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Principality of Andorra

› REPORT

1. This report compiles, without any specific attribution of authorship, the lines and criteria, as well as the main divergences, put forward by the participants in the meeting during the four debates held on 2 October 2003.

The participants were:

Austria, Mr. Erwin Felzmann, Judge

Belgium, Mr. Marc Bossuyt, Judge

Bosnia and Herzegovina, Mr. Mato Tadic, President

Bulgaria, Mr. Lasar Gruev, Judge

Cyprus, Mr. Andreas Kramvis, Judge

Cyprus, Mr. George Nicolaou, Judge

Czech Republic, Mr. Jirí Mucha, Judge

France, Mr. Jean-Claude Colliard, Judge

Germany, Mr. Winfried Hassemer, Vice-President

Hungary, Mr. Árpád Erdei, Vice-President

Italy, Mr. Giovanni Maria Flick, Judge

Latvia, Mr. Aivars Endzins, President

Luxembourg, Mr. Marc Thill, President

Luxembourg, Mr. Jean Jentgen, Counsel

Malta, Mr. Vincent A. De Gaetano, President

Monaco, Mr. Roland Drago, President

Norway, Mr. Trond Dolva, Judge

Poland, Mr. Marek Safjan, President

Portugal, Mr. Luís Nunes de Almeida, President

Romania, Mr. Lucian Stangu, Judge

Russian Federation, Mr. Vladimir Yaroslavtsev, Judge

Serbia and Montenegro, Mrs. Mirjana Rasic, Judge

Serbia and Montenegro, Mr. Radovan Krivokapic, Judge

Slovenia, Mrs. Dragica Wedam Lukic, President

Slovenia, Mrs. Mirjam Skrk, Judge

Spain, Mr. Manuel Jiménez de Parga y Cabrera, President

Spain, Mr. Pablo García Manzano, Judge

Spain, Mr. Vicente Conde Martín de Hijas, Judge

Turkey, Mrs. Samia Akbulut, Judge

Turkey, Mr. Mustafa Baysal, Judge

European Court of Human Rights, Mr. Javier Borrego Borrego, Judge

European Court of Human Rights, Mr. Josep Casadevall Medrano, Judge

2. First of all, several participants pointed out, with which everyone was in agreement, the difficulty of defining the legal/political concept of "minority", repeatedly qualified as "indefinite", "mutant" and "contradictory", "non-existent as such a concept" which, even "is preferable that it should not be defined".

However, it is no less true, as was recognised by everyone, that the concept in question is frequently used in positive texts, both international and internal, and even defined in them (viz Preamble to Hungarian Law LXXVII/1993), and is, furthermore, of common use doctrinally to refer to a number of groups who live in a larger society and who demand recognition of their own identity and, frequently and depending on it, special treatment by the public authorities.

3. It is a concept of international origin, admitted in constitutional law, from where it is projected once again to the international level watchful of the process of internationalisation of the formulation and guarantee of fundamental rights.

In effect, the protection of minorities appeared in the peace treaties that brought the First World War to an end and was compiled as such in the system of the League of Nations. The basis lay in Articles 86 and 93 of the Treaty of Versailles and its implementation was carried out through the so-called "minorities treaties" entered into between the allied powers and associates and the two new states, Poland and Czechoslovakia, and the states that had extended their borders (Greece, Romania and Yugoslavia); four special chapters included in the peace treaties with the defeated states (Austria, Bulgaria, Hungary and Turkey), various bilateral treaties and up to six unilateral declarations.

This concept was admitted by the constitutional law of the period after the First World War to become one of the characteristics of it.

In the period after the Second World War, the previous systems of minorities was abandoned, to be replaced by either a multilateral system consisting of clauses for the protection of fundamental human rights in the Peace Treaties of 1947 with Italy, Finland, Bulgaria, Hungary and Romania, or by a system implemented in bilateral

instruments (viz Austro-Italian treaty of 1946). Special mention is warranted of the Treaty of the Austrian State of 1955, due to its constitutional nature, in which special rights in terms of language, culture and schooling of "Austrian subjects belonging to Slovenian and Croatian minorities" were recognised (Article 7).

