

THE KIN-STATE INVOLVEMENT IN NATIONAL MINORITIES' PROTECTION

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Abstract: *The European standards in the domain of the protection of national minorities are well established by the Framework Convention for the Protection of National Minorities. They were also influenced by the legal and political developments during the last two decades, especially in the context of the adoption in 2001 by Hungary of the Law on Hungarians living in neighboring countries, proved to be relevant on the discussion related to the European standards in this matter. The substance and the conclusions of the debate on the role of the Kin-State and the rules established in this particular field with the support of different European institutions, relevant even today, are reflected within the present article.*

Keywords: *national minorities, protection, European standards, Kin-State.*

1. Introductory remarks

The developments during the last two decades in the domain of the European protection of national minorities, especially in the context of the adoption in 2001 by Hungary of the Law on Hungarians living in neighboring countries, proved to be relevant on the discussion related to the European standards in this matter.¹

The debate on the role of the Kin-State and the rules established in this particular field with the support of different European institutions remain relevant even² today. This is why the reference to the main conclusions referring to these items proves to be important for any political and legal demarches concerning the rights of persons belonging to national minorities and the established European standards in this domain.

2. Main conclusions

The first conclusion is that we have to notice that *the State where a minority lives has the primary responsibility for the protection and fulfillment of the rights of this minority.*

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¹ Adrian Năstase, Raluca Miga-Beşteliu, Bogdan Aurescu, Irina Donciu, Protecting minorities in the future Europe: between political interest and international law, R.A. Monitorul Oficial Monitor of Romania, Bucharest, 2002, page 110

² Mark Neville, Kin-State involvement in minority protection under the Framework Convention for the protection of national minorities, in „Kin-State involvement in minority protection – lessons learned”, R.A. Official Monitor of Romania, Bucharest, 2004, page 25-31

The role of the international community, including the Kin-State, is one of *assistance*, as well as a role of *monitoring*.

It is impossible to shape standard means for resolving the multitude of problems that appear in every country, due to the diversity and particular characteristics of each national minority.

On the whole, **the conclusion of bilateral treaties is an essential element**³ in the international framework for the protection of national minorities. If effectively implemented, they can have a serious say in the evolution of this process.

As recent developments show, *in order to assure a more effective support for their kin-minorities, States have decided to make a step forward- that is the adoption of domestic laws which contain provisions that allow their kin-minorities, citizens of other States, to benefit from certain facilities.*⁴ That is, to fill the gaps of the bilateral treaties or the lack of will to effectively implement them. But this unilateral demarche can only be legal if being subject to certain conditions, as set forth by the conditions of the Venice Commission Report.

In the same vein, we must stress upon the fact that *bilateral treaties must be given prior attention, as they must be mainly applied*. Despite their flaws, such agreements encourage both minority protection and the respect for the territorial integrity of states. On the other hand, although the process is ongoing, the assistance of the kin-state is not yet considered to have acquired enough *diuturnitatis* to become an international custom.

It is important also to focus now on a few aspects that underline **the strengths and weaknesses** of the bilateral treaties that could have determined this evolution in the kin-states' approach towards the protection of their national minorities living abroad.

It is to be mentioned strengths and weaknesses of the political bilateral treaties that include provisions related to the protection of national minorities.

We can list the following **strengths**:

- These treaties take into account the historical/traditional specificity of the minorities concerned;
- They contain provisions which reduce, due to their substance and wording the fear of secession-these provisions refer to the mutual recognition of borders (the respect of the *status-quo*), regional cooperation and mutual understanding;
- Their enforcement stimulates the climate of cooperation and good-neighborliness; political bilateral treaties are useful instruments for the prevention of conflicts between States, in that they formulate in a clear manner the types of policies the kin-State is about to develop and, as a consequence, contribute to transparency in its actions for the protection of national minorities;
- Bilateral treaties give legal force, through incorporation, to international instruments which are not legally bounding- the so-called soft law instruments;

Among the **weaknesses** we can mention:

³ Adrian Năstase, Raluca Miga-Besteliu, work cited, page 94.

⁴ Titus Corlăţean, National minorities and the security risks, The Romanian Journal of International Law, nr. 10, January – June 2010, The Publishing house of the Association of International Law and International Relations, C.H. Beck, Bucharest, 2010, page 197-200.

