PŘEDNÁŠKY ZAHRANIČNÍCH PROFESORŮ

Introduction to General Aspects of the Law on the Protection of Minorities

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1. Definition

International law has not, as yet, laid down a conclusive definition of a minority. The definition given by F.Capotorti in the UN Study on the Rights of Persons Belonging to Ethnie, Religions and Linguistic Minorities (1977), is usually followed: „a group which is numerically inferior to the rest of the population of a State, in a non–dominant position, whose members – being nationals of the state in question – 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".

The **first** thing to note is that the protection only attaches to nationals of the State in question. Non–nationals will probably fulfil all the other criteria of the Capotorti test, but it is well established that a State is only responsible for promoting the collective rights of minority groups within its own population. Aliens can rely on their own country's good offices for protection and international law additionally provides that State responsibility attaches with respect to the treatment an alien receives outside the country of which he is a national. Moreover, most human rights

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treaties grant to all individuals, regardless of nationality, the right to be free from discrimination in respect of the rights and freedoms set out therein.

Secondly, while a minority must be numerically smaller than the majority population, it must also constitute a sufficient number for the State to recognise it as a distinct part of the society and to justify the State making the effort to protect and promote it. There must be a group, not simply a few individuals.

Thirdly, the definition assumes that the group will be loyal (so–called „loyalty test").

Fourthly, the definition does not imply the possibility that minority status rather than being sought could have been imposed by the dominant population, creating so–called involuntary minorities.

Fifthly, the distinction has to he drawn between secessiomst minority gronps that strive for independence and ethnic, religious and linguistic groups seeking a distinct cultural identity within the State. The right to self–determinationis a right of „peoples" not minorities. The term „minorities" should be distinguished from that of „peoples" who not only desire preservation and furthar development of thair specific characteristics but, beyond that, also want to attain sovereignty and full independence. From this point of view, „minorities" are characterized by the fact that thare usually exists a country of origin (with the exception of indigenous popnlations), whereas „peoples" may be qualified as „nations without states".

2. Rights of minorities and thair protection: League of Nations

Given that the group has the proper attributes of a minority, what rights attach to it? The protection of minority rights reached its zenith immediately after World War I with the various peace treaties. Minorities came under the aegis of the League of Nations. Articles 86 and 93 of the Treaty of Versailles, 1919, contained provisions in favour of minorities, while Article 9 of the Polish Minorities Treaty, 1919, specifically guaranteed mothar–tongue education in towns and districts in which thare was „a considerable proportion of Polish nationals of othar than Polish speech". Similar treaties were put in place to protect minorities in most of the Balkans and in the Baltics. No article on minorities was incorporated into the League Covenant. As a result of the Paris Peace Conference thare emerged a system of legal obligations binding States which „voluntarily" assumed conditions concerning the treatment of minorities. The treaties and instruments making up the League system as it was known are very similar, sometimes identical. The focal point is tha question of equality and non–discrimination between the natiouals of the concerned States. They speak of racial, national, linguistic or religious minorities without attempting to define the concept furthar. There was no great effort to be more precise. The treaties avoided any delimitation by speaking of „persons belonging to racial, religious or linguistic minorities".Similarly we may find references to „inhabitants" of a state „who differ from the majority of the population in race, language and religion". The League never referred to the concept in general but considered the „minority question" as restricted to certain States or ever regions. This in itself narrowed down the terms of reference sufficiently. This, an international system of bilateral treaties and declarations placed under tha guarantee of the League of Nations intended to deal with tha minority problems in certain countries was in fact the first attempt in history to deal with the nationality and minority problems on a systematic basis.

The importance of the system was not in its success rate but more in the fact that is established the idea of the rule of international law in this field of international affairs. The Treaties brought an important innovation as citizens of sovereign States belonging to national minorities were subject to provisions of international law.

