



RECOGNITION OF MINORITIES – THE SCOPE OF APPLICATION OF THE FRAMEWORK CONVENTION FOR THE PROTECTION OF NATIONAL MINORITIES

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EXECUTIVE SUMMARY

The aim of the present thesis is to analyze more or less general arguments for the recognition of minorities, whether they are traditional minorities that have been living in a specific territory or country for a long period of time or so-called “new minorities”, which, for the purpose of this thesis, will be understood as referring to the groups of people that have arrived recently, as migrants (including refugees), in a country and constitute communities linked by ethnicity, nationality, religion, language, culture or other common values.

This thesis promotes the idea that in order to protect diversity or factual multiculturalism (to not be confused with state multicultural policies), states should consider legally recognizing ethnic or national minorities that are not yet recognized as such. This, I consider, will strengthen the link between the state, the majority society and its minorities, since the latter will possibly integrate faster if their presence in the state is further legitimized by the act of recognition. The thesis will also focus on the right to self-identification and its importance in the process of recognition and on different state conceptions of citizenship and the link between citizenship and minority status.

From a legal point of view, the Framework Convention for the Protection of National Minorities will serve as the main focal point of the thesis, along with its Advisory Committee’s work regarding the personal and material scope of application of the Framework Convention. However, since the Framework Convention relies on state legislation to be applied, an analysis of some of the states parties’ legislation is necessary.

ABBREVIATIONS

ACFC	Advisory Committee of the Framework Convention for the Protection of National Minorities
Art.	Article
ECHR/European Convention	European Convention for the Protection of Human Rights and Fundamental Freedoms
ECtHR	European Court of Human Rights
EU	European Union
ECMI	European Centre for Minority Issues
FCNM/Framework Convention	Framework Convention for the Protection of National Minorities
ICCPR	International Covenant on Civil and Political Rights
ILC	International Law Commission
p.	Page
pp.	Pages
Para.	Paragraph
VCLT	Vienna Convention on the Law of Treaties

INTRODUCTION

The aim of this thesis is to ascertain the various ways in which European countries have determined which are their ethnic or national minorities, if, indeed, they have recognized any minorities for the purposes of the Framework Convention for the Protection of National Minorities. For the purpose of a good comparative exercise, examples of policies on minorities will be given also from non-European countries, such as Canada and the United States of America, although they will not be discussed at length. Consequently, the elements of comparison will be the policies on minorities of these states, more specifically their decisions to recognize or not various minorities. However, given the variety of stances, I will not compare the policies of a few select number of states, but give examples from a greater number. The case-law of the European Court of Human Rights (henceforth, the ECtHR) and the rights enshrined in the European Convention on Human Rights (henceforth, the ECHR) will also be taken account of, though not at length. I will not embark on an extensive discussion regarding the substantive rights minorities have, although they will be discussed in the context of recognition.

The thesis will focus not only on national, traditional or “old” minorities, but also on so-called “new” minorities, a concept which will be given special attention since it is apparent that the rule, at least in Europe, is that persons belonging to groups that could be catalogued as “new minorities” often lack citizenship and are not usually recognized as minorities, with a few exceptions which will be discussed¹. The reason is that recently, especially after the 2015 refugee crisis in Europe, the subject of how the “Other” should be treated became a topic of great debate as it entails figuring not only what practical measures to ensure accommodation should be taken,

¹ See the example of the Czech Republic in Chapter IV, Section 1.2.

but also the status of the newly arrived groups, their place in their respective receiving societies and the changing dynamics of the relation between them, the so-called “established minorities” and, of course, the majority culture.

Legally speaking, the main focal point of this thesis will be the provisions contained in the Council of Europe’s Framework Convention for the Protection of National Minorities (henceforth “the Framework Convention” or “FCNM”), as it is one of the most comprehensive multilateral legal instruments that deals expressly with national minorities, and on the work of its main monitoring body, the Advisory Committee. Its scope *ratione personae* is the main subject of the thesis, but the discussion will not end there. States’ policies on recognizing minorities or not are directly influencing whether the Framework Convention applies to certain minority groups or not. This is due to the unfortunate weak nature of the Framework Convention, which leaves a great margin of discretion to states in determining which groups are to be recognized as minorities and which not.

Thus, the research question that the thesis seeks to answer is: **What arguments can one put forth in order to support the recognition of minorities?** The types of arguments that the thesis will look at will be not only *de lege lata*, i.e. relating to what present legal frameworks and instruments say in the case of recognition of minorities, but also *de lege ferenda*, i.e. how the law should, ideally, treat recognition of minorities. The thesis’ main points will, therefore, offer not only comparisons between the legislations of various states parties to the Framework Convention and an analysis of the Advisory Committee’s work, but also scholarly interpretations and arguments.

As such, Chapter I will start by introducing some of most influential scholars’ definitions of the general term “minority” or “national minority”, but I will also present upon some

delimitations made in the field of minority studies on different types of minorities. The focus will be particularly on new minorities, as they are, as stated above, particularly susceptible to non-recognition by states. Then, the discussion will move towards the Advisory Committee's own delimitations. Finally, as an exemplification, a non-exhaustive list of national and ethnic minorities which, in one form or another, are not recognized officially by their respective states will be provided in order to ascertain which are the groups this thesis generally refers to.

Chapter II will continue by exploring the Framework Convention's drafting process, with particular attention on the definition for "national minority", and the philosophy behind the Framework Convention, as well as its link with the European Convention on Human Rights, especially concerning dynamic interpretation. This will naturally lead us to interpret the declarations states made when signing the Framework Convention, as well as to ascertain their validity and effects, especially since many such declarations purport to exclude many national or ethnic minorities from the scope of application of the Framework Convention.

Chapter III will then add the main arguments for recognizing minorities, as well as explain why self-identification is essential, but also how to ensure it reflects as much as possible an authentic manifestation of the 'self'. The right to self-identification will be explained mainly through the Advisory Committee's state-by-state opinions, but also with the help of other sources, legal or non-legal.

