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**PARTICIPATION RIGHTS UNDER THE FRAMEWORK  
CONVENTION FOR THE PROTECTION OF NATIONAL  
MINORITIES (FCNM): TOWARDS A LEGAL FRAMEWORK  
AGAINST SOCIAL AND ECONOMIC DISCRIMINATION<sup>1</sup>**

**Abstract:** *The FCNM marks a many-fold milestone in setting higher the international standards for minority protection: a/ It is the first hard law multilateral treaty on minority rights; b/ fundamental in nature, minority rights are an integral part of the international protection of human rights; c/ the introduced second level of anti-discrimination standards includes in many cases additional rights for the persons belonging to minorities; d/ by including participation rights, the FCNM first recognizes a political dimension in minority aspirations. Given the absence of a formal minority definition in the FCNM, the ACFC drew benefits out of this for new migrant minorities. The article sets out differences in rational accommodation as a non-discrimination policy in Canada and EU law respectively, in order to discuss diverging approaches between the FCNM comprehensive understanding of the protection against discrimination and the rational accommodation of intercultural identities of migrants in the EU. Nowadays, state constitutional politics must build on the states' international legal obligations to guarantee to all those living within its territory regardless of their citizenship status a non-discriminatory protection of their fundamental rights.*

**Key words:** *Discrimination, National Minorities, Participation Rights*

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## **1. The Context and Emerging Issues: Contested Fields of Trans-Cultural Communication**

Identity politics represents a major challenge for the liberal constitutional democracy of today. Cultural themes dominate political debate on equal footing with economic issues, to say the least. This is the case not only in the societies with ethnic cleavages, let alone the countries coming out of ethnic wars worldwide. The same is true with Western democracies after September 11<sup>th</sup>, 2001.<sup>2</sup> The debate is irrevocably leading to re-visiting the question of national identity in terms of the commonly accepted values underlying a democratic consensus in the societies of Western Europe. The reforms to citizenship became a highly politicized issue in France and Germany in the 1990s, and nationality law was reformed four times in the two countries. Political debate over concepts of nationality, belonging and integration shifted in both countries to a more focused sphere of migration. Contrary to Brubaker's prediction given in 1992 (Brubaker, 1992), that basic structural differences between French civic and assimilationist, and German cultural and exclusionist idioms of nationhood would continue to affect nationality policy until today, it was Germany that in 1993 adopted for the first time a law granting an entitlement of citizenship on the basis of birth and residence. Again it was France, which in the same year pursued a restrictive citizenship policy and adopted for the first time a law ending the automatic acquisition, at the age of 18, of citizenship by aliens born in the country. As Nathan Glaser put it, we are all multiculturalists now (Hansen, Koehhler, 2005).

Shifting to migration aspects in citizenship policy in France and Germany in the 1990s can indeed be interpreted as a sign that citizenship discourse becomes foremost the issue of strongly politicized debates over nationality policies instead of a scholarship theorizing on nationhood. However, rather than to point to narrowing a policy debate, the four nationality law reforms in France and Germany demonstrate the depth of the issue behind the confrontation over nationality policy – the issue of nationhood itself. It is the foundational principles

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2 In one of his articles on "Identity, Immigration, and Liberal Democracy", F. Fukuyama argues that a more serious longer-term challenge than terrorism facing liberal democracies today concerns the integration of migrant minorities – particularly those from Moslem countries – as citizens of liberal democracies. "Europe has become and will continue to be a critical breeding ground and battlefield in the struggle between radical Islamism and liberal democracy", since "radical Islamism itself is a manifestation of modern identity politics, a by-product of the modernization process itself." (F.Fukuyama, 2006)

of both nation-states, personified in respective concepts of nation as *pouvoir constituant* that call for re-consideration and revision.<sup>3</sup>

Migration policy is rightly analysed within the relationship between migration, the state and the society. Citizenship models, modes of migrant incorporation, membership of the welfare state, socio-cultural exclusion, discrimination and ethnic minority formation, as well as ethnic mobilisation become major cross-cutting issues to address mature and emergent problems in migration policies (Craanen, 2006: 324). As regards the normative elements in future EU policy aiming at “complex-equality” and “reasonable accommodation” of cultural diversity among migrants (inter-culturalism as equal access of migrants to social services in terms of identity-driven equal rights and equal results), these is the issues to be seriously taken into account. The link between inter-ethnic relations changes in personal and group identity even without a further phase of incorporating migrants into citizenship must take into account this inherent relationship between migration, nation-state and society. A further significant step forward would be to focalize on the empirical aspects in the relationship between social disintegration, globalisation and intercultural and inter-ethnic conflicts at a micro level. That low-key political conflicts with ethnic bases can be de-escalated demonstrates a political anthropology on the micro-level. The members of different groups living together on an everyday basis are also constrained by the networks involving cross-group ties (Craanen, 2006: 334-335).