3. Rights of minorities and thair protection: United Nations

The Allied Powers in 1945 did not set about re–establishing minority rights conventions. The post–1945 period saw international lawyers concentrating on individual human rights. The concept of minority protection as known prior to World War II was replaced by a new international concept of universal human rights. The UN Charter drafters ignored the minority issue altogethar while individual rights were referred to in a number of Articles. However, the Cbarter in Article 68 provided for tha setting up of the Commission on Human Rights which than among othar duties was charged with the „protection of minorities" and the „prevention of discrimination on the grounds of race, sex, language or religion". The Commission on Human Rights than appointed the Sub–Commission on Prevention of Discrimination and Protection of Minorities. The Sub–Commission consists of independent experts. It was to this Sub–Commission that in 1977 Capotorti as a Special Rapporteur presented his comprehensive study on minorities, containing the well–known definition. It was also through the Sub–Commissions persistent attempts that tha Commission on Human Rights incorporated an article in the draft International Covenant on Civil and Political Rights, which came to read in the definite text of 1966 as follows (Article 27): „In those states in which ethnic, religious, or linguistic minorities exist, persons belonging to such minorities shall not he denied the right, in community with the othar members of thair group, to enjoy thair own culture, to profess and practice thair own religion, or to use thair own language."

The wording of this Article reflects the ambivalent attitude of States towards minorities, calling in question the obligations imposed on the State. The negative way in which the „minority rights" are granted differs markedly from the othar provisions of the Covenant. Negative phrasing usually indicates a prohibition rathar than a right. However, Article 27 grants rights in a negative format: „... minorities shall not be denied tha right...". It is as if the States parties did not want to be under an obligation to promote minority rights: it is one thing to permit minorities to exist, it is anothar to actively encourage potential dissident separatist groups within the State. The loyalty requirement is part of this same thame of limited support for minority rights.

None of the country reports nor any of the individual complaints made so far to the Human Rights Committee under tha International Covenant on Civil and Political Rights have yet added clarity to the scope of Article 27. Neverheless Article 27 has been the subject of successful petitions before the Human Rights Committee (for example: Lovelace v. Canada).

If the content of a State's obligations under Article 27 of tha International Covenant is unclear, even more controversy surrounds the closely connected but more general issue concerning the nature of the rights bestowed. Article 27 provides that minority groups ought to be able to „enjoy thair own culture, to profess and practice thair own religion and to use thair own language". Such rights emphasise the group protection given to a minority, but do not refer to the freedom from discrimination that individual members of the group might have to invoke. Individuals would

want to ensure thay receive equal treatment. While freedom from discrimination is important in protesting certain aspects of minority rights, the promotion of the group itself requires the collective guarantees set out in Article 27.A member of a linguistic minority, for example, would not want to suffer arbitrary discrimination based on the use of his mothar–tongue. However, failure to recognise collective rights while protecting individuals from discrimination can lead to covert assimilation of the group as snch. Furtharmore, non–discrimination provisions do not actively encourage tha survival of the language or any othar distinguishing characteristic of the group. So, the minority and it members should receive differential treatment, special measures for its protection as a minority, prevention of discrimination is not sufficient.

A furthar question concerns on whom are the rights bestowed, is it individual members of the group or is it the collective itself? Article 27 speaks of „persons belonging to such minorities" (it is added:„in community with the otbar members of thair group") and the Optional Protocol only allows individuals the right to present communications to the Human Rights Committee. The Genocide Convention 1949 confers rights on tha group, but it is exceptional in this regard. There are good reasons for not giving rights to the minority group. Politically, to accord a special status to a group within a State, especially where that group has ethnic connections with a neighbouring State, may not be domestically acceptable and lead to inter–community conflict. Moreover, post–1945 the emphasis has been on the individualisation of rights in contrast to tha inter–war system. It would seem clear, tharefore, that minority rights are granted to individual members of the minority, not tha group itself. Under Article 27 of the International Covenant individuals have locus standi before the Human Rights Committee via thair right of petition, whereas the minority groups as such have not.

The latest development is the adoption by the UN General Assembly of a **Declaration** on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities, on 18 December 1992 (Resolution 47/135). Of course, this Declaration only has recommendatory status (it is not mandatory for States), but at the same time the Declaration has been formulated in strictly legal term.Important „new" provisions are the following:

Article 1 (1): „**States** shall protect the existence and tha national or ethnic, cultural, religious and linguistic identity of minorities within thair respective territories and shall encourage conditions for the promotion of that identity."

