarily require the latter's formal recognition as a national minority, a definition of a national minority or the provision of a specific legal status for such groups of persons*" (ACFC, Fourth Cycle Compilation of Opinions, Article 3, p. 14). Although the generic approach of the Committee is that the minority rights should be free

from formal recognition requirements, the measures introduced by States parties to broaden application of the Convention, despite the existing legislative requirement for formal recognition, are considered good practice by the Committee, for example extension of minority protection of Roma in Cyprus, despite the lack of formal status of the group as a national minority (ACFC (2016), p. 11; III Monitoring Cycle Opinion on Cyprus, p.28, reiterated with reservations in its IV Monitoring Cycle Opinion on Cyprus). Similar approach is given to the evaluation of the conditions when protection under the FCNM is conditioned with the membership in public representative or consultative bodies. Thus, despite a general positive assessment of the country's performance, the Committee underlined that the lack of clear legal procedure in the legal framework of the Czech Republic for the inclusion into the Government Council for National Minorities, membership in which entitles minorities to protection, needs to be addressed to ensure compliance with the spirit of the Convention (IV Monitoring Cycle Opinion of 16 November 2015). In the Fourth Opinion on Germany, the Committee underlined that "the established criteria, such as the citizenship criterion, should not have the effect of arbitrary excluding certain groups of persons from the benefits of the provision of the Framework Convention", it encouraged the authorities "to pursue an active, open and dialogue-based approach" and "review the impact in practice of the application of the citizenship criteria as regards access to minority rights" (ACFC, Fourth Monitoring Cycle Compilation of Opinions, pp. 21-22).

The Advisory Committee does not consider citizenship a due prerequisite for qualifying for rights protection (ACFC (2016), p. 12), as the criteria is not considered free from discrimination and responsive to the situation of minority groups, who are often victims to displacement or statelessness due to geopolitical processes in their kin states or regions, which do not necessarily affect their ties with their states. The citizenship requirement, although not widely contested within the international law approach as a legitimate indicator for the recognition of national minorities, was, however, subject to "flexible approach" interpretation by the Advisory Committee. Overall, the Committee approaches the requirement of citizenship as an obsolete practice, and advised for an inclusive approach, welcoming state practices that disregarded the formal citizenship requirements. During its third monitoring cycle, the Committee highlighted the inadequacy of the

citizenship requirement to the recognition of the Roma minority to the government of Bosnia and Herzegovina, which admittedly faced obstacles in confirming their citizenship or obtaining identification documents in the aftermath of the conflicts (III Monitoring Cycle, Opinion Compilation, Article 3, p. 14). The Committee remarked that such difficulties should be taken into account when considering the personal scope of application of minority rights in the country, and that the government had to "*especially ensure that Roma whose citizenship has not been confirmed are not excluded from benefitting from the protection provided by the Framework Convention*" (III Monitoring Cycle, Opinion Compilation, Article 3, p.14). Extension of protection for non-citizens, in particular with respect to the persons of Serbian, Bosniak and Roma ethnicities living in Croatia, was recommended for the inclusion in to the national constitutional framework to Croatia, with Committee reiterating that "*it is considered as a restrictive element that can have a discriminatory effect*" and "*that it is part of its duty to examine the personal scope of application … to verify that no arbitrary or unjustified distinctions are made*" (III Monitoring Cycle, Opinion Compilation, Article 3, p. 24, reiterated in IV Monitoring Cycle Opinion on Croatia of 18 November 2015, which recommended "flexible case-by-case approach").

The Advisory Committee's approach is contextualized and substantiated with the conclusions by other Council of Europe institutions, including the European Commission for Democracy through Law. In its Report on Non-Citizens and Minority Rights, the Venice Commission advised member States "*to abstain from introducing a citizenship requirement in a domestic definition and/or in a declaration*", concluding that citizenship but can be a basis for access to some minority rights, but cannot be a basis for defining minority (CDL-AD(2007)001, p. 38). Overall, the Venice Commission proposed that "attention should be shifted from the definition issue to the need for an unimpeded exercise of minority rights in practice" and proposed those States where the citizenship requirement is embedded into the legal system to "*consider, where necessary, the possibility of extending on an article-by-article basis, the scope of protection of the rights and facilities concerned to non-citizens*" (CDL-AD(2007)001, p. 38-39). It arrived to the conclusion of the necessity of a calibrated but generally inclusive

approach to resolve the questions of access to minority rights.[174] Flexible and "case-by-case" approaches are recommended by the Commission for various aspects of implementation of the Convention, including *ratione personae* application and assessment of the accessibility of certain rights. Although ensuring attitude favourable to rights-holders free from excessive formalism, the approach does not appear to create a firm assessment framework that would allow foreseeability for the evaluation of rules developed on the national level.

In assessing the adequacy and justifiability of residency requirement and additional restrictions imposed by determination of its length, the Advisory Committee (ACFC (2016), p. 13) concluded that the majority of the provisions under the Convention did not condition access to the rights with any length of residence or traditional inhabitance within the state or a particular region, nor was it required by international standards, including Article 27 of the ICCPR. The Committee concluded that differences in treatment based on the length of residency are not fair and can lead to discriminatory treatment. This condition presents an example when an attempt to ensure objective assessment of the question of rights attribution does not prove adequate and functional for the purposes of the legal protection. The most common instrument adopted for the purposes of the realization of rights under the Convention are quotas and thresholds determined based on a variety of census and questionnaires conducted by the authorities. However, even in cases when methodological objectivity is intended to be safeguarded in data collection[175], its treatment and storage, as well as the design of the questionnaires, the problem remains with the subjective attitude of the participants, abstaining from participation, disclosure of data or providing inadequate data during

174 The European Commission for Democracy through Law. Report on Non-Citizens and Minority Rights (CDL-AD(2007)001). Adopted by the Venice Commission at its 69th plenary session (Venice, 15-16 December 2006). Available at: https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2007)001-e. Last accessed in May 2021.

175 The Advisory Committee developed a set of criteria for evaluating the adequacy and reliability of the national census, applying such indicators as integrity of the data collection, objective representation, obligatory responses, variables and categorisation. These issues are assessed within the section on Article 3 of the country specific opinions.

the census.[176] Such subjective behavioral choices, attributable primarily to fear or implied marginalizing consequences, lead to the inadequate bases for the assessment giving access to the right and entitlements under the Convention. In its III Cycle Opinion, the problem was raised with respect to the Armenian community in Azerbaijan, when the 2009 census indicated that only 10 per cent of the Armenian minority residing outside the Nagorno Karabakh region admitted their ethnic origin, compared to the official estimates, which led to the concerns of the compliance with the adequacy of conditions for the freedom to self-identification under the Convention (III Monitoring Cycle Compilation of Opinions on Article 3, p. 13). The Committee underlined with respect to the Czech Republic, that access to the rights guaranteed under the Convention could be hindered due to conditionality of the thresholds determined based on the census data of contested adequacy. Acknowledging the right of citizens no to disclose their ethnic origin, the Committee underlined, that given the high percentage (over 26 per cent) of census participants who chose to abstain to provide such data, the census "*cannot be considered as the only indicator of their number when implementing the policies and measures [required by the Convention] … where a number of rights are dependent on the census-based thresholds*" (IV Monitoring Cycle Compilation of Opinions on Article 3, p. 12).

Similar approach was adopted by the Advisory Committee with respect to the territorial limitations on applicability of the Convention and the requirement for dense or compact settlements of minority groups (ACFC (2016), p. 14). Besides admitting territorial restrictions as discriminatory and unjust, the Committee concluded that when all norms, except for Articles 10(2), 14(3) and 11(3), were concerned, territorial restrictions contradicted Article 29 of the Vienna Convention on the Law of Treaties, under which the general principle was established that international treaties had effect on the entire territory of participating States, "[u]nless a different intention appears from the treaty or is otherwise established" (UN Treaty Series, vol. 1155). In a number of cases, the Committee recommended extending protection to

176 Similar problems were examined by the ECtHR (e.g. with respect to Austria, it was considered in line with Convention that the persons belonging to national minorities who were speakers of the state language could not indicate themselves as belonging to a national minority on another basis due to the design of the linguistic census questionnaire).

minorities living outside their traditional settlements (as discussed above, a similar provision, de facto extending the application of the Convention ratione loci exterritorialy, was made by Poland; a recommendation on protection of internally relocated persons belonging to national minorities was made by the Committee to Italy in its First Opinion). In its Second Opinion on Austria, with respect to the consideration of extending the protection status to several autochtonous groups living outside their traditional settlements, the Advisory Committee recommended to *"…ensur[e] an inclusive and consistent application of the rights of persons belonging to national minorities and to ensure that the needs of those living outside the traditional settlement areas are also adequately catered for"*. The Committee also draws attention to the potential misuse, when territorial reservations may constitute an attempt to assign legitimacy to a maliciously intended attempts to exclude certain groups from the scope of the Convention (ACFC (2016), p. 14).[177] The Committee underlines that the validity of such reservations is limited due to intensified mobility of minority groups, determined either culturally or with the changing socio-economic factors. Thus, in its recent assessment of the State report by Germany, and in particular its argument that the Polish community does not fulfill the criteria for recognition as a national minority, as they "are not traditionally resident in Germany and do not live in traditional settlement areas" (ACFC, Fourth Monitoring Cycle Compilation of Opinions, pp. 21-22). Overall, recognizing the importance of residency with respect to practical aspects of service provision by public administration, the Committee underlined that, as a formal requirement, it should not lead to disadvantage of minority groups or diminish the scope of their rights. The Committee's response to the legislative solutions placing the enjoyment of minority rights restricted by the requirement of concentrated settlement and groups' local representation has remained critical, despite the general recognition of practical challenges for the participating States to ensure protection of groups, dispersed around the country. Nevertheless, the Committee underlined that the rights of

177 The Parliamentary Assembly Resolution 1301(2002) stressed the necessity of avoiding limitations and reservations upon the ratification of the Convention, as such reservations could be interpreted as defeating the purpose of the legal instrument being acceded to, and therefore run contrary to the provisions of the Vienna Convention on the Law of Treaties.

minorities "should not be impeded through the use of numerical criteria" (ACFC (2016), p. 15)[178].

An important aspect with respect to territorial application of the Convention is raised, when the territories of participating states are affected by conflicts. The Advisory Committee underlined that, despite limitation in practical implementation, exacerbated by contested authority rights of states of the territory in question, leading to unclear jurisdiction rules applicability, the urgency of protection for minority groups gains significance in conflict situations. Therefore, the Committee called upon States parties to take "a constructive approach" to the application of the Convention to the areas affected by conflicts, and giving prevalence to the interests arising from the status and situation of the affected groups (Advisory Committee Open Statement on the situation of national minorities in Crimea, May 2014).[179] The Advisory Committee concluded that territorial limitations and the population threshold for the application of the Convention should be utilized with utmost care, to ensure that contemporary mobility patterns leading to regional demographic dynamics would not lead to the restrictions on rights of national minorities (ACFC (2016), p. 32).

The Advisory Committee underlined that the enforced protection of minority rights was necessary for the effective social integration as it would allow them to exercise their rights on the basis of equality with others and in freedom from assimilation (ACFC: 2016, p. 5). The Explanatory report underlines that, under the norm of Article 7, positive obligations of States can be extended to protection against violations by third parties (para. 52). This gains increased significance when cultural rights are in focus, because of the identity-forming role of cultural traditions and heritage. The Committee identified three

178 The criticism was expressed, inter alia, in Commission's opinions with respect to the Netherlands (First report) related to the Roma exclusion from the enjoyment of conventional rights; First States Reports by Austria, Azerbaijan, Georgia.

179 Council of Europe. Advisory Committee for the Framework Convention on the Protection of National Minorities. Open Statement on the situation of national minorities in Crimea, May 2014 [online]. Available at:https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=090000168069faed]. Also relevant: The ad hoc report on the situation of national minorities in Ukraine, 2014.

primary components of minority rights that needed to enjoy protection in order to facilitate social inclusion: 1. Protection of the "ability to express difference" and its recognition; 2. Equal access to resources and rights, despite the differences; 3. Participation in social interaction "on the basis of respect and understanding across difference" (ACFC: 2016, p. 5). The Advisory Committee divided the rights and obligations under the Convention to be applicable to all persons within the territory of the state, to be applicable to all national minorities, and those that implied or allowed conditionalities to be imposed by States for triggering their application (ACFC: 2016, p. 6). Overall, the Advisory Committee has underlined its "broad scope of application" approach towards the Convention. The broad inclusion implies, *inter alia*, that some of the provisions, in particular those with wide formulations, are extended to those individuals not granted expressed formal recognition by states (ACFC (2016), p.p. 24-25). This approach is applied to most of the cultural rights safeguarded under the Convention and incorporates the provisions under Article 4 (equality), Article 5 (culture), Articles 7 and 8 (rights to association and religion), Article 9 (media), linguistic rights under Articles 10 (paras. 1 and 3) and 11 (paras. 1 and 2), education-related rights under Articles 12 (3), 14 (paras. 1 and 3), Article 15 (participation in, *inter alia*, cultural life). The criteria for implementation of these rights by States parties are ensuring them without exceptions, to all, without discrimination, and free from arbitrary deprivation. Article 4 is applied by the Committee to integrate various discrimination markers, including the gender perspective, age, sexual orientation, and lifestyle, into the protection framework, requiring safeguards for the rights of various categories of persons belonging to national minority groups, thus making them more beneficiary-specific (ACFC (2016), p. 15). The non-discrimination principle, in the sense of the Convention, is not limited to the formal equal treatment. The equal treatment is admitted sufficient only in equal situations (Cilevisc: 2004, p. 29), while the Convention requires "full and effective equality" is compliant with the notion of equality under the capability theory, where the measures and treatments are to be measured based on the practical requirements of the beneficiaries. The provisions of Article 4 set guidelines for the design of mechanism of minority rights protection, to be conducted under full implementation of effective participatory approach. The criteria for the assessments of legal and institutional structures, and measures aimed at promoting full and effective equality related to non-discrimination in

implementing the FCNM are given in the Advisory Committee's country opinions. The analysis of the fourth monitoring cycle opinions allows to conclude that frameworks and measures aimed at prevention of discrimination in member States were challenged by the lack of well elaborated financial frameworks or practical underfinancing (Finland, Armenia, Austria, Croatia, Cyprus, Estonia, Germany, Hungary, Moldova, Slovak Republic, Spain, UK), insufficient or missing legal regulation (Armenia, Austria, Croatia, Germany, Hungary, Moldova, Norway, Spain, UK (with respect to Northern Ireland)), lack of institutional structures (Italy, North Macedonia), lack of or hindered access to effective legal remedy (Austria, Croatia, Cyprus, Moldova, North Macedonia, UK), insufficiency in inter-institutional cooperation (Austria, Czech Republic), low level of awareness on problematic issues related to the minority groups or institutions (Croatia, Cyprus, Denmark, Estonia, Germany, Moldova, Norway, Slovak Republic) and the requirement for facilitation of due implementation of participatory approach (Armenia, Cyprus, Italy, Slovak Republic, North Macedonia). With respect to the ensuring cultural rights of minorities without discrimination, the Advisory Committee underlined the necessity to elaborate comprehensive legal and programmatic measures, ensuring that multi-vectoral planning based on a recognition of the correlations between culture and heritage of minorities with wider human rights perspective. The Commission noted that when minority agenda is perceived by the authorities only from the culture and heritage protection perspective and no reflection is given to minority rights protection within wider human rights framework results in "confusion and apprehension" of the agenda, leading to minorities' abstention to address public authorities or utilize national institutions, while public authorities misinterpret requests for recognition or access to minority rights as disloyalty (ACFC, Fourth Monitoring Cycle Compilation of Opinions, Article 4, Moldova, p. 42).

5.2. The Catalogue of Rights

5.2.1. Self-identification with Minority Groups. The nature of entitlements

The pivotal concept within the Conventional system is the right to self-identification. The right is crucial to the minority protection, but also for maintaining effectively functioning and peaceful societies, also due to established interconnections and mutual influences among different communities within societies that continuously influence each other in

their co-existence, and shape the way various identities are perceived (ACFC: 2016, p. 3). As follows from the analysis of the *travaux preparatoire* and the text of the Convention, the Convention does not protect collective rights, hence the choice of the terminology used for referencing the rights holders. The scope of the Convention is clarified in Article 1, under which the overall protection is granted to national minorities, while the protection of rights and freedoms is granted to persons belonging to national minorities, highlighting that the overall protection of the group is not guaranteed, but can be achieved through individual rights protection, without extending the scope to collective rights.[180] Semantically, therefore, the text of the Convention does not clearly delineate the nature of the protected rights, and the exemption of collective rights by official interpretation is not fully concurrent with the wording. This lack of pronounced determination of the scope of protection was also reflected in the unclear determination of the place of the convention within wider human rights framework, which influences the nature and scope of the concurrent obligations by states, who would become obliged to guarantee the protection of collective minority rights. The integration of the minority rights into the wider human rights framework was not conjured by the Vienna Summit decision, and consequently superseded the planned impact of obligations, aligning them in force with the international human rights protection standards. The lack of precision in the choice of wording in the Convention, impacting its concept, and the eventual lack of clarity in its norms, drove criticism to the Convention. Besides the Parliamentary Assembly, who criticized the soft provisions in which the obligation framework was framed, the criticism concerned "the tactic of mixing the collective and individual rights", which "cannot be considered satisfactory from the point of legal theory" (Heintze in Weller et al: 2008, p. 45). The Convention construes the rights of persons belonging to minorities based on the identity factor (Kymlizka in Weller et al: 2008, p. 17). The Convention builds upon a premise of

180 Heintze (in Weller: 2004, p. 48) expressed criticism that the failure to extend protection to collective rights leads to the failure to prevent discrimination. W. Kymplicka (1995) connects the failure to grant collective rights to persons belonging to the national minorities to the threat to individual rights. PACE recommendation 1492 (2001) and the Opinion of the Advisory Committee on PACE recommendation 1492 on the rights of National Minorities (2001), para 4.

insufficiency of pure respect for "*ethnic, cultural, linguistic and religious identity of each person belonging to a national minority*" but underlines the requirement for the affirmative actions, conducive to expression, preservation and development of their identities (preamble). Cultural diversity is perceived by the Convention as a value for enrichment of the society and underlines the significance of the tolerance and dialogue for maintaining the according role of diversity. The Advisory Committee underlined that besides assessment of minority status based on the cultural determinants expressly mentioned in the Convention, the protection measures should be forged based on the respect to diversity in a wider sense, including such factors, as gender, age, disability, political beliefs and economic resources (ACFC (2016), p. 17), as these factors contribute into the diversification of requirements and capabilities and functionings of minority groups representatives.

This was not re-shaped by the FCAC, although the aspect of collective enjoyment of rights is a specific monitoring issue and is repeatedly challenged in its opinions and commentaries. The Advisory Committee underlined that, although the Convention protects individual rights "exercised individually and in community with others", it also stated that "a number of rights only make sense if exercised in community with others". It highlighted that some conventionally granted rights presuppose formal affiliations with others (ACFC: 2016, p. 4), which leads to the recognition of "individual, social and collective dimensions" of minority rights. Yet, the formal attribution to a minority remains contested, even despite the determination of minority identity components, such as cultures, languages, and traditions. The solution chosen by the Advisory Committee in its monitoring work, was to address broader questions of social integration and cohesion created in the spirit of respect to diversity, references as primary aims of the Convention in its text (preamble, in particular). The Committee underlined that, although that approach was not consistently supported by participating States, it was seen as the most applicable measurement tool responsive to the requirements of the minorities, societies and consistent with the provisions of the Convention. It should be underlined that the attempt to define the scope of application of the Convention was undertaken by the Commission late in the process, compared to other thematically relevant issues arising from its implementation that were analysed by the Committee in earlier Thematic Commentaries, which proves the complexity of the question.

In forging the scope of the rights catalogue the drafters of the 1995 Framework Convention relied upon the 1993 Vienna Summit Declaration (the logic was underlined by the drafting committee in the Explanatory report to the Framework Convention, para. 22). The Convention develops an enforced agency for self-determination as to the membership in minority groups, including the entitlement to choose to be or not to be treated as a member of a minority group (Article 3). This approach of the 1995 framework Convention extends but is generally compliant with the HRBA approach to cultural rights that provides for the agency to determine cultural practices or to cease participation in them.[181] Moreover, as underlined above, any identity choices and related behavior shall not lead to any disadvantage (Article 3). The Advisory Committee reiterated in this respect that the concept of minority cultures should be considered by states as a fluid and constantly transforming notion, subject to external influences, such as political and socio-economic factors, as well as transformations driven by variations in individual and group practices and interpretations (ACFC (2016), p. 17). The sensitivity assigned to such evolutionary trends allows not only preservation of minority cultures, but its modern development, forming "contemporary expression of minority identity" (ACFC (2016), p. 17). The Convention ensures the development of minority identity, *inter alia*, through education and development of interpersonal ties within the communities sharing "*ethnic, cultural, linguistic or religious identity, or a common cultural heritage*" (Article 17). The Parties to the Convention undertake not to interfere with the rights of persons belonging to national minorities to establish and maintain cross-border contacts between members of minority groups sharing cultural background (Article 17).[182] Although a negative obligation in nature, this safeguard, read in conjunction with the guarantees under Articles 5 and 7 of the Convention, is an important catalyst of cultural development and preservation of minority cultural heritage.

181 "The right to take part in cultural life without discrimination, including the right to participate in decisions to change or cease cultural practices, is a human right in and of itself" (2018 Report, para. 57).

182 The Explanatory report clarifies that the origin of the safeguard is in paragraphs 32.4 and 32.6 of the Copenhagen Document.

The Advisory Committee interpreted the right to self-identification in its Thematic Commentary No. 4 as central to the minority rights protection (ACFC (2016), p. 7). The Committee underlined the condition of free individual agency in accepting the protection framework, implying an individual's full and informed consent leading to "established and informed decision". The Committee interprets that the right under Article 3 belongs intrinsically to everyone, giving the possibility to choose to identify themselves with a group, or not to. This entitlement is conditioned with the compliance with the objective criteria determining the group membership. The "objective criteria" remain without strict interpretation by the monitoring mechanism, allowing adjustment to the domestic challenges where the targeted measures are being developed and ensuring compliance with the non-discrimination principle. The Advisory Committee underlined its consideration of "the free individual choice" in opting not to limit it with strict interpretational boundaries (ACFC (2016), p. 7). To the Committee's reading, the increased relevance of an individual agency withdraws this aspect from the scope of definable notion (ACFC (2016), p. 7). The individual agency is framed therefore in self-identification with the due faith of the underlying intent, excluding misuse of minority group affiliation in pursuit of illegitimate advantage or intentional limitations of minority protection, from the scope of admissible self-identification practices. Overall, the determination of admissibility of the measures imposed for the self-identification principle remains primarily open to situational assessment on a case-by-case basis, as evidenced with diverging approaches to the resolution of related issues by various Council of Europe institutions.[183] Furthermore, the Advisory Committee reiterated the validity of situational assessment of self-identification by the same individual but adopted under varied circumstances (ACFC (2016), p. 7). However the explanation of the approach given by the Commission limits that the margin of individual appreciation in self-identification to the scope of

183 The Advisory Committee underlined the relevance of situational difference in its own approaches forged in its Opinions on, for example, inadmissibility of requirement for ethnicity identification in personal documents, and with the approach taken by the ECtHR in *Ciubotaru v. Moldova* (application no. 27138/04), Judgment of 27 April 2010, when the ECtHR recognized the right of the government to require objective evidence for substantiating individual claims for affiliation with minority groups.

rights protected under the Convention without leading to limitations in rights of others.

From another perspective, neither the Convention nor any interpretations issued by the monitoring bodies attempted to limiting claims for multiple identity affiliations. The Advisory Committee underlined on several occasions (ACFC (2016), p. 8; ACFC (2012 and 1998)) its reading of the Convention as explicitly entitling persons belonging to national minorities to multiple identities based on their individual informed choice. That approach is developed based on the conventional aim to ensure social cohesion and effective integration of national minorities with respect to their kin states, in conjunction with the protection of cultural diversity, which implies co-existence of several aspects of cultural identity owned by individuals and groups. This is re-iterated within the text of the Convention with the framing of some rights that can imply discretion in enjoyment or various modalities of implementation (e.g. individually or in association), which allows certain variations in individual behavior, influenced with group requirements or rules. Traditional practices within the society also constitute a choice-framing factor, as underlined by the Advisory Committee, as established practices leading to assimilation of minority groups may determine self-identification modalities of minorities with respect to the majority, but may leave practices on an individual basis or within the minority groups unaffected. In this respect, the Commission underlined (ACFC (2016), p. 8) the necessity of measures insuring that self-identification choices are not affiliated with any discouraging factors, including diminished social prestige or fear and in respect of all converging rights, including protection of sensitive personal data related to religious, linguistic or cultural backgrounds, which must be collected on a voluntary bases and safeguarded in compliance with international standards and free from assumptions . This approach is of particular relevance to the cultural practices and traditions, which require particular affirmative actions from the public authorities to ensure their sustainability and acceptance under the condition of clashes with the dominating majority cultural practices.

5.2.2. The Right to maintain and develop culture and identity and the right to participate in cultural life. Delineating the notions of culture and cultural expression under the FCNM

and policy approaches to their development under the ACFC "case-law"

The catalogue of culture-related rights granted to persons belonging to national minorities under the Convention includes the rights to maintain and develop their culture, and the right to preserve the essential elements of their identity, which include religion, language, traditions and cultural heritage (Article 5). In its thematic comment No 2 (2008, p. 11), the Advisory Committee calls the rights stipulated under Articles 5, 4 and 15 "*the three corners of a triangle which together form the main foundations of the Framework Convention*". Such measures were not construed to exclude voluntary assimilation of minority representatives, but as a general policy-making tool implied actions aimed at societies' cultural enrichment achieved due to facilitation of cultural diversity (Explanatory report, para. 46). The Convention establishes obligation for States to "*create the conditions necessary for the effective participation of persons belonging to national minorities in cultural […] affairs, in particular those affecting them*" (Article 15). With respect to these rights, the Convention foresees the obligation of States parties to promote necessary conditions for their implementation.

The evaluation of the States paries' reports by the Advisory Committee clarified the general framework of application of Article 5, ensuring the public assistance is granted to communities without formal national minority status, under the condition of established lack of other means to undertake measures aimed at development of their cultural identity or related cultural features (ACFC (2016), p. 26). The requirements to the policy and legal measures include the factor of adjustment to the needs and specific requirements of the particular groups, as well as to the particularity of the cultural features that form their specificity, including calibrated measures required for revitalization of minority cultures. The recommendations developed by the Advisory Committee are instrumental for the interpretation of the meaning of Article 5. In a number of opinions, the Committee underlined the necessity of a well-developed cultural policy with respect to maintaining and developing cultures of national minorities developed in effective participation of national minority groups representatives (e.g. ACFC, Forth Monitoring Cycle, Article 5, Moldova, p. 23, North Macedonia, p. 33). The Committee underlined insufficiency of a narrow reading of the minority cultural expressions that primary targets folklore,

recommending "a more proactive approach towards cultural expressions of national minorities and promote also a wider array of manifestations" (ACFC, Forth Monitoring Cycle Compilation of Opinions, Article 5, Armenia, p. 4, identical concerns were expressed by the Committee with respect to Croatia, ibid., p. 6). The change of folklore-oriented approach aimed to ensure wider perception of ownership and representation in such policies of minority representatives, especially younger generation, and help avoid static representation of minority cultures (ACFC, Forth Monitoring Cycle, Article 5, Croatia, p. 7). Moreover, the Committee criticized minority culture representation that entails marginalization of the culture as separate or foreign (reflected through festivals, books and editorial content), and recommended inter-cultural events that "*mark minority cultures as an integral part of … diverse society as a timely opportunity to promote dialogue platforms which also draw on cultural activities to promote a sense of cohesion in society*" (ACFC, Forth Monitoring Cycle, Article 5, Croatia, p. 6, North Macedonia, p. 32, where the Committee underlined that cultural policy reflected "*the key divisions in society rather than giving adequate space to diversity*"). The Committee also reiterated the importance of creating positive image of minority groups and their cultures, reflected through positive and diverse means of representation of their cultural heritage to the general public (Ibid., Cyprus, p. 8, Slovak republic, p. 30). With respect to Roma communities, this aspect of policies was also supplemented with the necessity to portray them as "a minority with distinct cultural heritage" and avoiding the limitation of the narrative to the socio-economic dimension, while attempting to adequately reflect the concerns of the rights holders (Cyprus, p. 8). The Committee recognized projects aimed at extending library collections with books in minority languages and establishing museum collections delivering minority dedicated messages (Ibid., Czech Republic, p. 10) as well as the theatrical groups in minority languages financially supported from the state budget (ACFC, ACFC, Forth Monitoring Cycle, Article 5, Hungary p. 19, Slovak republic, p. 29-30) as good practices of due implementation of Article 5.