Reacting to these emerging problems and debates, the Council of Europe called already in 1994 for political and cultural democracy as essential for maintaining social cohesion in Europe. What makes in this regard the international legal standards for the protection of national minorities, particularly the Framework Convention on the Protection of National Minorities of the Council of Europe (FCNM), relevant for the context and emerging issues as described until now?

Firstly, the discourse on “reasonable accommodation of cultural diversity” and “equal access of migrants to social services as identity-driven equal rights” draws attention to a new aspect in their protection. It targets their quality as

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3 Even the Swiss concept of composed nation, which builds on minority rights as group rights in order to guarantee collective liberty and identity, remains “hermetically” closed for “immigrated diversity”. Differential exclusion of migrants is immanent to Swiss migration policy, even more so than, say in French culturally-blind concept of nationhood. Swiss “Willensnation” (nation by will) is defined as much by those whom it includes (traditional linguistic and religious communities) as by whom it excludes. Territorial basis for minority rights goes against individual socio-economic mobility of migrants. Federal design minimizes the capacity of migrant powerless groups to act upon the full extent of their interests and direct democracy proved instrumental in fomenting anti-migration sentiments, including racism and discriminatory perception of some migrant groups in the population.

ethnic minorities. For migrant ethnic minorities, unlike national minorities, a rupture occurred between territory and cultural identity. More importantly, in most cases also a rupture between cultural identity and citizenship has taken place. Nevertheless, the new policy debate for the first time crosses the Rubicon and understands their minority cultural identity also as a part of their human rights' accommodation. Secondly, The Preamble of the Framework Convention for the Protection of National Minorities (FCNM) makes it obvious what major importance the Council of Europe gives to the rights of national minorities: their comprehensive and effective protection by State Parties is a key element to promote stability, democratic security and peace in Europe; only advanced pluralist societies as genuinely democratic can create a climate of tolerance and dialogue inside each society.

Therefore it is by no accident that the Council of Europe becomes the first international body to argue in favour of multicultural citizenship as a pre-condition to inclusive and participatory democracy. This oldest European organisation promoting democracy and the rule of law rightly understood that to date, the European traditional liberal democratic *acquis* faces a major challenge: How to constitute a state which would be inclusive for all major communities of its society? In this sense, the Parliamentary Assembly Resolution 1735 (2006) on the concept of nation made indeed a far-reaching statement on citizenship and nationhood within a multilateral setting: "The general trend of the nation state's evolution is towards its transformation, depending on the case, from, a purely ethnic or ethnocentric state into a civic state and from, a purely civic state into multicultural state."

Put it differently, effective protection of the rights of persons belonging to national minorities has become the standard for democratic governance and sine qua non for social cohesion within nation-states. Without this condition fulfilled by nation-states, Europe will not be able to design a sustainable strategic response to multiple identities of societies and individuals within its border. Mind that European Union has no common minority policy, and will probably not have in a near future.<sup>4</sup>

The paper maps the FCNM key legal standards for the minority protection and democratic management of diversity as a critical stepping-stone towards designing a comprehensive European legal framework against social and economic discrimination. In doing so, it focalises on participation rights of persons belonging to national minorities since the underlying concept of full and effective equ-

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<sup>4</sup> The number of EU Member States who ratified the 12<sup>th</sup> Protocol as of 8<sup>th</sup> July 2009 is more than telling. Among nineteen ratifications, six are from EU Member States (Cyprus, Finland, Luxemburg, Netherlands, Spain and Romania).

ality of persons belonging to minorities inherently embraces their participation rights in all areas of economic, social, cultural and political life. Given already existing different concepts of RA in Canada and EU law respectively, the paper also touches upon some similarities and considerable conceptual differences between the FCNM understanding of the protection against discrimination and the general approach underlying “rational accommodation of intercultural identities of migrants” in Europe.