The main comparative exercise, presented in Chapter IV, will take a look at different countries' approaches in what recognition is concerned. This will be examined through the lense of their citizenship laws, the broadness of their definitions of "minority" and also their societies' historical conceptions of nationhood. Some more or less recent improvements on citizenship will also be presented and discussed. The key concept of "national narrative" will play an important

role in this chapter, since by explaining how different countries view their respective societies and their history, it will be easier to find what role minorities play, if indeed they are seen as having one. Thus, while some countries accept minorities as part of their history and, consequently, of their societies and “national narratives”, others are reluctant. In my view, this societal and historical acceptance is not only part of the recognition process, but actually constitutes its basis.

The final chapter, Chapter V, will explore the material scope of the Framework Convention with the help of the Advisory Committee’s Thematic Commentary No. 4 on the scope of application of the Framework Convention. This final part of the thesis will show which are the rights that can be applied to all minorities as well as specific rights that can be applied to certain groups, so as to ascertain the benefits granted to minorities not officially recognized, as well as the entitlements new minorities can claim under the Framework Convention. The Advisory Committee’s implicit definition of “national minority” will also result from this discussion.

CHAPTER I. DEFINITIONS AND DELIMITATIONS

1.1. DEFINITIONS: CAPOTORTI, EIDE, CHERNICHENKO

One very influential and widely-cited definition of the term “minority”, for the purposes of international law, is offered by Francesco Capotorti, Special Rapporteur of the United Nations Sub-Commission on Prevention of Discrimination and Protection of Minorities, according to whom, a minority represents:

“A group numerically inferior to the rest of the population of a State, in a non-dominant position, whose members - being nationals of the State - possess ethnic, religious or linguistic characteristics differing from those of the rest of the population and show, if only implicitly, a sense of

solidarity, directed towards preserving their culture, traditions, religion or language.”²

However, as we will see, although this definition, in fact, still constitutes the basis of many European states’ definitions of the same term, some of its elements have been criticized as being too restrictive by scholars and by the Advisory Committee of the Framework Convention.

Asbjørn Eide, also a former Special Rapporteur of the Sub-Commission on Prevention of Discrimination and Protection of Minorities, for example, later proposed a different definition that considered a minority as “any group of persons *resident* (emphasys added) in a sovereign State which constitutes less than half of the population of the national society and whose members share common characteristics of an ethnic, religious or linguistic nature that distinguish them from the rest of the population.”³

Similarly, Stanislav Chernichenko, who was also a member of the same Sub-Commission, referred to the term “minority” in his own definition as “a group of persons *in principle resident* (emphasis added) in the territory of a state...”⁴ The two latter definitions seem to abandon citizenship as a necessary criterion for establishing the existence of a minority. As we will see, these later definitions would come to influence the Advisory Committee’s own implicit definition.

² Francesco Capotorti, *Study on the rights of persons belonging to ethnic, religious and linguistic minorities*, New York, United Nations, 1979 E/CN.4/Sub.2/384/Rev.1, para. 568.

³ Asbjørn Eide, *Possible ways and means of facilitating the peaceful and constructive solution of problems involving minorities*, 1993, E/CN.4/Sub.2/1993/34, para. 114.

⁴ Stanislav Chernichenko, *Definition of minorities*, second working paper, 1997, E/CN.4/Sub.2/AC5/1997, annex – Minorities – a working definition: art. 1.

1.2. DELIMITATIONS: KYMLICKA AND OTHERS

In addition to the above definitions, Will Kymlicka makes a basic distinction in his book, *Multicultural Citizenship: A liberal theory of minorities rights*⁵, between national and ethnic minorities. To him, national minorities are those groups that usually wish to maintain their cultural distinctiveness, form their own societies and maintain them through self-governance⁶, while ethnic groups or ethnic minorities are constituted mainly from immigrant groups that leave their countries on a family basis and, consequently, usually do not request autonomy or self-governance rights, but still desire integration⁷.

“New minorities”, on the other hand, as one author puts it, are “groups formed by individuals and families who have left their original homeland to emigrate to another country generally for economic and, sometimes, political reasons” and that they “consist of migrants and refugees and their descendants who are living, on a more than merely transitional basis, in another country than that of their origin”.⁸

I prefer to use the term “new minorities” in this context, instead of “ethnic minorities” because I wish to emphasize the non-recognition of many of these groups as minorities. The term “ethnic minorities”, while not entirely objectionable, does not focus on this problematic, but more on the lack of a link with a kin-state and the type of rights Kymlicka associates with ethnic minorities (such as polyethnic rights). I will not engage in a discussion on what type of rights these new minorities should be granted, but on the issue of lack of coherent state policies to integrate

⁵ Will Kymlicka, *Multicultural Citizenship: A liberal theory of minorities rights*, Oxford University Press, New York, 2003.

⁶ *Idem*, pp. 10-11.

⁷ *Idem*.

⁸ For more details, see Roberta Medda-Windischer, *New minorities, old instruments? Diversity governance from the perspective of minority rights*, in *Migration Letters*, Volume 13, No. 2, May 2016, pp. 178-192, p. 179.

them. However, when I refer to “new minorities” in the context of Kymlicka’s writings, I am referring in part to his concept of “ethnic minorities”, with which the concept of “new minorities” partially overlaps. To exemplify this, it is my view that ethnic minorities can be categorized as old or new (the Roma are, for example, an old ethnic minority in Romania, while Syrians would be a new ethnic minority). National minorities are, on the other hand, more or less always overlapping with the concept of “old minorities”, as they usually have traditional and long-term links with the state in which they reside, as well as with the territory they occupy. In short, the distinction between new and old minorities is made on the basis of length of existence as a group in a particular state, while the distinction between ethnic and national minorities mainly refers to the existence or lack of existence of a kin-state, as well as other factors. But, in any case, I will speak of “immigrant communities” or “immigrant minorities” so as to refer to both what Kymlicka refers to as “ethnic minorities” and the concept of “new minorities”.