The Committee reiterated the necessity of contemporary historical narratives in developing the presentation of cultural heritage in various media, including exhibitions, museums and literature. Assimilation through culture is explicitly unacceptable under the Convention.

Assimilation is interpreted through its recognition in the perception by minority groups representatives of their inability to maintain visibility for their specific characteristics (ACFC, Forth Monitoring Cycle Compilation of Opinions, Article 5, Austria, p. 4; CoM Resolution on Romania, 5th Monitoring Cycle, Resolution CM/ResCMN(2021)13, rec. 3 on elimination of "racist, xenophobic and anti-Roma language in political discourse and in the media"). The acknowledgment of trans-generational effect of the forced assimilation is underlined as an important aspect that needs to be reflected both in cultural policies and the institutionally and legally substantiated possibility of effective redress (ACFC, Forth Monitoring Cycle, Article 5, Norway, p. 27). Good practice in this respect was identified by the Advisory Committee in the development of cultural policies in Finland, where the accent was made not only on ensuring access to culture and cultural practices, but also on pluralism, entailing "enhancement of the participation of minorities in decision-making process", in particular within the processes related to funding distribution for cultural initiatives (ACFC, ibid., p.15). Moreover, states are encouraged to enable national minorities associations to "preserve and develop their distinct identities effectively as an integral part of cultural diversity", by means of provision of support, including funding, in a wide range of cultural fields, e.g. education, media (ACFC, Forth Monitoring Cycle Compilation of Opinions, Article 5, Austria, p. 5), as well as lifestyles (ACFC, Forth Monitoring Cycle, Article 5, Norway, p. 28 with respect to necessary measures for facilitating of travelers lifestyle for the Roma). Almost all opinions on implementation of Article 5 incorporated comments on the necessity of financial support to maintenance of minority cultures and promoting national minorities cultural initiatives. Under the Committee's consideration of effectiveness, these should be provided following a transparent procedure (ibid, Germany) and "in a timely manner, adequate and sustainable" (Ibid., Hungary, p. 19), and must be available in long-term, to ensure planning and implementation of cultural initiatives, with particular attention to the needs of numerically smaller communities (Ibid., Italy, p. 22, Moldova, p.23). The Committee welcomed needs-based approach in public authorities' assistance provision to minority groups' cultural initiatives, in particular those aimed at promotion and development of national minority cultures, reflecting the requirements of different minority groups and cultural initiatives (ACFC, ibid, Germany, p.16).

In the cultural rights framework created by the Convention, Article 15 carries a particular importance, as it establishes the right to participate in cultural life. Intervention in its implementation undermines the possibility to access other culture-related rights under the Convention. However, the formulation of the provision is rather austere and allows broad margin of appreciation of the States in determination of the domestic measures. Partially, this is attributable to the format of the agreement. As a framework instrument, the Convention is drafted as a set of principles to be implemented through the national legislation of the member States, and is not construed to develop imperative guidelines. It is unclear, inter alia, what correlations, if any, the Convention foresees for ensuring participation of national minorities in cultural life of the majority compared to the specific activities and practices attributed to minority cultures. The Advisory Committee acknowledged (2008, p. 21) that the provision of the Convention covers both aspects of cultural participation. The right to participate in cultural life of the group with which they identify themselves would extend to preservation and development of their cultural heritage and identity, as well as the right to participate and interact within the majority culture. Semantically, the scope of entitlements is not identical, and implies different regulatory framework. Furthermore, the provision of Article 15 does not mention the principles, under which it shall be implemented by the States parties. In the Explanatory comments to Article 15 of the Convention, the drafters attempted to cover some of the lacunae by providing guidelines as to the principles and measures proposed for incorporation into the legal system of States parties. First of all, the Explanatory report (para. 80) underlines that the realization of the right to effective participation in cultural life implies "real equality between persons belonging to national minorities and those forming part of the majority". The necessary conditions for effective participation of national minority are proposed to be achieved through a comprehensive and meaningful participatory approach that should include the following means:

- Participatory approach in legislative and administrative processes (includes consultations with persons belonging to national minorities through their representative institutions);

- Participatory approach in design, implementation and evaluation of programmes and development plans, affecting their status directly;

- Participatory approach in designing research on possible effect of programmes and measures on the national minority representatives (implies participation in methodological development and research per se, as well as the integration of national minority perspective in such due diligence assessment of legislation and policies);

- Effective participation in decision making (implies participation in the bodies in charge of decision making, and in elaboration of the decisions *per se*);

- Decentralisation of governmental system.

Participatory approach is one of the cornerstone principles proposed by the capabilities approach for any type of effective decision-making, including responsive and sustainable policies and reflexive legislation, able to create a sound basis for fruition of capabilities and ensuring effective empowerment of vulnerable groups. The measures proposed at the Explanatory report, although primarily related to general structure of decision- and policy-making, appear to utilize the capabilities approach without to ensuring the required effect in terms, for example, of gender equality and empowerment of a wider scope of groups, including senior citizens or persons with disability; or affirmative measures or standards ensuring economic sustainability of the participatory approach, which would ensure successful implementation of the elaborated measures. Moreover, the integration of persons belonging to national minorities here appears to be framed around resolution of topic-specific questions, when the minorities are directly affected. This does not effectively comply with the effective participation and meaningful democratic integration in respect with the diversity principle. Participatory approach is recommended (*ibidem*) with adjustment to minority needs by ensuring, inter alia, adequate opportunities for their meaningful participation. Sen (1999, p.152) highlighted that "informed and unregimented formation of our values requires openness of communication and arguments". In terms of democratic standards, this translates into a requirement for affirmative measures to ensure full-fledged participation in all aspects of cultural policy framing. Furthermore, the reference to effective participation on all stages of policy-making, including the governmental system, implies participating in the execution of decisions and implementation of normative requirements. The Advisory Committee underlined

several important aspects of the participatory approach implementation with respect to Article 15 of the Convention. First of all, the Committee required adequate representation of national minorities" in the existing national institutions empowered with culture-related decision-making (ACFC (2008), p. 22). The Committee stressed that the participation of national minorities representatives should not be limited to issues of direct relevance to these communities or solely financial aspects of programme planning, but should include wider scope of matters within general social interest, facilitating viable and inclusive solutions and intercultural and inter-community dialogue (ACFC (2016), p. 29; CM/ResCMN(2021)13 as a non-priority recommendation on continuation of dialogue regarding the expression of interest in protection under the FCNM, in particular in the linguistic and cultural interests and support of their identities; intercultural dialogue between majority and minorities, and among minorities). The Advisory Committee underlined that the infrastructural requirements for holding public consultations should be characterized by flexibility to accommodate changing circumstances and priorities within the agenda, as well as a high degree of autonomy, in respect to the principle of territorial integrity (ACFC (2016), p. 30). Decentralisation processes, leading to the formation of cultural autonomies, are perceived as empowering factors, facilitating effective participation of national minorities in cultural life (ACFC (2008), p. 6). These interpretations ensure a more comprehensive compliance of policy-making standards to the democratic development agenda.

The standards and requirements for the implementation of Article 15 developed by the Advisory Committee in its opinions are consistent and at times repeat the recommendations and approached elaborated for Article 5 with respect to cultural policies and public budget support to cultural activities of national minorities discussed above. The issues within the primary focus of the Committee during the Fourth Monitoring Cycle concerned facilitation of participatory approach in the development of cultural policies and realization of cultural projects. That included the recommendations on finding tailored and appropriate modalities for involving representatives of national minorities in legislative activities on a regular basis and consulting them on all stages of the drafting process (ACFC, Fourth Monitoring Cycle, Article 15, Armenia, p. 4). Moreover, to ensure adequate realization of participatory approach the Committee recommended the

promotion of "institutionalization of consultative and dialogue processes between national minorities representatives and senior decision making bodies" ((ACFC, Fourth Monitoring Cycle, Article 15, Austria, p. 5), which, however, needs to be equipped with a meaningful influence power, rather than providing consultative or expert services (ACFC, Fourth Monitoring Cycle, Article 15, Croatia, p. 7). For the consultative bodies, the Committee stated that they should possess "sufficient competences to effectively influence relevant decision making" (ibid., p. 8). Such competences have to be meaningful and extend beyond approval of cultural projects or redistribution of funds among cultural initiatives, but effectively influence related policies and legislation, "affecting minorities in broader sense" (ACFC, Fourth Monitoring Cycle, Article 15, Estonia, p. 16; positive assessment in this respect was given to the reported developments in Hungary, where local minority self-governance was entitled to managing minority educational and cultural institutions and influence nation-wide policies, in ACFC, Fourth Monitoring Cycle, Article 15, Hungary, pp. 24-25; while negative assessment was given to the Bureau of Interethnic Relations in Moldova, which "[d]espite its broad responsibilities, it is viewed as focusing mainly on cultural preservation issues without, however, having an adequate budget even for that task … and is viewed by minority representatives as having lost further political clout" (ACFC, Fourth Monitoring Cycle, Article 15, Moldova, p. 30). Establishing of a variety of consultation mechanisms was regarded by the Committee as a good practice (ACFC, Fourth Monitoring Cycle, Article 15, Austria, p. 6).

The efficiency of integration of national minorities into the cultural life is indeed assessed by the Advisory Committee through their access to media (ACFC (2008), p. 6). This indicator is measured according to the ability and capacity of minorities to create and use their own media. Concurrently, the Committee assesses the minority representation in the mainstream media and the effective capability to transmit their knowledge, ideas and opinions. This serves as an indicator of effective integration and a measurement of social receptiveness to differences and cohesion. The 1995 Convention envisages the civil rights, to which the interconnection is established under the HRBA, including the freedom of peaceful assembly, freedom of association, freedom of

expression, and freedom of thought (Article 7)[184]. The concurrent States' commitments for these freedoms are designed as the obligation to ensure respect. These freedoms are framed as individual rights, granted to "*every person belonging to a national minority*". The listed rights corresponded to Articles 9 to 11 of the European Convention of Human Rights and are of universal nature.

Participation under the capabilities approach to development, if deconstructed into a variety of facilitating procedures, freedoms and rights, should include, education, the freedom of speech and opinion, media freedoms to ensure informed decision-making and dissemination of ideas. It performs as catalyzer, amplifying the effect of the cultural rights, strengthening democratic decision-making on the grassroots level. It can facilitate social development, if duly instilled into collective and individual identity, starts influencing behavioural choices. As the analysis of the ACFC's recommendations above exemplified, the approaches adopted by the ACFC are compliant with the standards designed for facilitating development under the capabilities approach.

5.2.3. Rights and freedoms pertaining to religious beliefs. Religiously determined cultural practices

The religious rights are delineated as a comprehensive entitlement, compounding, besides the freedom of religion *per se*, also the right to beliefs, extending the scope to philosophical and ethical beliefs and existential philosophical views. Drawing from paragraphs 32.2, 32.3 and 32.6 of the 1990 Copenhagen Document, the Convention forges the rights ensuring the effectiveness of general religious entitlements, including the right to manifest religion or belief, and right to create religious institutions, organisations and associations (Article 8) (Explanatory report, para. 54). Thus, Articles 7 and 8 of the FCNM delineate two aspects of religious rights, reflecting forum internum and forum externum, accordingly.

The Advisory Committee approached the assessment of states' compliance with Article 8 requirements including the practices, implementable without discrimination, related to access to religious sites and the possibility to construct religious buildings, practices

184 Article 7 also established the rights to conscience and religion.

related to the burial procedures, religious apparel and traditions, as well as the scope of the administrative practices related to the registration of religious institutions and organisations. For all issues, the Commission paid attention at the effect of the implementation on property titles and claims, including restitution of religious property, access to sites and the possibility to build or establish new places for religious manifestation. The financial aspects of religious rights realization, including public financing to religious institutions, taxation born by individuals and institutions, are also included into the scope of Article 8 of the Convention through the Advisory Committee monitoring practice.[185] Considerable attention is granted by the Committee to the evaluation of state practices as to their influence on social cohesion, intercultural dialogue and integration, which constitutes *fil rouge* of the Committee's opinions. Moreover, the Committee's approach promotes empowerment of minority communities, and overall promotes religious rights as collective entitlements, extending the scope of the Convention to collectives, beyond the notion of manifestation of religion "in community with others".

The Committee's interpretation of the scope of Article 8 as encompassing access to religious sites and actions aimed at protecting them, including efforts undertaken to ensure this right outside the territories under the governmental control, thus *de facto* expanding the territorial scope of the Convention. During the Fourth Monitoring Cycle, the Committee considered actions taken by the authorities in Cyprus to ensure access of persons belonging to minorities to religious sites located in the territories outside the control of the government. Moreover, the Committee considered the undertakings by the religious leaders of the main and minority confessions in Cyprus to promote the right of everyone to access to places of worship and condemnation of

185 The legal regime of public financing and taxation issues for the minority churches and the individuals not belonging to minority churches other than the two regulated by the reviewed regulation or those who did not belong to any church, and differential regimes of taxation reflected *inter alia* on the costs of burial-related procedures were reviewed by the Committee during the Second Monitoring Cycle in the Opinion on Finland. The issue of economic and administrative aspects of unequal treatment of different confessions is consistently raised in consecutive opinions on Russia.

looting and vandalism in religious sites.[186] The examination of the issues pertaining to religious property included questions of access, use, restitution, restoration, as well as its destruction, including theft, vandalism and other offences, and the efficiency of the law enforcement to expeditiously investigate such cases, identifying, distinguishing and prosecuting offences committed based on "motivated by religious and ethnic animosity or committed with other criminal intentions".[187]

Overall, the Committee considers advantages in any form granted to one religion representatives or a confession in its institutional sense to constitute "*barriers to the free manifestation of religious beliefs by persons belonging to national minorities"* incompatible with Article 8 (ACFC, Fourth Monitoring Cycle, Article 8, Moldova, p. 5). The scope of discriminatory practices related to religious rights found incompatible with the Convention by the Advisory Committee include "obstacles impeding [the minority group's] efforts to acquire, build or apply for the restitution of places of worship […], including reluctance, or even refusal, by certain local authorities to grant permission for the building of new churches, as well as tensions generated by these procedures", attempts by one confession to appropriate property belonging the institutions of another confession, provocation and defamatory language against members of minority confessions, obstacles created by authorities with respect to minority groups' projects on construction or renewal of religious buildings, in particular, places allocated for religious worship and rites, manifestations of hostilities by majority groups or representatives of particular confession [typically associated with the majority] with respect to representatives of minority groups practicing other believes, practices or behavior with intimidating or discouraging effect on the performance of worship or religious practices (ACFC, Opinion on Georgia, ACFC/OP/I(2009)001, para. 93). The conditions for religious property restitution developed by the Committee, besides freedom from discrimination, include timely and expeditious implementation that does not allow delay (ACFC, Second

186 Discussed in ACFC, Fourth Monitoring Cycle, Compilation of Opinions, Article 8, Cyprus, p. 3 [online]. Available at: https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=0900001680648f5b. Last accessed in June 2021.

187 Second Monitoring Cycle, Opinion on Kosovo.

Monitoring Cycle, Opinion on Montenegro, ACFC/OP/I/2008)001). Apart from the discrimination aspect of such practices, the Committee approached them considering their effect on societal integration, underlining that abstention from positive resolution of attempts by minority groups to construct places of worship "a matter that risks undermining intercultural dialogue" with the representatives of the affected minority religious community (Second Monitoring Cycle, Opinion on Denmark, ACFC/INF/OP/II(2004)005, para. 88, cited at Berry: 2012, p. 26).

Most recently, the right to create religious institutions was assessed based on the report of North Macedonia, where several religious organisations were denied registration based on the restrictive interpretation of the legal requirement that the name, the doctrine and symbols of religious organisations applying for registration should considerably differ from the existing ones (ACFC, Fourth Monitoring Cycle, Article 8, North Macedonia, p. 6). The Advisory Committee evaluated the implementation of the obligation to protect and not to hinder the performance of religious organisations through legal or practical obstacles, including re-registration requirements, with particular criticism drawn to the practice of denial of registration affecting property rights of religious communities, or closure of places of worship (ACFC (2016), p. 27 and ACFC, Third Monitoring Cycle, Compilation of Opinions, Article 8, Azerbaijan, p. 5). The cases when the failure to register or re-register a religious community affected the functioning of religious institutions or affected property rights to places of worship belonging to religious minorities were assessed by the Committee most recently during the Third and Fourth Monitoring cycles, and were identified, inter alia, in Russia in 2011, where "non-traditional" religious communities faced difficulties to receive registration and were evaluated by state agencies for potentially qualifying as extremist (Third Monitoring Cycle, Compilation of Opinions, Article 8, p. 17). Besides, Opinion on Russian report cited cases of property rights denial on places of worship to the Muslim and Catholic communities, where the former were denied the right to construct mosques, while the latter were deprived of the property that was transferred to the Russian Orthodox Church (ibid., p. 17-18). During the Fourth Monitoring Cycle it was established that in North Macedonia, in 2016, Bektashi Sufi community's denial to register as a religious organization hindered their access and title to the Arabati

Beke Teke in Tetovo, which had been converted into a mosque (ACFC, Third Monitoring Cycle, Compilation of Opinions, Article 8. ACFC Fourth Monitoring Cycle Compilation of Opinions on Article 8, p. 6).

The Advisory Committee extends the evaluation of parties' performance in implementation of obligations under Article 8 to the religious studies, and provision of religious education in public educational institutions. The approach of the Committee is to assess whether religious diversity, encompassing the minority groups' religious beliefs and practices, is streamlined in teaching of religious issues within the framework of public educational system. Evaluating the Fourth report submitted by the authorities of Cyprus, the Advisory Committee admitted, despite the absence of the official religion, the predominance of the Greek Orthodoxy, reflected, *inter alia*, in educational system through the presence of icons in schools, observation of the Orthodox religious holidays and organizing some Orthodox rituals at schools. Besides, the Committee assessed the predominance of one religion in education through comparison of changes in the scope and substance of religious education at public schools, which was generalized and included wider elements aimed at familiarizing students with other religions. The established implementation was found to be characterized by "*the resistance in some schools to pursuing a genuine approach of embracing diversity that treats all cultures equally*" (ACFC, Fourth Monitoring Cycle, Article 8, Cyprus, p. 3).

The practices related to burial sites and burial traditions in terms of compliance with Article 8 of the FCNM were examined by the Committee on several occasions, for example, based on the minority communities' contributions with respect to earlier evaluations of Finland, Moldova and Montenegro (ACFC/OP/II(2006)003, para. 90; ACFC/INF/OP/II(2004)004, para. 84; ACFC/OP/I/2008)001, para. 66). The criteria for solutions as developed by the Committee include the acceptability of the solutions to the minority group concerned (in the case of Moldova, incompatibility with Convention was found when a cemetery site designated to a minority community by local authorities was not found appropriate by the minority community and therefore, in the absence of agreement reached on the national level, the policy solutions were not found in line with the Convention).

In its most recent evaluation of Denmark, the Committee substantiated its criticism to the legal prohibition of ritual slaughter of animals compliant with the kosher rules in Judaism and halal rules in Islam with reference to the case-law on compliance with Article 9 of the ECHR of prohibitions on religious animal slaughter. In its evaluation of the implementation of the provisions of Article 8 in this respect the Committee relied on the interpretation of the scope of Article 9 of the ECHR developed within the case-law by the ECtHR that admitted such bans to violate the right to manifest one's religion in observance (ACFC, Fourth Monitoring Cycle, Compilation of Opinions, Article 8, Denmark, p. 4). A contrasting approach, not aligned with the ECtHR solutions[188], was taken by the Committee in its evaluation of the prohibition on wearing certain types of religiously prescribed apparel. The Committee concluded that the prohibition of *niqab* in public schools in the UK adopted for the reasons of security and public safety could be misinterpreted as a blanked prohibition of all religious apparel in educational institutions, which would affect all minorities and all types of religions, applied indiscriminately and without a legitimate and precisely defined aim. The Committee recommended public consultations involving minority groups' representatives, for finding a viable solution representing a generally achieved compromise. The Committee's approach displays a higher degree of cultural sensitivity in their consideration of public interests, and signal of the prevalence attributed to the manifestation of minority identity components over the matters of general public concerns, including security and safety.

5.2.4. Cultural Rights associated with the freedom of expression, opinion and media

188 Analysis of the scope of the states' margin of appreciation formulated by the ECtHR, the ACFC and the HRC with respect to religious apparel rules limiting the right to manifest one's religion is discussed in Berry: 2012, pp. 28-37. The author concludes that, given the FCNM's provision under Article 23, allowing the possibility of choice between approaches of other international institutions in case of analogous catalogue of rights, leads to the probability that aligning the ACFC's approach with the ECtHR case law would lead to undermining the minority religious entitlements interpreted as a policy, while developing the ACFC in line with the HRC approach would strengthen the position of minority groups under the FCNM, ensuring distinction of minority religious traditions and would secure minority identity.

The right to hold opinions and to the freedom of expression is guaranteed comprehensively, implying safeguards to freedoms to receive and impart information and ideas in the minority language (Article 9) and the right to use mother tongue without interference (Article 10). Conjunctive interpretation allows to extend the protection regime to the performance of rituals under guaranteed linguistic freedoms. This approach constructively frames the development of legislative solution, based on the accumulation of functional capacities and added value generated from the mutual reinforcement of converging rights. Similarly, mutual reinforcement of human rights based on their convergences is applied in the 1995 Convention to overcome the limitations on the imperative capacity determined by the format of the document with respect to the delineation of rights underlining expression and dissemination of information. The convention ensures freedom of expression to minorities without territorial limitations or other interference, limitations pertaining to forms or language of expression, without discrimination and in full access to the media of choice (Article 9). The Explanatory report interprets the provisions of Article 9 as including the right "*the freedom to receive and impart information and ideas in the majority or other languages*" (para. 56). Thus, the national minorities are entitled with the right to create and use their own media, without limitation on forms, enforced by the positive obligation of States to ensure their access to media, without discrimination in attaining the permissions to using them. The entitlement is framed as a positive obligation of States parties to adopt affirmative measures for facilitating the exercise of these rights, with the aim to ensuring tolerance and pluralism. This is clarified by the drafters of the Convention in the Explanatory report. The Report underlineS that when reference was not made to certain rights creating fertile capabilities for the implementation of rights and freedoms under the Convention, their recognition was implied, for example, with respect to rights underlying access to media, including fund-raising and access to technical solutions for the media presence protected under the Convention (para. 61-62). These are reinforced by the positive obligations for affirmative measures provided for States' adoption under Articles 9 and 10.

In line with the Advisory Committee interpretation, this approach includes the obligations of ethical coverage on issues constituting cultural sensitivities for the minority, and should entail training

obligation with respect to consumers and news providers (ACFC (2016), p. 27). Furthermore, the Committee included the right to access to the relevant infrastructure for the right to participate and consume media content. The media related rights encompass the right of objective and culture-sensitive presentation of minorities in the media, including prohibition of stereotyping, limited or arbitrarily chosen and enforced understanding of their cultures, as well diminishing the influence of minority groups on the social agenda through artificial limitations in the scope of coverage (including the limited coverage in minority languages, narration on national minorities centered on their folklore, cultural practice, cuisine and attire (ACFC (2016), p. 27). This interpretation of the right implies participation of minority groups representatives in the decision-making and management of the media.

The effective enjoyment of the right to use minority language in dissemination of information is ensured under the condition of free access to media. The Committee underlined that "*in order for the language to develop in all domains and serve the speaker as an all-encompassing means of communication, it needs to be present in the public sphere, including in public media*" (ACFC: 2012, p. 14), hence the significance of the convergence application of linguistic rights in conjunction with Articles 6 and 9. The success of the practical implications and the necessary adjustments in design of the regulatory measures in the field of broadcasting in minority language may depend on a number of underlying factors, including the nature of the programmes, the type of media and the structure of the broadcasting companies involved. The standards established by the monitoring mechanism for the public service broadcasters include support to the media and production aimed at, produced by, and dedicated to the issues related to national minorities in minority and majority languages, provision of translation for programmes into minority languages, as well as multilingual programmes (ACFC: 2012, p. 14). In line with the general approach developed by the Committee to the cultural life of minorities, the media content is required to streamline minority-related issues or concerns into the general social discourse in the media, without separating or narrowing them into a singled out agenda. Furthermore, media content should be forged in compliance with the participatory approach to media functioning. The participatory approach as adjusted to the media aspect of cultural rights requires integration of professionals, including journalists,

provision of professional trainings for journalists reporting in minority languages, and ensuring persons belonging to national minorities membership in media councils. Allocating unfavourable time of broadcasting to programmes dedicated to minority-related issues, budgetary cuts for their production, leading to decreased quality, lack of funding for translation into minority languages, or broadcasting time quotas for programmes in minority and majority languages implemented regardless of the regional demographic situation are criticized by the Commission and are found to constitute indirect discrimination (ACFC: 2016, pp. 14-15). Biased reporting or incitement to racial or other types of discrimination through media are condemned by the Commission as bad practices. Most recently, these issues were reflected in the Advisory Committee's Opinions on the Fourth Monitoring Cycle, where it recommended to "*condemn systematically and promptly all instances of hate speech in public discourse, particularly as part of political discourse, and to increase their efforts to promote professionalism and ethical behaviour in the media*" (ACFC, Compilation of Opinions, Fourth Monitoring Cycle, Article 6, Austria, p. 8). Cases of negative reporting, creating negative images of the representatives of various minority groups, as well as underreporting leading to silencing issues of concern for the livelihood of minority communities were continuously criticised by the Committee in its reports, for example with respect to the communities of migrants, refugees, foreigners, Jews and Roma (ACFC, Second Monitoring Cycle, Compilation of Opinions, Article 6, Ukraine, pp. 112-115; ACFC, Fourth Monitoring Cycle, Compilation of Opinions, Article 6, Austria, p. 7 and Spain, pp. 56-57 with respect to Anti-Semitism, anti-gypsyism, and Islamophobia).

The Committee underlined the crucial role of the private and community media for the realization of minorities' cultural rights, and promotion of linguistic rights in particular. That was found to amount to the necessity of affirmative measures for their development (ACFC:2012, p. 15). The proposed scope of affirmative measures would imply public subsidies for their maintenance and production, including special budget allocations for translating, dubbing and subtitling programmes, and special incentives as frequencies allocation, in particular to the media associated with smaller minority communities and their languages. Language quotas are required to be weighted with particular respect to such media outlets and adjusted in order to secure due representation of minority languages. The Committee highlighted

the necessity of increasing the quota and quality of reporting, in particular with respect to the numerically smaller groups and lower levels of governance or administrative division. It also provided for measures aiming to ensure diversity of media outlets in public respect to and appreciation of diverse media environment (ACFC, Fourth Monitoring Cycle, Compilation of Opinions, Article 9, Moldova, p. 20).

Print media are specifically mentioned by para 3 Article 9 of the Convention, secured by the negative obligation not to hinder their creation. The Committee's interpretation created wider interpretation of the obligation under the Convention, requiring the support to print media dedicated to minorities related issues or targeting minority communities, and encouraged state subsidies for ensuring outreach of such outlets (ACFC: 2012, p. 16). The allocation of such subsidies should be based on clear and transparent criteria. The Committee's approach is to recommend targeting youth and aiming to ensure high quality of minority-oriented media production, as well as additional support to smaller and local outlets (ACFC, Fourth Monitoring Cycle, Compilation of Opinions, Article 9, Austria, p. 5, Denmark with respect to print media in minority language, p. 10). The Committee expressed consideration that digitalization and technological advances in the media field can facilitate promotion of minority languages, multilingualism and intercultural dialogue. For these aims, the Committee proposed financial support to the online media in minority languages or on minority-related issues, as well as affirmative measures to provide professional training of journalists. Participation of minority groups in creative industries, including music and cinema production, are seen by the Committee as parts to the protection framework under the Convention. Measures required by States to adjust the creative production to the consumption by the majority groups or to their needs, including obligatory dubbing or sub-titling, were considered by the Committee as disproportionate (ACFC: 2012, p. 16).