Major accents will be outlined in the pronouncements of the Advisory Committee (ACFC), a monitoring body to the Convention<sup>5</sup> as regards a normative content of the Article 15 governing participation of minorities in cultural, social and economic life and in public affairs (political participation). The underpinning argument is that the Opinions of the ACFC on the implementation of the FCNM by State Parties during more than a decade of its jurisprudence underscored and developed the foundational nature of the participation rights, in terms of both their content and connection to other rights that the State Parties under this convention are obliged to guarantee to the persons belonging to national minorities (Advisory Committee on the FCNM, 2008; Weller, 2005). As already said, the aim is to demonstrate the relevance of the FCNM but also principal differences to the RA concepts as embedded in the Canadian and EU law respectively. Finally, the paper argues that only an inclusive approach of participation rights for the persons belonging to minorities, bringing together social and economic rights with the rights in public sphere, can be taken as an important step towards providing a European legal framework against social and economic discrimination, and in favour of both political and cultural democracy in Europe.

## **2. FCNM Participation Rights – an Important Step towards European Legal Framework against Social and Economic Discrimination**

### **2.1. Legal Nature and the Importance of the FCNM <sup>6</sup>**

The FCNM marks a milestone in setting higher the international standards for minority protection. Such a statement is by no means exaggerated, although most of the provisions of the Framework Convention contain rather general principles

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5 “In evaluating the adequacy of the measures taken by the Parties to give effect to the principles set out in the framework Convention the Committee of Ministers shall be assisted by an advisory committee, the members of which shall be recognised experts in the field of the protection of national minorities” (Art.26, para1). The composition of the ACFC and its procedure were established in the Rules of Procedure (1998) and further decisions of the Committee of Ministers relevant to the monitoring procedure.

6 The Framework Convention for the Protection of National Minorities of the Council of Europe entered into force February 1<sup>st</sup>, 1998. As of April 2009, it has 43 signatures and 39

and –except for the right to freely choose to be treated or not as belonging to a national minority (Art. 3) - establish duties for State Parties, not individual rights to be directly claimed. Nevertheless, the FCNM is the first multilateral treaty, which in a form of hard law obliges the Parties to treat rights of persons belonging to minorities as fundamental rights. Minority rights thus become an integral part of the international protection of human rights, and do not fall within the reserved domain of States. Furthermore, by declaring full and effective equality a key standard for minority protection, the Convention introduces a second level of anti-discrimination standards that will in many cases imply additional rights for the persons belonging to minorities. Last but not least, Art. 15 of the Convention that lays down the obligations of the State Parties in effectuating participation rights of persons belonging to national minorities, goes much further than Art 27 of the UN Covenant on Civil and Political Rights. Moreover, Article 4(2) lays down the participation in social, economic, cultural and political life as a measure for full and effective equality.

This is how the FCNM for the first time recognizes a political dimension in minority aspirations while “avoiding dangerous and radical “aspirations of self-determination (Kymlicka, 1995). In the same context, the importance of the participation of national minorities as a part of democratic cohesion and political pluralism has been stressed out in the Recommendation 1492/2001 of the Parliamentary Assembly. It says, inter alia, that ‘the minority has the responsibility to participate in political and public life of the country in which it lives and to contribute, along with the majority, to the democratic cohesion and pluralism of the states to which it has offered its allegiance”.

## **2.2. Participation is inclusive and covers cultural, economic, social and public life**

Article 15 of the FCNM provides that “the parties shall create the conditions necessary for the effective participation of persons belonging to national minorities in cultural, social and economic life and in public affairs, in particular those affecting them”. Undoubtedly, the importance of Art.15 lies in its scope. It stipulates the necessity for the creation of the conditions by the State Parties needed for the effective participation of national minorities by imposing on States negative as well as positive obligations. On one hand, it implies obligations not to interfere in the cultural and other practices on which minority identity is based and not to hamper their participation in public affairs, in particularly those affecting them. On the other hand, it obliges the States to take measures

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ratifications out of 47 member-states. Belgium, Greece, Ireland and Luxembourg have not ratified, and Andorra, France, Turkey and Monaco have not yet signed the Convention.

to support the development of national minorities' identities and to create conditions for the effective participation of national minorities.