Of course, there are other theoretical delimitations that use the term “immigrant minorities” in a much broader sense. In a working paper⁹ for the ECMI (European Centre for Minority Issues), Alan B. Anderson describes immigrant minorities as “ethnic minorities which have originally come from other countries, thus lack a territorial base within an adopted country where they have resettled”¹⁰. While this definition might suit the concept of “new minorities” used in this paper as well, Anderson’s concept also includes so-called “imperial relics”, i.e. “remnants of imperial settlement policies, representing ethnic kinship with the colonizing power, yet remaining behind after de-colonization or independence”¹¹, such as ethnic Germans and Hungarians in the territories that once belonged to the Austro-Hungarian Empire, ethnic Turks or other Muslims in parts of the

⁹ Alan, B. Anderson, *Ethnic minorities and minority rights in Europe: Theoretical Typologies*, ECMI Working Paper No. 99, September 2017.

¹⁰ *Idem*, p. 8.

¹¹ *Idem*.

former Ottoman Empire and ethnic Russians settled in the former republics of the USSR¹². It also includes “metropolitan migrants”, groups formed from migrants that travel from former colonies to toe “metropolis”, such as Francophone Africans, Haitians, Moroccans or Algerians in the case of France, West Indians and Indo-Pakistanis in the case of Britain, Surinamese in the case of the Netherlands or Congolese in the case of Belgium¹³. “Middleman minorities” are another category used by Anderson to describe temporary migrants, such as the Turkish *Gastarbeiter* in Germany, or the Chinese and Vietnamese in France¹⁴. Finally, “permanent migrants” are used to refer to various groups, including economic migrants that do not move on a temporary basis and refugees. However, he includes in this category not only Syrian refugees in various European states, but also Russians, Jews and other Eastern Europeans in Paris¹⁵. In any case, with the exception of the “imperial relics”, most of the groups included in the latter three categories are included in my use of the terms “new minorities” or “immigrant communities/minorities”.

While it is true that immigrant communities that constitute new minorities mainly and, more important, initially seek accommodation by making the welcoming society more tolerant and, above all, more engaged with the newcomers, it is, nonetheless, important to note that the presence of a large enough immigrant community could also lead to the natural creation of separate, parallel societies and, of course, to the requesting of rights normally associated with national minorities. There are, of course, individuals and families that have neatly integrated into the larger “receiving” society and also maintain some degree of cultural distinctiveness so it may be true that these groups only seek accommodative measures. Small groups would tend to assimilate easier, if not right from the first generation, then certainly after the second or third,

¹² *Idem.*

¹³ *Idem.*

¹⁴ *Idem.*, p. 9.

¹⁵ *Idem.*

because of intermarrying and adoption of the mainstream majority culture. Integrating large groups of immigrants, on the other hand, can pose serious difficulties, not only from a logistical and resource point of view, but also because of the lack of social acceptance by the majority culture.

Even though minorities in general could be viewed by the majority as "the Other", an acute feeling of "otherness" is evoked by new minorities as they are not as predisposed as old minorities to social recognition. They are not viewed as part of the cultural fabric of a nation. Thus, while, for example, Hungarians and Germans in Romania may be viewed as being more or less always present in the nation's recent cognitive history, new minorities are not. Could the fear of separatism be at the center of states' refusal to officially recognize new minorities?

What Kymlicka notes is that immigrant minorities usually don't pose such a threat to a nation as they usually do not organize as well as old minorities and, consequently, are not as susceptible to cause civil war or insurgencies¹⁶. This is because, Kymlicka argues, they do not request self-governing rights, but so-called polyethnic rights¹⁷, which aim at integration in the larger society. Self-governance is, therefore, not an issue normally associated with the claims of immigrant minorities, which have "weaker" claims. It would be particularly difficult for immigrants to engage in separatist movements, since this would presuppose not just the manifestation of their cultural distinctiveness, but also the creation and sustaining of institutions similar to those used by the majority¹⁸, which would need a considerable legal framework and

¹⁶ Will Kymlicka, *Multicultural Odysseys. Navigating the New International Politics of Diversity*, New York: Oxford University Press, 2007, p. 175, *apud*. Darian Heim, "Old" natives and "new" immigrants: beyond territory and history in Kymlicka's account of group-rights, in *Migration Letters*, Volume 13, No. 2, May 2016, pp. 214-227, p. 216.

¹⁷ Will Kymlicka, *Multicultural Citizenship*, pp. 30-31.

¹⁸ Will Kymlicka, *States, Nations and Cultures, Spinoza Lectures*, University of Amsterdam, Assen: Van Gorcum 1997, p. 52-56, *apud*. Roberta Medda-Windischer, *Changing Paradigms in the Traditional Dichotomy of Old and New Minorities*, in Kristin Henrard (ed.), *Double Standards Pertaining to Minority Protection*, Netherlands, 2010, pp. 195-218, p. 217.

substantial resources. Moreover, there is no evidence, at least in Western societies, of immigrant groups seeking such goals¹⁹. Thus, the fear of separatism appears to be unfounded.

But even this chain of thought is marked by the assumption that immigrants have a different mindset from that of old minorities and that they always seek less than old minorities, which is not always the case. While old minorities may try to gain some sort of autonomy inside the host state, since they are not considering returning to the kin-state as an immediate and pending option, some immigrant communities, Kymlicka argues, are always on the verge of returning to their state of origin and, as a direct consequence of this, they tend not to form parallel societies²⁰. However, this is not entirely true for all minority groups that would qualify as “new minorities”²¹. Many do decide to remain in their new state and choose to either assimilate in the majoritarian society, many doing so with probably greater success than old minorities, or retain their distinctiveness by integration or, in less fortunate cases, by isolating themselves from the majority. Even the case about old minorities not desiring to return or move to their kin-states is not entirely accurate, as the example of Hungarians and especially Germans and Jews in Romania shows. Groups of people leave a particular country for various reasons and intentions. Indeed, Kymlicka does not assert that his theory should be taken for granted as making clear cut distinctions between new (ethnic) and

¹⁹ *Idem.*

²⁰ Will Kymlicka, *Multicultural Citizenship*, p. 15.