5.2.5. Linguistic freedoms

In its Thematic Commentary on the Right to Education (2006), the Committee interpreted the term "minority language", including into the scope of the Convention such languages spoken by minorities, as the traditional and historical language of a minority group; the language used in practice by a minority group; the language spoken by

the majority out of the minority, or a language that is different from the language of the majority (ACFC: 2006, p. 25). Besides, the Committee underlines that the analysis of the legislative solutions in the participating States does not allow to equate the term "minority language" with the term "mother tongue" that is not used in the Convention but that is used within national legislations, as the latter also includes fluency of the speaker as an assessment framework. In assessing the role of the framework Convention within the wider international legal framework, the Advisory Committee underlined its specific reference to the obligation to "foster knowledge of the culture, history, language and religion of the different groups and targeting both minorities and majorities" (ACFC: 2006, p. 27), which underlines the specific commitment to ensure replication of minority identities through educational system and linguistic knowledge in particular. The Committee underlined that, to qualify for the protection under the Convention, the official recognition as the minority language by the respective state is not required (ACFC: 2012, p. 4).

Language is seen by the Convention as an attribute of both individual and collective identity, its "essential marker" (ACFC: 2012, p. 6), and is characterized with its strong collective dimension (ACFC: 2012, p. 10). The "social" dimension of the linguistic rights, originating from the entitlement of its realization "in community with others", without specific limitations to the type of community, implies increasing requirement for protection against discrimination and ensuring the equality. The Committee interpreted the aim of States' obligation regarding the linguistic diversity in elaborating "balanced and coherent strategies" for empowering minority groups to "maintain and develop their culture, and to preserve the essential elements of their identity, including language" (ACFC: 2012, p.8). For these aims, the States are required to elaborate clear legislative regulation, creating sufficient safeguards, and enhanced with effective monitoring mechanism. All policy and regulatory instruments should be elaborated under participatory approach. The correlations between culture and language and its role as a factor of maintenance of the minority existence is reflected in the Advisory Committee's opinions.

The linguistic freedoms for minority groups are granted with guarantees against interference or limitations as to the format of expression (Article 10). The guarantees to the use of minority languages

extend to practicing in private and in public, orally and in writing. The Committee underlined that linguistic rights are effective "only if they can be enjoyed in public sphere" (ACFC: 2012, p. 17). The affiliated entitlements under the Convention include the right to display in his or her minority language of "*signs, inscriptions and other information of a private nature visible to the public"* (Article 11). Significantly, following semantic interpretation, this right is framed as an individual right and is limited to matters of private significance, which in practice leads to the confrontation with the guarantee of the right to the freedom of expression in minority language, which is not limited to groups and matters significant to communities. The Advisory Committee underlined that one of the goals of the entitlements under Article 9 is the facilitation of integration, and therefore linguistic policies should not be used as objects to inflict pressure or as a conditionality to provide access to other entitlements, requiring excessive efforts from the minority groups representatives (ACFC: 2016, p. 29).

Another social integration aspect of the linguistic freedoms, examined in conjunction with access and use of media, lies within the possibility to distribute information in the minority language in the media field. The issue was examined by the Committee in the context of the growing influence of foreign media, often associated with the minority groups' kin-states and being the only available sources of information in minority languages, which are perceived, objectively or subjectively, or misused to created such a perception, as strengthening the negative rhetoric persisting within the society and the minority groups in the state of residence of minority groups. Such foreign or foreign funded media can be utilized to create inter-group tensions and undermine peaceful co-existence of minority and majority groups, instilling the feeling of social division and intolerance that lead to conflicts. The Committee recommended facilitation of the locally produced minority media to create a more balanced coverage and avoid inflaming conflicts within the society through stigmatising minorities as carriers of the image of the evil, impacting social cohesion (ACFC, Fourth Monitoring Cycle, Compilation of Opinions, Article 9, Estonia, p. 11; Opinion on Spain with respect to the images of Roma women, ibid., p. 24). The Committee highlighted the crucial significance of this right to the preservation of identity of minority communities, "*one of the principal means to assert and preserve linguistic identity*", and therefore provided that all decisions related to the implementation of the right should be

made in strict and effective compliance with the minority participation requirement (ACFC: 2012, p. 17). The limitations on the right under Article 10 are interpreted by the Committee to be exercised only "*in cases where the activities of private undertakings, organisations or institutions affect a legitimate public interest, such as public security, health, protection of consumer and employment rights, or safety in the workplace*" (ACFC: 2012, p. 17). The public interest is required to be interpreted narrowly, while the proportionality and necessity assessment is required to be conducted on a case by case basis.

The obligation under the Convention to ensure free use of minority languages without interference is advised by the Committee to be taken into consideration in elaboration of protective measures for the official language and related state policies. In the process, the Committee requires to maintain appropriate balance between the protection of state languages and minority linguistic cultures, ensuring respect to minority identities (ACFC: 2012, p. 17). The Committee evaluated some measures provided for protection of official languages as incompatible with the Convention. Such measures included sanctions as a means to impose the use of official language, and provided fines, language inspections in private sector, or withdrawal of professional licenses (ACFC: 2012, p. 17). The Committee underlined that introduction of punitive measures enforcing official language use shall be based on a comprehensive assessment of proportionality and established public interest that must be clearly demonstrated and legitimate. Such measures were admitted to potentially intrude into the private sphere of individuals.

In the absence of the regulation within the text of the Convention, the Advisory Committee interpreted that alphabet constituted an inalienable component of the language and therefore should be protected within the scope of the Convention (ACFC: 2012, p. 19). In this respect, the Committee established that the use of the language and the alphabet should not be regulated following different principles and provided that the choice of the alphabet should belong to the discretion of individual, except for official correspondence (ACFC: 2012, p. 19). Another individual entitlement granted within the catalogue of linguistic freedoms is the right to use surname, patronym, and first names in the minority language (Article 11). The entitlement is substantiated with the obligation of official recognition of minority

names. However, the scope of public obligation is unclear as it requires recognition "*according to modalities provided for in their legal system*". The formulation does not allow to assess clearly, whether the provision may be considered a prevention from discrimination, or effectively allows prevalence of the existing normative approach within the States' legal systems. The Advisory Committee considers the right to use one's personal name as "*a core linguistic right, closely linked with identity and dignity*" (ACFC (2012), p. 19). The obligations of the States parties are considered to include positive obligation to ensure the effective realisation of the right, and adopt practical measures for their implementation. For these aims, the procedures related to issuance of identity documents were recommended to be adjusted to include the respective implementation measures, while the public servants responsible for the preparation of the documentation should be well informed and trained to prevent rejection of activities (ACFC (2012), p. 20). The adjustment of the measures to the domestic legislative framework, allowed by the provision "*according to modalities provided for in their legal system*" of Article 11, is required by Commission to be applied in line with the principle of equality. Article 11 of the Convention are interpreted by the Committee to reflect minority language traditions, including the use of patronymics, and provide for the right to convert the forcibly changed name back to the original in the identity documents and birth certificates, which the Committee attributed to the persons concerned or their representatives (parents), and limited the requirements of proof to the extent that it would not bear dissuasive or prohibitive effect on such applications.[189] The Committee also developed the principles applicable to the phonetic transcription of names in minority languages provided by Article 11. According to the Committee, the transcription should be "*as accurate as possible and should not be disconnected from the essential elements of the minority language, such as its alphabet and grammar*", in full use of the technological advancements allowing the precise use of diacritic signs and other special features of minority alphabets (ACFC (2012), p. 20).

189 The Committee consistently criticised the legal lacunae preventing the use of patronymics for persons belonging to minority groups where it is an established linguistic tradition, for example, recently the respective recommendation to redress such practice was adopted with respect to Estonia within the Fourth Monitoring Cycle (ACFC, Fourth Monitoring Cycle, Compilation of Opinions, Article 11, Estonia, p. 9).

This general approach appears to dissent from the line taken by the ECtHR in its jurisprudence. However, it must be underlined that the ECtHR cases concerned the use of alphabet with respect to individual names, which implies high level of public interests for the purposes of civil registration, which constitutes an area of regulation that necessitates sustained public intervention and therefore requires wide margin of appreciation. The legislative requirements for the substitution of the minority language rules, including diacritics in personal names, for the standardisation purposes are not considered consistent with the Convention by the Committee[190]. The Committee also identified as good practice the legislative rules allowing sensitivity for foreign language grammar in surname transcription (e.g. addition or removal of Slavic suffixes depending on the gender decision), their application to first and family names, as well as to be made available for different types of registered partnerships (ACFC, Fourth Monitoring Cycle, Compilation of Opinions, Article 11, Moldova, p. 15). The failure to address legislative lacunae resulting in impossibility to reflect gender sensitivity of minority languages was recognized a reflection of gender-based discrimination.[191]

The Convention also provides for the positive obligation of States to create conditions for the use of minority languages in communications between the national minorities and the public authorities, interpreted as "administrative authorities" by the Explanatory report (para 64). As follows from the semantic interpretation, the Convention does not

190 In its 2016 Opinion on Moldova, the Committee criticised "the practice of adjusting the personal name in line with the state language norms, which results in at times substantial changes" on ID cards, introduced under the argumentation of standardisation and optimisation of the ID cards content with the EU format. Moreover, the Committee underlined that such a practice "raises serious issues with regards to the right to use one's personal name in a minority language and to have it officially recognised, which is widely viewed as a core linguistic right that is closely linked to personal identity and dignity" (ACFC, Fourth Monitoring Cycle, Compilation of Opinions, Article 11, Moldova, p. 15). The Committee criticized the lack of progress in Finland with redressing the absence of the technological possibility to use diacritic signs in names of the Sami origin (ibid., Finland, p. 9)

191 Gender-based discrimination was invoked by the Committee with respect to the German legislation not allowing introduction of gender sensitive suffixes in surnames of female representatives of Sorbian minority (ACFC, Fourth Monitoring Cycle, Compilation of Opinions, Article 11, Germany, p. 10).

extend the protection to the right to official communication in minority language, neither it creates obligations to ensure such a right. The Explanatory report highlights that the provision could not be used to affect the status of the official language of the State party concerned (para. 66).[192] Moreover, the entitlement to create conditions mainstreaming such communication is framed with a wide range of implementation conditionals. The conditionals, which are primarily widely formulated, grant considerable margin for discretionary interpretation and subjective assessment. This primarily refers to the conditionals prescribed for the assessment of the scope of obligations. Thus, in case assessment and policy-making, the States are allowed to apply the factors of "the real need" as to the objective necessity of the measures, and "as far as possible", which underlines the discretion for calibrating the choice of measures. Thus, the implementation is contingent to the explicit request expressed by the minority community, while the agency of the community is conditioned to the compliance with the "*real need*". There is no established guideline as to the measurement of the objective necessity for the communication in the mother tongue for the minorities, or indication whether such measures have to be considered necessary in view of the States' failure to create effective integration policy that would allow the minorities to communicate freely with the representatives of state authorities, exclusion of minorities from the work at such administrative institutions so that the mainstreaming of communication becomes necessary, or the limitations deriving from traditional values of minorities as groups could also be considered a sufficient qualifying factor for granting such requests. Another question that remains open in this respect is what party shall bear the burden of proof as to the compliance with the conditional. Another significant limitation to a potential effect of the norm is in the absence of regulatory guidance. The commitment requested from governments is formulated in a soft manner, requiring only an "*endeavor to ensure*" and "*as far as possible*".

192 Switzerland declared that the provisions of the framework Convention governing the use of the language in relations between individuals and administrative authorities are applicable without prejudice to the principles observed by the Confederation and the cantons in the determination of official languages. (Declaration contained in the instrument of ratification deposited on 21 October 1998).

The Convention, thus, does not establish a framework instrumental for determination of vectors the policy-making shall adopt to make the right implementable in practice, for example, requiring additional educational measures to facilitate effective communication of the majority representatives within the administrative state apparatus with the minority groups representatives, or additional material resources as a minimal practical benchmarks.[193] The requirement of a minority culture sensitivity in police making would also have been an additional tool to facilitate implementation.

Furthermore, under the Convention, the *ratione loci* criteria for establishing conditions under which the minority languages could be used as working languages for official administrative communication is designed to be limited to areas "*inhabited by persons belonging to national minorities traditionally or in substantial numbers*". Both factors of traditional inhabitance and quantitative assessment of the part within the general population are perceivably abstract, lacking the assessment guideline. The Explanatory report clarified that the lack of definition of these terms was a deliberate solution, as the flexible approach was considered to allow contracting States to reflect and take into consideration internally significant "special circumstances" (para 66). The Explanatory report specified that the "*term "inhabited ... traditionally" does not refer to historical minorities, but only to those still living in the same geographical area*". The Advisory Committee clarified that the interpretation of the term was to be reflected in official regulation by the State and therefore the assessment would be objective, and should not be used discretionary (ACFC: 2012, p. 18). The condition of the need to provide the mechanism of the enjoyment of the right is stated to be provided based on the assessment of the demand in conjunction with the specific geographical particularities. The need for such measures is interpreted by the Committee to exclude the cases substantiated with the reason of the lack of proficiency in the official language by the members of the minority community (ACFC: 2012, p. 18). The Committee required not to use the numerical

193 The implementation of the law of North Macedonia requiring the administrative staff of public institutions in certain areas with established Albanian presence were not supported with provisions ensuring fertile functioning in activities employed to implement the legal requirement (e.g. language courses for the administrative nomenclature).

thresholds as an undue obstacle for the official communication in minority language, and to be applied flexibly and cautiously (ACFC (2012), p. 18 citing Third Opinion on Slovak republic, where 20 per cent threshold was criticised). The only safeguard introduced within the Convention that could serve in favour of fairness and objective implementation of the requirement of the threshold of population can be drawn based on Article 16. Article 16 creates a negative obligation to *"refrain from measures which alter the proportions of the population in areas inhabited by persons belonging to national minorities and are aimed at restricting the rights and freedoms flowing from the principles enshrined in the present framework Convention"*. This provision effectively safeguards against "gerrymandering" in assimilation purposes. However, the Explanatory report underlines (para. 81-82) that the assessment of the applicability of this provisions shall be made based on testing the causal links between the intent and the consequence of the measures. While resettlement measures, including expropriation, evictions, expulsions or redrawing of administrative boundaries with the aim of affecting the distribution and concentration of residing national minorities are explicitly qualified for the prohibition, the measures that may indirectly affect such residency density would not be recognised in compliance with the limitation. Yet, neither the Convention, nor the Explanatory report identifies the carriers of the burden of proof or the sufficiency of evidence required for adoption and potential challenges to such administrative and legal measures. In the absence of other guidance, this lacuna appears to be capable of entailing particular significance due to the vulnerable status of national minorities, and may potentially lead to practical inefficiency of the framework, failing to ensure effective prevention against marginalization of minority communities, unless interpreted in line with the ECtHR case-law.

A similar limiting conditionals are introduced in framing of the possible display and use of traditional toponym in minority languages (Article 11). Despite the overall positive endeavor to adopt a normative approach towards the recognition of historical significance of the established presence of minority communities and their roots, the language of the Convention can hardly be considered instrumental for practical empowerment. The document appears to create a framework of normative and practical obstacles for the enforcement. Among the conditionals required for consideration of a possibility to create measures for a parallel display of traditional topographical indications,

the Convention provides for the qualifiers of minority presence, limiting the options for "*areas traditionally inhabited by substantial numbers of persons belonging to a national minority*"; pre-established normative framework, without requirements of amendments to ensure effective empowerment ("*in the framework of their legal system*"); the lack of preventive provisions within international agreements, as opposed to a possible revision of such pre-existing limiting frameworks conducted in the spirit of international dialogue favouring cultural pluralism, as declared in the preamble of the Convention; as well as a requirement for "*a sufficient demand for such indications*". The latter conditional lacks semantic precision that would ensure its objective internalization into the legislative procedures, as the provision fails to establish neither the methodology for evaluation of the sufficiency of the demand, nor the stakeholders who is understood as duly entitled to initiate such a demand, which fails to create preventive system against a potential misuse of excessively formalistic criteria for procedural or substantial assessment of admissibility of requests. The Explanatory report confirms the intention to allow a wide margin of appreciation for States in forging their compliance with the provisions (para. 68). Moreover, the Report underlines the intention to allow States parties the room for adjustment of the conventional norm to the domestic situations, both procedurally and substantially, including the use of official alphabet for the transcription of traditional names, in line with their phonetic forms (para. 66), which construes a narrow interpretation of the core of the right under the formula of compliance with the "*framework of [domestic] legal system*". Moreover, the Explanatory report specifies that the scope of the right cannot be extended to the right of official recognition of the traditional topographic indications (para. 71).

The Advisory Committee underlined the necessity that legislation in member states clearly defined the procedures for determination of communities eligible to use this right. Based on the evaluation of the methodologies implemented in Member States and the impact on minority communities, the Committee devised that the main principle in determination of thresholds is to ensure they do not obstruct the

enjoyment of the right disproportionally.[194] Furthermore, the Committee did not recognize the requirements for the eligible groups to constitute absolute or relative majority within the area (ACFC: 2012, p. 21). Giving interpretation to another condition specifying the areas traditionally inhabited by substantial number of persons belonging to the national minority, the Committee underlined that *"the demographic structure of the area in question should be considered over a certain period in order to ensure that more recent assimilation tendencies do not work against the preservation of the minority terms of its compatibility with Article 11 of the Framework Convention"* (ACFC: 2012, p. 21). The Committee did not support the determination of the eligibility for the usage of traditional minority toponyms and names in minority languages, conditioned to the eligibility under the legislation valid at a certain period in the past.[195] Furthermore, the *"sufficient demand for […] indications"* required by the Convention implies the existence of a practical possibility for the minority groups to express such a demand, a local or national infrastructure for consultations or submissions of such requests, as well as a wide awareness of such solutions. In its opinion, the Committee criticised the lack of consultations with minority representatives by local authorities in Armenia, when topographical indications were installed and in the process of elaboration of the relevant legislation, and recommended adoption of "*necessary legislative provisions... with a view to facilitating consultations on the existing demands and needs pertaining to the use of minority languages for topographical indications*" (Article 11, Armenia, p. 3; the lack of consultations in legislative process was criticised with respect to Croatia, ibid, p. 5, Moldova, p. 16). The Committee also criticized restrictive formulations in the national legal frameworks, limiting the scope of rights under the Convention, as well as ambiguous legislative provisions, which may lead to tensions.[196] That

194 The thresholds introduced for this purpose, for example, in the Czech Republic and Hungary are 10 per cent, in Croatia is 30 per cent of the residents of the respective municipality.

195 The opinion on Estonia stated with regard to the requirement to the eligibility under the law of 1939 that the "reference to the linguistic situation of 75 years ago is anachronistic and does not correspond to the modern day context" (Article 11, Estonia, p. 8).

196 During the Fourth Monitoring Cycle, the Committee negatively assessed the German legislation that interpreted the term "signs and inscriptions of a topographical nature" as relevant to the names of settlements

relates also to the implementation practice, such as the failure of maintenance of signage in minority language or spelling mistakes (Moldova, pp. 15-16). The Committee described such practices as "*apparent lack of appreciation for the important role that the use of minority languages on place names can have for the development of a sense of inclusion amongst the population"* as well as a missed opportunity to *"demonstrate that the diverse character of a specific region, traditionally and at present, is acknowledged and valued*" (Moldova, p. 16). The Committee called for dialogue and appreciation of the symbolic value of the display of toponym in minority languages, recommending inclusive and direct dialogue with stakeholders among national minorities in order to devise "*pragmatic solutions"* that would be geared to reflect *"the symbolic value of minority languages*" in geographical names and signs (ACFC Compilation of Opinions on Article 11 from the Fourth Monitoring Cycle, Slovak Republic, p. 17). This approach also highlights the attempt to ensure the prevalence of interests of minority communities, and signals effective transfer from the protection approach safeguarded under the UN Declaration of Human Rights and the Covenants to the recognition of obligations and entitlements of equal participation ensured with duly tailored affirmative measures.

Historical connections of peoples belonging to minorities, especially the indigenous or disadvantaged groups, are a crucial component of the minority identity. The possibility to make known the historical and traditional toponyms is a sensitive issue, as it creates an established evidence of a continuing presence of certain groups in the territory and their spiritual and material links to the territory. The acknowledgment of such presence through the recognition of the veracity of some historical indicators, including toponyms, especially when publically displayed, unequivocally implies the recognition of the rights of the relevant minority community, enforcing the group's agency and

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and towns, rather than including streets or other toponym (ACFC, Fourth Monitoring Cycle, Compilation of Opinions, Article 11, Germany, p. 4). In the case of Slovak Republic, the lack of clarity in the formulation of the law where the minority language versions should be indicated is attributed to the rise of tensions among the population of the communities (p. 18). In the UK, in Northern Ireland, the regulation remains ambiguous and lacks unification, while the implementation is "patchy" and politicized, and depends on the discretion of the local authorities; installing unofficial topographical signs in Irish is a criminal offense (UK, p. 19).

ownership, both tangible and intangible, in the area in question. This outcome appears compliant with the objective of the minority rights protection under international law, and from this perspective the weak and restrictive formulation provided by the 1995 framework Convention do not appear sufficient in their empowering effect. The ACFC's 'soft case-law' appears to balance the insufficiently strict normative provisions, and creates a policy-making standards that may work as a capacity- and agency-building means for the minority communities and individuals.

Further restrictive formulations are introduced for the right of persons belonging to national minorities to learn their minority languages (Article 14). These concern the affirmative measures required to be afforded by States. The Convention requires the participating States to create "*adequate opportunities for being taught the minority language or for receiving instruction in this language*". The introduction of such measures requires compliance with all aforementioned criteria of established presence of minority groups representatives, or the quantitative threshold for minority population, and sufficient demand. Moreover, such measures should be institutionally compliant with the existing architecture of the educational systems, which significantly decreases the potential success for any initiative for an educational reform, promoting integration of trainings adjacent to the interests of minority groups. Overall, despite explicit entitlement for affirmative measures in the field of education and research, aimed at "*foster[ing] knowledge of the culture, history, language and religion of their national minorities and of the majority*" (Article 12), the scope of affirmative measures foreseen to implement them does not go beyond "*adequate opportunities*" for "*teacher training and access to textbooks, and facilitat[ion] of contacts among students and teachers of different communities*", which does not imply the general education on issues related to national minority cultures. The Explanatory report clarified that the provision did not imply positive obligations of contracting States, "notably of a financial nature" (para. 74). Positively, the Convention establishes a commitment to ensure equal access to education at all levels for persons belonging to minorities (Article 12) and their right to establish and to manage their own private educational and training establishments (Article 13), but the facilitation tools for the latter is not stipulated. On the contrary, the Convention explicitly underlines the private nature of such specialized educational establishments and relieves the Parties from any financial

obligations on this account. The *de facto* realization of the right becomes accessible to the larger or financially empowered minority communities that do not require public support for dissemination of their community-specific knowledge and cultural regeneration. Taking into consideration that such institutions specialized in generation of minority-specific knowledge may appear in practice the only option for qualitative culturally sensitive education, the effect of the approach adopted under the Convention may result in limited benefits to minority communities. The opinions by the Advisory Committee on the evaluation of state reports related to the implementation of Article 13 support this conclusion, as the Committee underlined that generally the implementation was limited due to the lack of communities' resources (ACFC (2006), p. 23). This also cannot be estimated sufficient under the capabilities approach that requires calibration of affirmative measures to the specific conditions of the rights holders and the specificities of their requirements. Overall, the scope of narrow formulations, especially in the fields so fundamentally imbedded into the processes related to formation of identity, equality and pluralistic society, as education, appear counter-intuitive to the overall goal of promotion of minority rights and equality. However, the validity of the criticism would not be sustainable in countries where public education curriculum and institutional architecture incorporate the minority cultures on the equal basis with that of the majority.

The same approach is developed by the Advisory Committee with respect to the linguistic policies, where not only multilingualism is promoted, but the measures are proposed to exclude discriminatory measures imbedded into the language training systems (ACFC (2016), p. 23; Third Opinion on Estonia and Lithuania – regarding number of students in classes; Fourth Opinion on Spain about Catalan, etc.) and ensure active presence of different languages in the public domain, allowing members of the society to realise the diverse nature of the society and develop self-identification with such diverse community. The promotion of minority languages within the media and public space should not be limited to the use by minority, but promotion of majority access and effective use of minority languages is seen as the contributing factor into the creation of "integrated societies" (ACFC (2016), p. 24). The Explanatory report (para 78-79) clarifies the approach towards application of the general national linguistic policies to the national minorities, and its coexistence with the rights associated with

minority languages. The Convention is explained not to affect the general policies and the obligations pertaining to the knowledge of the official languages, providing no reservations for representatives of national minorities, due to the special importance assigned to the knowledge of official state languages. The proficiency in official language is perceived as a "factor of social cohesion and integration" and therefore cannot be revoked for any resident groups. That approach gains validity for the contracting States that did not recognize the scope of the "national minority" notion beyond the groups with established residency and citizenship status, which is relevant for the majority of the States parties to the Convention. Besides, the States are entitled to determine policy and legislative solutions for language policies in multi-lingual societies, with more than one language assigned an official status.

The Committee underlined the relevance of targeted approach in developing measures aimed at promoting and protecting different languages, based on the evaluation of specific requirements. The States parties should not allow differentiation in treatment of minorities identified as such based on national or linguistic indicators (ACFC: 2012, p.6, cited Second Opinion on Poland, First Opinion on Albania), as well as differentiation of treatment or scope of rights depending on the linguistic competences, either in minority or other languages, based on objective assessment or by presumption (ACFC: 2012, p.7). In this respect, marginalization discourse with respect to minority linguistic traditions are seen as a negative practice, preventing integration and promotion of the minority cultures as inalienable components of the general state culture. Other practices that are indicated as capable of producing indirect discriminatory effect include language requirements for employment or citizenship or access to services. Implementation of rights under Article 14 is qualified by indirect discriminatory practices against Roma (Wilson: 2004). The Committee underlined the discriminatory approach to the Romani language and recommended particular affirmative measures for promotion of its use. The Committee established from states' reports that, where the right to receive education in minority languages was developed in legislation with respect to particular minority languages, similar guarantees for the Romani languages were, as a rule, missing (ACFC: 2006, p. 24, Committee relied on its Opinions on Romania (2002) and Slovakia (2001)). The Committee therefore reiterated the significance of teaching

of and in the Romani languages as a medium to integrate Roma population into the educational system (2001 Opinion on Romania cited in ACFC: 2006, p. 26)

To address the potential disadvantages created by discriminatory effects, the Committee recommended periodic review of the measures in light of changing circumstances, standards and methodologies, as well as their impact on the rights and capabilities of various groups and individuals, while affirmative and preventive measures aimed at reducing disparities should be provided in the law, such as accessible and adequate linguistic training, aimed at increasing proficiency both in majority and minority languages (ACFC: 2012, p. 11-12). The Committee considered sanctions introduced by some States for the failure of linguistic integration of migrants and other minority representatives disproportionate and unacceptable, underlining that integration requires mutual efforts of minority and majority groups and should not be entirely placed upon the minority representatives (ACFC: 2012, p. 13).

Positively, with respect to the three articles containing the conditional provisions, the Advisory Committee advised inclusive implementation determined by the benefits of the achievable aims, and in consideration of the primary importance of these rights to the minority identity. The principle would lead to extending the scope of application of the Articles to cases, when formal requirements are not met, but their application leads to improvement of the social openness, integration and cohesion (ACFC (2016), p. 31).