### **2.2.3. Foundational Nature and Contextualised**

#### **Approach: Articles 3, 4 and 6**

It is not possible to talk about effective participation without taking into account other rights that State Parties have to guarantee under the Framework Convention. The right of persons belonging to national minorities to be involved in affairs affecting them directly or indirectly touches profoundly upon their identity, traditions and cultural heritage, as well as their active participation in political life, and in consequence presupposes that they can enjoy these rights in a non-discriminatory manner. Ensuring full and effective participation of the persons belonging to national minorities is the most working instrument for the effective protection of other rights covered by in the Framework Convention. Put it differently: Effective participation is a condition sine qua non and a measure for the level of protection of all other principles guiding minority rights in the Convention.

The legal nature and a broad normative content of Article 15 of the FCNM are best reflected in the inclusive concept of participation that the Convention lays down, and the ACFC persistently embraced in its Opinions. In order to act as a facilitator in a constructive dialogue between the state authorities and members of national minorities the ACFC endorsed a transversal scope of participation rights and interpreted participation as indeed a critical standard for democratic governance. It may well be that in this sense the ACFC could have been even more persistent. For example, it is notable that in its early pronouncements<sup>7</sup> the ACFC did not often make an explicit link between education (arts. 6 and 12-14) and participation although it often requested the authorities to decide "in consultation with concerned minorities". On the other hand, already later opinions of the first monitoring cycle show that the ACFC went further in targeting state's non-compliance with its duties under Art. 15, when it concluded that these reflected a deliberate state policy and saw them as an element of non-democratic governance. Especially in the post-conflict cases of state-reconstruction the ACFC also used the participation argument in order to warn against the "reinforcing ethnic lines as the main pillar of state action".

As regards our theme, a consolidated review of the ACFC jurisprudence on participation rights shows that the FCNM monitoring body mainly focused on the following issues:

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<sup>7</sup> The 1<sup>st</sup> monitoring cycle (1998 – 2003)

- Scope of application (Art.3),
- equal protection of laws and non-discrimination clauses (Art.4),
- a spirit of tolerance and inter-cultural dialogue, including anti-discrimination measures (Art. 6).

To start with, the ACFC particularly underlined the importance of the relationship between Article 15 and articles 4 and 5 (maintenance and development of culture) in demonstrating that effective participation of persons belonging to national minorities is a key to the full enjoyment of other rights protected under Convention. In fact, Articles 15, 4 and 5 can be seen “as the three corners of a triangle which together form the main foundations of the Framework Convention”(Advisory Committee on the FCNM, 2008).

In a similar vein, the ACFC outlined Art 3 as critical to the fulfilment of the aim of the Convention. It is clear that the effectiveness of participation directly depends on the number of those in one country who are protected under the FCNM. In this context, notably revealing are the comments of the ACFC under Article 3 related to the personal scope of application of the Framework Convention. The on-going disagreement over the definition of national minorities during the drafting phase – reflecting in fact a more fundamental, political disagreement over their individual or group-right nature<sup>8</sup> - was the key reason why the Convention remained intentionally unclear about its personal scope of application. Nevertheless, the ACFC always examined the scope of application given by each State Party, in order to verify whether this margin of appreciation had not been used in a given case for arbitrary and unjustified restriction in implementing the FCNM.

The ACFC in fact persistently held to a standard concept of “unjustified and arbitrary distinctions” in international law. For instance, the Committee used the scope-of-application-argument also to reiterate the importance of advisory and consultative mechanisms, saying that certain persons belonging to ethnic minorities should not be excluded a priori from the dialogue because they are not recognized as national minorities under the Framework Convention. This went in line with the PACE Recommendation 1623 (2003), namely: “The Assembly considers that the states parties do not have an unconditional right

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<sup>8</sup> Notwithstanding the Explanatory Report, according to which the Convention “does not imply the recognition of collective rights”, the ambivalence between the individual and the collective in MR remains. It played a significant role in the work of the ACFC, notably in its conceptual discussions. The “founding fathers” of the FCNM did put this ambivalence aside, since no consensus within the international setting seemed feasible in near future. As a consequence, the Explanatory Report draws a clear line, almost in a manner of antinomy, between individual and collective rights.

to decide which groups within their territories qualify as national minorities in the sense of the framework convention. Any decision of the kind must respect the principle of non-discrimination and comply with the letter and spirit of the Framework Convention.”