Article 4 (1): **States** shall take measures where requited to ensure that persons belonging to minorities may exercise fully and effectively all thair human rights and fundamental freedoms withour any discrimination and in full equality before the law.

(2): **States** shall take measures to create favourable conditions to enable persons belonging to minorities to express thair characteristics and to develop thair culture, language, religion, traditions and customs, except where specific practices are in violation of national law and countrary to international standards. Now, paragrapbs (3) and (4) concern special protection of the language and education of minorities and thair members.

Article 5: „**National policies and programmes** shall be planned and implemented with due regard for the legitimate interests of persons belonging to minorities."

4. The protection of minorities under the European Convention on Human Rights

The European Convention on Human Rights contains no provision guaranteeing minority rights. The Convention does not provide for any rights of a national 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 tha grounds of thair belonging to the minority. Article 14: „The enjoyment of the rights and freedoms as set forth in this Convention shall be secured without discrimination on any ground such as... association with a **national minority**". On the othar hand, minority groups will be recognised as having locus standi to bring cases questioning breaches of the ECHR before Commission and Court. Article 25(1) of the Convention speaks of „any groups of individuals" from which the Commission may receive petitions. Thus, while an individual member and the minority group itself can bring applications before the Commission, thay can only do so under the existing provisions: thare is not direct protection for the minority group as a group. The effect of this restriction needs to be addressed. While many group rights will entail measures guaranteeing non-discrimination and othar fundamental freedoms relevant to individual claims, the protection and promotion of the minority, i.e. „minority rights" are not recognised as such. As matters stand, applicants seeking to preserve the rights of thair minority group have to rely on Article 14 of the European Convention. Article 14 is purely a non-discrimination provision.

Article 14 does not establish an autonomous right not to suffer discrimination. It is dependent upon the othar provisions of the European Convention. A wide interpretation of discrimination in Article 14 could provide minority groups with effective protection of thair collective rights. If it is read to encompass indirect discrimination and affirmative action to eradicate institutionalised discrimination, than many group rights can be enforced through individualized Article 14 applications. The standard definition of discrimination is found in the Belgian Linguistics case (Case relating to certain aspects of the law on the use of languages in education in Belgium; 1968): -the principle of equality of treatment is violated if tha distinction has no objective and reasonable justification; tha existence of such a justification must be assessed in relation to the aim and effects of the measure under consideration, regard being had to the principles which normally prevail in democratic societies: a difference of treatment in the exercise of a right laid down in the Convention must not only pursue a legitimate aim: Article 14 is likewise violated when it is clearly established that thare is no reasonable relationship of proportionality between the means employed and the aim sought to be realised.

While the Court's views seem to evince a concept of direct discrimination alone, it is possible to read into the judgment an acceptance of group promotion through a justified difference of treatment. If so, than actions by States that favour minorities at the expense of majorities may be justified under Article 14, where as claims by an individual or group that such actions be undertaken by a State would fail since thare is no express provision for the promotion of minority rights under the European Convention. The discretion granted to the Court and Commission by the concepts of, inter alia, reasonableness and proportionality, should permit to those institutions the latitude to reach decisions which would avoid the constraint of thare being no express minorities provision in the Convention.

Having established that Article 14 itself and the leading interpretations of it leave it open to the Commission and Court to protect minority rights through a broad reading of the idea of discrimination, it is necessary to examine how the deliberative organs of the Convention have dealt with group rights cases brought before tham in terms of individual discrimination. As might be expected, thare is no cateforical denial of group rights, but the balance is in favour of a repudiation of protection. On the basis of jurisprndence the conclusion might be drawn that, while thare has been some movement in favour of protecting minority groups by means of a wide interpretation of discrimination in Article 14, the general trend has been to deny to minorities as such the rights and freedoms of the Convention, even where the result is harsh.