After the Second World War, the 1966 United Nations Covenant on Civil and Political Rights undertook the protection of persons belonging to "ethnic, religious or linguistic minorities" (Article 27) and the Council of Europe has concerned itself with the issue since its creation up to the formulation of the 1994 Framework Convention on the subject. The latest generations of constitutions of different countries in central and eastern Europe include this same category, under some term or another.

Several participants considered the international formulation and its internal adoption by reference as a valid alternative to constitutional formulation, both of the rights of minorities and of fundamental rights, concluding, however, in the pedagogic value of constitutional formulation for the greater introjection of constitutional values by the various societies.

4. The necessary general nature of the constitutional formulation of these values leads to the conclusion of the importance of the case law of the Constitutional Courts insofar as interpreters of the fundamental Rule. To this is due the leaning and evolution of the concept of minorities and the implementation of their protection, on occasions based on an express textual mention, on others, more numerous, based on more generic values and the consideration of the specific circumstances of the case in question.

It is in the area of the value of "equality", the key to modern democracies, where this interpretative task takes on greater importance. Nobody in effect denies this value, but the problem arises when defining it definitively in the treatment of unequal situations, which, it has always been recognised, justify not inequality before the law but a proportional treatment of the inequality of the specific case in the application of the law. In any event, the value of equality demands the eradication of all forms of discrimination.

5. Constitutional case law, Germanic especially, bases the protection of minorities on the safeguarding of fundamental rights in their dual dimension of rights of defence against the public authorities – which exclude their invasion in the sphere of freedom, which, although individual, has a necessary collective projection – and rights of protection by the public authorities, which may go as far as the requirement of a life provision. This way, rights cease being limits to power to become goals or objectives of that power.

6. Two principal positions were formulated in this respect. On the one hand, the one that attends the supremacy of the rule, be it the law, be it the Constitution, and, consequently, the supreme will of the legislator and even of the constituent power, which the judge cannot replace and which, in any event, may prevail over them. On the other hand, the one that supports the greater freedom of the constitutional judge to interpret the rule according to the circumstances of each case, which leads to the mutation of it. In other words, to change its meaning, even without affecting the tenor of its literal nature.

The French case is paradigmatic in this respect. In principle, there are no minorities in the French Republic, which is one and indivisible, but equal citizens before the law, holders of fundamental rights. This would be the criterion deduced from Article 2 of the 1958 Constitution, and this is how it was understood by the Conseil Constitutionnel in 1991 with regard to the "non-existence of a Corsican people" and in 1999 in relation to regional languages.

However, it is evident that in practice there are legal differences between groups, basically territorial, of citizens, be they for geographical reasons ("populations d'outre-mer"), be they for historic reasons (continuance in effect of the concordatory right and others of German origin in Alsace), be they for cultural reasons (tolerance of regional languages, including in education, only limited when it means a monolingual immersion in a language other than French). This apart, the adoption of the gender quota in electoral regulations means a recognition of a type of minority, in the qualitative rather than the quantitative sense of the term. The problem arises with the dissemination of Islam in France due to the separating legislation between Church and State of 1905, which affords the Catholic religion immense architectural and cultural wealth and hinders the cooperation of the Republic with other faiths.

7. The situation is especially complex and dynamic because, alongside the classic minorities, new types of minority emerge, and these may superimpose and juxtapose themselves between one another. The participants agreed to distinguish, to this effect, three fundamental types of minority.

First, those known as classic minorities. These are the national and ethnic groups, i.e. cultural groups (linguistic, religious, etc.) which provide a global identification of the individual belonging to them.