Citizenship is indeed a decisive element to influence the scope of FCNM application in general and minority participation in public affairs, in particular. The absence of a formal minority definition in the FCNM left a broad margin of appreciation for the ACFC, and it did its best to draw benefits out of this for new migrant minorities despite encountering resistance of certain states and discontent of the Committee of Ministers. As already said, the ACFC built its arguments in compliance with general principles of international law. Indirectly conducive may have been the EU principle of constitutional tolerance and human rights foundation of European citizenship. Referring to the concept of “arbitrary or unjustified distinctions”, the ACFC considered as a part of its duty to examine the personal scope of application given to the implementation of the Framework Convention in every given case. This allowed the Committee to go beyond the states definitions and examine the situation of other minority groups, most notably migrants (Tanase, 2003).<sup>9</sup> The ACFC took a position that, “while it is legitimate to impose certain restriction on non-citizens concerning their right to vote and be elected, they should not be implied more widely than necessary”. As a rule, the Committee encouraged the State parties to provide non-citizens with active and passive voting right in local elections. It consistently recommended flexibility and inclusiveness in the approach taken by State Parties. Moreover, the ACFC always emphasised the fact that the application of the Framework Convention to non-citizens belonging to minorities can enhance the spirit of tolerance, intercultural dialogue and co-operation, as provided for in Art 6 of the Convention.

It is the normative content of Art 6 that considerably helped the ACFC by its article-by-article-approach to assess the FCNM implementation also in view of the inclusion of non-citizens belonging to ethnic minorities that were not guaranteed minority protection in given cases. This article applies to everyone within the state with respect to threats and discrimination based on ethnicity, language, or religion. The Committee used inclusive scope and mandatory character of the obligations for State Parties under Art 6 in matters regarding media

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<sup>9</sup> In its opinion on Germany of March 2002, the Committee didn't hesitate to refer to the large number of groups of noncitizens living in Germany, the Government itself having indicated 7.49 million foreigners living in Germany (§ 17). In particular, the Committee quotes the official statistics at the end of 1999, it referred to the presence of 1,856,000 citizens from EU States, more than 2,053,000 Turkish citizens, 737,000 Yugoslav citizens, 214 000 Croats and 291,000 Polish citizens. (More in: Tanase, 2003)

stereotyping, policy failures, and citizenship laws (Gilbert, 2005). The principles of tolerance, dialogue and mutual respect, enshrined in Art 6 are intrinsically linked to full and effective equality and non-discrimination. Thanks to a creative teleological interpretation by the ACFC, positive effects of Art 6 went far beyond providing a framework for balancing between the need for persons belonging to a national minority to preserve their own culture, and yet be integrated into the society. By systematically targeting migrants' policy failures, the Committee in fact "stubbornly" reiterated that economic and social cohesion are not viable in societies where persons belonging to big ethnic or religious migrant groups remain at the same time "differentially" included (labour and social welfare) and systemically excluded as regards their cultural identity. This is an important lesson learnt when considering the feasibility and principles of rational accommodation of cultural diversity within a European legal framework.

In its Report on Non-Citizens and Minority Rights (2006) the Venice Commission points to the above developments as an indication "that a significantly more flexible and nuanced approach has gained ground in the implementation and monitoring practice under the FCNM, even in those cases where the Government's formal position on the issue has remained intact." Moreover, "a move towards a more nuanced approach to the definition issue can be detected not only in the work of the ACFC, but also in the work of the CM and, although to a lesser extent, in governmental practice." Finally, also the Venice Commission leaves no doubt as to the key standard for arbitrary or unjustified, i.e. discriminatory distinctions in granting minority rights:

"132. Each State shall secure to everyone within its jurisdiction - including non-citizens - the human rights guaranteed by the general human rights treaties binding upon them, mainly by refraining from undue interference in their exercise. A restrictive declaration entered upon ratification of the FCNM and/or a general law on minorities containing a citizenship-based definition can in no way mitigate this international obligation."<sup>10</sup>

Given such developments, the PACE re-focused its concerns from minority definition to the risk of discriminatory exclusion of minority groups by those States, which have entered declarations or reservations upon ratification of the FCNM. The support backing the Recommendations 1623 (2003) stressed in particular that "it would be rather unfortunate if the European standards of minority protection appear to be more restrictive in nature than the universal standards". Namely, Article 27 ICCPR is not limited to citizens; at the same time, it remains binding for all State Parties to the FCNM regardless of the citizenship criterion in the implementation policy of a considerable number of them. This principal

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10 CDL-AD(2007)001

warning of the PACE against undue restrictions based on the citizenship-criterion in the state policy of human rights was also *mutatis mutandis* echoed in the Resolution 1509 (2006) on the Human Rights of Irregular Migrants.