5.2.6. The right to education

The right to education is among the rights that is given more attention within the Convention compared to other rights, with the mentions in the preamble and three articles in the text (12-14). The Advisory Committee (2006) classified the entitlements as those related to the rights to education and the rights in education, and underlines that the Convention does not create gender- or age- related distinctions in the scope of entitlements. The right to education implies access to education, the possibility to attend educational institutions and receive relevant training, including the right to a specific type of education (for example, free and compulsory primary education, etc.). The Framework Convention provides for the right to education for the

minority groups, and the right to receive education tailored to their requirements. Rights in education include the right to equal access to education, equality in the process of education, the freedom to choose a particular type of education, the right to culturally sensitive education, the right to create and maintain educational institutions, as well as linguistic education (ACFC: 2006, p. 6-7). The Committee also underlined that the right to education did not only imply the training activities aimed at the minority groups, but also education for the representatives of the majority groups, in particular those belonging to specific professions, aimed at familiarizing them with minority identities. Overall, the provisions of the Convention with respect to education appear geared to addressing inequality from the perspective of the minority – majority relations, and to an extent aims to facilitate diversity by regulating co-existence of various minority communities, by having their profiles reflected in educational systems. However, the issues pertaining to intra-community relations, including gender-specific discrimination attributed to traditional practices and customs, as well as age specific trends are not reflected in the norms on education, and are left to the Committee to address.

The Advisory Committee underlined the convergence between the right to education and other human rights (ACFC: 2006, p. 7), naming it as a precondition for the effective implementation of other human rights, including the right to the freedom of association, expression and participation, which highlights the "*importance of the place of the Framework Convention in the nexus of human rights provisions is crucial as a guarantee of the full spectrum of human rights of persons belonging to national minorities*". This perception complies with the capabilities that education helps achieve, and extends the prospects of individuals to their effective enjoyment. In particular this related to empowerment for political and economic participation, personal freedoms including equality among representatives of some groups, as well personal capabilities attributed to individuals, including additive multilingualism (ACFC: 2006, p. 8-9). The Committee promotes application of the Four-A-scheme to the evaluation of the education systems. The Four-A-scheme uses the criteria of availability, acceptability, accessibility and adaptability (ACFC: 2006, p. 28) as primary components for the policy-making and the assessment of the measures' suitability. Availability of education incorporates functioning institutions, sufficiency of their quality, trained teachers,

materials, buildings with due facilities, reflecting gender specific needs. The Commission reiterated that under the framework Convention the scope for the availability requirement is different and depends on the level of education. Accessibility is perceived from the three aspects, including economic, physical (infrastructure, equipment and proximity), and non-discrimination. Acceptability concerns form and substance and implies sufficiency quality-, culture-wise, as well as relevance of its content. Adaptability of education is interpreted as capable of adjustment to changing needs of students and circumstances. The four-A approach provides a practical toolkit for culture-sensitive policy-making and helps ensure the adaptability of the policy-making to the beneficiaries needs. Its benefit is in wide-reaching and comprehensive scope that address multiplicity of diverse needs of stakeholders in the educational process, in respect of intra-communal and in particular gender specific requirements.

Equality and non-discrimination in education are guaranteed under Article 12 and are re-enforced by Article 4 of the Convention, with the standard requiring measures to ensure full and effective equality of persons belonging to minority groups in the field of education. The Advisory Committee underlined that where positive obligations of States are foreseen by the Convention, the failure to adopt them amounts to violation of the Convention, including the failure to adopt respective legislative frameworks (2006, p. 9; ACFC/INF/OP/I(2003)006, para. 60).[197] Norms guaranteeing the right in and to education, when read in conjunction with Articles 4, 5 and 15, are interpreted to require a comprehensive educational system, designed in participation of the rights-holders, providing measures and institutional guarantees that ensure equality and conducive to maintenance and development of minority identity (2006, p.9). Interpretation of Articles 12 and 14 in conjunction with Article 6 led the Commission to pronounce the States' obligation to ensure guarantees with respect to "content of education and the choice of form, educators, structures and institutions of education", to ensure integration, tolerance and social cohesion, and should include the requirements to

197 In its Opinion on Germany in the Fourth Monitoring Cycle (Compilation of Opinions. Article 12. Germany, p. 22), the Committee advised to adopt positive measures to promote appointment of qualified teachers specialized in minority languages in the areas, where required.

ensure adequacy of textbooks and curricula, as well as their timely revision (p. 11). The Advisory Committee singled out the issue of history teaching and history textbooks, highlighting the necessity of safeguards against stereotypes and prejudices in history education and related materials. The Opinions of the Advisory Committee underlined the importance of comprehensive training on history and culture-related components, including the religion. Education measures that limit the scope of teaching by, *inter alia*, favouring a single narrative or confession, are recognized incompatible with due standards, as contrary to the principles of inclusion and availability.

Overall, in determining the adequacy and sufficiency of approaches to the equality and inclusivity in education, the Committee applies international law principles as interpreted by other international institutions or documents, including the principle that allows parents to decide on the type and character of education that their children receive, in line with their personal opinions, views, philosophical and religious convictions as provided for by Article 2 Protocol 1 to the ECHR and Article 26 of the UDHR. The Committee requires objective, pluralistic and critical manner of educational approaches, as underlined by the ECtHR in its case-law and Human Rights Committee (2006, p. 11). Furthermore, the Committee applies the principle of non-violation of rights of others, regardless of actual belonging to a particular group, in pursuing the rights related to religious teaching and education, as provided by the FCNM itself and Article 17 of the ECHR. Thus, the requirement to the curriculum is designed on the integration of multicultural and intercultural dimensions, ensuring that "*the culture and history of national minorities are adequately portrayed and taught in all schools, including those attended by majority children, and that they should convey all aspects of national minority cultures as an integral part of […] society*". (ACFC: 2006, p. 12; ACFC, Fourth Monitoring Cycle, Compilation of Opinions on Article 12, Armenia, p. 4). The Advisory Committee underlined, with reference to the interlocutors among the minority groups, the particular importance of history teaching integrating the minority perspective "*to increase children's awareness of the cultural and ethnic diversity of their country*" (ACFC, Fourth Monitoring Cycle, Compilation of Opinions, Article 12, Armenia, p. 4).

In forging the requirements to educational policies, the Advisory Committee utilizes the definitions of multicultural and intercultural

dimensions of educational systems developed for the 1992 UN Declaration on the Rights of Persons belonging to National or Ethnic, Religious or Linguistic Minorities, which is explained with the similarities of the formulations in both instruments. Therefore, multicultural education is interpreted as "*educational policies and practices which meet the separate educational needs of groups in society belonging to different cultural traditions*", while intercultural education implies "*policies and practices whereby persons belonging to different cultures are trained to constructive interaction*"[198]. Intercultural element of education policies is assessed to require adjustments to the structure of teaching to include cross-cultural modalities, based on tailored and pre-estimated requirements of particular minority groups (ACFC: 2006, p. 15). The Committee continuously criticized the folklorisation of educational activities, limiting the presentation of minority cultures to the traditional arts and crafts as such an approach diminishes the perception and information of national minorities culture and identities to the *"folkloristic aspects"* and fails to promote a comprehensive and deep consideration of their contribution into general culture and other aspects of social life, necessary for the social cohesion and integration of diversity into social (ACFC, Fourth Monitoring Cycle, Compilation of Opinions on Article 12, Armenia, p. 3).

In its interpretation of Article 12 of the Convention and its assessment of the reports submitted by States parties, the Committee took a wide understanding of education, which implies the entire educational cycle, from pre-schooling, compulsory education of basic schooling, higher education, research, vocational education, adult education (ACFC: 2006, p. 13-14). This also includes professional training of certain groups depending on specialization (e.g. law enforcement, public administration, media workers, etc.). The Committee elaborated sets of requirements specific to the particular types of educational institutions, but united by the requirement of sensitivity to national minority specificities, integration of minority cultural determinants. Pre-school education specific requirements include re-iterated attempt to create a special bond between the administration of educational institutions

[198] Eide, A. Commentary to the UN Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities; E/CN.4/Sub.2/AC.5/2001/2 (2001), paragraphs 64-70, cited in Thematic Comment No 2 (2006), p. 15.

and parents who belong to national minorities. The Opinions of the Advisory Committee specifically mention engagement of Roma parents and the necessity to develop measures for increasing their integration for increasing attendance of Roma students, which is recognised dependent on the engagement of parents[199] (Opinion on Slovakia ACFC/INF/OP/I(2001) 001, paragraph 40, cited in 2006, p. 14; Fourth Monitoring Cycle, Compilation of Opinions, Article 12, Italy, p. 27). One of the tool to facilitate realization of educational policy goals is devised in the availability of trainings for education professionals and specialized teacher training in minority languages. The aim of such trainings needed to be reflected in their design is to "*accommodate diversity in classroom […] and to systematically prevent and combat all discriminatory attitudes*" (ACFC, Fourth Monitoring Cycle, Compilation of Opinions on Article 12, Austria, pp. 5-6). The standardization of policies for higher education was admitted problematic to develop due to the lack of international standards in this area, diverse social and economic basis among member States and related historically developed trends related to higher education. This is reflected in reporting patterns on the FCNM and the Committee acknowledged the disproportionately low scope of reporting on higher education.

Inclusive education is perceived to reflect all cultural determinants defining the identity of national minorities, in accordance with the Convention. The Committee recognised the challenges pertaining to educational system design compliant with the Convention's requirement of "integration in diversity" (2006, p. 16). The possible solutions are showcased by the Committee on the example of language learning in schools under different modalities (depending on the proportion of the use of minority/majority language within the curricula and the language of the medium). While the Committee's interpretation of the Convention is in the aspiration for bilingual schools, the conclusion on the dominating established practice among states parties based on their reports signifies that the prevailing modality allocates limited scope of subjects taught in minority languages within curricula adopted in participating States (ACFC:

199 During the Fourth Monitoring Cycle, the Committee recommended consultation with parents of children of Roma, Sinti and Caminanti origin in elaboration of educational system as a measure to prevent student drop out (Compilation of Opinions, Article 12, Italy, p. 27).

2006, p. 16). The Committee also indicated the existing segregation of educational modalities maintained in some States parties, and utilized for some minority groups based on the stigma related to general inability to comply with educational requirements in ordinary educational institutions. Among such modalities, the Committee indicated usage of specialized institutions designed for students with special intellectual requirements for training of minority groups representatives; or "supportive"/remedial additional educational training designed to ensure compliance with general curriculum; or additional schooling (Sunday schools format). The Committee underlined that the most common recipients for obligatory segregation education are the members of Roma community, which are assigned to such schooling due to stigma or misperception (ACFC: 2006, p. 17).[200] While the introduction of remedial training is evaluated as a good practice for the educational policies to ensure participation and making the decision-making inclusive for minorities, yet the Committee underlined that the design and format of the educational system needs to be elaborated in participation of members of minority groups, reflect the consideration of their needs and aim at ensuring that students belonging to national minorities can effectively participate in the general classes where the curriculum reflects their cultural specificities (ACFC: 2006, p. 17). The Committee does not promote or mainstream separate education, unless these are thought for by the community or there are no alternative options for achieving the required standards of education (for example, in its opinion on Sweden the Committee criticizing specialised classes for minority children, while the opinion on Cyprus welcomed the special Maronite elementary school established upon request of the minority community). This aligns the approach by the Committee to the case-law of the ECtHR.

The Commission developed a set of indicators to determine objective tools that can be used in forging the concept of educational systems to ensure their responsiveness to the needs of the minority population under particular conditions. The indicators include the specificity of

200 The Committee of Ministers (CM/ResCMN(2021)13) recommended Romania to combat discrimination and inequality with respect to Roma, and in particular measures to be adopted in the field of education aimed at elimination of "*all forms of segregation of Roma children and other forms of discrimination of Roma children at school with a view to including them*".

political and cultural context in the region (e.g. post-conflict environment, ethnic tensions, nationalism, etc., that need to be assessed from the perspective of the requirements of minority groups); needs, demands and expectations and preferences of minority pupils and teachers (to be reflected in gender sensitive data), general linguistic level of minority population (reflected in the assessment of their capability to adjust to and participate in general educational environment, needs to be reflected in gender sensitive data structured per age and social status groups); demographic profile of the region (required to determine the modalities of participation of students and teachers, teacher/student ratio, maximal number of students and the distribution of resources as indicators of quality of education); availability of teaching materials and textbooks; availability of resources (including financial resources) (2006, p. 18). States parties' reports reflect some of the indicators in their reports, in particular the availability of resources and state subsidies channeled to the minority education.

The interpretation elaborated by the Advisory Committee the requirements to training and educational materials and methodologies compliant with minority rights standards set under the Convention are formulated under interpretation of Article 12 in conjunction with Article 6, introducing protection against discrimination and hatred based on cultural determinants. Both Articles are seen as general norms aimed at the entire society (ACFC (2016), p. 23). To comply with the Conventional standards, the educational systems need to be adjusted to dialogue promotion, and include components reflecting sensitivity to minority cultural determinants, promote exchange and dialogue. Furthermore, Convention-compliant educational materials should reflect diversity. The presentation of minorities, in particular in the aspects reflecting their cultural differences, should be forged in effective participatory approach, in active engagement of the minority groups' members. The crucial aspect is avoidance of stereotypical reflection, but aim to promote respect, inter-cultural understanding and acceptance of difference, in line with the aims of the Convention (ACFC (2016), p. 23).

The assessment of the quality of education and the adequacy of conditions for realization of the right to education under the Convention is conducted by the Commission depending on the

availability of teachers, representing both the minority and majority, duly trained to provide education adjusted to the minority groups' needs and reflecting their cultural particularities (e.g. depending on the nature of instruction), availability of adequate textbooks and resources, without overdependence on the kin-states for the provision of such support (ACFC: 2006, p. 19). The reliance on the sponsorship from the kin-state or other external reliance is considered unsustainable as a long-term solution by the Committee due to the risks associated with "*progress achieved due to external factors that are beyond the control of the national and local authorities*" (criticism to excessive funding reliance for educational programmes for the Assyrian and Yezidi minority in Armenia ACFC, Fourth Monitoring Cycle, Compilation of Opinions on Article 12, Armenia, p. 3). The special requirements addressing the needs of the nomadic minority groups should be responded. The framework of due kin state support is assessed generally on the basis of compliance with the concept of friendly neighbourly relations, maintained without intervention into the sovereign matters of the state, and in particular, with respect to the provided educational materials, based on the content, whether it reflects the narrative and the circumstances of the minorities in the state of residence (ACFC: 2006, p. 20).

The Commission requires clear and coherent legal framework to ensure the rights to and in education (ACFC (2006), p. 20), reflecting necessary measures that are effectively implemented on national, regional and local level. The legislation should be drafted in consideration of other legal acts and contradictions with related legislation, e.g. language laws. Specifically, the language education laws should not integrate the minority languages into the curricula as foreign languages, but should be framed as part of the national culture (ACFC (2006) cites Advisory Committee Opinion on Poland ACFC/INF/OP/I(2004)005, paragraphs 68-69).[201] For these purposes, a revision of curricula is recommended by

201 During the Fourth Monitoring Cycle, limited integration of minority cultures, language and history was identified in school curricula in Italy (Compilation of Opinions, Article 12, p. 26). The Committee criticized that the curricula were not reviewed to promote "mutual understanding and intercultural dialogue and promoting integration of society as a whole", noting limited efforts in improving the inclusive integration of foreign students. The concern was repeated with respect to teaching of Romani language as a foreign language in the Czech Republic (p. 14) and the Estonian education system that

the Committee for the awareness raising purposes and accumulation of knowledge on minorities, its effective incorporation into educational system with the general aim to facilitate social integration (Fourth Monitoring Cycle, Compilation of Opinions, Article 12, Italy, p. 26). Legal certainty, clarity and accessibility of the legislation (both in terms of awareness and the easiness of comprehension of its provisions for rights holders) are prerequisites for the effective implementation of the laws.[202] These requirements are mentioned for legal acts establishing rights and duties of stakeholders, in particular, with respect to such norms that, through quotas and thresholds, may lead to abolition of educational institutions or classes, or reserved educational quotas (ACFC: 2006, p. 20). The educational institutions established and managed by the minority groups and maintained from sources other than state budget should not be excluded from the system of public supervision and control, according to the Explanatory report. The state supervision mechanism should include teaching standards and affect the recognition of qualifications (para. 72).

5.2.7. Protection against discrimination

Article 5 semantically construes the positive obligations under the Convention as additional to the measures adopted within the framework of the States' general integration policies. An important commitment on parties that follows along the HRBA approach requirements is that the Convention frames the negative obligation for the States to abstain from assimilation practices in policies and implementation with respect, *inter alia*, cultural identity. Thus, the Convention provides for the necessary protection actions against assimilation practices with respect to minorities. Furthermore, the commitment to adopt "appropriate measures" for protection of minorities is provided for cases, when their representatives are subjected to "*threats or acts of discrimination, hostility or violence as a result*

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maintains separate Estonian and Russian-speaking schools, which prevents communication and dialogue in education or promote learning of both languages, which is not in line with the general policies of the Estonian government to "create a more cohesive and integrated society" (p. 16).

202 Priority recommendation (requiring immediate actions) to review the domestic legal framework abolishing gaps that hinder "consolidated and coherent" laws related to rights of persons belonging to national minorities were mentioned in the Committee of Ministers Resolution with respect to Romania (CM/ResCMN(2021)13).

of their ethnic, cultural, linguistic or religious identity" (Article 6). This provision originated from paragraph 40.2 of the 1990 Copenhagen Document (Explanatory report, para. 50) and aimed to ensure social cohesion in preservation of cultural integrity of minority groups. The Advisory Committee developed a twofold protection system developing the requirements of Article 6. First and foremost, it is a general protection of all persons, irrespective of their origin or cultural affiliation. This aspect requires measures to promote and ensure "*mutual respect, understanding and cooperation among all persons, regardless irrespective of their ethnic, cultural, linguistic or religious identities*". On the other perspective, the design of measures reflecting obligations on protection against discrimination are interpreted by the Committee to require the acknowledgment of the cultural determinants that contribute to the formation of diversity within the society. The Committee explained the necessity of "*wider interpretation*" of Article 6 with the insufficiency of conditions that would lead to hampering the possibility to express and develop cultural differences, effective self-identification as minorities, and, consequently, affect social integration, in case this reading is not applied (ACFC: 2016, p. 21). The primary element of policy and law-making in this respect are the national integration policies, that should respond to the requirements of diversity and promote intercultural dialogue in full respect of cultural differences.

Furthermore, the Convention establishes the obligation to protect all persons not only against discrimination, but also from violence on ethnic, cultural, linguistic or religious grounds. The wording of the provision is not limited to creating the protection system to minorities, but implies unlimited scope of rights holders, "*all persons living on their territory*". The scope of protection extends *ratione materiae* through the interpretation by the Advisory Committee to hate crimes. The measures considered relevant by the Advisory Committee for addressing the issues included criminalization of hate speech, threats, violence based on ethnic grounds, but also crimes motivated by cultural, linguistic or religious differences, and public incitement to violence and hatred, as well as inclusion of ethnically, culturally, linguistically or religiously motivated misconduct into legal regulation as aggravating circumstances (ACFC: 2016, p. 22). Other measures interpreted by the Advisory Committee as requirements for effective implementation of the conventional prohibitions included due training

on prevention of ethnically motivated aggression into the professional education programmes for law enforcement, to ensure that such offenses are duly documented, recorded, investigated and punished (ACFC: 2016, p. 22). The states' efforts aimed at ensuring effective equality with respect to the rights protected under the Framework Convention implies the necessity of protecting different identities (ACFC: 2016, p. 23). Education, culture and the media are defined by the Convention as the areas where "particular" measures aimed at preventing "*discrimination, hostility and violence resulting from ethnic, cultural, linguistic or religious identity*" (Article 6) and cooperation are required. Interpreted in conjunction with Article 12 that prescribed education and research activities to "*foster knowledge of the culture, history, language and religion of their national minorities and of the majority*", creates a reinforcement of educational rights, ensuring protective measures developed for the educational, media, and cultural fields to encompass an anti-hate crime component.

Thus, the Convention provides for a wider protection than the general international framework appears to grant, as the 1995 Convention does not distinguish as to the nature, objective or subjective assessment of imminence of threat that need to be regulated by the States and are required for triggering the application of such measures. The lack of definition does not prevent from attempts for a wide interpretations and discretionary approaches, while, at the same time, triggers the requirement of a comprehensive regulation and an effective human rights protection mechanism, in line with general principles of international human rights law and international law of treaties. Therefore, the efficiency of the framework Convention in this respect largely depends on the methodology applied on the national level for the incorporation of its principles into the national legal and policy frameworks. The approach, based on human rights standards, both material and procedural, ensures the efficient protection systems within the framework of national laws.

The 1995 framework Convention excludes any effects of the preferential treatment of minorities from discriminatory treatment (Article 4). The problem of discriminatory treatment of majority as a result of the international protection of minorities has been named as one of the critical ideas against such a regime by Capotorti (1979: p. iv), along with the concerns regarding state security and a risk for

intervention into the internal affairs of States triggered by the cultural ties of minority groups with other representatives abroad and the intrinsic differences of their identity from that of the majority group, the alleged impossibility of uniform application of international law rules in the variety of states where the conditions and status of minorities were largely different. The 1995 Framework Convention superseded the critical attitude against the minority empowerment, partially through the cultural domain and impetus on the goal of identity development. The anti-discriminatory provisions of the Convention imply equality before and of the law for the protection of all human rights, including cultural rights of peoples belonging to national minorities, while any discrimination arising from the affiliation with minority groups is prohibited (Article 4). The Explanatory report interprets Article 5 to imply a preventive measure against negative cultural practices promoted through cultural relativism discourse. In particular, the reference to traditions as constituent component of identity of national minorities is explained to exclude endorsement of cultural practices that are not in line with international law requirements, and states that "*[t]raditional practices remain subject to limitations arising from the requirements of public order*" (para 43-44). The States parties to the Convention are obliged (and, under the text of the Convention, this is a positive commitment) to adopt necessary and adequate measures to promote the equality of minorities in all fields of life, including cultural life. The policy and normative planning in this respect is instructed to be calibrated to the requirements and special conditions of the groups. This latter formulation is particularly instrumental for developing efficient implementation tools, as the Conventional provisions instructing policy and law-making are generally widely formulated, and lack precision as to what criteria need to be followed to ensure that the measures adopted by the State are considered adequate, while the sufficiency requirement to the measures is not prescribed. The Explanatory report binds the norm with the principle of proportionality, to prevent violations of the rights of others, and positive discrimination. The Report frames the norm *ratione temporis* and *ratione materiae* within the adequate and proportionate measures not exceeding "*what is necessary in order to achieve the aim of full and effective equality*" (para. 37). The guidance by particular conditions of specific groups ensures targeted problem solving approach and should eventually ensure effectiveness of the protection frameworks developed to implement the Convention.

5.3. Implementation Practice and Policy Developments

The FCNM does not provide for a separate procedure on the evaluation of compliance with previous recommendations besides the references in state reports, their subsequent assessment by the Advisory Committee and the transmission of the conclusion to the Committee of Ministers for eventual transformation into the political instrument. This sub-chapter will examine the progress identified in implementation of recommendations of the Advisory Committee. The analysis is conducted based on the Committee of Ministers Resolutions issued with respect to Member States based on the opinions by Advisory Committee. The scope of the assessment is limited to the resolutions adopted with respect to the third cycle onwards, which allows to provide up-to-date profile of the policy developments and to build upon previous assessments of practice avoiding repetition of the material subject to the review.[203] As of 2021, the FCNM mechanism is characterized by a backlog in country reports and resolutions at the stage of the Committee of Ministers review, which was highlighted by the Council of Europe Secretary General in her opening address at the Council of Europe Conference on Norms and Standards on National Minority Rights on 29 June 2021.[204] The assessment will be conducted based on the analysis of measures recommended by the ACFC and the Committee of Ministers, and will aim to supplement the research with the map of the developments and outstanding matters that the minorities' cultural rights milieu is characterized with, within the jurisdiction of the Council of Europe.

Currently, the Fifth Monitoring Cycle is underway. In 2021, four countries submitted their Implementation Reports (San Marino, the Russian Federation, Sweden and XX). In the period from January to July 2021, the Advisory Committee adopted three reports on the Fifth

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203 For example, those given in the commentaries to the FCNM edited by Marc Weller.

204 In her speech at the Council of Europe Conference on Norms and Standards on National Minority Rights (Strasbourg, online. 29 June 2021), the Secretary General highlighted that the backlog of resolutions and reports under the FCNM monitoring mechanism started to diminish prior to the pandemic as a result of to the reforms initiated in 2018 and implemented in line with the Resolution CM/Res(2019)49 on the revised monitoring arrangements under Articles 24 to 26 of the Framework Convention.

Cycle (with respect to Croatia, Malta and Liechtenstein). In 2021, the Committee of Ministers adopted seven Resolutions, that included XX on 3d Monitoring Cycle (Montenegro and Latvia), 3 resolutions on Fourth Monitoring Cycle (Albania, Bulgaria, Azerbaijan, Romania) and 3 resolutions on the Fifth Monitoring Cycle (Cyprus, Spain and Hungary). Overall, there are 34 resolutions adopted on the fourth monitoring cycle and 38 – on the Third monitoring cycle, as of June 2021. These documents created the primary source for the analysis of the dynamics of the implementation of recommendations and the trends within the fields of cultural rights. The resolutions from the third monitoring cycle are used as a comparative basis and a source for the assessment of positive developments, as the third cycle resolutions contained the assessment of general trends in the reporting States.

The analysis of the Advisory Committee Reports and Committee of Ministers resolutions on the implementation of the Framework Convention for the Protection of National Minorities shows that the progress in implementation of the Convention is primarily twofold and can be categorized into the thematic assessment and technical assessment. The thematic assessment evaluates the progress in a particular area or with respect to the general situation of cultural rights of particular groups. The technical assessment is measured primarily on the basis of three components, namely the institutional, policy and legal framework developments.

5.3.1. Substantive assessments and matters of concern

The analysis of the Resolutions highlighted official recognition of new minorities as a benchmark for the progress on the way of facilitating their entitlements. During the Third monitoring cycle, the official recognition was granted to minorities in Azerbaijan (CM/ResCMN(2015)1) and the UK (Cornwall, CM/ResCMN(2012)22). Problems with the regulation and the procedure of recognition were identified in Bulgaria (CM/ResCMN(2018)2), and Albania, where the principle of self-identification was not relied upon in the implementation of the law. Primary deficiency in the area was highlighted when the authorities relied upon technical criteria and documentary evidence for official recognition (CM/ResCMN(2021)2). Flexible approach to the application of the Convention was recommended to states with rigid legal regulation on granting the

national minorities groups the protection status, which was expanded in a number of cases with the proposals of selective, article-by-article, application of the Convention to unrecognized national minorities, as well as other minority groups, including migrants and refugees. Problems remaining to be addressed through the elaboration of the implementation and interpretation practices related to the Convention include rigid approach to the recognition of minorities, which remain to require official recognition with the scope of application of the Convention mechanism remaining limited to the officially recognized minorities.

The examination results of the substantive measures are reflected in the general overview of the situation of particular minorities, as the analysis of particular entitlements (e.g. development in the field of education, religion, culture, etc.), or measuring particular developments of a minority as per their capacity to enjoy certain rights. Positive developments were highlighted in efforts aimed at combatting racism, and programmes and undertakings to promote cultural diversity and integration (for example in Denmark, CM/ResCMN(2012)8, San Marino (CM/ResCMN(2010)2), Georgia (CM/ResCMN(2020)5), Moldova (CM/ResCMN(2010)6). Some positive developments were achieved in the field of education, in particular where practices of segregating minority students were decreased (Denmark, CM/ResCMN(2012)8; Montenegro (CM/ResCMN(2021)14), decrease in the drop-out rate of minority students (Denmark, CM/ResCMN(2012)8). Effective dialogue with minority representatives facilitating public trust and effective participation in policy development have been considered progressive with respect to Georgia.

In the 3d and 4th cycle, substantive improvement of the situation of certain minorities was identifies in response to the previous recommendations with respect to Montenegro (Roma and Egyptians) and Azerbaijan[205]. Positive dynamics was recognised in Bulgaria, although the general situation of Roma in the country was assessed as

205 In its 2015 resolution the Committee of Ministers assessed that the Azerbaijani society was characterised by a "generally open attitude towards diversity and good relations among different ethnic groups" (CM/ResCMN(2015)1).