²¹ As a matter of fact, the “on the verge of leaving” state of mind can also be present in old minorities. Romanian Jews, for example, numbered over 138.000 in 1948 (if we take into consideration only those speaking Yiddish) or 428.000 (their probable real number), while Germans numbered approximately 344.000, according to the 1948 census. While Jews could definitely be recognized as an old minority in Romania (as they are still a recognized minority), their numbers dropped to approximately 9000 in 1992 and 3271 in 2011, primarily due to mass emigration to Israel. Germans in Romania also emigrated mainly to Germany, as part of an economic deal by which Germany would pay for each ethnic German left to leave, and their numbers dropped to 36.042 in 2011. The numbers of Hungarians also dropped from 1,6 million in 1948 to 1,2 million in 2011. What is interesting to note, however, is that during the Communist period and even up until the late 1990’s, many old minorities were fleeing Romania in massive numbers and their reasons to emigrate, especially in the case of Germans and Jews, were strikingly similar to that of many new minorities (oppression, state attempts to forcefully assimilate minorities, lack of protection for human rights and minorities rights, but also for economic and family reunification reasons). Talk of emigration was omnipresent among Germans and Jews. For more on the exodus of minorities from Romania, see Lucian Boia, *Cum s-a românizat România* (Transl.: How Romania Romanianized), Humanitas, Bucharest, 2015, pp. 107-117.

old (national) minorities²². The assumption that new minorities would soon leave is, however, used as a basis for state policies, as in the case of Germany, which will be discussed in another chapter²³.

Moreover, new minorities are thought to request in general less protection than old minorities since their decision to leave their countries of origin is voluntary and, consequently, do not have the same expectation as old minorities that they would reproduce their society in the new host state²⁴. This is not always the case, of course.

However criticized Kymlicka is because of the association of voluntariness with new minorities²⁵, he does mention that there are groups that don't fit neatly into his proposed dichotomy and that some groups, such as those that are constituted from refugees, do not leave their country of origin on a voluntary basis²⁶.

1.3. THE ADVISORY COMMITTEE'S APPROACH

Notwithstanding the above delimitations, definitions and categories of minorities made by Kymlicka, the Advisory Committee of the Framework Convention has a flexible and, at some times, possibly different interpretations of what a minority constitutes or which are the groups to be considered as minorities. Of course, the Framework Convention does not have a definition, yet it does make consistent use of the term "national minority". It is useful to note that this term does not necessarily overlap with Kymlicka's use of the same term. It is not to be understood in the *stricto sensu* meaning he ascribes to it. On the contrary, the Framework Convention can also be applied to so-called ethnic minorities (as understood by Kymlicka) or to indigenous communities,

²² Will Kymlicka, *Multicultural Citizenship*, p. 25.

²³ See Chapter IV, Section 1.1.

²⁴ Will Kymlicka, *Multicultural Citizenship*, p. 15.

²⁵ Darian Heim, *op.cit.*, p. 219.

²⁶ Will Kymlicka, *Multicultural Citizenship*, p. 25.

notwithstanding formal recognition as national minorities or not. As proven by the Advisory Committee²⁷, some indigenous people do not wish to be formally recognized as national minorities, yet the rights and guarantees found in the Framework Convention are open to them as well and they could avail themselves of their protection without having to identify as a national minority. Even so called minorities-within-minorities, i.e. members of the majority population living in areas where they are numerically inferior to that of the minority or minorities that have a majority position, can benefit from the rights and guarantees enshrined in the Framework Convention, since their position is similar to that of other minorities.

The lack of a definition in the Framework Convention is not only a result of compromise by the states parties, but also a doctrinal choice that highlights the nature of the Convention. More specifically, as former president of the Advisory Committee, Francesco Palermo, pointed out²⁸, the issues relating to minority rights protection have shifted from “who” to protect to “how” to protect. This underlying interpretative principle is also mentioned in the Advisory Committee’s Thematic Commentary No. 4²⁹, which dealt with the issue of scope of application of the Framework Convention: “Rather than asking ‘*who*’ should be protected, it asks ‘*what*’ is required to manage diversity most effectively through the protection of minority rights. It is for this reason that the Convention does not contain a definition of the term ‘person belonging to a national minority’”. This does not mean that the scope of application *ratione personae* of the Convention is a closed issue that no longer needs clarification or that the issue of “who” to protect is of no

²⁷ Advisory Committee of the Framework Convention for the Protection of National Minorities, Thematic Commentary No. 4 on the Scope of Application of the Framework Convention for the Protection of National Minorities, ACFC/56DOC(2016)001, Strasbourg, 27 May 2016, paras. 46-49.

²⁸ The quote has been taken from the conference that launched the Advisory Committee’s Fourth Thematic Commentary on the Scope of Application of the Framework Convention, held in Strasbourg on the 11th of October, 2016. The webcast of the conference is available for viewing at: http://www.coe.int/en/web/minorities/tc4_conference (Site last accessed on 18.07.2017).

²⁹ Thematic Commentary No. 4, Executive summary, p. 3.

interest any more. I contend that an interpretation more consistent with the work of the Advisory Committee and the object and purpose of the Framework Convention would dictate a different meaning to this change of paradigm. Thus, my interpretation is that in the present day, the focus is not on strictly delimitating groups of national minorities with the intention to protect them by enclosing them from the majority, but on how to effectively distribute and guarantee minority rights as measures protecting diversity. Minority rights measures in the 80's and 90's focused mainly on preserving the culture of minorities separately from the majority³⁰. Approaches nowadays, on the other hand, lean more towards integration, which presupposes constant interaction with the majority.