- They can reflect a political stand which exists at the time of conclusion; they are submitted to a strong political influence; the pre-condition for their effective implementation is the political will to enforce them; the absence of such a will determines the impossibility to put in practice the clauses of the treaty;

- It is recommendable to avoid lowering the European standards (e.g., the provisions enshrined in the Framework Convention for the Protection of National Minorities)⁵;

- They usually protect kin-minorities-an approach which still might generate tensions in relation to other communities on a given territory;

Within this context, it is to be mentioned the fact that the adoption by a state of laws with extraterritorial effects represents a disputed issue.⁶

A first caveat should be introduced here: the adoption of laws with extraterritorial effects do not represent, per se, a breach of the international law; the mere fact that an internal law refers to foreign citizens does not have as a corollary an interference in the internal affairs of another State or a violation of its territorial sovereignty. It is an established principle, internationally accepted, *within some limits* which I intend to underline as follows:

- This type of legal norms must observe, to the letter and in its spirit, the four fundamental principles, that is the territorial sovereignty, the good-neighborliness principle, *pacta sunt servanda* and the non-discrimination principle;

- If they have extraterritorial effects, the Venice Commission made a clear distinction in order to appreciate their validity, and the main criterium is the nature of the advantages it offers to the addressees. The conclusion is unequivocal: the legal norms that refer to *educational and cultural rights* are the only accepted⁷, as long as they have, as a legitimate aim, the strengthening of the cultural bonds and are proportionate to this aim. *We can almost refer to it as to a customary rule.*

- Why are these rights particularly important today? Because in the context of democratic societies /structures and of friendly relations between States, based on the good-neighborliness principle and the observance of the *status-quo*, the cultural identity is in fact the key link between a minority and the kin-State;

- On the contrary, States must avoid the inclusion of special provisions that refer to social, economic or political rights for their ethnics, citizens of other countries.⁸ These measures can be indeed considered as a breach of the international standards and interference in the internal affairs of another State;

- We have to stress also upon the fact that these legal provisions must not, according to the European and international standards, have as a consequence/determine a distinction among the ethnics living abroad;

⁵ Ion Diaconu, *Minorities in the Third Millenium*, The Publishing House of the Romanian Association for democratic education, Bucharest, 1999, page 241.

⁶ Simona Granata-Menghini, *The role of the Kin-States in minorities protection, Kin-State involvement etc*, work cited, page 17-20.

⁷ Adrian Năstase, Raluca Miga-Beșteliu etc., work cited, page 167-171.

⁸ *Ibidem*, page 171-174.

- By the same token, it must be avoided the establishment of any procedure or institution that rolls-down competences which could affect the relations with the State on whose territory the national minorities live. It is wrong, therefore, to resort to the issue of documents similar to the identification cards, with political or ethnic connotations.

- These documents should be conceived exclusively as an instrument of administrative simplification for access to rights/facilities these laws imply;

- As to the procedure of issue, as a rule, these documents are put forth by the authorities of the kin-State and are used only on the kin-State's territory;

- The consular authorities or the embassies of the kin-State in foreign territory can play a certain role in this procedure; any form of certification must be realized with the support of the consular authorities within the limits of prerogatives reflected by the international treaties;⁹

- The devolvement of such competencies to private institutions is not therefore in conformity with international law.

- Another means for the protection of national minorities that should be mentioned is the possibility to grant support for the communities living abroad based upon reciprocity, for instance through bilateral agreements.

Another important conclusion reflects the necessity of bilateral and multilateral consultations.

The unilateral approach of this issue and, more, the imposition of such measures with a breach of territorial sovereignty cannot be accepted;

The bilateral way can work out; it is a necessary, but not sufficient condition. The reproach brought to the Hungarian initiative was the lack of consultation (and implicitly, the breach, with *mala fide*, of the good-neighborliness and international cooperation principles.

The *sine qua non* condition for these provisions not to be perceived as an interference in the internal affairs of another State: a *bilateral approach*, with the States concerned, and also, if necessary, *consultations* with *European institutions* with competencies in the field.

3. Final remarks

In our opinion, these conclusions are important, if not essential, for underlining once again the substance of the European standards related to the protection of national minorities, which are to be respected by everyone, but also for inspiring the attitudes of the directly concerned States for avoiding inter-State tensions.

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⁹ Idem, page 135-138

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