"significant socio-economic challenge" (CM/ResCMN(2018)2). In Montenegro the overall improvement of the situation of Roma and Egyptians was assessed as substantial, with improvement in the field of education identified with respect to these groups. Progress in ensuring availability of courses in minority languages and developing the textbooks was welcomed in Moldova (CM/ResCMN(2010)6), where experimental schools were established to facilitate education in minority languages, and measures were taken to increase the enrollment of Roma students, and in Armenia (CM/ResCMN(2012)1). Particular substantive measures in the field of cultural rights leading to the recognition of improvement included the closure of a segregated preschool in one of the regions. Progress in the development of anti-discrimination framework was underlined in several countries in the region, including San Marino (CM/ResCMN(2010)2; Georgia CM/ResCMN(2020)5). The efforts of the Moldova authorities in safeguarding minority heritage were acknowledged in the third cycle resolution by the Committee of Ministers (CM/ResCMN(2010)6).

Despite the adoption of positive measures highlighted in the resolutions, the analysis of the outstanding issues mentioned in the resolutions allows to conclude that the effects of the adopted policies and legal instruments remain to be accumulated to affect the general perception of minorities in the society and their smooth integration. This is reflected in outstanding trends of polarization within the societies and social compartmentation, the negative perception of national minorities, also reflected in their degrading portrayal in the public discourse. In a number of cases, such trends as stigmatization, inflammatory language or hate speech dominating public discourse, in particular in social media, were reflected in the resolutions as unresolved issues. With this respect the situation of minorities was negatively assessed in Montenegro (CM/ResCMN(2021)14) due to the growing "ethnic distance" trend underlined by the Advisory Committee in its country opinion. The trend implied increasing social divide and distance between communities with a negative forecast for increasing division. North Macedonia was discouraged from 'forming parallel societies' and 'mutually exclusive ethno-nationalist politics' (CM/ResCMN(2019)5), in order to achieve the aim of facilitation of human rights of minorities, and the diversity within the society. In Moldova, the abuse of linguistic policies was identified leading to extending the divide between minorities (CM/ResCMN(2010)6).

Deficiencies in implementation of special programme on rights of indigenous peoples, affecting their rights and effective participation, were identified in the Russian Federation (CM/ResCMN(2020)14). In Kosovo, it was recommended to prioritise comprehensive efforts to promote inter-ethnic dialogue "to bridge divides between communities and promote reconciliation", targeting the youth and employing education and linguistic policies (CM/ResCMN(2019)11). Implementation of the right to free self-identification and of multiple affiliations as a means to overpower social division based on ethnic origin and to contribute to the creation of an "open, multilingual and inclusive society" was advised to Cyprus (CM/ResCMN(2016)8). With respect to Croatian cultural policy, it was brought to the attention of the government that respect to diversity within the society should be enhanced through various policy measures, including intercultural education and the work of the media regulator (CM/ResCMN(2017)3).

Despite improvements mentioned in the 3d cycle resolution on the UK (CM/ResCMN(2018)1), including "innovative approaches and provisions" on human rights, the protection of ethnic communities, a range of deeply rooted problems pertaining to ethnic intolerance and prejudices remained highlighted in Committee of Ministers' resolution in the 4th cycle. "Efforts to combat all forms of intolerance and racism" praised in the third report did not bring comprehensive results yet to the fourth report, as the Committee highlighted uninterrupted practice of hate speech and "ethnically hostile behavior" and negative discourse on minorities disseminated in the public media. Similar issues were targeted by the recommendations to Azerbaijan ((CM/ResCMN(2015)1, CM/ResCMN(2021)71) with respect to manifestations of intolerance, prejudice "and allegations of disloyalty" that were proposed to be addressed by wider awareness-raising measures; to Ukraine (CM/ResCMN(2020)13) and Croatia (CM/ResCMN(2017)3) with respect to intolerance, racism, xenophobia and hate speech; in the Russian Federation (CM/ResCMN(2020)14); to Poland (CM/ResCMN(2020)12) with respect to anti-Gypsyism, to Ireland (CM/ResCMN(2019)14) with respect to discrimination of Roma and Travellers, to North Macedonia (CM/ResCMN(2019)5), to Lithuania on prevention of negative stereotypes with respect to Roma (CM/ResCMN(2019)4), to Germany (CM/ResCMN(2016)4), and to Hungary (CM/ResCMN(2017)5) with respect to anti-Roma and anti-Semitic statements and behaviour. Measures aimed at community-

building and facilitating acceptance of historical complexities to combat intolerance and ethnically motivated hostility were recommended to Poland (CM/ResCMN(2020)12). Raising awareness about the cultural components of identities of persons leading nomadic lifestyle was part of recommendations concerning cultural rights of travelers in Switzerland (CM/ResCMN(2019)7). Adopting measures aimed at tolerance and intercultural respect among majority was advised to Liechtenstein (CM/ResCMN(2015)4) and Hungary (CM/ResCMN(2017)5), while adoption of additional targeted policies and initiatives, providing systematic measures, aiming to combat intolerance, racism and xenophobia was advised to Denmark (CM/ResCMN(2015)7). To San Marino (CM/ResCMN(2016)11), recommendations on prevention of discrimination were issued with respect to potential violations and included advice on open and comprehensive approach to integration processes within society, and facilitating a comprehensive scope of measures, including legislative and administrative, to strengthen and mainstream tolerance and intercultural respect within the majority (CM/ResCMN(2016)11). Awareness-raising on the availability of legal remedies for victims of discrimination, in particular among Roma, were considered necessary in Poland (CM/ResCMN(2020)12), in Ireland (CM/ResCMN(2019)14), in Germany (CM/ResCMN(2016)4) with underlined necessity to inform about avenues available for redressing discrimination by public actors, and in Croatia (CM/ResCMN(2017)3).

The related solution proposed for addressing these trends by the Committee of Ministers included crime prevention and prosecution of ethnically motivated crimes, as well as the development of related law (the latter is discussed in the part of this chapter dedicated to technical measures). A set of recommendations concerned the measures aiming to facilitate the prosecution of discriminatory practices and ethnically motivated crimes. The analysis of the outstanding recommendations shows that dynamics of bringing the culprits to justice remained unaddressed even in the countries with the developed anti-discrimination legal framework and where the previously recommended legal amendments related to criminalization of ethnically motivated acts were addressed. Such dynamics could be attributed, in some cases, to the remaining deficiencies in the legal framework, while in other cases they originated from insufficiently elaborated implementation mechanism, the lack of institutional

capacity or sufficient training of the personnel, which were consequently recommended for addressing. In Russia, eliminating deficiencies in prosecution and sanctioning for racially and ethnically motivated violations were required, also with respect to the law enforcement personnel that was required to be trained in human rights of minorities. Similar measures, including with respect to hate crime prevention, were recommended in Poland (CM/ResCMN(2020)12), Portugal (CM/ResCMN(2020)6), Kosovo (CM/ResCMN(2019)11), Lithuania (CM/ResCMN(2019)4), Liechtenstein (CM/ResCMN(2015)4), Spain (CM/ResCMN(2016)10), Spain (CM/ResCMN(2016)10), Croatia (CM/ResCMN(2017)3), Germany (CM/ResCMN(2016)4) related to combatting intolerance, extremism prevention, and hatred, Hungary (CM/ResCMN(2017)5), Moldova (CM/ResCMN(2010)6), Armenia (CM/ResCMN(2012)1). Positive development was highlighted in Georgia with respect to the institutionalization and activities of the ombudsman's office and the state inspector's office in prosecuting hate crimes and discrimination as an aggravating factor of criminal activity (CM/ResCMN(2020)5)). In Georgia, the positive experience was underlined in the developed mechanism of human rights violations resolution by the ombudsman through civil courts (CM/ResCMN(2020)5). Positive assessment was also received by the activities of Bulgarian Anti-Discrimination Commission and Ombudsman in resolving ethnic-based complaints lodged by persons belonging to national minorities, including Roma Committee (CM/ResCMN(2018)2). The necessity to improve implementation patterns of the anti-discrimination legal framework was raised as an issue for addressing to San Marino (CM/ResCMN(2010)2).

5.3.2. Promotion and protection of culture

Protection of cultural heritage of minority groups as an indicator of implementation of the Convention brought a range of recommendations to facilitate the States' performance in this respect, which also indicates the degree the cultural manifestations of minority heritage are integrated into the mainstream cultures and the possibility to realise cultural rights of minorities. Protection of cultural heritage of minorities, in consultation with communities, was recommended in Kosovo, with particular focus on Serbian cultural and religious heritage, and prevention of misappropriation of heritage were recommended in Kosovo (CM/ResCMN(2019)11). Recommendations

to Switzerland (CM/ResCMN(2019)7) included creation of sites of significance to Yenish, Sinti/Manush, Roma and travelers within the framework of implementing an action plan, while in Denmark additional solutions for the recognition of German national minority were admitted necessary (CM/ResCMN(2015)7). Facilitation of sustainability activities aimed at preserving and promoting minority cultures and achieving diversity of cultures based on the long-term needs assessment was recommended to Germany (CM/ResCMN(2016)4).

Facilitation of cultural integration was channeled in recommendations of the Committee of Ministers through facilitating and capacity-building of cultural, organisations, activities and initiatives. The measures proposed by the FCNM oversight mechanism varied from financial support of cultural organisations to ensuring direct management of cultural organisations by the minority communities through ownership transfer. Organisation of cultural events as a means to promote cultural expression and heritage were praised as a continuous positive measure in Azerbaijan (CM/ResCMN(2015)1). In Ireland, measures recommended for development of cultures of Travellers included the proposal to launch consultations on the possibility to establishing a permanent culture centre (CM/ResCMN(2019)14) to enable collecting and preserving their history, stories, legends, songs and identities. Promotion and protection of cultural diversity was recommended in Kosovo aiming to facilitate minority communities' possibility to express, preserve and develop their identity (CM/ResCMN(2019)11). The necessity to provide support to the institute of Roma Culture and related programmes and projects mainstreaming Roma culture was highlighted to Spain (CM/ResCMN(2016)10), to Estonia with respect to all minority groups (CM/ResCMN(2016)15), Croatia (CM/ResCMN(2017)3) without reservation to cultures of particular groups. Measures ensuring cultural pluralism, including through the support to the independent and small media broadcasting in minority languages was considered necessary in Croatia (CM/ResCMN(2017)3). The recommendation to transfer ownership of national minority cultural centres and institutions to the national minority self-governments to allow uninterrupted functioning was issued to Hungary, highlighting the necessity of public financial support (CM/ResCMN(2017)5).

Obstacles to free expression and development of minority cultural identities are also seen in the resolutions as rooted in hampered exercise of freedoms of expression and association. In such cases, the Committee of Ministers recommended affirmative measures to national minorities to ensure their capability to express their cultural identities (Azerbaijan CM/ResCMN(2021)7, the Russian Federation (CM/ResCMN(2020)14), Portugal (CM/ResCMN(2020)6), Ireland (CM/ResCMN(2019)14 with respect to Travellers and the preservation of the nomadism culture). This issue is also closely linked to the effective implementation of participatory approach. In the Russian Federation, problems were identified with the development and maintenance of identities and cultures of indigenous small-numbered people (CM/ResCMN(2020)14). To ensure cultural development, capacity-building of Roma associations and performance efficiency evaluation were required in Portugal.

Measures aimed at ensuring that minority cultures are mainstreamed included strengthening of minority's access to the means of dissemination of knowledge and cultural exchange, implying intensifying support to the media. In Montenegro (CM/ResCMN(2021)14) and Croatia (CM/ResCMN(2017)3), the promotion of minority cultures and linguistic knowledge necessitated the development of funding opportunities for the radio and TV programmes and stations, print media, as well as trainings and employment of journalists belonging to national minorities. For Montenegro, particular impetus was made on the Roma and Egyptian communities, while for Denmark (CM/ResCMN(2012)8) the recommendation concerned journalists belonging to the German minority. Similar concerns existed in Bulgaria and Albania (CM/ResCMN(2021)2). Ensuring adequate reporting and 'nuanced' presentation of minority issues in the media, promoting peaceful co-existence and avoidance of fueling intercultural discord, was underlined in Kosovo (CM/ResCMN(2019)11). Additional support to local media broadcasting in minority languages was recognized necessary in Germany (CM/ResCMN(2016)4), while extending the minimum reserved broadcasting time was required in Armenia (CM/ResCMN(2012)1). Support to the media in minority languages, including broadcasting of programmes in Minority languages, was recommended to Azerbaijan (CM/ResCMN(2021)71), as due representation of minority cultures and identities through public

programmes, both in majority and minority media, were assessed as "insufficient" and "limited" ((CM/ResCMN(2015)1). Similar recommendations were adopted with respect to the situation in Bulgaria (CM/ResCMN(2018)2), Ukraine (CM/ResCMN(2020)13), Russia (CM/ResCMN(2020)14), North Macedonia (CM/ResCMN(2019)5), Lithuania (CM/ResCMN(2019)4), Cyprus (CM/ResCMN(2016)8), Germany (CM/ResCMN(2016)4). Public financial support and mainstreaming measures were recommended at the third cycle to the media in the German language (CM/ResCMN(2012)8), but the recommendation was not maintained in the fourth cycle.

5.3.3. Religious freedoms

Religious discord among minority communities and between the majority and minority was perceived as an important factor hampering the peaceful coexistence in a number of FCNM Contracting States. In isolated instances, the tensions were fueled with centrally-adopted regulation. In Montenegro (CM/ResCMN(2021)14), religious tensions were identified between different Orthodox communities. Hampered freedoms of expression and manifestation of religious beliefs, exacerbated with hindered access to places of worship were recommended for addressing in Azerbaijan, as such practices undermined development of minority identities (CM/ResCMN(2021)71). In Poland, measures promoting intercultural dialogue and understanding among religious communities were considered necessary to eliminate hostility and intolerance, including in political discourse (CM/ResCMN(2020)12). Facilitation of registration of minority religious associations was recommended to North Macedonia (CM/ResCMN(2019)5), ensuring uniform and effective enjoyment of the right to manifest religious beliefs. In Georgia (CM/ResCMN(2020)5) and Moldova (CM/ResCMN(2010)6), it was recommended to ensure compliance of implementation practice with the judicial decisions, and guarantee the right to manifest the religions and beliefs, as well as the rights to establish religious institutions, organisations and associations. Undue state interference into the religious freedoms were identified in Ukraine (CM/ResCMN(2020)13), which was proposed for resolution through non-interference with the inter-confessional peace in society. Ensuring the right to manifest religion, in particular to the Muslim devotees, was recommended to Moldova (CM/ResCMN(2010)6). In Georgia, transparent and non-

discriminatory procedures for the construction of places of worship were requested for elaboration in consultation with minority representatives (CM/ResCMN(2020)5). Attacks on places of worship as one of the extreme manifestations of intolerance are consistently criticized in Committee of Ministers' resolutions. Cases related to attacks on places of worship of minority communities were established and criticized in Bulgaria with respect to attacks on mosques (CM/ResCMN(2021)1). The obligation to ensure that the restitution of property to religious communities was conducted on just conditions without discrimination was underlined in the third monitoring cycle recommendation to Georgia (CM/ResCMN(2020)5).

5.3.1.4. Education

The implementation pattern of education-related entitlements under the FCNM did not expose consistency in the improvement. Despite some highlighted progress, especially with respect to elimination of segregation in education, academic divide remains between majority and minority communities, reflected in hindered access, attendance, attainment and the quality of education. Educational programmes remained insufficiently adjusted to the requirements of minority groups, while Insufficient availability of training of teachers and availability of quality educational materials, including textbooks, remain technical hindrances to effective educational process and integration of minority groups, affecting social cohesion. The right to education was not recognized effectively ensured in Albania due to the lack of access to educational institutions (CM/ResCMN(2021)2). The drawback was identified in the domestic implementation of the law in Montenegro, where the Ministry of Education could not provide effective oversight over the part of curriculum reserved for determination on the local level. Effective monitoring was required from the UK, to track progress on the adopted measures guaranteeing equal access to education (with the focus on Gypsies, Traveller and Roma children).

Problems pertaining to the design of the academic curriculum were highlighted in different aspects in the majority of resolutions. in Montenegro (CM/ResCMN(2021)14), the criticism was drawn to the removal or limitation of the 'civic education'. The authorities were recommended to ensure that 'the identity and culture of persons belonging to national minorities' are reflected in the school curriculum,

the measures were required to be elaborated in co-operation with minority representatives. School curriculum was subject to criticism in Azerbaijan (CM/ResCMN(2015)1) as being superficial and failing to represent minority cultures and identities. Curricular deficiencies drew criticism in Bulgaria for unavailability of subjects taught in minority languages (CM/ResCMN(2021)1). Moreover, the curriculum and educational programmes were recommended for revision to ensure that "adequate information […] on the history, culture, languages and religion of minority groups as well as their contribution to Bulgarian society" is provided to children (CM/ResCMN(2021)1). Reflection of the role of minorities, as well as dissemination of knowledge on the cultures, histories, languages and religions of national minorities through educational curriculum was recommended to Lithuania (CM/ResCMN(2019)4); knowledge and awareness of minorities were advised to be integrated into the educational system in Denmark (CM/ResCMN(2015)7), Germany (CM/ResCMN(2016)4 with respect to Sinti and Roma in particular) as well as in Spain (CM/ResCMN(2016)10 with respect to Roma). In Ireland, recommendations regarding the revision of school curriculum considered integration of narrative promoting Traveller culture and history (CM/ResCMN(2019)14). Development of an integrated curriculum in Serbian was recommended to Kosovo (CM/ResCMN(2019)11). Recommendations to Kosovo (CM/ResCMN(2019)11) were further extended to incorporate general modules "supporting the preservation of the identity, language and culture of the communities". Intercultural content was required to be introduced into the curricula in North Macedonia (CM/ResCMN(2019)5), as well as in Cyprus (CM/ResCMN(2016)8). Reflection of cultural diversity of Croatia was advised to be reflected in the curricula and textbooks (CM/ResCMN(2017)3).

Insufficiency of teaching personnel, both qualified in providing education in and of minority languages, was highlighted in a number of reports and recommendations to Member States, including Azerbaijan, Lithuania (CM/ResCMN(2019)4), Cyprus (CM/ResCMN(2016)8), Cyprus (CM/ResCMN(2016)8). Ensuring the qualification to conduct intercultural education, as ensuring the availability of teachers competent to teach in minority languages on all levels of education was recommended to Germany (CM/ResCMN(2016)4), as well as in Croatia (CM/ResCMN(2017)3).

Ensuring availability of teachers qualified in specialist subjects and able to work in the state language for working at the minority schools was underlined in Estonia (CM/ResCMN(2016)15). The recommendation to ensure equality of teachers of minority languages was issued with respect to Poland and in particular concerned the Kashubian language (CM/ResCMN(2020)12). Particular attention was considered needed to the availability of teachers trained to leading classes in minority languages, and their appointment where such skills are needed, in particular with respect to Frisian and Sorbian, in Germany (CM/ResCMN(2016)4), while in Estonia (CM/ResCMN(2016)15) it was recommended to ensure sufficiency of teachers qualified to teaching specialized subjects in state language and their appointment to minority language schools.

Failure to ensure accessibility of textbooks on minority languages was highlighted in Azerbaijan (CM/ResCMN(2015)1 and Albania (CM/ResCMN(2021)2). The revision of textbooks with the aim of ensuring adequate representation of minorities' culture, identities and contribution to the society, free from stereotypes, were recommended in Bulgaria (CM/ResCMN(2021)1), Russia (CM/ResCMN(2020)14), Kosovo (CM/ResCMN(2019)11), Ireland, North Macedonia (CM/ResCMN(2019)5), Lithuania (CM/ResCMN(2019)4). Revision of textbooks was recommended to improve the quality of linguistic education in Poland (CM/ResCMN(2020)12), Kosovo (CM/ResCMN(2019)11), Cyprus for linguistic education (CM/ResCMN(2016)8), in Georgia (CM/ResCMN(2020)5) the revision was recommended to facilitate tolerance.

The necessity of measures facilitating the attendance of minority students in education programmes remained applicable in a number of countries. Recommendations addressing attendance of children were issued with respect to Montenegro (Roma and Egyptian in CM/ResCMN(2021)14), Ukraine (CM/ResCMN(2020)13 – with respect to the Roma), Poland where pre-school and secondary education possibilities for the Roma students (CM/ResCMN(2020)12), Portugal (CM/ResCMN(2020)6), Lithuania (CM/ResCMN(2019)4 with respect to Roma students). Classes cancellation due to shortage of teaching staff was highlighted in Azerbaijan (CM/ResCMN(2015)1). Analysis of external and internal causes on school absenteeism and drop-out of Roma students was recommended in Portugal (CM/ResCMN(2020)6), along with the inclusion of Roma representatives in drafting

educational policies and measures. Ensuring due qualification of teachers to enable their ability to maintain diversity and intercultural dialogue (CM/ResCMN(2019)11). Flexible learning solutions were recommended for development in Switzerland, targeting educational possibilities of persons leading nomadic lifestyle (CM/ResCMN(2019)7). Such solutions should ensure balance between the educational possibilities and the right to lead the nomadic lifestyle (CM/ResCMN(2019)7). Ensuring equal opportunities to minority students at schools in pursuit of effective integration, by means of, inter alia, provision of linguistic training in minority languages, was recommended to Liechtenstein (CM/ResCMN(2015)4). Wrongful placement of Roma children to special classes and schools was highlighted as a matter of concern requiring to be addressed in Hungary (CM/ResCMN(2017)5).

Academic attainment remained one of the consequences arising from the academic divide and the phenomenon characterizing minority groups' educational rights. The long-standing recommendations by the Committee of Ministers signal of the persistent problem of educational attainment divide between the majority and minority students[206]. This is particularly relevant to the Roma and travelers (CM/ResCMN(2012)22, CM/ResCMN(2018)1). Segregation, regionally or within educational institutions remain to be mentioned in the resolutions as the factor contributing to the divide (e.g. CM/ResCMN(2021)14 on Montenegro). As a follow-up to the low level of attainment of students of minority origin, in particular Roma and travelers identified in the UK after the third reporting cycle, the Committee of Ministers reiterated its recommendation for measures aimed at "enhance[ing] the achievements of pupils belonging to national and ethnic minorities" to bridge the gaps in academic attainment between the majority and minority students. Although the scope of such recommended measures was not defined in the Recommendation, the type of recommendation implies the requirement for the approach targeting not only the technical requirements for accessibility and minority sensitive curriculum, but the meaningful effect that educational process can provide on the individual students and on the cumulative capability

206 The criticism to the academic performance gap between majority and minorities was persistently raised in the CoM resolutions on the United Kingdom (CM/ResCMN(2012)22).

level of the group. Measures to facilitate integration and academic performance of Roma students were considered necessary in Spain (CM/ResCMN(2016)10) and Hungary (CM/ResCMN(2017)5). Positive attainment dynamics were identified with respect to the Roma community in Bulgaria, which was attributed to the successful national integration educational programming (CM/ResCMN(2018)2).

Although education is seen as the primary tool for the facilitation of social inclusion through education, segregation or inefficient integration of culturally sensitive component into the educational systems remained characteristic to the implementation of education-related entitlements under the FCNM. Creating inclusive educational systems remains a goal to achieve and was recommended explicitly to Germany (CM/ResCMN(2016)4). Discontinuation of segregation at schools was recommended in Kosovo (CM/ResCMN(2019)11), North Macedonia (CM/ResCMN(2019)5 in particular with respect to Roma students), Germany (CM/ResCMN(2016)4 with respect to segregation of Roma and Sinti students in special schools), in Hungary with respect to Roma students, in Moldova (CM/ResCMN(2010)6) segregation in education was linked to the isolated residence patterns of the Roma. Ensuring intercultural dialogue and diversity was recommended through multilingual education in integrated environment in Cyprus (CM/ResCMN(2016)8), Georgia (CM/ResCMN(2020)5) and Croatia (CM/ResCMN(2017)3). Creation of perception that Roma identity constitutes an integral part of the Spanish society and culture was recommended as a strategy for ensuring integration and social cohesion in Spain (CM/ResCMN(2016)10).

A set of supportive outreach measures aimed at promoting inclusion in education was elaborated by the Advisory Committee and delivered through the Committee of Ministers' recommendations. In Montenegro, awareness raising was proposed as a tool to ensure social cohesion. It was recommended to conduct public awareness programmes highlighting the benefits of education, presenting education as an instrument to decrease early marriages. Other outreach measures proposals included enabling a long-term support to Roma programme across pre-school and primary education without regard to the number of students; employment on long-term contracts; comprehensive long-term solutions ensuring the possibility of learning state language to be conducted in public education system.

5.3.5. linguistic rights and linguistic education

Positive dynamics in the linguistic rights of national minorities was mostly reflected in expanding scope of minority languages offered for studies, the increase in the academic hours dedicated to minority languages within curricula, and the increase in teaching capacity. The recommendations targeting linguistic freedoms predominate resolution of the Committee of Ministers on minority issues and oversight of the FCNM, highlighting the long-lasting gap in this field. Systemic problem pertaining to the minority languages and their protection and promotion, were brought to governments' attention in resolutions on Montenegro, the UK, Azerbaijan, Ukraine, Kosovo, North Macedonia, Cyprus and Estonia. In the recommendations to Cyprus, the Committee of Ministers advised to shift the paradigm to the support of minority languages and identities from viewing it as a component of heritage of minorities to conceptualizing it as an integral part of the contemporary society (CM/ResCMN(2016)8), reflecting an important shift from minority protection to the recognition of integration and enforcement of the minority agencies. In Hungary, the recommendation concerned elaboration of solutions ensuring visibility of minority languages in public life, creating an environment conducive for their use (CM/ResCMN(2017)5). In Estonia, importance of ensuring linguistic rights of minorities was underlined in recommendations by the Committee of Ministers (CM/ResCMN(2016)15), highlighting the appropriateness of positive incentives approach compared to the penalization for violations of the law on languages. Teaching the required academic hours in state language in minority schools in Estonia was underlined as an issue for further elaboration and monitoring was required for assessment of the necessity to opt for flexible approach (CM/ResCMN(2016)15). In the UK, some national minorities were recognized as deprived of access to linguistic freedoms, while in Azerbaijan persistent problems concerned implementation and availability of information.

Measures proposed for developing minority languages included codification of the main variants of the Romani language for Montenegro (CM/ResCMN(2021)14), which was to be conducted in intensive dialogue with regional partners. In Ukraine, concern was raised with respect to the necessity to ensure due balance in promotion of minority and state languages and implementation of linguistic rights

of persons belonging to national minorities, including the paradigms of parallel education in state and minority languages (CM/ResCMN(2020)13). In Kosovo, the necessity to ensure quality translation and provision of services in minority languages was underlined (CM/ResCMN(2019)11), as well as the necessity to address capacity gaps in language knowledge. Facilitating the use of minority languages at the state level, including the use of minority languages and scripts, were recommended to Croatia (CM/ResCMN(2017)3). Implementation of the requirements under Article 11 of the FCNM to respect minority language rules in transcription of names into the majority language lacked uniform implementation, as mentioned in several country resolutions (e.g. Armenia).

In Montenegro, long-term solutions were required with respect to the general education programmes to ensure that sufficient possibilities for protecting and promoting the languages of national minorities. One of the particular measures recommended by the Committee of Ministers in this respect was the introduction of multilingual teaching methodology (CM/ResCMN(2021)14). In Azerbaijan, despite sustainable measures applicable to selected minority communities (CM/ResCMN(2015)1), it was recommended (CM/ResCMN(2021)71) to expand the scope of teaching of minority languages, with sustaining measures aimed at public awareness about the minority linguistic rights, training of teachers and enhancement of teaching quality through university education on minority languages (similar recommendation was adopted with respect to Cyprus, CM/ResCMN(2016)8). In Bulgaria, sufficient minority linguistic education was missing on preschool and secondary school levels (CM/ResCMN(2021)1), and lack of teaching staff was identified. Substantial problems with access to education in and of minority language were identified in Albania, where the hindrance of enjoyment of rights was attributed to the rigid law on recognition of national minority and the disregard to the self-identification principle (CM/ResCMN(2021)2). The undergoing administrative reform and the related development of regionalization in Ukraine raised concerns with their effects on accessibility of the educational institutions in minority languages and the quality of teaching, due to the creation of larger educational institutions (CM/ResCMN(2020)13). In Russia, a comprehensive strategy on minority language education was needed to regulate the teaching of minority languages throughout the entire

educational cycle from kindergarten to higher education. The methods for facilitating such education were proposed to include enforced bilingual and multilingual teaching, dissemination of 'comprehensive and adequate' knowledge about cultural components of minorities' identities, and corresponding adjustment of teaching materials and textbooks (CM/ResCMN(2020)14). To Lithuania, it was advised to conceptualise bilingual and multilingual education for implementation in schools and pre-schools, while ensuring cross-lingual exposure of students belonging to majority and minority to the Lithuanian and minority languages respectively (CM/ResCMN(2019)4).