1.4. *EXAMPLES: MINORITIES NOT RECOGNIZED*

In the states parties to the Framework Convention there is still a large number of populations or groups which are not officially recognized as such either formally or in practice – meaning that either they are not listed officially in any legal document or instrument in the positive law of the state concerned, notwithstanding the fact that they might be *de facto* benefitting from some minorities rights, or their rights are not efficient or practical. Amongst those mentioned by the Advisory Committee, the following ethnic or national minorities are either not covered by the Framework Convention at all or are experiencing other forms of lack of recognition, which will be mentioned: the Egyptians and Bosniacs in Albania³¹; the Abkhazians, Abazins, Bulgarians,

³⁰ As Asbjørn Eide once said in the 2016 Conference, “The concept of minorities rights was in the 1990's mainly associated with the preservation of minority identities to prevent assimilation. The focus then was to protect the very existence of minorities. Sometimes they were facing ruthless ethnic cleansing during violent transformation of states and of the nation-building process”. See *supra* note 28.

³¹ Advisory Committee, Compilation of Opinions of the Advisory Committee relating to Article 3 of the Framework Convention for the Protection of National Minorities (3rd cycle), Strasbourg, 13 May 2016, Third Opinion on Albania, adopted on 23 November 2011, p. 5: “It [the Advisory Committee] requests the authorities to examine, in consultation with those concerned, the possibility of including persons claiming Bosniac and Egyptian identities, in the application of the Framework Convention, in particular as regards their linguistic and cultural interests”.

Latvians, Lithuanians, Lom, Moldovans, Mordvans, Ingushetians, Ossetians, Persians, Romanians, Tatars, Udins and others, which are not represented in the co-ordinating council in Armenia³², although other minorities are; Polish people in Austria³³; many individuals belonging to the Roma minority in Bosnia and Herzegovina, who lack legal documents and, consequently, cannot benefit from the rights enshrined in the Framework Convention since minority status in Bosnia and Herzegovina requires citizenship³⁴; Pomak and Macedonians in Bulgaria³⁵; Roma people, Faroese and Greenlandic speakers and Jews in Denmark³⁶; the Polish minority and the East

³² Advisory Committee, Compilation of Opinions of the Advisory Committee relating to Article 3 of the Framework Convention for the Protection of National Minorities (4th cycle), Strasbourg, 1 March 2017, Fourth Opinion on Armenia, adopted on 26 May 2016, p. 3: “The Co-ordinating Council for National and Cultural Organisations of National Minorities is the main forum where representatives of 11 larger national minorities, namely Assyrian, Belarusian, Georgian, German, Greek, Jewish, Kurdish, Polish, Russian, Ukrainian and Yezidi can raise concerns and discuss issues affecting them with the authorities. This gives them increased visibility and better recognition than other national groups, such as the Abkhazians, Abazins, Bulgarians, Latvians, Lithuanians, Lom, Moldovans, Mordvans, Ingushetians, Ossetians, Persians, Romanians, Tatars, Udins and others, which are not represented in the co-ordinating council”.

³³ Advisory Committee, Compilation of Opinions of the Advisory Committee relating to Article 3 of the Framework Convention for the Protection of National Minorities (3rd cycle), Third Opinion on Austria, adopted on 28 June 2011, pp. 11-12: “The Advisory Committee further notes that representatives of the Polish community continue to seek their recognition as an ethnic group in line with the Law on Ethnic Groups [...] The Advisory Committee further calls upon the Austrian authorities to enter into a constructive dialogue with the Polish representatives to review their request for recognition as an ethnic group while taking into account all relevant aspects, including but not limited to statistics”.

³⁴ *Idem*, Third Opinion on Bosnia and Herzegovina, adopted on 7 March 2013, p. 14: “While progress has been made in remedying the lack of personal documents of many Roma (see further below under Article 4), this issue has not been fully resolved and has in turn created difficulties regarding the confirmation of their citizenship. The Advisory Committee considers that the authorities should take these difficulties into account when considering the personal scope of application of minority rights in Bosnia and Herzegovina and should especially ensure that Roma whose citizenship has not been confirmed are not excluded from benefitting from the protection provided by the Framework Convention”.

³⁵ *Idem*, Third Opinion on Bulgaria, adopted on 11 February 2014, p. 19: “The Advisory Committee notes that the Bulgarian authorities maintain the position that they will not recognise the existence of the Pomak and Macedonian minorities as such, based on the understanding that there are no objective criteria for distinguishing persons belonging to these communities from the majority population.”.

³⁶ Advisory Committee, Compilation of Opinions of the Advisory Committee relating to Article 3 of the Framework Convention for the Protection of National Minorities (4th cycle), Fourth Opinion on Denmark, adopted on 20 May 2014, pp. 12, 13: “The Advisory Committee has, as in the previous cycles of monitoring, been approached by the Roma expressing an interest for the protection of the Framework Convention. It notes the authorities’ claim that the Roma living in Denmark today ‘have no historical or long-term and unbroken association with Denmark’, but consist partly of immigrants and partly of refugees. The Advisory Committee reminds the authorities nonetheless of the long-term presence of Roma in Denmark. A similar approach extended to the Faroese and Greenlanders living in mainland Denmark would also, in the opinion of the Advisory Committee, improve the integration of persons belonging to these groups. In particular, the vulnerability of Greenlanders requires taking specific measures”. While the Jewish community did not express a desire to be included in the scope of application of the Framework Convention, they were interested in maintaining their culture and religion, so extension of the scope of application with regard to specific areas should be made, according to the Advisory Committee: “The Advisory Committee considers that the

Frisians in Germany³⁷; the Bunjevci community in Hungary³⁸; in Italy, some of the inhabitants of the Resia, Natisone and Torre valleys, which desire to be recognized as a linguistic minority separate from the Slovene minority³⁹ and the Roma, Sinti and Caminanti that are viewed as nomads and excluded from the Italian law on historical linguistic minorities, which is territory based⁴⁰; Silesians in Poland, which, nevertheless, benefit from state support⁴¹; the Mirandese community in Portugal⁴²; the Hungarian Csangos and Aromanians in Romania⁴³; the Siberian Tatars in Tyumen Oblast in Russia⁴⁴; in Slovenia, German-speakers, who are not recognized as a national

implementation of the relevant provisions of the Framework Convention could improve the situation in the areas such as freedom of religion, preservation of culture and traditions, etc”.