5. The protection of national minorities within the CSCE

The CSCE has a long history of involvement in the protection of minority rights, dating back to Principle VII of the Helsinki Final Act of 1975, reading, inter alia, as follows: „The participating States on whose territory national minorities exist will respect the right of persons belonging to such minorities to equality before the law, will afford tham the full opportunity for the actual enjoyment of human rights and fundamental freedoms and will, in this manner, protect thair legitimate interests in this sphere." However, the principal measures have been adopted since the Vienna Follow-up Meeting of 1986-1989. The most detailed exposition of minority rights within the CSCE process than came out of the Copenhagen Meeting on tha Human Dimension of 1990. The Copenhagen principles represent a significant advance over efforts to define minority rights in othar international forums. The three areas in which tha Copenhagen principles contribute most significantly to minority rights are the nse of minority languages, education and political participation. The most radical measnre is found in paragraph 35 of the Copenhagen Document, wherein the participating States noted the efforts undertaken to protect and create conditions for tha promotion of the ethnic, cultural, linguistic and religious identity of certain national minorities by establishing appropriate local or autonomous administrations corresponding to the specific historical and territorial circumstances of such minorities. The provision adopts tha view that individual rights can only be properly protected where the group has political control of thair own affairs. Given that States had previously accorded rights to members of minority groups only reluctantly, this new dimension to the promotion of tbe group itself reveals a potentialy monumental shift in thinking, even if the participating States only „noted" it. Furtharmore, it discloses the fact that the protection of minority rights may require more than judicially enforceable rigbts.

The Copenhagen Document consists of five chapters one of whoch is exclusively devoted to the question of national minorities. This question was undoubtedly one of tha most complicated and sensitive issues at the Copenhagen Meeting. It touched upon questions which are considered by several CSCE States to be of vital interest for tha preservation of thair national and territorial integrity. Neverthaless, the negotiations resulted in an extensive chapter four, encompassing not less than eleven paragraphs on the subjects. The chapter contains a number of agreements which are an important step forward on the difficult road to a commuuis opinio about the status of national minorities in international relations. As a matter of fact, thare is no othar intergovernmental document at this moment dealing with national minorities

which would bear comparison with tha Copenhagen Document. A major achievement of the fourth chapter of the Document is its resolution of the question of how to determine who belong to a national minority. On this question, paragraph 32 states: „To belong to a national minoritis a matters of a person's individual choice and no disadvantage may arise from the excercise of such choice." It is understandable that some CSCE states felt uncomfortable with this clause, as it seems to entitle everyone to choose to belong to a national minority without any furthar conditions. In the same paragraph it is also stated that persons belonging to a national minority have the right to establish and maintain unimpeded contacts among thamselves within thair country as well as contacts across frontiers with citizens of othar States with whom thay share a common ethnic or national origin, cultural heritage or religious belief. The Copenhagen Document bears clear sings of the most controversial issues which could be solved only by compromising on carefully formnlated clauses. This resulted in the insertion of a great number of escape clauses which highly affect the obligatory character of tha provisions concerned. Often the CSCE States only pledge to „endeavour" or to „consider" and in one case thay only were prepared to „note". Moreover, thay could achieve agreement often only by referring to „national legislation" as anothar escape formula. The formula „to note" has been used for the very sensitive issue of possible autonomous administrations of minorities (paragraph 35 of the Copenhagen Document). Anothar issue which remained controversial until the very end of the Copenhagen Meeting concerned the nse of tha mothar tongue of national minorities in public life. The fear of some CSCE States that privileged treatment of national minorities might result in the demolition of the national State (territorial integrity) is clearly expressed in paragraph 37.

Since „Copenhagen", thare has been the Geneva Meeting of Experts on National Minorities (1991). It was not as innovative as Copenhagen: for instance, it speaks of „persons belonging to national minorities", again emphasising the individual rathar than collective nature of minority rights, although, like Article 27 of tha International Covenant, it is recognized that the rights may be exercised in community with othar members of the group. However, the fact the meeting was convened indicated a continuing wish to keep minority rights at the forefront of the CSCE process. Much of the Geneva Final Document repeats the language and wording used in the Copenhagen Document, but in paragraph II the Experts Meetiug clearly emphasised that: „issues concerning national minorities, as well as compliance with international obligations and commitmens concerning the rights of persons belonging to tham, are matters of legitimate concern and consequently do not constitute an internal affair of the respective state".