The design of the education systems related to minority languages primarily lacked cultural sensitivity and increasing scope of languages available for learning, as well as the structure of language training solutions were proposed for the implementation into the national systems. Although bilingual schools exist in Montenegro, the practical solution chosen for its implementation, when students opt for a complete educational cycle in one of the languages with a possibility of a minority language, leads to effective separation of educational curricula and students studying in one school depending on the language of instruction. The solution undermines the standard prohibiting educational segregation, and is not conducive to the promotion of the social integration or the dissemination of minority language through education. In Lithuania (CM/ResCMN(2019)4), the recommendations concerned avoiding discrimination of minority language schools as a result of education reform. To this aims, it was recommended to opt for evidence-based rather than deadline-driven policy in developing the transition plan. It was advised to ensure effective consultations with minority language teachers.

Furthermore, numerically small communities were recognized to require adequate first language education opportunities in Kosovo (CM/ResCMN(2019)11), North Macedonia (CM/ResCMN(2019)5), and Cyprus (CM/ResCMN(2016)8). In Kosovo, the recommendations underlined the obligation to improve access to education of the Roma, Askali and Egyptian communities in compliance with gender equality dimension, by means of ensuring full implementation of inclusion policies, establishing learning centres, mediators (CM/ResCMN(2019)11). Access to linguistic training in Italian and Romanish outside the traditional settlement of the communities were

recommended to guarantee by the authorities of Switzerland (CM/ResCMN(2019)7). Assessment of the needs for linguistic education, namely at the secondary education level, of these communities was advised to be elaborated in consultations with the communities concerned (Switzerland, CM/ResCMN(2019)7), as well as in Denmark (CM/ResCMN(2015)7).

Problems pertaining to the implementation of entitlements to display signs in minority languages were highlighted in Azerbaijan (CM/ResCMN(2015)1), Bulgaria (CM/ResCMN(2018)2), Albania (CM/ResCMN(2021)2), Russia (CM/ResCMN(2020)14), North Macedonia (CM/ResCMN(2019)5), Lithuania (CM/ResCMN(2019)4), Germany (CM/ResCMN(2016)4) recommending bilingual signs with minority languages, Estonia (CM/ResCMN(2016)15), Hungary (CM/ResCMN(2017)5). In Bulgaria, negative practice of changing the original toponyms in minority languages was criticized and required for reversion to the original, while the practice was recommended for termination (CM/ResCMN(2021)1). In recommendations to Denmark, the entitlement to displaying signs in German was considered conditional to the recognition of cultural heritage, which required the search for solutions (CM/ResCMN(2015)7), and overall the installation of signs in minority areas was not recognized 'sufficiently advanced' (CM/ResCMN(2012)8). Similar situation was identified in Georgia (CM/ResCMN(2020)5).

Possibilities of addressing authorities in minority languages remain low in the majority of participating States, and, according to the resolutions of the Committee of Ministers, were restricted or unavailable to national minorities in Azerbaijan (CM/ResCMN(2015)1), Bulgaria (CM/ResCMN(2018)2) , Ukraine (CM/ResCMN(2020)13), Russia (CM/ResCMN(2020)14), Kosovo (CM/ResCMN(2019)11), Switzerland (CM/ResCMN(2019)7), Hungary (CM/ResCMN(2017)5), Lithuania (CM/ResCMN(2019)4), Denmark (CM/ResCMN(2015)7, with respect to the ability of the German minority to use German), Germany (CM/ResCMN(2016)4) with impetus on the requirement of an environment conducive to the use of minority languages with administrations of different levels, Estonia (CM/ResCMN(2016)15), Georgia (CM/ResCMN(2020)5). In Hungary, the recommendation on facilitation of the use of minority languages in communication with public authorities included measures aimed at

promoting the employment of staff proficient in the minority languages.

5.4. Policy-making and implementation

Assessment of the implementation of the Convention and related policy- and decision-making patters include the analysis of the institutional design constructed on the national level. This includes the actual presence of the empowered institutions on the national level, the sufficiency of the scope of their functions within the mandate, and the availability of due funding proportionate to the scope of the mandate. Institutional progress is measured with respect to the establishment of institutions recommended or required by the international framework, dynamics in institutional authority, namely institutional trust, frequency of petitions to the institutions and the institutional efficiency. The institutional efficiency criteria imply accessibility, the backlog of cases and adequacy of timing for the revision of complaints. In the country resolutions adopted by the Committee of Ministers in 2021, the resolution on Montenegro[207] on the Third Monitoring Cycle contained detailed assessments of the dynamics of the implementation. The Committee of Ministers examined the dynamics pertaining to the development of the institution of the ombudsperson. Positive dynamics was acknowledged based on the increase in trust and respective growth in the number of applications.

As reflected in the recommendations, the outstanding issues pertaining to the technical aspect of the implementation of the FCNM included institutional, financial, and regulatory deficiencies. Institutional and financial issues were often highlighted as intersecting, as the institutional capacity was reported deteriorating due to insufficiency of the funding, and would undermine the institutional independence. In Montenegro, institutional and financial dependency on the government or the legislature of the ombudsperson on the electing body, as the appointment and dismissal can be carried out with simple majority in the parliament, and the government in determination and distribution of budget (Resolution CM/ResCMN(2021)14). Institutional design of consultative bodies failing to reflect the structure of minority

207 Council of Europe. Committee of Ministers. Resolution CM/ResCMN(2021)14 on the implementation of the Framework Convention for the Protection of National Minorities by Montenegro.

communities in its composition was criticized in the Russian Federation (CM/ResCMN(2020)14). In San Marino, the absence of monitoring body with the mandate in monitoring racism and discrimination was recommended to address consistently through the third and fourth cycles (CM/ResCMN(2016)11, CM/ResCMN(2010)2).

Underfunding remained a problem to the effective functioning of institutions designed for the protection against discrimination and specialized agencies on minority issues in Bulgaria (CM/ResCMN(2018)2, CM/ResCMN(2021)1), in Poland, where the insufficiency of funding compromised institutional independence of the Office of the Commissioner for Human Rights and hindered effective fulfillment of its mandate (CM/ResCMN(2020)12), the ombudsman office and Diversity and Integration Bureau in Ireland (CM/ResCMN(2019)14), Kosovo (CM/ResCMN(2019)11), North Macedonia (CM/ResCMN(2019)5), with respect to the balance between expanded mandate of the Danish Institute of Human Rights and the funding allocated in Denmark (CM/ResCMN(2015)7), the Anti-Discrimination Agency in Germany (CM/ResCMN(2016)4), Commissioner for Fundamental Rights in Hungary (CM/ResCMN(2017)5). The number of recommendations issued with respect to the necessity of anti-discrimination bodies funding revision are signals, therefore, that led to conclusions that there was a tendency of underfunding of such agencies or an established disproportion between the scope of mandate and functions of the agencies and the funding allocated to them.

The problems with execution of the institutional mandate in the field of cultural rights of minorities reflected in the absence of an institution or insufficient scope of mandate, as well as with the technical specificities of institutional design, or limited membership. The absence of an institutional mandate or of a specialized agency in charge of national minorities were identified and recommended for addressing as a priority measure in Azerbaijan (CM/ResCMN(2021)7, CM/ResCMN(2015)1) that was criticized as a missed opportunity to create a forum and a tool for the national minorities to effectively participate in policy-and decision-making. In the absence of the functional immunity of its members, the activities of the Bulgarian Anti-Discrimination Commission were not fully relieved from external pressure (CM/ResCMN(2021)1). Reinforcement of legal and

institutional frameworks on investigatory and sanctioning powers of the anti-discrimination complaint bodies was recommended in Portugal (CM/ResCMN(2020)6), Germany (CM/ResCMN(2016)4), Russia (CM/ResCMN(2020)14). The staffing of the law enforcement offices was recommended to be reviewed with the view of recruiting 'more ethnically and culturally diverse' personnel in Ireland (CM/ResCMN(2019)14), as a measure to revert the existing mistrust to the police in the society. In Bulgaria, institutional design of the specialized minority agency was admitted flawed as the participation was limited to officially recognized minority groups (CM/ResCMN(2018)2). Its composition was recommended to be reformed to ensure wider inclusion based on self-identification with minorities, as well as conceptual reforms were advised in the field of culture and identity, mother tongue, and promotion of inter-ethnic tolerance and understanding as well as the implementation of the Framework Convention (CM/ResCMN(2021)1). Insufficiency of minority representation in consultative bodies were identified in the Russian Federation (CM/ResCMN(2020)14), Lithuania (CM/ResCMN(2019)4), where, apart from optimization of financing, awareness-raising was required to ensure informing of the society about parallel mandates of several human rights defence institutions. Establishing meaningful and effective consultation mechanism for Roma at local and regional levels was advised to Spain (CM/ResCMN(2016)10). Another deficiency of institutional design was the lack of transparency. The lack of transparency was highlighted with respect to a body responsible for the decision-making in the field of cultural rights in Montenegro, in particular with respect to public trust in distribution of public funding for cultural projects.

In the field of media, considerable problems with the institutional lacunae were identified in the resolutions on Montenegro, the UK, Azerbaijan. In Montenegro, the Committee of Ministers highlighted the gap in functional profile of institutions in charge of monitoring social media to effectively implement the recent criminalization of hate speech. In the UK, the Committee of Ministers recommended the creation of an independent media regulator, in light of incurring issues of hate speech and 'intolerant and ethnically hostile behaviour' in the public discourse, including the press. In Germany (CM/ResCMN(2020)14) and several other countries increasing the representation of minorities among the staff of the media regulator was

recommended by the Committee of Ministers to ensure diverse coverage and due representation of minorities.

5.4.1. Policy measures

The assessment of policy measures by the Committee of Ministers is conducted with respect to the regulated subject, measuring the compliance with the previous recommendations on the matter. Policy measures tend to be interrelated with the legislative assessment. Issues covered with the CoM's oversight in policy analysis include the procedures of its drafting, conditions for implementation, and the compliance with the substance of the measures to the standards under the FCNM. The issues under review include safeguards and effective implementation of participatory approach in policy-making and decision-making; safeguards to the accessibility of project funding and accessibility of other resources to national minorities; as well as thematic issues the policies in question concern.

Respect of tradition and identity of minorities remains the criteria disregarded in policy-making on the state level in a number of Member States. The recommendations on reflection of sensitivity to minority identity and traditions in cultural policy development was recommended to the UK (in particular, with respect to Cornwall, and overall for programmes targeting minorities that lead a nomadic lifestyle). Programmes aimed at social integration, diversity and tolerance were admitted necessary in Denmark (CM/ResCMN(2015)7). Perceiving minority rights as an inalienable component of human rights in the authorities' agenda, and its introduction as a foundation of public programmes on minorities, safeguarding persons belonging to national minorities from negative consequences resulting from their choice was highlighted among recommendations to Croatia (CM/ResCMN(2017)3). To Croatia, it was also reiterated that cultural diversity issues shall be integrated into the general narrative of the national cultural policy (CM/ResCMN(2017)3).

Generally positive assessment was afforded to the integration programmes targeting Roma in Bulgaria, which provided national and municipality outreach actions (CM/ResCMN(2018)2), creating region-specific tailored solutions. However, a new nation-wide programme on Roma issues was not timely adopted upon the expiration of a previous one (CM/ResCMN(2021)1). Moreover, specific programmes impacting

cultural rights of national minorities were not integrated into the package, which negatively affected their implementation (ibidem). In Russia, additional multi-annual action plan was needed for full and effective equality of the Roma in the fields of education, culture and participation (CM/ResCMN(2020)14), elaborated in participation of minorities in consideration of gender dimension and with the developed mechanism of implementation and financing. A similar recommendation was issued with respect to Poland, where a multi-annual integration programme for the Roma was necessary, in particular with respect to education (CM/ResCMN(2020)12), as well as in Ireland (CM/ResCMN(2019)14) concerning Roma and Travellers). The requirement extended to the implementation, monitoring and evaluation mechanism to be designed in participation of the Roma representatives. Additional programmes targeting the Roma were admitted necessary in Poland (CM/ResCMN(2020)12), with the requirement of adequate funding. In Ireland, an action plan on revitalization of the travelers' language and media production in minority languages was recommended to facilitate transmission and popularization, in particular among the youth (CM/ResCMN(2019)14).

Consolidation of anti-discrimination policies targeting Roma communities was required in Portugal (CM/ResCMN(2020)6), in particular by means of awareness-raising with respect to the legislative standards, legal remedies and protection mechanisms. Similar recommendations regarding anti-discrimination mechanisms were recommended to Switzerland (CM/ResCMN(2019)7), in particular with regard to the prevention of prejudice of persons leading nomadic lifestyle, including Yenish and Sinti/Manush; media were indicated as one of the target groups that would ensure the implementation of the recommendation, and to Spain to ensure full and effective equality of Roma (CM/ResCMN(2016)10). In Ireland, the Committee's recommendations included monitoring of hate speech, including against Roma and Travellers, in the broadcast and online media, analysis of the nature and causes of the phenomenon (CM/ResCMN(2019)14), within a new mechanism of social media monitoring. It was highlighted to Spain, that integration programmes targeting Roma should be clearly drafted to frame the attempted aims and contain earmarked funding for effective implementation, and enforced with effective and regular monitoring (CM/ResCMN(2016)10). Positive integration policies and programmes

of action, as well as progress in developing institutional framework for hate crime prosecution were recognized in Georgia (CM/ResCMN(2020)5).

Rigidity of policies related to minorities cultures and languages appear to constitute another matter requiring improvement, which relates to the identified problems with implementation of the law. Flexible and pragmatic solutions to systemic issues in the fields of education and culture were recommended to the UK (for Cornwall, in CM/ResCMN(2018)1), and Montenegro (CM/ResCMN(2021)14). The necessity of programmatic sustainability for media policies was underlined to Montenegro (ibidem). The need for a comprehensive long-term strategy on minority language teaching was identified in the Russian Federation (CM/ResCMN(2020)14).

5.4.2. Project funding

In Montenegro (CM/ResCMN(2021)14), positive dynamics were identified in procedural and methodological changes in project management within the field of preservation and promotion of minority cultures. The changes implemented in procedural aspects of project management included a change in funding distribution, while methodological change, driven by concerns of the government about integration and social cohesion, implied opting for intercultural approach. Both changes resulted to short-term increase in multi-cultural participation in government funded projects. The government underlined the expectation that the methodological and systemic changes were to entail the facilitation of intercultural dialogue. Public funding distribution practice was recommended to be improved in Azerbaijan (CM/ResCMN(2021)71), with earlier recommendations for their normative regulation (CM/ResCMN(2015)1). Underfunding of minority projects were identified in Albania, failure to consistently earmarking the funds for minority-focused programmes, especially in linguistic education, were highlighted in Poland (CM/ResCMN(2020)12); to programmes on preservation of minority cultures and identities (North Macedonia CM/ResCMN(2019)5), and those specifically earmarked to the media (CM/ResCMN(2019)11). Creating accessible, fair and transparent funding distribution procedures for projects targeting travelers and preserving and developing their identities and cultures were recommended to Switzerland (CM/ResCMN(2019)7), Moldova (CM/ResCMN(2010)6).

Expansion of sustainable financing of civil society initiatives targeting minorities, as well as all measures aimed at dissemination and promotion of minority languages and culture were recommended to Azerbaijan (CM/ResCMN(2021)71), Bulgaria (CM/ResCMN(2018)2), Ireland (CM/ResCMN(2019)14), Lithuania (CM/ResCMN(2019)4), where long-term multi-year project support was necessary for cultural programmes and initiatives targeting minorities, as well as the assistance in raising institutional profiles of cultural centres and initiatives. Provision of facilities to cultural centres of minorities were recommended in Cyprus (CM/ResCMN(2016)8).

5.4.3. Participatory approach

Participation underpins effective governance and a means to balance interests of persons belonging to the various national minorities in all aspects of public life, including cultural life (Weller: 2004, p. 267). Mainstreaming of participation of minority groups representatives in the policy- and decision-making was recommended in the Fourth cycle recommendations to all Member States, signaling not only on the significance of the measure, but also of the consistently insufficient integration of national minorities in policy framing processes. In Montenegro, the Committee of Ministers underlined the necessity to ensure "close cooperation with the communities concerned" and their engagement in developing a mid-term strategy for social inclusion, while "good relation" and dialogue on minority issues with rights-holders to ensure passing the legislation required in the UK. General participation guarantees for national minorities in the decision-making processes affecting them were required in Azerbaijan (CM/ResCMN(2021)71), where additional measures were also required to ensure that persons belonging to national minorities "*express their identities, voice their concerns*" in public decision-making. For Azerbaijan, particular condition to engage national minority representatives in the work of the specialized governmental agencies on national minorities issues. Participation of minorities in policy-making related to culture and education was recommended to all Member States, in particular in Portugal (CM/ResCMN(2020)6) and Ireland (CM/ResCMN(2019)14), Switzerland (CM/ResCMN(2019)7), North Macedonia (CM/ResCMN(2019)5), Lithuania (CM/ResCMN(2019)4), Cyprus (CM/ResCMN(2016)8), Spain (CM/ResCMN(2016)10), Germany (CM/ResCMN(2016)4), Estonia (CM/ResCMN(2016)15), Croatia (CM/ResCMN(2017)3), Hungary

(CM/ResCMN(2017)5), Georgia (CM/ResCMN(2020)5), Moldova (CM/ResCMN(2010)6). Formalisation of the public consultations with the national minorities representatives was recommended to Georgia (CM/ResCMN(2020)5).

5.4.4. Data collection

Data collection is another problematic issue brought to the attention of the authorities in a number of Committee of Minister's resolutions. The required standards are regular and systematic collection, comprehensiveness and reliability of data, and disaggregation of components. In Montenegro, the collection of data in line with these criteria was recommended for the application to educational policies of minorities. Collection of disaggregated data on Roma and Travellers necessary for socio-economic policies was required from the UK with respect to England and Northern Ireland, while optimization of questionnaires to adjust to the changes in recognition of groups as national minorities was required for Cornwall. To ensure effective participation of Roma in social life, collection of disaggregated data on Roma was required in Poland (CM/ResCMN(2020)12), Portugal (CM/ResCMN(2020)6); identical measures were proposed with respect to Travellers community, reflecting gender and ethnicity, in Ireland (CM/ResCMN(2019)14), to North Macedonia (CM/ResCMN(2019)5 with respect to all minority groups), to Cyprus (CM/ResCMN(2016)8) and Moldova (CM/ResCMN(2010)6) to ensure effective policy-making. The Council of Ministers' requirement for the new population census in Azerbaijan aimed at ensuring that the new data reflects the multicultural nature of the country, and therefore requested the possibilities for indication of multiple affiliations and more than one first language; to avert distrust to the objectivity and adequacy of the data on ethnic composition of Azerbaijani society, the Committee underlined the necessity to safeguard 'free and voluntary' self-identification with ethnic minorities (CM/ResCMN(2021)7)[208]. Conducting of a comprehensive census elaborated in consultation with national minority representatives was recommended to Ukraine (CM/ResCMN(2020)13), along with the attention to the possibility of voluntary and informed answers; to Russia the recommendation

208 Council of Europe. Committee of Ministers. Resolution CM/ResCMN(2021)71 On the implementation of the Framework Convention for the Protection of National Minorities by Azerbaijan.

highlighted the possibility to declare multiple attributions to be also accounted for in the processing of the results, designed and developed in participation of minorities. Similar recommendation was given to Lithuania (CM/ResCMN(2019)4) to ensure voluntary self-identification and a possibility to indicate several minority groups, as well as the aggregation of linguistic data, in a suitable form to allow for adequate use in policy-making. The importance of the free-identification principle in ethnic data processing and interpretation was underlined to Hungary (CM/ResCMN(2017)5). The recommendations to Cyprus (CM/ResCMN(2016)8) and Croatia (CM/ResCMN(2017)3) also prescribed incorporating data on social inclusion and the situation with the rights of minorities. While existing equality data was recognized sufficient overall in Germany (CM/ResCMN(2016)4), additional quantitative and qualitative data was advised for designing equality measures.

Structural lack of data was located in Georgia (CM/ResCMN(2020)5); for the new census, it was highlighted that the self-identification principle needed to be fully integrated into the form design. Recommendation not to rely on an outdated census results in designing linguistic policy responses was given to the North Macedonia (CM/ResCMN(2019)5). Positive developments in the practice of data collection were exemplified in Bulgaria, where the census questionnaire and related definitions were developed in participation of national minorities representatives and included optional references to ethnic affiliation, mother tongue and religious belief and denomination (CM/ResCMN(2018)2).

5.4.5. Legislative measures

Legislative measures are assessed as to the presence of the legal acts, their quality and scope. Particular normative regulation of certain commitments is examined as to the appropriateness of the regulatory level, sufficiency of guarantees, and adequacy of penalty. The regulatory level assessment verifies whether guarantees to the rights and freedoms under the Convention are introduced into the constitutional regulation, or reflected in a legislative act with the force of law. The standard applied to the legislation promoting equality and prohibiting discrimination includes such criteria as sufficiency and comprehensiveness, robustness, unification and clarity. The analysis of

recommendations related to anti-discrimination framework leads to the conclusion that the national legal frameworks remain in need of further elaboration. The missing equality framework was identified in some parts of the UK (Northern Ireland in particular), Azerbaijan (CM/ResCMN(2021)71), Moldova (CM/ResCMN(2010)6). In Ukraine the legal framework on the protection of national minorities was not in place, and the Committee underlined the necessity to ensure that a new regulatory framework, when developed, should include an implementation mechanism (CM/ResCMN(2020)13). Regulatory lacunae with respect to the framework on national minorities protection were criticised in Azerbaijan (CM/ResCMN(2021)71), Russia ((CM/ResCMN(2020)14), Portugal (CM/ResCMN(2020)6), Liechtenstein (CM/ResCMN(2015)4), San Marino (CM/ResCMN(2016)11). The necessity of revision of the anti-discrimination act aiming to ensure meaningful protection was recommended to Germany (CM/ResCMN(2016)4), Armenia (CM/ResCMN(2012)1). In Montenegro, the Committee positively assessed criminalization of hate speech, but underlined that the measure cannot be implemented fully due to the absence of an oversight body with a mandate in social media monitoring. Hate speech criminalisation was required with respect to the UK for introduction in the legal frameworks of some parts of the state. The failure to attribute racial discrimination to aggravating circumstances under the criminal procedure framework entailed criticism to criminal legislation, and related prosecution practice, in Bulgaria (CM/ResCMN(2018)2, CM/ResCMN(2021)1), in Germany (CM/ResCMN(2016)4), Estonia (CM/ResCMN(2016)15). Adoption of legislation on hate crime in line with the ECRI General Recommendation no. 15 on combating hate speech was required in Ireland (CM/ResCMN(2019)14).

The necessity to adopt a comprehensive legal framework safeguarding minority rights, in an inclusive approach and ensuring that the personal scope of the FCNM is clarified, was underlined in recommendations to Lithuania (CM/ResCMN(2019)4), Hungary (CM/ResCMN(2017)5) with the condition of ensuring its openness without distinction as to the scope of protection. The recommendation to extend the scope of the FCNM to non-citizens was recommended to several countries, including Hungary (CM/ResCMN(2017)5). In Bulgaria, despite general attempts to ensure participatory approach,

policies elaborated with respect to the implementation of the FCNM did not afford consultations on extending the protection to certain unrecognized national minorities, despite their explicit requests (CM/ResCMN(2018)2); while identical issues were monitored in Poland, in particular with respect to the Silesians. Holding consultations with minority groups as to their willingness to benefit from the protection under the FCNM was recommended to Denmark (CM/ResCMN(2015)7). In the case of Liechtenstein, the application of the FCNM to unrecognized minorities was recommended on article-by-article basis to ensure wider scope of protection. Flexible approach to the scope of application of the FCNM was underlined in the implementation by Georgia (CM/ResCMN(2020)5)) and Armenia (CM/ResCMN(2012)1).

The regulatory progress was recognized in Montenegro for criminalization of hate speech. Legal lacunae undermining protection of national minority languages were identified and recommended for addressing in the UK with respect to the Irish and Cornish languages. Recommendations of the Council of Ministers aimed at legislative improvement provide for addressing the absence of definitions in the law. It was recommended to the UK to introduce definitions of "good relations" and "sectarianism" in Northern Ireland legislation (CM/ResCMN(2018)1)[209]. Moreover, the amendments in legislation were recommended to address lifestyle requirements for nomadic communities, including the provision of permanent and temporary sites for caravans. Legislative solutions were recommended to be elaborated in Azerbaijan with respect to funding framework for minority-related civil society projects (CM/ResCMN(2021)71). Lack of legal regulation on conditions pertinent to full realization of human rights and ambiguous rules on the freedom of association for minorities, namely rules on registration of NGOs were identified in Bulgaria (CM/ResCMN(2021)1). Compensation of the existing legal lacunae and the continuous elaboration of the legal framework on minority issues equipped with "solid legal guarantees" for the protection and the use of languages were required in Ukraine (CM/ResCMN(2020)13). Cultural identity and heritage were

209 Council of Europe. Committee of Ministers. Resolution CM/ResCMN(2018)1 On the implementation of the Framework Convention for the Protection of National Minorities by the United Kingdom.

recommended to be taken into consideration in the development of the Ukrainian reform of legal framework on the linguistic rights of minorities (CM/ResCMN(2020)13). The status of Roma socio-cultural mediators remained unregulated in Portugal, which entailed the requirement to address the gap (CM/ResCMN(2020)6). In Ireland, de-criminalisation of trespass was recommended to facilitate the situation of Travellers. In Ireland, the adoption of Roma and Traveller education strategy was clarified to include clear targets, timeframe, indicators and evaluation (CM/ResCMN(2019)14).

Incorporation of previous international recommendations to the legal frameworks on cultural rights of minorities were advised in Ukraine with respect to the recommendations by the Venice Commission issued on the national Law on Education (CM/ResCMN(2020)13). In Germany, revision of the law was required to align the existing regulation on the use of minority language names with the requirements of the FCNM, including their reference in the databases and correct transliteration.

The quality of legal acts as a monitoring criteria includes foreseeability and clarity, gaps and ambiguous provisions were highlighted and recommended for review (for example, with respect to Romania in CM/ResCMN(2021)13), while vagueness was criticized with respect to legislative framework on national minorities in Azerbaijan ((CM/ResCMN(2015)1), Bulgaria (CM/ResCMN(2021)1). In Albania, the primary law on national minorities was not supplemented with secondary legislation, which made the framework impossible to implement (CM/ResCMN(2021)2). In Poland, legislative measures were required to ensure access of minorities to the media and facilitate the participation of minorities in the work of media regulators (CM/ResCMN(2020)12). Legislative impact assessment in the field of media regulation was required and continuous monitoring of its effect on the rights of minorities were recommended as a tool to ensure coexistence of national minority languages and cultures (CM/ResCMN(2020)12). Adequacy of regulations implies that it provides effective solutions with proportional sanctions and preventive mechanism, as well as compliance of regulation with the international law programmatic requirements. Substantive deficiencies identified in state reports included, inter alia, citizenship criteria for determination of national minorities remaining in the law (Montenegro). The rigidity

of minority group status attribution was criticized also in Bulgaria (CM/ResCMN(2018)2).