³⁷ *Idem*, Fourth Opinion on Germany, adopted on 19 March 2015, p. 19: “The Advisory Committee encourages the authorities to pursue an active, open and dialogue-based approach in their relations with persons and groups having expressed an interest in benefiting from the protection of the Framework Convention, such as persons of Polish origin, language or culture and persons identifying with the East Frisian group.”

³⁸ *Idem*, Fourth Opinion on Hungary, adopted on 25 February 2016, p. 21: “[...] the Advisory Committee notes that persons belonging to the Bunjevci community have repeatedly sought recognition as a separate ethnic group, and not as a part of the Croatian national minority with which they are amalgamated”.

³⁹ *Idem*, Fourth Opinion on Italy, adopted on 19 November 2015, pp. 24, 25: “Some inhabitants of the Resia, Natisone and Torre valleys in the province of Udine continue to seek recognition as a separate linguistic minority, distinct from the Slovene minority. According to their representatives they are unjustifiably assimilated with Slovenes. [...] It [the Advisory Committee] further notes that the complex linguistic situation calls for an open and flexible approach to the scope of application of the Framework Convention”.

⁴⁰ *Idem*, p. 26.

⁴¹ Advisory Committee, Compilation of Opinions of the Advisory Committee relating to Article 3 of the Framework Convention for the Protection of National Minorities (3rd cycle), Third Opinion on Poland, adopted on 28 November 2013, p. 61: “The Advisory Committee welcomes in this context the authorities’ support for Silesian culture, traditions and heritage. The Advisory Committee welcomes the on-going dialogue concerning the Silesian identity and language. In particular, the Advisory Committee notes the existence of the parliamentary multi-party Panel for the Preservation of the Silesian Spoken Language grouping 17 members of the Sejm”.

⁴² *Idem*, Third Opinion on Portugal, adopted on 4 December 2014, p. 64: “The Advisory Committee invites the authorities to start a dialogue with the Mirandese community with a view to finding appropriate solutions for strengthening the existing protection and promotion of the Mirandese language, culture and heritage, including by considering a possible extension of the protection offered under the Framework Convention and also by signature and ratification of the European Charter for Regional or Minority Languages”.

⁴³ *Idem*, Third Opinion on Romania, adopted on 21 March 2012, p. 66: “In particular, the authorities are encouraged to continue the dialogue with persons having expressed an interest in the protection afforded by the Convention, such as the Aromanians, and the Hungarian Csangos, on the possibility of including them in the scope of application of the Framework Convention”.

⁴⁴ *Idem*, Third Opinion on the Russian Federation, adopted on 24 November 2011, p. 69: “The Advisory Committee notes that the 1999 Federal Law on Guaranteeing the Rights of Numerically Small Indigenous Peoples still defines that only those groups that are smaller than 50,000 persons can enjoy the status of numerically small indigenous groups and related guarantees. The Advisory Committee is aware of a request by some representatives of the Siberian Tatars in Tyumen Oblast for recognition as a numerically small indigenous group due to their shared perception of belonging to a group which is different from the broader Tatar population by virtue of its specific traditional lifestyle, culture and history in Siberia. In this regard, the Advisory Committee invites the authorities to consider the applicability of

minority, and “non-autochthonous” Roma people, who cannot elect their representatives in 20 municipalities⁴⁵; the Basques, Catalans and Galicians⁴⁶ as well as Aranese, Oliventine Portuguese and Tamazight speakers in Spain⁴⁷; the Egyptians, Croats and the Torbesh community in Macedonia⁴⁸; Ruthenians, Boikos, Hutsuls and Lemkis in Ukraine⁴⁹ etc.

Of course, the above list does not comprise all the minorities not recognized by European states, but merely those mentioned by the Advisory Committee in its latest two cycles of monitoring the states parties to the Framework Convention. There are many other groups which could factually qualify as minorities if we are to take a broad approach, but are not envisaged for

the provisions of the Convention to numerically small and distinct groups within larger national minorities, in line with the principle of free self-identification as contained in Article 3 of the Framework Convention”.

⁴⁵ *Idem*, Third Opinion on Slovenia, adopted on 31 March 2011, p. 78: “They [the Slovene authorities] should in particular ensure that the distinction between “autochthonous” and “non-autochthonous” Roma no longer results in practice in any differentiated treatment. Specific emphasis should be placed on effective participation of all Roma in public affairs, including at the local level. The Advisory Committee calls upon the authorities to pursue the dialogue with representatives of the ‘new national communities’ and the German-speaking community on the issue of the protection afforded to them”.

⁴⁶ Advisory Committee, Compilation of Opinions of the Advisory Committee relating to Article 3 of the Framework Convention for the Protection of National Minorities (4th cycle), Fourth Opinion on Spain, adopted on 3 December 2014, p. 30: “The Advisory Committee has again been approached by persons belonging to organisations representing the Basque, Catalan and Galician cultures and languages, who have expressed interest in the protection offered by the Framework Convention”.

⁴⁷ *Idem*, p. 31: “Similar consultations with representatives of other groups that may be interested in benefiting from the provisions of the Framework Convention, such as speakers of Aranese, Oliventine Portuguese and Tamazight, would also be useful.”

⁴⁸ *Idem*, Fourth Opinion on the Former Yugoslav Republic of Macedonia, adopted on 24 February 2016, p. : “[...] the Advisory Committee notes with regret that efforts made by the representatives of the “others”, including numerically smaller groups such as the Egyptian and Croat minorities, as well as possibly larger groups such as the Torbesh community, to be accorded rights based on the same legal grounds as other minority groups, have been rejected with vague references to the Constitution and the legislative framework in place under which they are not accorded a protected status”.