CSCE Human Dimension Mechanism, High Commissioner and Peace-keeping

Within the framework of the CSCE process thare are three instruments to be pointed out that may the used to deal with minority questions. In the first place thare is the Human Dimension Mechanism under which especially individual human rights may be protected. This supervisory mechanism consists of four elements or phases:

1. The CSCE states decided to exchange information and respond to reqnests for information and to representations made to tham by othar participating states in questions relating to the human dimension of the CSCE. The states are obliged to supply the information asked for. So, tbis is tha first and information phase.
2. If the exchange of information asked for does not lead to satisfactory results, the CSCE states are entitled to convence a bilateral meeting with the othar state in order to examine such questions, including situations and specific cases with a view to resolving tham. So, this is the second phase of bilateral meeting for the examination of issues.
3. If the exchange of information and/or the bilateral meeting has no lead to a solution, the CSCE states are entitled to inform all othar states about the questions concerned. This is the third phase concerning notification of all othar states.
4. Finally, if the previous procedures, which all aim at the solution of the problems, remain futile, the CSCE states have the right to raise thase problems, including information concerning situations and specific cases, at the (annual) meetings of the Conference on the Human Dimension of the CSCE. So this is the fourth and last phase of the human dimension mechanism which has a plenary character.

Of course, this supervisory mechanism is of a purely inter-governmental character, from state to state, without any independent intermediary such as an international committee on human rights or the like. Neverthaless tha establishment of the mechanism was an important step forward. The mechanism has to a certain degree a compulsory nature. States are obliged to respond to diplomatic demarches by anothar CSCE-state. But, on the othar hand, tha mechanism does not provide for sanctions being imposed on states which violate thair obligations.

In Moscow 1991 the human dimension mechanism was furthar elahorated and extended. Now, a participating State my invite the assistance of a CSCE mission of up to three experts to address or contribute to the resolution of questions in its territory. It is also possible, that one more CSCE States, having pnt into effects phases 1 and 2 of the human dimension mechanism, may initiate such a fact-finding mission with the consent of the host state. Then it should concern „a particular, clearly defined question on its territory relating to the human dimension of the CSCE". Now, if the requested state does not react by inviting a mission of experts or if the requesting state judges that the issue in question has not been resolved as a result of a mission of experts, the requesting state may, with the support of at least five othar participating states, initiate the establishment of a mission of up tha three rapporteurs. There is also a third possibility under the Moscow Document: if a CSCE State considers that „a particular serious threat" to the fulfilment of tha provisions of the CSCE human dimension has arisen in anothar state, it may, with the support of at least nine othar participating States, initiate the establishment of a mission of up to three CSCE rapporteurs. And the fourth possibility is as follows: upon the request of any CSCE State the CSCE may decide to establish a mission of experts or of rapporteurs.

In Helsinki 1992 of the office of a CSCE High Commissioner on National Minorities was established. The High Commissioner will act under the aegis of the CSCE and thus will be an instrument of conflict prevention at tha carliest possible stage. According to his mandate he will provide „early warning" and, as appropriate, „early action" with regard to tensions involving national minority issues which have

not yet developed beyond an early warning stage, but have the potential to develop into a conflict within tha CSCE area, affecting peace, stability or relations between Participating States, requiring the attention of and action by the CSCE. If, on the basis of exchanges of communications and contact with relevant parties, the High Commissioner concludes that thare is a prima facie risk of potential conflict he may issue an early warning. As far as „early action" is concerned, The Helsinky II Document provides that the High Commissioner may recommend that be authorized to enter into furthar contact and closer consultation with tha parties concerned with a view to possible solutions, according to a mandate to be decided by the CSCE. So, tha High Commissioner's mandate contains an outspoken „linkage" between the human dimension (human rights) in the sense of minority (groups) rights and peace and security in and between states.

Apart from the establishment of a High Commissioner on National Minorities, in the Helsinky II Document specific instruments of conflict prevention and crisis management are mentioned: fact–finding and rapporteur missions and CSCE peace–keeping. It is said that peace–keeping constitutes an important element of the overall capability of the CSCE for conflict prevention and crisis management intended to complement the political process of dispute resolution, CSCE peacekeeping activities may be undertaken in cases of conflict within or among Participating States to help maintain peace and stability in support of an ongoing effort to reach a political solution. CSCE peacekeeping will take place in particular within the framework of Chapter VIII of the Charter which concerns regional arrangements for tha maintenance of international peace and security. So, tha CSCE is to he considered a regional arrangement or agency according to Cbapter VIII. It is explicitly said in tha Helsinky II Document that CSCE peacekeeping operations will not entail enforcement action (as a matter or fact, permission for this would be required on the part of tha Security Council under Article 53 of the UN Charter).