Conclusions

For the purposes of responding to the research questions of the thesis, the analysis of the FCNM was conducted in several dimensions: the initial analysis of the historical development of the approaches to and of the normative scope of rights and obligations covered by the Framework Convention were conducted based on the *travaux preparatoires* and activities of its drafting body – CAHMIN. The scope of culture-related rights of minorities and related measures foreseen for the Member States to their implementation, as well as the current approaches to the interpretation of the Convention and the catalogue of standards and good practices applicable for policy-making in the field of cultural rights of minorities were conducted on the basis of the text of the Convention, the commentaries to the FCNM, as well as of the recommendations and assessments given in country-specific opinions and resolutions by the oversight bodies. To ensure a comprehensive overview of all aspects of the implementation of the cultural rights under the FCNM and for the purpose of devising standards and good practices recommended on the basis of the FCNM for policy-making, the analysis was conducted separately for substance-related recommendations per each category of rights indicated above, while "procedure-related" observations and conclusions were examined separately. The catalogue of the cultural rights safeguarded under the FCNM was examined in the thesis grouped into the following categories of entitlements:

1. Right to maintain and develop culture and identity and the right to participate in cultural life [the rights to maintain and develop their culture, and the right to preserve the essential elements of their identity, which include religion, language, traditions and cultural heritage; preservation and development of their cultural heritage and identity, as well as the right to participate and interact within the majority culture].
2. Rights and freedoms pertaining to religious beliefs and religiously determined cultural practices [*forum internum* and *forum externum* of religious rights, including the right to manifest religion or belief, and the right to create religious institutions, organisations and associations; the freedom of

religion *per se*, also the right to beliefs, extending the scope to philosophical and ethical beliefs and existential philosophical views].

3. Cultural rights associated with the freedom of expression, opinion and media [Linguistic freedoms, including freedoms to receive and impart information and ideas in the minority language, entitlements to communicate with authorities in minority language and the entitlements to display signs in minority languages, and the right to use mother tongue without interference, the right to hold opinions and the freedom of expression; performance of rituals under guaranteed linguistic freedoms (through interpretation by the ACFC].
4. The right to education [including the right to be educated in minority languages, and to study minority languages; right to objective interpretation of minorities' cultural identities through teaching and in education.

The procedure-related analysis was conducted with respect to the technical aspects of policy-making, project funding, data collection for the development of policies on national minorities, and technical aspects underlying legislative measures.

Addressing the initial criticism of the FCNM as 'a frame an incomplete painting' (Alfredsson: 1998, p. 292), important progress was achieved by the ACNM as a result of its standard-setting activities. Its work in assessing the activities of Members States on the implementation of the Convention resulted in a comprehensive and sustainable body of requirements towards policy and normative frameworks adopted with respect to cultural rights of minorities on the basis of the Convention. ACNM's reviews elaborated standards pertinent to scope, processes and methods of policy-making, requirements for project design in the field of cultural rigths of minorities, their implementation, public funding and supervision of implementation, as well as some procedural measures related to the attribution of minority status, i.e. technical and material requirements to data collection and data management on minorities. These standards, as analysed in this thesis, can be summarised as follows:

Field	Related Procedures	Requireme nts

Policy-making	Due policy- drafting procedures, conditions for implementation, compliance with the substance of the measures to the standards under the FCNM procedural and methodological changes in project management within the field of preservation and promotion of minority cultures	safeguards and effective implementation of participatory approach in policy-making and decision-making; safeguards to the accessibility of project funding and of other resources to national minorities; sensitivity to minority identity and traditions in cultural policy development; requirement for a comprehensive long-term strategies Measures with specific relevance to minorities' identities: Programmes aimed at social integration, diversity and tolerance; integration programmes targeting specific minority groups, e.g. Roma; gender dimension and with the developed mechanism of implementation and financing; Consolidation of anti-discrimination policies targeting specific groups; awareness-raising with respect to the legislative standards, legal remedies and protection mechanisms; violation prevention and sanctioning, including monitoring of hate speech;

		necessity of programmatic sustainability for media policies; assessment of methodological change, driven by concerns of the government about integration and social cohesion, opting for intercultural approach.
Project Funding	Regulation; Availability\accessibility of resources Procedures for accessing	Regulation: clear, foreseeable, consistent, beneficiary oriented, available, comprehensive (covering all aspects pertaining to financing of cultural initiatives and activities that are minorities-oriented or implemented by minorities; Adequacy of funding Fair distribution and equal access Participatory approach ensured for developing rules and standards for project financing of minority-oriented initiatives
Data collection	Methodologies Participatory approach Principles of data analysis	Methods to ensure adequate representation and Minimisation of statistical data based on quantitative/proportional representation Objectivity of data analysis and representation
Legislative Measures	Presence of the legal acts,	appropriateness of the regulatory level chosen for implementation of the FCNM standards;

	Quality of legislation Scope of regulation Participatory approach Branch-specific requirements Implementation	legal force of the norms on FCNM; sufficiency of guarantees; dequacy of sanctions (proportionality, dissuasive effect, due implementation); quality of legal acts: sufficiency, comprehensiveness, robustness, unification and clarity of legislation, foreseeability and clarities, gaps and ambiguities; articipatory approach ((related to legislative process and reflection of the interests of the minorities in the substance of the adopted acts); ranch-specific: required frameworks on antidiscrimination; ban on hate-speech etc., adoption of integration programmes, etc.; uman-rights approach; inexistent or flawed implementation mechanism; provision of an oversight body with a due mandate; prescription of legislative impact assessment (before adoption, during validity).

Despite some progress identified in the resolutions adopted by the Committee of Ministers based on the assessment of States' practices pertaining to the implementation of the FCNM, a number of issues of material and procedural aspects of the implementation of the convention remain problematic. The analysis of the recommendations allows to identify the problematic areas and corrosive disadvantages of primary significance for the realisation of cultural capabilities of minorities, as well as the opportunities available for persons belonging to minorities to effectively realise their cultural entitlements.

Among outstanding issues related to the material substance of the rgulation, primary challenges remain with the approaches adopted by the Member States to the recognition of minority groups and extending the protection under the Convention to new minority groups. This problem can be attributed to the lack of normative definition of minorities in the Convention, which was opted to allow the States to deterime the scope of application, and the lack of political will among the Contracting States to apply inclusive approach. Despite the developing interpretation of the *travaux preparatoires* on the scope *ratione personae* of the Convention by the ACNM, a number of States continue practicing a rigid formalistic approach to recognition of minorities.

Problems remain in compliance with the protection against discrimination, with the anti-discrimination legal frameworks remain insufficiently developed or absent in some Member States. Among particularly problematic outstanding issues, the country progress reports signal that in a number of Contracting States hate speech is not criminalised, discrimination is not recognised an aggravating factor of criminal activity, and the level of prosecution of discrimination-related crimes remains low. Thus, the deficiency in national anti-discriminatory legal framework can serve as a corrosive disadvantage for realisation of cultural capabilities and self-attribution of cultural identities, due to unhampered stigmatisation and negative stereotyping, contributing to the feeling of danger and collective self-discontent based on identity. Deficient design of normative regulation constitutes a preventive factor for realisation of the freedom to choose cultural identity and realise cultural choices, which are fundamental indicators within the capability theory approach to cultural policies.

Another area that entailed criticism of the Committee of Ministers concerned the quality of legislation, characterised with lacunae and ambiguous formulations preventing effective implementation. Missing institutional mandates of agencies in charge of cultural rights of minority groups and underfunding of the agencies, culture centres and programmes implemented by or designed for the minority groups constitute another challenge in the effective implementation of commitments under the Convention, gaining particular significance due to the framework design of the Convention, that grants the parties the leverage to develop effective response mechanism. Yet, the Committee of Ministers resolutions signify of progress achieved by a number of Member States in guaranteeing the improvement of the status of some minority groups and their socio-political situation, decrease in tensions among the majority and minority communities.

The analysis of resolutions highlights corrosive disadvantages to the realisation of specific cultural capabilities. These are primarily related to deficient institutional designs, insufficient access to resources or hampered participatory opportunities to programme- or legislative processes, or inadequate assessment of special requirements of minority groups. In education, although some progress was identified in abolishing segregation of minority students, culturally sensitive educational systems, however, are not effectively ensured due to the lack of qualified teaching staff, training materials and adequate methodological frameworks to enable parallel multilingual education for the minority and majority students. The implementations of linguistic rights remain problematic, in particular with respect to the entitlements to communicate with authorities in minority language and the entitlements to display signs in minority languages. Cultural entitlements originating from the religious rights and freedoms remain characterised with tensions on inter-confessional basis and hampered access to places of worship, as well as hindered freedoms to manifest religious beliefs. Primary corrosive disadvantage to culture-related policy- and law-making remains in the inavailability of participatory approach and inability to locate genuine needs of minorities, which leads to misattribution and misappropriation of public funding in minority-targeting projects. Despite some progress identified in the involvement of minorities in policy-making locally, the general engagement of minorities on the national levels remains problematic. Insufficient involvement of beneficiaries into processes related to them,

both in programme design, policy-making and legislative activities, leads to misrepresentation of minorities and their needs, folklorisation and stereotyping, and inefficiency of measures derived as a result of such activities.

Among positive developments, the resolutions highlight increasing cultural offer, both with respect to the availability of cultural institutions, activities and events representing minority cultures, and the availability of materials in minority languages and linguistic courses represented positive dynamics in promotion of minority cultures and development of cultural identities of the persons belonging to national minorities within the implementation of rights guaranteed under the FCNM. These trends signal of the contribution of measures developed under the FCNM to cultural diversity of Members States, which signifies progress in achieving a fundamental Council of Europe goal, and an important indicator of social development under the capabilities approach.

Another issue that the analysis of the FCNM under the capabilities approach elucidates is the security of cultural capabilities due to the lack of definitions and framework status. As indicated above, the missing definitions create lacunae in the crucial aspects of the scope of the convention, including the rights holders. The framework nature of the document led to a vast difference in policies and norms employed among Members States, which does not comply to the equality principle. Furthermore, gaps in formulations and framework format of the instrument created problematic issues with respect to the interpretation of the material norms of the document and the effects of the recommendations by the supervising bodies. The ACNM has developed a set of revolutionary standards towards cultural rights of minorities. Its interpretation of the provisions of the Convention reflects most prodigeous developments in the doctrinal approaches to minority rights, which aim to extend their cultural opportunities. However, as discussed in the Chapter, the interpretation that in many aspects is not supported by a sustainable normative basis is not willingly undertaken as a commitment, even though as a political advice, by the Members States. This issue is not conducive to implementation of technical advice by the ACNM and the recommendations by the Committee of Ministers, hampering the efficiency of the mechanism.

The analysis of the Convention and the subsidiary instruments related to its implementation indicates that substantial progress was achieved in theorising cultural rights of minorities within the jurisdiction of the Council of Europe. The catalogue of cultural rights under the FCNM established is considerably broader in comparison with all previously developed instruments. However, the primary problems pertinent to the other instruments as identified in this research remain valid to the FCNM. This criticism applies to the chosen format of the convention, the decision to avoid explicit definitions of fundamental concepts, and allocation of wide margin of appreciation to the Contracting States.

Chapter 6. Conclusions

This Chapter will present a summary of findings developed in this thesis on the basis of the research questions, discussed within the context of the current regulatory and theoretical developments, as well as academic discourse. The Chapter will indicate the possibilities for practical application of this research along with the perspectives of future studies that can be built upon the findings of this work.

6.1. Summary and Discussion of Findings and Conclusions

This thesis examined cultural rights of minorities within the development paradigm. Its aim was to critically analyse the normative solutions adopted under the auspices of the Council of Europe as to their potential to safeguard cultural rights of minorities. The critical analysis of the legal framework aimed to determine the sufficiency of culture-related capabilities for minority groups under the legal framework; the capacity of the framework to ensure security of capabilities for rights holders; the role of values and the concept of a 'common European identity' in the efficiency of the framework and the scope of protection; the potential of the framework to facilitate the agency of rights holders in determination and maintenance of their cultural identity and in ensuring opportunities for making informed choices regarding cultural identity. The research attempted to discover potential deficiencies of the framework in order to determine the necessary actions for future reform that would be benefitial for the promotion of cultural rights of minorities.

The research questions were responded based on the analysis of four Council of Europe conventions, namely the European Cultural Convention, the Council of Europe Framework Convention on the Value of Cultural Heritage for Society, the European Convention for the Protection of Human Rights and Fundamental Freedoms, and the Framework Convention for the Protection of National Minorities. As the structural division of the thesis is based on the instruments under the analysis, the discussion of all research questions was primarily streamlined in chapters 2, 4 and 5. Chapter 3 was instrumental for the

epistemic aspect of the research. In particular, it informed the choice of the framework of analysis of two instruments selected for the empirical study, the European Convention on Human Rights and the Framework Convention for the Protection of National Minorities. Based on the findings of Chapter 3, analysis structure was designed and the scope of the research questions was formulated. It also helped locate the issues considered by the political bodies of the Council of Europe as crucial for regulating, but consequently rendered challenging or impossible to regulate by the drafters of the legal instruments, and to devise the underlying reasons. The analysis of the legal framework was conducted under a set of four clusters of indicators developed on the basis of the capability theory requirements to policy and normative regulation in the cultural field. The indicators reflected the four major criteria foreseen as standard for normative frameworks under the capabilities theory, including the opportunities for the realization of agency, opportunities for realization of culture-related capabilities, conditions for functioning of a multicultural society, and opportunities for development.

Methodologically, the research was conducted using historical, contextual, semantic and teleological interpretations of legal acts, based on the *travaux preparatoires* to the primary regulatory sources and the implementation practice, drawn from States' reports, country opinions, and the case-law of the ECtHR. The methodological choice of the analytical model represents a viable solution for practice-oriented legal analysis aiming to contribute into optimizing cultural policy efficiency. The research questions were responded, *inter alia*, based on the analysis of the convergences between human rights that allowed extending protection mechanisms to cultural rights and practices initially outside the regulatory scope of the legal framework. The convergences were derived from the legal sources, their interpretation given in the case-law and conclusions on implementation oversight. The human rights convergences were considered as areas or capabilities providing fertile functionings (after De Shalit, Wolff: 2014) for cultural capabilities, including in cases when such fertile functionings are used by the implementing bodies to cover the legislative *lacunae*. This analysis contributed into the recent academic research on the intersections of cultural rights and human rights, with the analysis dedicated to the rights of national minorities under a regional legal regime.

The specific feature of this research lies not only in providing analysis of a legal framework from the perspectives of its development potential conducted under the capabilities approach. It is also in the evaluation of the contribution of democratic principles, used as legal tools, to the capacity of the legal framework to facilitate the development potential in cultural field. The development potential can be realised by targeting wider clusters of disadvantages than could be eliminated by means of legal instruments with a narrower, purely culture-related scope of regulation, and ensuring broader catalogue of rights for groups with special requirements (minorities identified on cultural and ethnic grounds). Moreover, the research examines issues pertaining to the processes of identity design within the Council of Europe jurisdiction, and the contribution of culture into these processes (as discussed in Sen: 1997, 1999; Kristeva: 1993; Kymlicka: 1995; Bhabha: 2000 and 2003).

This topic is of high relevance both in academic and practical aspects. The recognition of the role of culture, heritage and cultural rights as development factors have recently become a growing trend within international law (Tünsmeyer: 2020, p. 319). For example, the 2030 Agenda for Sustainable Development underlines the interdependencies between sustainable development and human rights, equality and appreciation of cultural diversity and culture's contribution to sustainable development (Goal 4.7). The 2030 Agenda (para. 36) acknowledged the contribution of cultures into sustainable development and recognized it as the crucial enabler of development, integrated within the notion of diversity and peaceful coexistence of different groups committed to "inter-cultural understanding, tolerance, mutual respect and an ethic of global citizenship and shared responsibility". The interconnections between culture and human rights are reflected in multiple development goals, including in the field of economic development (goals 8.9, 12.b), peace and inclusive societies, favourable living conditions (goal 11). Attribution of the inalienable role of culture in development is highlighted by various UN agencies, including the UN General Assembly that summarized in its Resolution 63/223 "*an essential component of human development […], a source of identity, innovation and creativity*". Special Rapporteur in the field of cultural rights deconstructed the development potential of culture in a number of reports (A/HRC/17/38, UN Doc A/72/155, A/73/227, A/HRC/40/53). This trend leads to the necessity of re-evaluation of implications that cultural profiles and heritage impose on

social dynamics and international order, with the view to define appropriate and effective ways for fostering well-being and development of society, and attempting to revert adverse effects of human activities.

This thesis examined development approach to cultures of minority groups as manifested from the European perspective. Under the capabilities approach, which was used as the theoretical basis for the research, development potential of policies and laws should be evaluated in terms of their input into freedom, which are defines as the "[e]xpansion of the capabilities of people to lead the kind of life they value – and have reason to value" (Sen: 1999). The function of the law and policies are therefore to provide the widest possible set of sustainable and reliable opportunities to ensure that individuals are capable to realise their potentials and to achieve the quality of life of their choice that satisfies their expectations and hopes in full dignity (Sen: 1999, Nussbaum: 2007). Individual orientation is crucial for policy-making under the capabilities approach (Nussbaum: 2011, 396). As the measurement of viable policies under the capabilities approach is the one that respects the individual choice and practical reason (Nussbaum, 2011: 411). The application of the capabilities approach to the cultural heritage discourse reinforces the requirement of cultural tolerance and acceptance, and increases the standard of protection. Furthermore, this approach leads to promotion of multiculturalism and cosmopolitanism. Therefore, the Council of Europe legal framework was analysed in this thesis from the perspectives of opportunities its instruments create for the development of culture-related freedoms and opportunities, and their protection.

To determine the scope of cultural capabilities and the extent of their protection under the Council of Europe instruments, the thesis examined the catalogues of rights under the conventions and the use of convergences of human rights extending the scope of entitlements. The operational definitions and concepts of the capabilities theory, including fertile functioning and corrosive disadvantages, were employed to establish facilitating and degrading factors within the regulatory and implementation systems. The notion of security of capabilities was employed to devise conclusions of the assessment of the developmental potential of the Council of Europe legal framework. The security perspective allows to determine whether the protection regime is sufficient and conducive to development, and whether the

protection is comprehensive, implying economic sustainability and political powers (Nussbaum: 2011, 488). The objective was to define the conditions facilitating and hampering the expansion of the capabilities of minority groups to lead the cultural lives of their choice and value.

The analysis of the four Council of Europe conventions revealed a number of problematic issues. The overarching problem identified with respect to all the analysed instruments related to the scope of guaranteed rights. The only binding Council of Europe instrument specifically designed to regulate culture in its wide sense – the 1954 Paris Convention – ensures a limited scope of culture-related capabilities in the field of education, cultural exchange and protection of some cultural heritage. Importantly, the cultural heritage eligible for protection is left to the Contracting States to determine. Protection of cultural rights of minority groups can only be derived from the contextual interpretation of the Convention, in light of later developments in the normative framework of the CoE. Moreover, the regulatory effect is undermined by the lack of definitions, including heritage, culture and values, and of explicit formulation of the scope of commitments of the States. These features of the Convention do not ensure its compliance with the modern standards for the protection of cultural rights in its effect and scope. In particular, the Convention does not comprehensively achieve the protection of the scope of culture-related entitlements defined by the Special Rapporteur in the field of cultural rights and the interpretation of cultural rights provisions of the ICCPR and ICESR in the General Comments. The notion of culture developed by the Special Rapporteur includes such elements as "expression and creation, including diverse forms of art; language; identity and belonging to multiple, diverse and changing groups; development of specific world visions and the pursuit of specific ways of life; education and training; access, and contribution to and participation in cultural life; and the conduct of cultural practices, access to cultural heritage" and scientific freedom (A/HRC/31/59, paras. 3–6, 9 and 21–22). The scope of Paris Convention ensures explicit facilitation of development and protection to only few of the elements, including language, education, access to cultural heritage, while the crucial identity setting elements remain without an explicit mention, and can only be achieved through interpretation in conjunction with other instruments.

Of the other three instruments examined in the thesis, one – the 1950 ECHR – does not encompass cultural rights and is only applicable to them by interpretation of the material norms and as long as there is a direct relevance to the rights explicitly secured under the Convention to render the subject matter fall within the material jurisdiction of the Court. Although the possibility to extend judicial protection to some cultural capabilities can be seen positive, considering the lack of explicit provision, this does not ensure protection for a sufficiently comprehensive scope of cultural rights of all stakeholders. For example, the right to cultural heritage and a vast scope of linguistic rights are excluded from the scope of protection. Furthermore, some cultural capabilities can only be protected for the sake of democratic principles, e.g. equality or pluralism, which the Court guards as *ordre public*, but not for the sake of realization of individual cultural rights or maintenance of their cultural identity (i.a. this relates to creative capabilities and the use of language in cultural production). Moreover, despite some progress that will be discussed further, the effective opportunities for facilitation and realization of cultural opportunities under the ECHR system is further distinguished by the remaining rigidity of approaches to the interpretation of fundamental concepts, including minorities and the role of states who continue to maintain agency in determination of standards for the protection of cultural rights. These matters affect, in particular, the right to determine cultural identity, choose a lifestyle, determine some aspects of education and the freedoms underlying manifestations of religious beliefs. The possibility of interventions into culture-related rights of minorities resulted in criticism (Al Tamimi: 2017) that the mechanism under the Convention is deficient because the protection framework is not absolute. Moreover, the lack of consistency in the interpretation of cases identified in this analysis and other sources (e.g. Arnadottir: 2003, Ringelheim: 2008, Al Tamimi: 2017) remains a problematic issue, in particular, with respect to freedoms within the fields of education and religion, as it undermines the foreseeability of the development of protection standards, the threat to undermine the credibility of the system for political influence, besides direct adverse effects on the protection of individual rights.

As discussed in the thesis, although the development of the ECtHR case-law does signal of the tendency to employ culture-sensitive approach, its aplication still falls short from the standards elaborated

under the FCNM, the role of individual and collective cultural agency under the Faro Convention, and the recognition of justiciability of the right to cultural heritage on the international level, as demonstrated, *inter alia*, by the ICC in the *Al Mahdi* case. There is also an issue with the protection of culture-related identity elements of groups, as some claims qualify as *actio popularis* and cannot be pursued at court. These features signal that the security of cultural capabilities under the mechanism is not fully guaranteed and the mechanism is not sufficiently responsive to ensure a vibrant development perspective. However, the mechanism does achieve another aim admitted as fundamental by the capabilities approach (Nussbaum: 2011), which is a stability of the system of the state. In this respect, the ECtHR case-law ensures sustainable protection of the democratic principles and values, which prevails over the interests to safeguard some cultural traditions. However, if the choice of living in a democratic state be interpreted as the protection of the conscious choice of a lifestyle of its citizens, it means the overlapping consensus is reached in preference of democratic values over cultural attributes, which in principle complies with the test of capabilities approach (Sen: 2007).

There are, moreover, a few constructive developments that the analysis indicated among the approaches employed by the ECtHR in cases concerning cultural rights of minorities. The analysis showed that the protection of cultural identity of national minorities is granted by the Court as to a component of universal cultural diversity and to the extent drawn from the international consensus on correlation between the cultural identity of minorities and their "special needs". The recognised special needs are translated by the Court into the legal obligation to ensure affirmative measures and specifically calibrated rights protection within the national and international legal systems. This recognition signifies transition from a formalistic approach to interpreting discrimination to the "substantive equality" with a focus on the circumstances raised in individual cases (Ringelheim: 2008, p. 4 based on van Dijk and van Hoof: 1998, p. 74). The conditions for admissibility of interventions include their necessity, correspondence to values of democratic society, proportionality, weighted effect on the rights of others, and the availability of alternative solutions in each particular case.

The concept under which the ability to live in accordance with one's cultural traditions as a manifestation of one's identity has led the Court to develop a system specific for evaluation of the nature of minority traditions, encompassing a callibrated translation of substance of the tradition into the taxonomy of civil law and the customs practiced by the majority. In the Court's case-law, the assessments of traditions, culture and their relevance to particular groups are based on the perception and meaning of cultural traditions for the individual and the group the individual belongs, which implies a culture-sensitive interpretation of the Convention. The analysis of the case-law showed that the culture-sensitive approach is a relatively recent and developing interpretational methodology. Although, as mentioned above, its interpretation does not display universal consistency throughout the Court's case-law, the conclusion that can be drawn on the cases analysed in this thesis requires to acknowledge an overall positive trend (with respect to the religion-related rights this trend was also highlighted in Ringelheim: 2008), as the culture-sensitive approach is gaining prevalence over more State-oriented culture-neutral approaches. This change, incorporating considerations of cultural identity and respective special needs of minorities, induce changes in the case-law of the Court, expanding the protection of cultural traditions. It therefore appears a legitimate expectation that the facilitated application of culture-sensitive approach by the ECtHR will lead to raising of standards for cultural rights of minorities, cumulatively improving the protection of minority groups both within the national jurisdictions and internationally. The regionally implemented culture-sensitive approach, considered within a wider context of developments pertaining to cultural heritage law, including the international tribunals' decisions on heritage destruction in Mali and within the territory once comprising former Yugoslavia, also contribute and create methodological and theoretical foundations for the development of a justiciable right to cultural heritage. The necessity of such a solution is evidenced from the applications submitted to the Court, signalling of the demand for a regional instrument. At the same time, some of the recent ECtHR's judgments and decisions, including by the Grand Chamber in cases *Chiragov v. Armenia* and *Sargsyan v. Azerbaijan*, have evidenced the Court's recognition of an inalienable heritage component in a number of issues successfully protected under the Convention, which remains unaddressed in the absence of the normative tool.

The other two instruments – the Faro Convention and the Framework Convention on the Protection of National Minorities – do envisage a wider scope of cultural capabilities, in particular those available to minorities. Moreover, the approach of these instruments to the agency of rights holders and the scope of opportunities required for the realization of their cultural capabilities, by text or its interpretation, represent a substantial network of opportunities. The research established that the policy recommendations devised by the oversight bodies thematically correspond to the development goals developed by the capability approach theorists, including facilitation of participatory approach, beneficiary-needs oriented approaches, utilisation of fertile functioning for facilitating the improvement of the well-being of community.

The FCNM mechanism employs identity-based approach for developing the capabilities of minority cultural rights and the communities' well-being, while targeting to ensure the strengthening of minorities' agency through culture-sensitivity in policy-making. The Convention utilises culture-sensitivity as a tool for promoting diversity. Procedurally, the standards devised based on the FCNM and its interpretation is visibly developed to comply with the Council of Europe rule of law standards (e.g. the Venice Commission Rule of Law Checklist, CDL-AD(2016)007rev). Comparative horizontal analysis of the approaches provided by the FCNM and the ECHR allowed to identify several inconsistencies in approaches to protecting cultural rights of minorities. For example, differences were identified with respect to the recognition of the *ratione personae* requirement of formal recognition of national minorities within the national jurisdictions, as well as the scope of groups eligible to benefit from the protection regime of the Conventions (e.g. contested status of migrants and refugees), *ratione loci* approach to the obligation to protect, as well as in some thematically specific approaches, including the recognition of linguistic entitlements in communication with local authorities, religious freedoms, and the standard of cultural sensitivity in the educational processes. The approaches promoted by the FCNM are wider and more liberal, while the ECHR's approach is yet under the transition to culture-sensitivity, with positive dynamic identified above. Besides the rights catalogue is wider under the FCNM, compared to the scope developed through conjunctions between other human rights under the ECHR. Facilitating the identity- and culture-

sensitive approaches conjured by the Paris and Faro Conventions, the FCNM's mechanism reinforces the agency of minority groups, in particular within identity-forming cultural spheres. This makes the FCNM approach favourable to creating preconditions for realisation of the right to cultural identity.

However, the efficiency for the protection of cultural rights the Faro Convention and the FCNM provide is undermined by the framework format chosen for their design, the failure to establish a stable apparatus of fundamental concepts directly relevant to minorities, and a vast margin of appreciation these entail to States with respect to the development of measures for implementation of these standards. One crucial deficiency among a few is the absence of the definition of minorities under the FCNM, which grants the Parties the freedom to determine the scope of protection *ratione personae*. These render the Conventions effective standard setting tools and efficient platforms for expert-coordinated policy elaboration, but do not lead to establishing a set of directly enforceable rights.