Regardless of their territorial settlement, in terms of classic minorities the participants distinguished two sub- groups. On the one hand, what could be called historic or autochthonous "minorities", as is the case of the Slovakians in Austria, the Italians and Hungarians in Slovenia or the Sami people in Norway, among many other possible examples. The Hungarian Constitution classes them as "national minorities" and the Slovenian as "national communities". In other words, as the Hungarian regulations state, those whose settlement in the global society dates back more than one hundred years, and is frequently immemorial. On the other hand are the groups that are not in this situation and which Hungarian case law doctrine classes as "de facto groups", consisting of legal, and even resident, immigrants. The distinction, which will be reiterated subsequently, has great practical relevance when implementing their protection, as whereas the first are protected as a group, the members of the second are protected in their fundamental rights, including those implying a collective exercise, on the basis of the principle of equality.

Second, the new minorities which are the result of recent mass migrations. These migrations, according to the experience of Council of Europe experts, may be extra-European, generally not tied to a mother state when they are sub-Saharan but with clear ties to a mother state if they are from Arab, Asian or Latin American countries; intra- European, normally tied to a mother state, with a different significance if that state borders or not on the state receiving the migration; and intra-European Union.

With regard to the last group, the problem was posed that the free movement of persons which prevails in the Union may aggravate the problem of minorities in those countries and territories which, due to their small size or to other social and eco-environmental conditions, are especially fragile to the impact of population flows. Intense flows when the aesthetic, climatological, economic or employment attractions of these territories attract permanent or quasi-permanent residents (long-term tourists) from other richer countries in the Union. Experience gleaned to date and which some participants provided reveals four models to inhibit such flows without committing discriminations banned by the regulations of the Union. Transitory exceptions (the case of the Tyrol), exception rules (Isle of Man), segregation of a state territory from the Union (the case of Greenland) and the arrangement of the territory as a measure to foster population settlement (being studied in the Canaries).

It is clear that this question has particular importance with regard to European micro-states, including members of the Council of Europe, and ones which one way or another are called upon to associate with the European Union. Micro-states, anywhere but even more so in Europe, are especially fragile to the impact of external demographic and financial flows, and the preservation of their identity and existence justifies special protective measures.

Third, the so-called ultra-new minorities, consisting of groups that demand recognition and special protection according to gender, sexual orientation, disability, etc.

The participants opted to focus their attention on the first two types of minority, given the particular nature of the "ultra-new" minorities and their heterogeneity with the others, classic and new, based on objective factors capable of establishing a global cultural and political identification. The comparison, by J. Habermas, of French- speakers in Quebec with Canada's deaf and dumb community does not favour a greater understanding of either problem.

Most of the participants agreed that the classic minorities, even when dealing with a very mixed population, do not pose special problems today. These come from the new minorities the product of immigration whose ethical and aesthetic values jar with those in the European host countries.

8. All of the above gives rise, in the opinion of the participants, to a series of tensions, frequently simultaneous, on at least four axes:

Firstly, between the individual and the minority group itself to which they belong. A liberal view of society demands the open nature of the group, such that belonging to it is voluntary. However, it cannot be denied, and this was noted by some of the participants, that the protection of the identity and the permanence of the group may require a degree of measures limiting freedom of choice. Such is the case of the linguistic immersion policies that, even when they aim at creating a plurilingual society, impose the learning of a language, including on those who would not want to learn it.

Secondly, between the minority group itself and whoever puts themselves forward in representation of it, which may not be the majority and whose confirmation may not be formally possible as this would mean a principle of discrimination.

Thirdly, between the minorities encompassed in a larger minority group and the larger group.

Fourthly, between the minority group and the global society in which it is situated. Models of coexistence between minorities – especially new ones – and the host society, still to be determined, call for a development of the attitude of mutual tolerance and the determination of the limits of this tolerance according to the constituent values of public order. A participant formulated the situation, stating that from the homogeneous unity of the past the passage was proposed to a form of heterogeneous unity in which the will to live together is compatible with that of being different and, in turn, this presented the admissible limits of this difference.

9. The participants examined, in light of their own experiences, a series of techniques used for the protection of anyone belonging to a minority.