⁴⁹ Advisory Committee, Compilation of Opinions of the Advisory Committee relating to Article 3 of the Framework Convention for the Protection of National Minorities (3rd cycle), Third Opinion on Ukraine, adopted on 22 March 2012, p. 89: “The Advisory Committee was informed that the group of approximately 10,000 persons who declared themselves as Ruthenians in the 2001 census, continues to claim specific protection as a national minority. [...] the Advisory Committee was informed during the country visit that a decision had been taken to register the Ruthenians, along with the Boikos, Hutsuls and Lemkis, as a ‘sub-ethnic’ group of the Ukrainians, as done in the census of 2001. According to the State Statistics Committee, this decision was made based on extensive research conducted by academics and independent experts. The Advisory Committee regrets that no direct discussions with the Ruthenian and other groups concerned appear to have been conducted and reminds the authorities that efforts should be made to find pragmatic solutions in close consultation with the groups concerned, taking full consideration of the principle of free self-identification contained in Article 3 of the Framework Convention, and in line with a generally inclusive approach to its personal scope of application.”

protection under the Framework Convention by the great majority of states parties. The Turkish and Kurdish communities in Germany⁵⁰ and Austria⁵¹ or the more recently-arrived Romanians in Spain⁵², Italy⁵³, Germany⁵⁴ etc, Serbians in Austria⁵⁵ or Germany⁵⁶ or Syrians that came mostly as

⁵⁰ For more details regarding the Turkish community in Germany, see Chapter IV, Section 1.1.

⁵¹ According to a 2012 report by Statistik Austria, the official statistics office of Austria, 18.9% of the Austrian population was comprised of so-called “population with migration background” (*Bevölkerung mit Migrationshintergrund*), a term used also in German statistics. In total, they numbered 1.568.632 persons, out of which 185.592 were of Turkish migration background, although Minority Rights Group International estimated that the full community probably numbers between 200.000 and 300.000, thus being the largest ethnic (or new) minority in Austria. For the Statistik Austria report, see *Migration & Integration. Zahlen. daten. indikatoren 2012*, Statistik Austria, Vienna, 2012, pp. 23, 27, available online at: http://medienservicestelle.at/migration_bewegt/wp-content/uploads/2012/07/IBIB_2012_Integrationsbericht.pdf (last accessed on 23.09.2017); For the Minority Rights Group International estimation, see: <http://minorityrights.org/minorities/turks/> (last accessed on 23.09.2017).

⁵² According to the Instituto Nacional de Estadística (National Institute of Statistics), in 2014 there were 730,340 people with Romanian as their main nationality and 678.098 in 2017. Their numbers have dropped considerably since the economic crisis and are mainly economic migrants, but their presence in Spain as a group seems to point to a permanent presence there. Also, according to a 2011 study on Romanian immigrants in Spain, 29% of Romanians living in Spain plan to remain there, while 15% think on returning only in the long-term (over more than 5 years), 33% think of leaving within 2-5 years, while the rest were planning on returning the following year. In any case, while their numbers are decreasing, there is data to suggest that a large portion will remain in Spain and seek integration and, possibly, also minority status. And even if they choose not to request official recognition, some of the rights enshrined in the Framework Convention could definitely be applied to them as well, especially those rights that have a broad scope of application (see Chapter V, Sub-section 1.1.2.). For the statistic by the Instituto Nacional de Estadística, see *Population Figures at 1 January 2014. Migration Statistics 2013*, 30 June 2014, p. 4, available online at: http://www.ine.es/en/prensa/np854_en.pdf (last accessed on 23.09.2017) and *Cifras de Población a 1 de enero de 2017 Estadística de Migraciones 2016*, 29 June 2017, p. 4, available online at: http://www.ine.es/en/prensa/cp_2017_p_en.pdf (last accessed on 23.09.2017); For the mentioned study, see CEPS Projectes Socials, *National Report. Romanian immigrants in Spain*, Barcelona, December 2011, p. 69, available online at: <http://www.participation-citoyenne.eu/sites/default/files/report-spain.pdf> (last accessed on 23.09.2017).

⁵³ At the end of 2015, there were 1,151,395 Romanian citizens living in Italy, although the total number of individuals of Romanian ethnicity might be higher, due to some of them being naturalized Italian citizens. Although, as with the case of Spain, a considerable portion would choose to leave Italy, there still remains a sizeable group that would choose to remain. According to a 2012 study, amongst the Romanians recently arrived in Italy, only 8% would choose to remain, while almost 25% of those that have been residing there between 3 and 6 years would choose to reside permanently in Italy. For the statistical numbers, see: <http://demo.istat.it/str2015/index.html> (last accessed on 23.09.2017); For the study, see Isilda Mara, *Surveying Romanian Migrants in Italy Before and After the EU Accession: Migration Plans, Labour Market Features and Social Inclusion*, Vienna Institute for International Economic Studies, Research Reports, 378, July 2012, pp. 23-24.

⁵⁴ According to a 2015 census done by the German Federal Statistical Office (*Statistisches Bundesamt*), there are 657.000 persons with Romanian migration background (*Personen mit Migrationshintergrund*). See Statistisches Bundesamt (Destatis), *Bevölkerung und Erwerbstätigkeit, Bevölkerung mit Migrationshintergrund, Ergebnisse des Mikrozensus 2015, Fachserie 1 Reihe 2.2*, p. 62, available online at: https://www.destatis.de/DE/Publikationen/Thematisch/Bevoelkerung/MigrationIntegration/Migrationshintergrund2010220157004.pdf;jsessionid=85A7339F5B34916BE4AB300E6487C349.cae1?_blob=publicationFile (last accessed on 25.09.2017).

⁵⁵ According to Statistik Austria, there were 209.000 people with Serbian, Montenegrin and Kosovar backgrounds. See Statistik Austria, *op. cit.*, p. 26.

⁵⁶ According to the German Federal Statistical Office, there were 281.000 persons with Serbian migration background in 2015. See *supra*, note 54.

refugees. However, since mobility has increased dramatically, especially within the Schengen Area, it is difficult to ascertain how these (sometimes) volatile communities will develop.