The framework format also undermines the efforts of the supervisory mechanisms aimed at extending the strength of the protection regimes. As discussed in the thesis, the States are bound to implement the opinions of the FCNM supervisory mechanism, but the Convention itself provides the right of States to define the measures they commit to implement. Thus, the activities of the ACNM, in many aspects revolutionary it their nature and content, in practice remain to be implemented through political dialogue and technocratic counseling, without a firm support with a normative basis of enforceable obligations arising from the Convention itself. This leads to a number of corrosive disadvantages identified by the ACNM unaddressed in the implementation practice of States, for example with respect to the rigid requirements for the recognition of minorities, limiting requirements pertinent to citizenship, residency and quantity of communities to qualify for protection, deficient minority-focused programme design originating from the lack of genuine understanding of special needs of minorities, etc. On the other hand, the ACNM increased the threshold for minority-friendly institutional design, e.g. with regard to education system, contributed into the departure from folklorisation of minority cultures and facilitation of recognition of equality and plurality of all national identities, and facilitated policies curbing segregation and stigmatization of minorities. These achievements constitute a basis for

the realisation of fertile functionings conducive to the development of cultural identities of minorities and consequential improvement of their well-being and standard of leaving, in line with the development vectors foreseen under the capability approach.

Despite the deficiencies in the Council of Europe legal framework, which limited the scope of secure cultural capabilities and hampered the ability of the supervisory mechanisms to fully curb corrosive disadvantages in implementation of cultural capabilities, as discussed in the thesis, the positive effects of the four Council of Europe conventions on development of cultural rights of minorities are considerable. First of all, the instruments in their plurality stipulate a basis for diversity, multiculturalism and tolerance. In words of Montesquieu, Europe is "a nation comprising several" (cited in Chopin: 2018, p. 3). Historically, ideological and culturally determined divides led to conflicts in the region. As Souleymane Bachir Diagne stated, "democracy is threatened by the fragmentation that produces the retreat into microidentities and the resurgence of ethnicism" (Diagne: 2001, cited in A/HRC/31/59, para.18). The same concerned was voiced by Sen who saw the threat to development and liberalism in proliferation of cultural clustering and microidentities (1999, 2007). This implied that an international organization uniting multicultural states had to find ways to embrace cultural plurality, avoiding the associated political and ethnic fragmentation (Chopin: 2018, p. 3). Hence, the Council of Europe's attempt to find common determinants to construct a foundation for peaceful coexistence, to acknowledge unity in respect of all comprising identities.

Bergen (2005) describes the 21st century as a "renaissance of ethnic identity", which is utilized as a response to the west-east conflict, migration flaws, the dismantling of the nation state concept, globalization and related homogenization. He also claims a parallel "renaissance of the concept of culture" that is explained by the need for the conceptual and terminological apparatus for the interpretation of social and political processes and "fundamentals of individual and collective identity". From the Paris Convention onwards, the Council of Europe legal framework employed the concepts of 'European identity', 'European common heritage' and 'European values' as a foundation for a pan-European overlapping consensus uniting nations under the same ideological paradigm. The culture-related conventions define 'common European values' and 'common European heritage' with the reference

to the statutory aims of the organization. The Statute of the Council of Europe pronounces that the organization aimed to ensure greater unity and peace among the European countries united with common "spiritual and moral values", ideals and principles, forming their common heritage (CoE:1949, Preamble, Articles 1 and 3). In line with the Statute, the Common European heritage is construed on the adherence to the principles of the rule of law, the obligation to ensure human rights and fundamental freedoms, and sincere and effective cooperation in the realisation of the organisations' aims (CoE:1949, Article 3). The common European identity was construed as the common determinant, encompassing both normative – human rights and rule of law – and moral principles, including those respecting identity and dignity of persons. The latter indicated a transition of the Council of Europe policy from the Kantian anthropological sense, inbuilt into the UDHR, to one conjured by Habermas and interculturalists as a phenomenon of "social power expressive of collective agency", through "which members of human community establish and re-establish conditions of their sociality" (Buchwalter: 2021, p. 5). This approach aimed to grant more space for the requirement of recognition of multiple plural identities within society. National and sub-national particularities and supra-national bonds are the factors that the common identity was designed to balance. According to Jaume (2010), the European identity served to "finding a middle road between the global and the local, between dilution and self-withdrawal, to avoid, as much as possible, a brutal confrontation between world interdependence and blind, xenophobic, sterile isolation" (cited in Chopin: 2018, p. 3).

The answer the Council of Europe chose for the search of balancing multiculturalism and potential social fragmentation was to expand the concept of culture to "all of the values that give human beings their reasons for living and doing", which refocused the state cultural policy to cultural democracy, cultural development and the right of all to cultural expression" (CoE: 2004, p. 14). The significance of that choice was in linking culture and the Council of Europe's human rights principles. This principle, introduced in the CoE legal framework in 1954 continues to be replicated in the international development conceptualization. For example, the "vision" on the future of the society under the 2030 Agenda (para. 8) conjures the model of the world established upon "universal respect for human rights and

human dignity, the rule of law, justice, equality and non-discrimination; of respect for race, ethnicity and cultural diversity; and of equal opportunity permitting the full realization of human potential".

Contrary to the discourse challenging the added value of the concept of dignity integrated into legal instruments in a number of law branches, in particular criminal and civil law (Brownsword: 2014, Duewell: 2014), the Council of Europe framework exemplified that cultural heritage law is enforced and enriched with the integration of the concept of human dignity (in line with the argument by Raz: 1979, p. 221 on the individual agency to forge one's circumstances) into the framework, even when its legal content remains only partially defined. This approach helps address the problem of contested values related to heritage, in particular when several communities are involved. Thus, if perceived as a legislative technique, it appears instrumental in ensuring security and peace capabilities addressed within the conventions, effectively streamlining culture-related interests of minority groups and attributing their cultures an unchallenged value. This, however, aims to serve not only interests of separate groups, but was meant to contribute into reconciliation, understanding and ensure the ownership of heritage by the society at large, preventing both value-based conflicts and elitism in cultural field (Palmer: 2009). In order to enforce this effect, the Faro Convention relies on the intersections of cultural rights and other human rights, strengthening the potential contribution to sustainable development through the expanded scope of social contexts (Explanatory Report: 2005).

Importantly, diversity, as one of the fundamental democratic principles, is framed in the Council of Europe conventions as a fundamental value for the society. The logic of the drafters of the convention in this respect aligned with the development concept by Sen, as they acknowledged that it was only possible to preserve cultural diversity with "mutual respect and dialogue…, on the basis of knowledge of differences, …of common values such as human rights and genuine acceptance of the other" (CoE: 2004, p.16). To enforce and maintain the "unity in diversity", starting from the Paris Convention, the development of the material scope of the legal framework aimed at establishing tools to enforce this peace-building component for social and cultural diversity management. The Paris Convention *travaux*

preparatoires explicitly connected the efforts prescribed for cultural development with expected improvement of international relations and conflict prevention within the region. This strategy effectively complies with the development narrative under capabilities theory, which conditions stabilization of international relations and improvement in peace and security to fostering inter-cultural dialogue through better knowledge and understanding of cultural groups, education and intercultural exchange. For Sen (1999, 2004, 2007), these are effective areas for interventions aiming to facilitate fertile functioning for cultural coexistence.

Although capabilities theory acknowledges the intrinsic links of values to determination of identities and to the process of development, which "is mediated" by the realization of freedoms by values (Sen: 1999, p. 9), the Council of Europe approach can be critically assessed from the perspective of the capability theory that elucidates the internal contradiction that the aims and means pursue. The contradiction shows in the inbuilt risks of identity compartmentalization and conflict potential arising from the measures employed specifically to unite societies upon an overlapping consensus about the fundamental values. The problem within the conceptualization of European identity as forged in the Council of Europe conventions under analysis shows in several aspects. First of all, the approach attributes universal values and principles to a certain region, which cannot claim a sole authentic ownership (Sen: 1999, 2007). The capability theory explicitly critiques geographic attribution of identities and values, particularly and explicitly the attribution of "democratic values" to the concept of the European common heritage. Sen, in his works "*Development as Freedom*" (1999) and "*Identity and Violence: The Illusions of Destiny*" (2006) developed a substantial argumentative critique of such "civilizational" ideological attribution. *Inter alia*, he discussed the aetiology of a number of democratic principles attributed as Western by origin and the substance of foundational values, from other regions and civilizations. He claimed that the attributive attempts based on such faulty arguments lead to manipulations with cultural identities of citizens and historical truth, and provoke ideological conflicts and civilizational divides. He also proved that normative and policy solutions based on such narratives are conducive to conflicts. The aims of the Council of Europe conventions stated in their texts, namely the explicitly declaired efforts to curb and prevent conflicts, as well as the

historical background of the conventions, i.e. the aftermath of the World War II, the Balkan conflicts and the cold war, evidence of a contradiction between the stated aims of the document and the inbuild conflict potential of the tools they employ to reach these aims. Furthermore, it provokes a selective approach towards the elements of 'common European identity', which contradicts to the notion of multiculturalism, recognized as one of the primary aims of the Council of Europe, which conjures internal contradiction within the concept. Moreover, the approach effectively denies the contributions of influences by cultures and values practices by other civilizations or other geographical areas, which is historically false. These critiques render the performance of the analysed legal framework problematic with respect to the third cluster of development potential assessment dedicated to conditions for functioning of a multicultural society.

The valid response to the future is seen in the ability to adjust to "a heritage of an increasingly complex set of identities" with the goal to making it beneficial for the society, which is seen possible through utilizing the universalized set of legal measures, rights and obligations under the condition of recognized and acknowledged differences within and outside nation-States. (CoE: 2007, p. 27). The Council of Europe contemporary ongoing activities highlight the attempt to forge a 'new cosmopolitanism' that does not contradict the previously applied concept of universalism, in particular, in part that presupposed universalized standards, but at the same it brings the benefits of including everyone, regardless of the group of origin, even if they do not "correspond to certain European archetypes", and facilitates the binary reconciliation processes among European nations as well as among Europe and other regions and countries, simplifying 'plural allegiances' (CoE: 2007, p. 33). While the political citizenship is linked through the concept of the indivisibility of human rights and its (inter alia) cultural foundation to the dignity of human beings (CoE: 2007, p. 49).

The importance of the identity and cosmopolitan-style cooperation is acknowledged in view of the persistently complicating dynamics in the international arena. In words of Arancha González Laya, Spain's Minister for Foreign Affairs, European Union and Cooperation, the Europeans "have learnt that we have to build [a] strategic autonomy" as a result of the contentious developments, partially attributed to the failures in cooperation with the US during the Trump's presidency and

consequential collapse of several strategic institutions, conventional framework and joint security operations (e.g. the withdrawal of the USA from the WTO dispute settlement mechanism, effectively leading to its collapse, from the Paris agreement, or the withdrawal of funding to UNESCO). This "strategic autonomy", however, does not mean reinforced functioning in "brilliant isolation", but being capable of bringing forward a well-articulated common European framework, that is widely supported and unconditionally owned by the European community as a joint force. Another issue that highlights the importance of values is the challenge presented internally, in the repeatedly recurring violations of the rule of law in Europe. The decision to reinforce the accountability for such violations within the EU, to impose additional monitoring and reporting mechanisms on Member States' compliance with their commitments in the field of the rule of law and statutory values, as well as making disbursement of European funding conditional to the respect of European values (mentioned in the interview with Laya), all signal that the European values are not considered declaratory but are steadily gaining economic consequences and enforcement mechanism on the European Union level, which signifies political and economic spill-over effects. Thus, integrating diversity into the policy mechanism influences economic and political processes. As González Laya underlined, the strength of democracy depends on the possibility to accept diversity "as a resource" – literally reiterrating Sen's views (1999) - and use it as a foundation for constructing unity, which in its turn requires mutual respect and consensus-building. Culture is then recognized as a tool for overcoming crisis and achieving the goals and aims set by the statutory documents of the three major European regional organisations, the Council of Europe, the OSCE, and the EU.

In the words of Gitte Zschoch (2021), crisis situations should be used for determining how 'tomorrow's culture' should be designed to achieve the 'European project', which is "first and foremost a peace project", with peace understood as a knowledge and understanding of each other in the context of ideas exchange, achievable through culture. The Council of Europe framework, with its developed human rights protection system and democratic principles, deeply ingrained in its foundation, accumulates best from the cultural cosmopolitanism concept, while ensuring an effective protection against cultural relativism, as "[c]ultural traditions, whether they be "majority" or

"minority" traditions, could not trump principles and standards of the European Convention on Human Rights and of other Council of Europe instruments concerning civil and political, social, economic and cultural rights." (CoE:2008, p. 10). This overall concept reiterates the conclusions of the Special Rapporteur in the field of cultural rights advocated in her 2016 report (A/HRC/31/59), stating that in the contemporary world characterised by growing sectarianism, there is a need for a system, a 'vocabulary', which would "respect diversities and recognize power differentials and historical injustices, while still promoting the idea of living together in harmony". The cultural rights approach also makes the Council of Europe the kind of '*polis'* that Elsa Stamatopoulou (2007: 258) envisioned, "where one would focus less on identities that divide us and more on the many cultures we share and enjoy", to ensure meaningful promotion of cultural rights through policy and normative frameworks. This construct is compliant with the capabilities approach, as it is centred in acknowledging the individual value and input into the common value, plurality of interconnected identities, and criticism of any divides and dependencies between constituent cultures that should be bridged through dialogue, effectively complying with Sen's notion of genuine pluralism (e.g. Sen: 1996, 2006, 2006a).

The formation and pursuance of values are affected by other determinants, such as the availability of public infrastructure and wide participatory freedoms (Sen: 1999, p. 9), which was also taken into consideration in the assessment of the legal framework and implementation practice in this thesis. The capabilities approach invokes "plurality and nonreducibility" (Sen: 2001a; Nussbaum: 2011) of the concept of the quality of life, including the rights and interests, as its fundamental principle, incorporating the agencies of minority and vulnerable groups of rights holders. This streamlines the assessment of the sustainability of a legal framework in terms of its non-discrimination capacity. The requirements of this approach are reflected in the FCNM Advisory Committee's country-specific solutions, with a high capacity-building potential. The sustainability of its contribution is also evidenced on the basis of the progress achieved in culture-related rights of minorities, including improvements in combating segregation of minorities in the field of education, increasing implementation of participatory approach in culture-related policy-making, implementation of international standards on

minorities' rights protection on the normative level, as well as recognition of minority rights and transit to culture-sensitive approach to identity of minority groups, reflected in opting against falklorisation of minority cultures, progress in the recognition and protection of unique minority heritages, and implementation of good practices to memorisation process and history teaching. The pivotal concept within the Conventional system is the right to self-identification. The right is crucial to the minority protection, but also for maintaining effectively functioning and peaceful societies, also due to established interconnections and mutual influences among different communities within societies that continuously influence each other in their co-existence, and shape the way various identities are perceived.

The analysis showed that the elaboration and implementation of the Council of Europe legal framework have been continuously characterised with the lack of political consensus on fundamental aspects of the protection mechanism of cultural rights of minorities, including the categories of rights holders eligible to benefit from the protection to the scope and nature of rights and obligations. These political discord has been eminent to the legal system from the launch of minority-related cultural rights framework, as Chapter 3 showed, which was informally attributed to the attempts to prevent separatism. Although it was not directly relevant to the subject of analysis in the present work, it is important to address it here from the perspective of the correlation between the self-determination rights of minorities, associated with multiculturalism and perceived as a source of separatism and threat to constitutional and territorial inviolability of nation States (Turton and González: 1999 and 2000). This issue is important to be examined as this association has led to suspension of progress in regulating and implementing issues related to recognition, promotion and protection of cultural rights of minorities, including their right to determine their cultural identity.

From the legal perspective, all Council of Europe instruments related to cultural rights of minorities, including the Framework Convention on the Protection of National Minorities, explicitly underline that the recognition of cultural rights of these groups does not entail any effect to the entitlement to any independence claims. The same stance is underlined in the ECHR case-law. This approach is reiterated in multiple political documents adopted within the Council of Europe

with respect to cultural rights of minorities, as addressed in Chapter 3 of this work. The same approach follows from the interpretation of Article 27 of the ICCPR in the 1994 General Comment No 23 (CCPR/C/21/Rev.1/Add.5, paras. 3.1. and 3.2.). The Human Rights Committee explained that the enjoyment of rights under Article 27, which are related to cultural rights of minorities in the sense of determination of the substance of their unique identity through cultural elements, does not "prejudice the sovereignty and territorial integrity of a State party". They are, moreover, different in legal nature, as the cultural rights under the ICCPR are designed as individual entitlements, while the right to self-determination is a collective right. As underlined by the HRC, the only correlation between these rights lies in the protection of traditional lifestyles and occupations of minorities, which may require special status or special legal entitlements, e.g. access to protected land or the right to fishing or hunting in special reserves. Thus, the commonly shared concern that cultural diversity is a threat to political balance and peace is not normatively supported. This allows to conclude that the poltiical opposition of States to support culture-sensitive instruments, e.g. the European Charter on Regional or Minority Languages that struggled to achieve five ratifications for the entry into force six years, or the failure consensus of the Additional Protocol on cultural rights of minorities to the ECHR, are not well-grounded from the legal perspective, as well as the assumed logical connection between the recognition of cultural rights of minorities and its possible effect in the increase in separatism that cannot be proven. The lack of political will to enact full-fledged binding legal commitments in the field undermine the regulatory effect of the regional legal framework, and requires adjustment.

The Council of Europe framework goes further in embedding human rights instruments into the protection of cultural heritage, including that of minorities, than is currently conjured by legally binding instruments of universal level (criticism of low level of human rights incorporation into the global cultural rights instruments is most recently in Carstens and Varner: 2020, including by Tünsmeyer, p. 342; Ringelheim: 2008). The conclusions of the thesis concur with the argument by Tünsmeyer that analysis of states' human rights portfolio from the perspective of the intersections between cultural heritage and human rights allows to establish a selective or biased approach of the States to certain cultural manifestations or heritage values of certain

developmental strategies, it also can be concluded as to the policy of the States towards the construction of national identity, in particular with reference to cultural minorities.

The analysis of the Council of Europe framework concludes that the instrument blends cultural internationalism and nationalism approaches, creating the initial basis for further measures forging a regime with a high potential for further elaboration of measures conducive to marginalized communities. As currently implemented, the regime related to cultural heritage extends the protection beyond an object-specific dimension. This transition is characteristic to different extents to some of the UNESCO instruments, and the trend is positively assessed within the academic discourse (e.g. Carstens and Varner: 2020, p. 5 discussing it on the example of the influence of intersections between cultural heritage and entitlements under the international humanitarian law instruments). This indicates that the regional regime is not less constructive with respect to the facilitation of peace-building efforts through culture and heritage than the core international documents (e.g. the UNESCO Constitution (Article 1.1) that follows identical logic to the one employed by the Paris Convention), and undertakes a development-focused approach. The approach can be effectively utilized for a further paradigm shift in the cultural rights protection, where political interests would be instrumental for the development of collective capabilities of national minorities and society at large. This line of analysis of the thesis extends the discussion by Tünsmeyer (2020, p. 323-325) under the functions approach on the expected effects of express realization of the political dimension of heritage protection on individual and community rights, under the "congruence of heritage functions and human rights", where human rights obligations are framed as factors determining the selection of particular heritages subject to protection. The conclusion Tünsmeyer (2020: 324) reaches on the interpretation of the effects of convergences under the law of treaties to ensure optimization of positive effects of the converging disciplines, namely obligatory compliance with human rights obligations, prohibition to abstain from such compliance under the pretext of cultural practices and the protection of cultural heritage compliant with human rights concepts, are reaffirmed by the conclusions in the thesis derived from the analysis of the CoE *acquis*.

As highlighted by Carstens and Varner (2020: 12), the growing acknowledgment of cultural heritage importance for the civilisational development will lead to increasing legislative instability, dictating the requirement of addressing the legislative *lacunae*. The convergences between cultural heritage law and other branches of law should be considered indicators of the areas, where new regulations will be necessary. This underlines the validity of the subject of the thesis, as it maps such intersections from a practical perspective. This may become instrumental for devising best practices, standards and legal techniques for domestic legislative processes, as well as within the international and European law, as it highlights areas with potential regulatory needs. As mentioned above, the research is practice-oriented and addresses issues pertaining to activities in policy-making and legislative activities. The research supplements and enriches the existing academic discourse on intersections within international cultural heritage law and international public law in several other dimensions. From the thematic standpoint, this research primarily focuses on intersections of cultural heritage law and cultural rights with political and social rights, as well as conceptual issues including democratic development, identity and dignity, and is thus extending the recently developed research focusing, to a large extent, on intersections with the law on armed conflicts, the law of the sea, environmental law and regulation on illegal movement of cultural goods.

As highlighted above, the thesis uncovered various vectors how the introduction of minority- and culture-sensitive approaches to normative regulation influence human rights law, proving its methodological contribution to social cohesion and security. It was demonstrated that corroborative effects of human rights and cultural heritage regulation effectively contribute to igniting social development and reflect upon human potential though the progress in education, cultural exchange, facilitation of linguistic policies and valorization of heritage, while the acceptance of minority cultures contributes into mutual understanding and dialogue. The analysis of the Council of Europe framework shows that the regional framework does not address the selective approach of the states to cultural rights of minorities. The results of the analysis of the four Conventions indicates that in case the political consensus is reached, amending the existing framework or adopting a new comprehensive and binding

instrument on cultural rights would be necessary to address the standing deficiencies, in particular those pertaining to the definitional *lacunae*, scope of application *ratione personat* and *rationae materiae*.

Evans underlined (2004, p. 55) the contribution of the capabilities approach in theorizing the possibility and necessity of social choice, and the crucial importance of the political will and socio-political debate of social change, which makes the methodology applicable for the development of legal reform. In the development of a new instrument, the best practices and standards identified in this thesis should be encorporated, in particular those developed by the oversight mechanism of the FCNM and the ECtHR. The FCNM and the Faro Convention can be used as a basis for the development of the catalogue of rights and definitions, which could be extended with the rights and freedoms included into the scope of cultural rights developed by the Special Rapporteur in the Field of Cultural Rights. The approaches elaborated by the Council of Europe developed for the protection of cultural identity of minorities can be integrated into the instrument, however, the current approach to the use of democratic values can be changed to the principles of interpretation and implementation of rights and freedoms, rather than constituent components of a regional identity. The self-identification principle with respect to recognition and attribution of cultural identity of minority shall be explicitly incorporated into the instrument and affirmative measures to ensure independent realization of cultural choices should be provided to reinforce the principle. The oversight mechanism for the instrument should contain judicial component and the possibility of independent expert assistance in policy and legislative development.

This thesis contributes into the debate on intersections of law and identity studies, examining the role of the law as the power tool influencing identity-formation processes, as well as the value-shaping role of identity on the contemporary standards of international law (as discussed in Bhabha: 2003; Tamimi: 2017), examining their input as catalysers of tolerance and social cohesion. The thesis analysed the benefits of the identity- and dignity-oriented approaches for cultural studies and regulation on minority cultural rights from the standpoints of political and social processes (Hall: 1990; Du Gay et al.: 2000; Douzinas: 2002; Tamimi: 2017), with the analysis related to legislation and policy-making (Duewell et al.: 2014). This discussion also

contributed into the debate on the role of cultural diversity as an intermediary concept performing a conflict-preventive and unifying function construed within the convergences of cultural heritage law and human rights law (Council of Europe, AT(2010)397 rev.1; Cottrel: 2009; Vrdoljak: 2014). The relevance of the latter role of cultural heritage and the validity of the related research are substantiated with the recent incorporation of cultural heritage into the EU conclusions on EU approach to cultural heritage in conflicts and crises, which includes a strategic foreign policy toolbox and operational framework on cultural heritage for peace (EU External Action Service: 2021). The research fills the existing gap in the up-to-date systematic analysis of the case-law of the ECHR related to cultural rights of minorities and the country-specific implementation practices assessment under the FCNM (Weller: 2004; Pentassuglia: 2002 and 2003; Novak: 2005 on the UN system).

6.2. Perspectives for Future Research

This research provides for a possibility of an improved understanding of the nature of cultural rights and needs of national minorities, and the contemporary development of the international good standards and practices. The field remains contested politically and highly discussed academically, with the necessity of a more comprehensive and cohesive progress in the improvement of conditions for the implementation of the cultural rights of minorities, and the possibilities for the general status improvement. The spillover effects from improvement in realization of social and political rights of national minorities on their cultural rights and vice versa is well exemplified in chapters 4 and 5 of this research, proving the need for further utilization of these positive capabilities igniting capacity for the sustainable development of national minorities, as well as the society at large, since the improvement of conditions of one group leads to the improved development of wider social groups.

The findings of this research will assist optimization of policy solutions, elaborating effective legal responses and better understanding the good practices and standards developed within the Council of Europe framework.

The primary content limitations in this research were applied in the field of the analysed jurisdiction, as the Council of Europe framework

was the primary field of analysis, although the contextualisation of the regional solutions were made within the wider international framework. Furthermore, the conditions of particular minority groups were not included into the scope of the analysis, as this issue was located outside the planned aim of identifying general set of good practices and approaches utilisable for policy solutions. Additionally, the research was based on a selection of legal sources in each of the used typology of sources, including case-law, advisory opinions and resolutions, reports, and other political and programmatic documents. The selection of sources is representative in terms of the thematic scope and quantitatively, allowing a wide perspective in terms of the development of organisational and institutional approaches with respect of the time of adoption. However, the selection of sources used for the study was not meant to be exhaustive in absolute terms (unless specifically underlined for some historical analysis), and was subject to the limitations explained in each chapter for each type of sources (thematic relevance, timeline of adoption, attempt for upgrading pre-existing analysis, unless the examination of particular sources were necessary for the comprehension of the discussion). Therefore, although the analysed materials did not contain divergence in approaches by the respective bodies that would provide the material for exclusive or diverging conclusions, there is no possibility to exclude divergence in the future divergences of approaches in the case-law and decisions, or isolated case-law and decisions that have not been included as sources into the current research.

Future research could incorporate the results of fieldwork with respect to the national minorities of the Council of Europe Member States and compare the data with the solutions proposed by the Treaties bodies and the legislators. One of the useful fields of analysis could be comparison between the evolution of the legal and political solutions and the development patterns in implementation of cultural rights of minority groups within the Council of Europe Member States and non-member States within the region, including for example Belarus, Uzbekistan, Kazakhstan, Tajikistan etc. Such a research appears to be able to provide a response to the criticism of the Council of Europe legal framework and the programs that the organisation implements. The conclusions of this research can also be utilised in the field of analysis on collective identity and cultural identity as a determinant of values and behavioural patterns of various culturally or ideologically

defined groups, with the perspective application in the conflict studies and heritage-based mediation.

Among thematic areas in need of further research the requirement for further elaboration could be focused on devising additional mechanisms and solutions for the protection of rights to cultural heritage of national minorities. Particular importance could be attributed to the search for justiciable solutions, expanding beyong property approaches. The necessity for such solutions is substantiated, *inter alia*, in the continued exclusion of cultural heritage rights *per se* from the ECHR framework and respective rejections of cases invoking cultural heritage as a human right, as indicated in Chapter 3 of the thesis. Further analysis could be benefitial also in the areas identified in Chapter 4 among the problematic based on the analysis of Advisory Opinions and Committee of Ministers Resolutions and Recommendations to provide solutions in the areas, where the current implementation practice has not progressed as efficiently.

Another possible field for future research building upon the current analysis could be the comparison of conclusions based on different approaches to development. The conclusions and assessments of the present research were reached based upon capabilities and human rights methods, with an attempt of divising analysis relied upon a methodology oriented towards sustainable development goals and sensitive to the phenomenons of values and intrinsic interlinkages of various human rights that allow to devise the most optimal policy solutions capitalising upon all available potential. In order to respond to the necessity of devising practice-oriented solutions for cultural rights protection, other methods, including utilitarian perspectives or those providing quantitatively assessable results could be used to expand the markers of development and generating statistical data useful for divising legislative and policy solutions facilitating cultural rights of national minorities as an additional measurement mechanism. Such approaches, conditional to the continued maintenance of values, diversity and dignity aspects of planned policy goals, may allow for optimisation of search for most cost-efficient and practically implementable solutions, increasing the negotiation weight and success probability throughout political negotiations, ensuring ratification and effective implementation of the proposed solutions.

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