UN action in Europe:

a) The Security Council may in principle undertake military enforcement action to protect minorities a)where thare is a threat to the peace because acts of oppression have international complications, or b)where thare is a gross and constant violation of human rights („humanitarian intervention")

b) The Security Council may in principle undertake peacekeeping operation, with the consent of the parties concerned, to protect minorities, etc. (UN peacekeeping in Europe).

6. Conclusion: towards collective rights?

In fact, minorities' law, the concerning the protection of minorities, is still mainly a question of individual human rights – not only within the UN framework (see Article 27 of the International Covenant on Civil and Political Rights), but also under the European Convention on Human Rights. Group rights are not recognized as such. Minorities have no locus standi. Quite unique in this context is the office of the High Commissioner on National Minorities of the CSCE. However, this is only a „preventive diplomacy" function in order to avert threats to the peace. Minorities' law is still far from encompassing a right to autonomy (self–rule), which would be kind of a right to self–determination within national state boundaries (short of secession). Minorities cannot claim autonomous status as a „collective human right".

An interesting example of the protection of minority rights is to be found in the so–called Carrington plan for the republics of former Yugoslavia („Treaty provisions for the Convention" ; UN Doc. S/23169 Anex VII). Chapter II concerns human rights and rights of ethnic and nationals groups. Amongst the rights of members of national and ethnic groups are mentioned: protection of equal participation in public affairs such as the exercise of political and economics freedoms, in the social sphere, in acces to tha media and in the field of education and cultural affairs generally: and the right to decide to which national or ethnic group he or she wishes to belong, and to excercise any rights pertaining to this choice as an individual rights choice as an individual or in association with othars. Apart from thase individual rights, more importantly, tha following is said about the possibility of receiving a „special status" for minorities:– areas in which persons belonging to a national or ethnic group form a majority, shall enjoy a special status of autonomy. This status, inter alia, encompases „the right to a second nationality" for members of that group in addition to the nationality of tha republic in question, and: a legislative body, an administrative structure, including a regional police force, and a judicary responsible for mattars concerning the area, which reflects the composition of the population of tha area. Now, here some possible ground rules for autonomy status of minorities are formulated, which could be included in a future (Council of Europe) Convention on the subjects of minority rights.

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SUMMARY

K obecným aspektům práva na ochranu menšin

1. Definice

Mezinárodní právo dosud neobsahuje definici menšiny.Proto je nutné se obrátit k doktrinárním vymezením. F. Capotorti ve „Studii OSN o právech osob patřících k etnickým, náboženským a jazykovým menšinám" (1977) vypracoval následující definici: „Skupina, která je početně menší než zbytek obyvatelstva státu, v nedominujícím postavení, jejíž členové – jsouce občany státu – mají etnické, náboženské nebo jazykové znaky, jež je odlišují od ostatního obyvatelstva a ukazují, třebaže pouze implicitně, smysl solidarity, směřující k zachování jejich kultury, tradicí, náboženství anebo jazyka."

2. Práva menšin a jejich ochrana: Společnost národů

Ochrana práv menšin dosáhla svého zenitu bezprostředně po I. světové válce. Články 86 a 93 Versailleské smlouvy (1919) obsahovaly ustanovení ve prospěch menšin, zatímco článek 9 Polské smlouvy o menšinách z roku 1919 zvláště zaručoval vzdělání v mateřském jazyce ve městech a okresech, v nichž byla značná část polských občanů, hovořících jinak než polsky. Obdobné smlouvy chránily menšiny na Balkáně či v Pobaltí. Žádné ustanovení o menšinách však nebylo zahrnuto do Paktu Společnosti národů. Jako výsledek Pařížské mírové konference se objevil systém právních závazků, které některé státy „dobrovolně" převzaly, v zacházení s menšinami. Daný mezinárodní systém, vytvořený pod egidou Společnosti národů, představoval ve skutečnosti první pokus v dějinách, jenž se zabýval problémy menšin na systematickém základě. Význam systému nespočíval v jeho úspěšnosti, ale spíše v založení myšlenky upravit tento problém prostřednictvím mezinárodního práva.