#### **2.2.4. Full and effective equality means positive measures and the obligation of a result**

From the very beginning of the monitoring process, the ACFC understood the principles of full and effective equality and of second level of protection against discrimination (Art. 4) as cornerstones for the foundational nature and inclusive scope of participation under the FCNM. The ACFC particularly built upon para.2 of the Article 4 of the Framework Convention, which explicitly demands from State Parties to engage in “non-exclusion policy” prohibiting discrimination. It also called on State Parties to adopt, where necessary, adequate measures in order to promote, in all areas of economic, social and political and cultural life “full and effective equality between persons belonging to a national minority and those belonging to the majority”. Compared in sequence to respect and protection, promotion is the third, highest level of accommodation. Throughout its Opinions, the ACFC repeatedly related the broad scope of application of these measures of positive discrimination to participation. More importantly, the ACFC always underlined that it did not consider positive measures as discriminatory. For example, the ACFC saw that some discriminatory situations might be remedied by adopting special measures, such as quotas, to ensure full and effective participation of persons belonging to national minorities in terms of a more significant presence of these minorities in state administrative structures. In particular, the ACFC often made in its opinions a cross-reference between the effective participation, equality and non-discrimination principles, in order to address the problem of differences in social and economic situations between certain minorities and the majority. The ACFC also concluded that unemployment appears to affect disproportionately persons belonging to national minorities, especially young women, stressing the need to eliminate both direct and indirect discrimination in the labour market, and enhance the recruitment of qualified persons belonging to national minorities in public service persisted. When coming to the dispute over minority land rights, the ACFC often pointed out that both socio-economic and cultural aspects of the problem are directly interrelated with the participation rights of the minority in question. In a nutshell: It becomes obvious that the ACFC applied the indirect-discrimination-concept<sup>11</sup>

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11 Indirect discrimination is generally understood as a rule, policy, practice, or procedure that is the same for everyone and thus may look fair but whose side effect disadvantages members of a specified group relative to others.

taking fully into account that indirect discrimination as such points to a collective dimension of minority rights *as such*, including also migrant minorities.

#### **2.2.5. Participation in public affairs – not goal in itself, but an instrument to effectively prevent social and economic discrimination on the basis of cultural identity**

In its ten-year work, the ACFC had to address three key aspects of participation rights in public affairs: constitutional state design (decentralisation and territorial autonomy) and governance of state as a whole, in order to evaluate the inclusiveness of a given constitutional framework for effective decision-making capacities of minority communities; the entitlements of the minorities to autonomously decide on the issues that are of particular relevance to them; the question of internal democracy within minority communities (Weller, 2005: 430). The truth of the matter is that the ACFC differentiated in devoting its attention to these issues.<sup>12</sup> One could say that throughout all its opinions the ACFC never gave up stressing the importance of a dialogue between the state and minority organisations. Like with representation, the ACFC always understood consultation of minorities as a stepping-stone, but definitely not already as a form of full participation. In many cases the ACFC encouraged the authorities to make this step forward and give appropriate effect to the opinion and proposals of the minority representatives. In fact, the ACFC looked upon consultative mechanisms and their relevance in political decision-making process as a very important term of reference to measure both the scope and the effectiveness of the participation rights in a given country.

The Opinions addressed a whole set of questions pertinent not only to minorities' auto-determination entitlements and their genuine representation through the organisations and institutions of their choice; the ACFC, for example, ruled on the various solutions related to elected bodies, in order to monitor the participation of minorities in legislative process - parties, design of electoral system at each level, boundaries, reserved seat system, parliamentary practice and veto-type rights, participation through specialised governmental bodies.

The message of the ACFC was clear in terms of high-level standards for an effective participation in public life; minority representation and minority consultative mechanisms as such are inherent in political participation of persons belonging to minority. Nevertheless, their mere existence does not mean a fulfilment of participation. Representation is not an aim in itself. Consultative mechanisms are to operate instead as forceful institutional avenues, which will actively

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<sup>12</sup> In 2005, M. Weller rightly warned that "little or no attention has been devoted to the internal democracy of minorities thus far". (Weller, 2005: 430)

promote effective participation of minorities, in cultural, social and economic life and in public affairs, in particular those affecting them.