Firstly, the close equality before the law and the equal guarantee to every individual of the fundamental rights that as such correspond to them "without discrimination due to race, language, religion, culture, etc." This is the republican principle of refusal of any private law (=privilege) of group or territory as being contrary to the principle

of citizen, and even human, equality. This means stopping the discrimination of minorities because of their nature as such, but not guaranteeing them the development, especially in the public sphere, of their own characteristics as minorities (viz language).

Secondly, the collective exercise of the fundamental rights with an essential collective dimension (viz freedom of worship and religious catechesis). Such has been the thesis developed by the case law of the European Council Court of Human Rights in light of the 1950 Declaration where collective rights are not recognised.

Thirdly, the policy of public order as limit to all freedom to guarantee the right of the others. This means the common acceptance of shared axiological bases of that public order. The risk was pointed out that the rules to this effect contain formulas of hidden discrimination.

Fourthly, the self-government of minorities territorially settled in their own space. This option will have a different meaning according to the functional or symbolic sense of the space in question for the being of the group in question (viz "national home") to the cohesion of the group settled there and their nature as the majority or otherwise there. The participants discussed the scope of the principle of territoriality, which, on the one hand permits the coexistence of spatially settled groups, with functionally federal formulas (viz cases of Spain and Belgium), and on the other poses the problem of guaranteeing the rights of minorities installed within each group and belonging to or related to the other.

Fifthly, the self-government of communities on a non-territorial personal basis, such as that put forward by the Austrian Marxists Renner and Buaer. The system follows the regulations and practice of countries like Slovenia, Hungary and Poland. The condition of such minorities as "integrating factors of the State" demands their representation as such in the assemblies (consequently, Ruling 35/1992 of the Hungarian Constitutional Court).

Sixthly, the personal statute of being a minority that follows them throughout the territory "like a shadow" (the case of the civil fiscal and regional specialities in Spain).

In seventh place, positive discrimination, being the different and even preferential treatment given to members of a minority in their condition as such.

The participants were in agreement of the inadequacy of such a name as being contradictory: if one discriminates – which is prohibited as being against equality as a fundamental right – it is not positive, and if it is positive it is not discriminatory. Some constitutional jurisdictions, such as the Slovenian, which began using this expression (in 1998) has replaced it with that of affirmative action (in 2001).

Regardless of the terminology used, it was evident that the basis of such measures is to compensate a real situation of submission or marginalisation. The aim of the "affirmative action" or "positive discrimination" is to treat better what is in the worst condition to place it in a better situation. It is, then, a version of the "promotion clause" contained in a number of constitutions (viz Article 3, Italy; Article 9.2, Spain; Article 6.2, Andorra; etc.).

Consequently, the positive discrimination that sets out to achieve real equality between those who are in principle unequal cannot consist of a permanent measure, which would be equivalent to a privilege to the detriment to others, but a transitory measure (viz gender quota but not gender parity) belonging more to the economic-social sphere than the political-institutional one (viz reserved representation of ethnic groups). However, in Hungary the Constitutional Court, in case law from 1990 to 1999, has interpreted that real equality allowed the elimination of the minimum votes required to obtain electoral representation with the aim of guaranteeing the representation of minorities. Something similar has occurred in current Spanish electoral regulations to permit the representation of

non-statewide parties which, in fact, represent nationalist or regionalist demands. While there is no lack of critics who feel that this situation is a privilege, it is no less certain that the application of an equal electoral minimum would mean the perpetual exclusion of the representation of these minorities.

10. Finally, the participants considered that the fundamental question was the aim of the system of protection. Either the individual member of a group for their fundamental rights to be respected and made effective, including those of collective exercise and, what seems an essential condition of them all, their own identity, by essence inter- subjective; or the minority group in itself, both against external erosion and interior dissidence or disloyalty.

Of the various experiences contributed by the participants, it appears that the classic minorities, and especially those classed as "national minorities" or "national communities", due to their autochthonous nature and historic roots, are regarded as subjects deserving of rights, as such groups, to special treatment. On the contrary, the mere "de facto groups" are not deserving of a similar treatment and their members receive protection on the basis of fundamental rights.