3. Práva menšin a jejich ochrana: OSN

Koncepce ochrany menšin vytvořená mezi dvěmi světovými válkami byla po roce 1945 nahrazena novým mezinárodním pojetím univerzálních lidských práv. Tvůrci Charty OSN ignorovali problémy menšin. Nicméně článek 68 Charty OSN dovolil zřídit Komisi pro lidská práva, mezi jejímiž povinnostmi je mj. „ochrana menšin" a „zabránění diskriminaci na základě rasy, pohlaví, jazyka anebo náboženství". Komise pro lidská práva jmenovala Podkomisi pro zabránění diskriminace a ochranu menšin, složenou z nezávislých odborníků. Zvláštním zpravodajem této Podkomise byl v roce 1977 F. Capotorti, jenž připravil obsažnou studii o menšinách. Zmíněná Podkomise rovněž usilovala o prosazení ustanovení o menšinách do návrhu Mezinárodního paktu o občanských a politických právech. Její vytrvalé snažení nalezlo svůj výraz v článku 27 Mezinárodního paktu o občanských a politických právech z roku 1966, jenž zní: „Ve státech, kde existují etnické , náboženské nebo jazykové menšiny, nesmí být jejich příslušníkům upíráno právo, aby ve společnosti s ostatními příslušníky menšin užívali své vlastní kultury, vyznávali a vykonávali své vlastní náboženství nebo používali svého vlastního jazyka".

Znění ustanovení odráží dvojaký postoj států vůči minoritám. Pravidlo chování je formulováno negativním způsobem, aniž by zavazovalo státy aktivně podporovat menšinová práva. Obsah uvedeného praviodla zůstává nejasný a vzbuzuje kontraverse. Navzdory tomu je zřetelné, že menšinová práva se poskytují jednotlivým příslušníkům minority a nikoli skupině. Nejnovější vývoj charakterizuje přijetí Deklarace o právech osob patřících k národnostním nebo etnickým, náboženským a jazykovým menšinám, schválené Valným shromážděním OSN 18. prosince 1992 (rezoluce 47/135). Uvedená deklarace má pouze doporučující povahu, nicméně byla formulována za použití právního názvosloví. Důležitá nová ustanovení znějí.

Článek 1 (1):

„Státy chrání existenci a národnostní nebo etnickou, kulturní, náboženskou a jazykovou totožnost menšin na jejich vlastních územích a vytvářejí podmínky pro podporu této totožnosti."

Článek 4 (1):

„Státy přijmou opatření, aby zajistily, že osoby patřící k menšinám mohou plně a účinně vykonávat všechna jejich lidská práva a základní svobody bez jakékoli diskriminace a v úplné rovnosti před právem."

Článek 5:

„Národnostní politika a programy budou plánovány a prováděny s náležitým ohledem na legitimní zájmy osob patřících k menšinám."

4. Ochrana menšin podle Evropské úmluvy o lidských právech

Evropská úmluva o lidských právech neobsahuje ustanovení zaručující menšinová práva. Úmluva neposkytuje jakékoli právo národnostní menšině. Ochrana příslušníka menšiny je omezena na právo nebýt diskriminován v požívání práv Úmluvy na základě příslušnosti k minoritě. Článek 14 Úmluvy stanoví, že užívání práv a svobod přiznávaných touto úmluvou musí být zajištěno bez diskriminace založené na jakékoli příčině, jako je pohlaví, rasa, barva pleti, jazyk, náboženství, politické nebo jiné smýšlení, národní anebo sociální původ, příslušnost k národnostní menšině, majetek, rod či jiné postavení.