### 3. Outlook

In fulfilling its task of a treaty body, the Advisory Committee addressed the implementation of the FCNM as “an unfinished story of human rights” and understood its role as that of discovering and developing normative meanings in the human rights canon in terms of minority protection. Has the ACFC hereby confirmed the foundational nature of participation rights, and has it sufficiently built upon and developed the inclusiveness backing the concept of participation rights?

Here, it is worth reminding that the inclusiveness of participation rights of persons belonging to national minorities can be understood in two ways: a/ in terms of the scope of rights, b/ in terms of a constitutive nature of a given state construction which should accommodate and further improve inclusiveness as a major principle of effective, legitimate multicultural societies (multicultural nationhood). The letter message still waits to be more explicitly communicated by the ACFC in its future monitoring work. Nevertheless, the jurisprudence to date represents a good ground for the ACFC to engage into further interpretative possibilities of the “effectiveness” of political participation. As the Commentary on Participation shows, the interpretative basis has been already provided:

“Effectiveness” of participation cannot be defined and measured in abstract terms. When considering whether participation of persons belonging to national minorities is effective, the Advisory Committee has not only examined the means which promote full and effective equality for persons belonging to national minorities: it has also taken into account their impact on the situation of the persons concerned and on the society as a whole.

Hence it is not sufficient to formally provide for the participation of persons belonging to national minorities. The measures should also ensure that their participation has a substantial influence on decision taken and that there is, as far as possible, a shared ownership of the decisions taken.

Similarly, measures taken by the State Parties to improve participation of persons belonging to national minorities in socio-economic life should have an impact on their access to labour market as individual economic actors, their access to social protection and, ultimately, their quality of life. Full and effective equality may, in this context, be seen as a result of effective participation” (Advisory Committee on the FCNM, 2008: 13).

It remains to be seen whether the ACFC will pursue its ten-year proactive interpretation of the FCNM, and whether it will further take an indeed bold path in developing normative content of Article 15 in terms of multicultural citizenship, as suggested in the PACE Resolution 1735 from 2006. Whatever the result may be, it will certainly not depend on expertise level and good will of the members of the ACFC. I would fully agree with those who argue that today, “we are facing perhaps even more difficult stage of the FCNM implementation”. The essential today’s challenges for the full and effective compliance by the State Parties with their obligations under the present Convention are far-reaching and systemic: although integral part of universal human rights, minority rights are often handled as a sort of “special” rights, different and completely isolated from the “general” human rights.<sup>13</sup>

Even with such important tasks still pending for the ACFC, there is no doubt that the most important lessons learnt also affect migrants’ accommodation. The ACFC demonstrated in its jurisprudence that to date, traditional differentiation between immigration and “other” countries is obsolete. There is no viable future for state constitutional politics which ignores both new reality and states’ international legal obligations to guarantee to all those living within its territory and regardless of their citizenship status a non-discriminatory protection of their fundamental rights. From a different perspective and in a different approach the ACFC thus contributed to the on-going debate, which contextualizes migrants’ rights and nationality state policies into a broader spectrum of state and society. Such a linkage should be translated not only in social and cultural, but also constitutional politics. The Committee always encouraged the states to give electoral rights to minorities at local levels, where their social, economic and cultural rights face a day-to-day- policies directly affecting them, including protection of their cultural identity and social security against indirect discrimination. A more convincing argument could not be provided to show that social cohesion is viable only (a) with a critical mass of politically cohesive elements in migrant policies and (b) provided that there is legal basis guaranteeing a critical level of political accommodation of minority groups, including big migrant groups.

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13 Besides the problem of failed mainstreaming, B. Cilevics, member of the Parliamentary Assembly of the Council of Europe, warns of States’ reluctance to guarantee full and effective equality to the national minorities, and criticizes the lack of synergy between the EU and the Council of Europe in this field, what additionally undermines the principle of universality of minority rights (*Conference 10 Years of Protecting National Minorities and Regional and Minority Languages*, Strasbourg, March 2008).