5. Ochrana národnostních menšin v rámci KBSE

Závěrečný helsinský akt obsahuje zásadu VII, ze které vyplývá, že zúčastněné státy, na jejichž území existují národnostní menšiny budou respektovat právo osob, které k takovým menšinám patří, na rovnost před zákonem, poskytnou jim veškeré možnosti pro skutečné užívání lidských práv a základních svobod a budou tímto způsobem chránit jejich zákonné zájmy v této oblasti. Problematika menšinových práv pak byla projednávána na následujících schůzkách. Kodaňské zasedání o lidské dimenzi konané v roce 1990, zaznamenalo významný pokrok při definování práv menšin na mezinárodním fóru. Principy přijaté v Kodani směřují přitom do třech oblastí: užívání jazyků, vzdělání a účast na politickém životě. Nejzásadnější opatření je vtěleno do paragrafu 35 Kodaňského dokumentu, jenž vyžaduje ochranu a vytváření podmínek pro podporu etnické, kulturní, jazykové a náboženské totožnosti národnostních menšin zakládáním vhodných místních či autonomních správ, korespondujících se zvláštními historickými a územními okolnostmi takových minorit. Ustanovení přijímá názor, že individuální práva mohou být důkladně chráněna tam, kde skupina má politickou kontrolu nad vlastními záležitostmi. Kodaňský dokument také určuje otázku, kdo patří k národnostní menšině. Paragraf 32 stanoví, že příslušnost k národnostní menšině je věcí osobní volby a žádné znevýhodnění nemůže vzejít z výkonu takové volby.

V rámci KBSE také působí kontrolní mechanismus lidské dimenze, jenž sleduje ochranu práv jednotlivce. Kontrolní mechanismus je vystavěn na čtyřech pilířích:

1. *Účastnické státy KBSE rozhodli o vzájemné výměně informací a poskytování informací na žádost jiných účastnických států v otázkách, jež se vztahují k lidské dimenzi KBSE. Státy jsou zavázány poskytnout informace, o než jsou požádány.*
2. *Jestliže výměna informací nevede k uspokojivým výsledkům, jsou účastnické státy oprávněny svolat dvoustrannou schůzku za účelem šetřit takové otázky, včetně situací.*
3. *Pakliže výměna informací nebo dvoustranná schůzka nenalezla řešení, jsou účastnické státy oprávněny informovat ostatní státy o dotčených otázkách.*
4. *Nevyústil-li předchozí postup k řešení problému, mají účastnické státy právo vznést problém, včetně informace o situaci a zvláštních případech na roční zasedání Konference o lidské dimenzi KBSE.*

V roce 1992 byl vytvořen úřad Vysokého komisaře pro národnostní menšiny v Helsinkách. Mandát Vysokého komisaře obsahuje spojení mezi ochranou lidských práv a udržováním míru a bezpečnosti mezi státy a má preventivní povahu. Vysoký komisař může včas upozorňovat na napětí, problémy týkajících se menšiny, jež se dotýkají míru a bezpečnosti, aby neohrozily stabilitu mezi státy. Vysoký komisař taktéž může doporučit, aby byl pověřen vstupovat do kontaktů a konzultací se zainteresovanými stranami.

6. Závěr: směrem ke kolektivním právům?

Kolektivní práva menšin nejsou mezinárodněprávně uznána jako taková. Minority nemají locus standi ve věci lidských práv. Menšina nemůže ani nárokovat autonomní postavení jako kolektivní lidské právo. Nicméně tu existuje jistá možnost zvláštního statutu autonomie, kdy osoby patřící k menšině v určité oblasti vytvářejí většinu. Tuto možnost navozuje tzv. Carringtonův plán pro republiky bývalé Jugoslávie (Smluvní ustanovení pro úmluvu, UN Doc. S/23169 Annex VII). Kapitola II se týká lidských práv a práv etnických a mezinárodních skupin v individuálním pojetí jako například ochrana rovné účasti na veřejných záležitostech jako výkon politických a hospodářských svobod v sociální oblasti, přístup k médiím a v kulturní sféře právo rozhodovat ke které národnostní či etnické skupině si přeje osoba patřit. Stranou individuálních práv pak stojí otázky zvláštního autonomního statutu, které zahrnují aspekty zákonodárného sboru, správní struktury, včetně místních policejních sil atd.

Dalibor JÍLEK