#### 4. Concluding Observations

The FCNM represents the first respond to the need of hard-law obligations for State Parties within the international legal system of minority rights. Already at first glance it becomes clear that this document of the Council of Europe has embraced the principle of reasonable accommodation of persons belonging to national minorities as such, without using the legal concept properly taken, in the sense it developed in Canadian law.<sup>14</sup> Some articles are indeed paradigmatic in this regard.<sup>15</sup> A commonality with the Canadian concept is in the motives of discrimination prohibited: religion, language, ethnic or national origin. However, the comparison has to stop here. The teleology of the FCNM goes much further and is fundamentally different: although positive measures in promoting effective and full equality of persons belonging to national minorities also take place at an individual level (obligation of an action), the aim behind this second level of anti-discrimination standards goes beyond a given case, and implies that such measures should have additional positive impact on the situation of persons concerned/given community and on a society as a whole (obligation of results).

Finally, regarding practical implications of the above-outlined ACFC jurisprudence for the institutional and social-policy reforms necessary to sustain social and economic integration of migrants also by taking into account their cultural identity, a conclusive question has to be raised: Do legal responses effectively lead to policy implementation? The answer underlying this paper is straightforwardly positive. The rule of law notoriously demands legal standards for policy implementation in the sense that they make policy implementation more or less comprehensive. More notably and more pragmatically, it is again legal settings that are testament to measuring the effectiveness of policies in terms of breaches of international legal obligations of a result. To date, 43 signatures and 39 ratifications prove that FCNM indeed became the European standard in implementing international legal obligations in minority rights, including to a considerable extent also those with a non-recognized status of national minorities.

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14 Given to its reduced, basically labour-market-driven-nature, neither can the RA as introduced in the EU since 2000 be a point of reference here.

15 In areas inhabited by substantial numbers of persons belonging to a national minority traditionally or in a substantial numbers, if there is sufficient demand, the Parties shall endeavour to ensure, as far as possible and within the framework of their education system, that persons belonging to those minorities have adequate opportunities for being taught the minority language or for receiving instructions in this language" (Art. 14, para 2)

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**Права партиципације према  
Оквирној конвенцији за заштиту националних  
мањина: У сусрет Правном оквиру за сузбијање  
социјалне и економске дискриминације**

*Резиме*

Оквирна конвенција за заштиту националних мањина представља први одговор на потребу да државе-чланице Савета Европе приступе испуњавању обавеза преузетих из међународних уговора у оквиру међународног правног система заштите права националних мањина. Очигледно је већ на први поглед да овај документ Савета Европе почива на принципу рационалне правне заштите припадника националних мањина, при чему се овај правни концепт ипак значајно разликује од тога како је схваћен у канадском праву и у Европској Унији. Заједничко за оба концепта је основ дискриминације: верско опредељење, језик, етничко или национално порекло. Међутим, свако даље поређење ту престаје. Телеологија Оквирне конвенције иде много даље од канадског концепта, који је свеобухватнији, и од стандарда ЕУ. Иако се позитивноправне мере, усмерене ка промовисању делотворне и потпуне једнакости припадника националних мањина, примењују на индивидуалном плану (кроз обавезу држава да предузму одговарајуће мере), основни циљ увођења другог нивоа антидискриминацијских стандарда има далекосежније импликације од решавања појединачних случајева. У случају Оквирне конвенције, он подразумева да такве мере морају имати додатан позитиван утицај на конкретну ситуацију у којој се дотичне особе налазе или на конкретну друштвену заједницу и друштво у целини (обавеза постизања конкретних резултата).

Практични ефекти, које приказана јуриспруденција Саветодавног комитета може имати на реформу институција и социјалне политике неопходних да би се подржала социјална, економска и културна интеграција миграната, воде до кључног питања: да ли одговарајућа правна регулатива води до ефикасне имплементације ове социјалне политике? Одговор аутора је несумњиво позитиван. Владавина права нужно захтева установљавање

правних стандарда за имплементацију одређене политике социјалне интеграције миграната. Истовремено, правно утврђени стандарди и инструменти миграционе социјалне политике значајно доприносе њеној свеобухватној имплементацији. Правни оквир је опет кључни фактор који обезбеђује мерење ефикасности усвојених програмских политика с обзиром на резултате и обавезе који проистичу из међународних правних обавеза. До данас, Оквирну конвенцију су потписале 43 државе-чланице а званично је ратификована од стране 39 држава-чланица, доказ да је ова Конвенција прихваћена као европски стандард у имплементацији међународних правних обавеза заштите мањинских права, укључујући у одређеним случајевима и мањинске групе којима није признат статус националних мањина.

**Кључне речи:** дискриминација, националне мањине, партиципациона права.