CHAPTER II. THE FRAMEWORK CONVENTION

1.1. BACKGROUND AND DRAFTING

The Framework Convention came into being at a time when a renewed interest in minorities' rights issues began to emerge, namely the 1990's. Previously, during the Cold War period, minorities' issues were largely ignored, the focus being on the creation of instruments that would protect individual rights better⁵⁷. Such is the case with the 1948 Universal Declaration of Human Rights or the 1950 European Convention on Human Rights, neither of which contained any articles related specifically to the protection of minorities as a distinct category worthy of special treatment. The main achievement⁵⁸ in the field on minorities' rights during this period which has to be mentioned is the coming into force of the International Covenant for Civil and Political Rights, which expressly refers to minorities in article 27⁵⁹, which mentions the right of ethnic, religious or linguistic minorities (thus omitting the term "national") to enjoy their culture, profess and practice their religion and use their language in community with other members of their group.

⁵⁷ Julie Ringelheim, *Minority Rights in a Time of Multiculturalism: The Evolving Scope of the Framework Convention on the Protection of National Minorities*, Human Rights Law Review 10:1, 2010, pp. 99-128, pp. 105-106.

⁵⁸ The signing of the Helsinki Final Act (Conference on Security and Co-operation in Europe Final Act) in 1975 should also be mentioned here, as it contained articles related to minorities protection, such as in the Declaration of principles, at point VII, as well as in the third "basket" or topic (which dealt with co-operation in humanitarian and other fields), where provisions related to national minorities can be found at the end of title three and four (on co-operation and exchanges in the field of culture and education, respectively). However, the Helsinki Final Act is non-binding.

⁵⁹ Art. 28 ICCPR: "In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language."

The Framework Convention was signed in 1995 and came into effect in 1998 and presently has 39 contracting states that have ratified it. Its origins, however, lay in the recommendations of the Council of Europe's Parliamentary Assembly⁶⁰ in which the latter stressed the need for expressly including minorities in an additional protocol to the European Convention on Human Rights so that they "could benefit from the remedies offered by the convention, particularly the right to submit applications to the European Commission and Court of Human Rights."⁶¹ It is already clear from this statement, found in Recommendation No. 1201 (1993), but also from the proposed text of the envisaged future protocol, that the proponents aimed at framing rights specific to individuals pertaining to minorities, otherwise the need for such an addition would prove redundant were it the case that minorities could be given the possibility to just avail themselves of pre-existing ECHR rights.⁶²

Another key point to make would be that the above-mentioned Recommendation also speaks in the preamble to its proposed Protocol of rights which "any person may exercise either singly or jointly"⁶³. The emphasis on "jointly" is essential here, as I will later discuss the importance of the communitarian elements in the case of the right to self-identify⁶⁴, which will

⁶⁰ See Recommendation 1201 (1993), point 1.2: "In the texts adopted on 5 February 1992 [the Parliamentary Assembly] asked the Committee of Ministers: to draw up an additional protocol on the rights of minorities to the European Convention on Human Rights. The Recommendation is available online at: <http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=15235&lang=en> (last accessed on 21.11.2016);

⁶¹ *Idem*, point 7;

⁶² Although previously, in 1973, the committee of experts that was confronted with seeking the feasibility and advisability of adding such a protocol found that, legally speaking, there was no special need for this measure. See the Explanatory report to the Framework Convention, para. 2;

⁶³ Recommendation 1201 (1993), point 13;

⁶⁴ See also *idem*, art. 12, point 25: "Nothing in this protocol may be construed as limiting or restricting an individual right of persons belonging to a national minority or a *collective right* of a national minority embodied in the legislation of the contracting state or in an international agreement to which that state is a party.";

stress out the fact that minority rights, while usually construed as individual rights, nevertheless contain collective characteristics as well.

As we continue to look upon the Recommendation's text, a surprising difference from the final text of the Framework Convention can be noticed – the inclusion, in article 1 of the proposed Protocol, of an actual definition of what “minorities” mean in the context and for the purposes of the European Convention:

“For the purposes of this Convention [the European Convention on Human Rights], the expression “national minority” refers to a group of persons in a state who:

- a. reside on the territory of that state and are citizens thereof;
- b. maintain longstanding, firm and lasting ties with that state;
- c. display distinctive ethnic, cultural, religious or linguistic characteristics;
- d. are sufficiently representative, although smaller in number than the rest of the population of that state or of a region of that state;
- e. are motivated by a concern to preserve together that which constitutes their common identity, including their culture, their traditions, their religion or their language.”

Later, of course, the definition, or, indeed, any definition, would be omitted from the text of the Framework Convention. It is interesting, though, to see that the initial proposal had a very precise description of the said notion and that its definition was actually not that far-fetched. On

the contrary, similar definitions are to be found in the states' declarations⁶⁵ defining "minorities" and, as we have seen, also in Capotorti's own definition⁶⁶, which probably influenced both the above definition and many state definitions. However, as the explanatory report to the Framework Convention mentions, a general definition would have had difficulties in being accepted by States Parties: "It was decided to adopt a pragmatic approach, based on the recognition that at this stage, it is impossible to arrive at a definition capable of mustering general support of all Council of Europe member States."⁶⁷

On the other hand, one could easily criticize this definition for narrowing the meaning of "national minorities" to exclude migrants and refugees (new minorities). Limiting as that may be, it is not only migrants and refugees that would get excluded, but also all other minorities which are either not "sufficiently representative" or their members are not citizens of the country they reside in or they don't have longstanding ties with the host state. Although defining the term "national minorities" might seem attractive, it is essential not to fall into the trap of rigid definitions which may become cumbersome. As we will see, most of the elements that make up the above-mentioned definition would eventually be criticized by the Framework Convention's Advisory Committee. As such, the lack of a definition should not be seen only in a negative light, in the sense that states have a large discretionary power to define the term themselves, but also in light of the fact that, in this way, the Advisory Committee itself has leeway to interpret the term in a broader sense than it would have been if there were an official definition.

⁶⁵ See Section 1.4. of the present chapter for details regarding the definitions contained in some of the states-parties' declarations when signing the Framework Convention.

⁶⁶ See Chapter I, Section 1.1.

⁶⁷ Explanatory report to the Framework Convention, para. 12;

Moving further back in time, we see from the Explanatory report that the Council of Europe's interest in the problem of minorities' rights was nearly constant. The Parliamentary Assembly was, again, the voice that brought forth minorities' rights issues, when it recognized, in 1949, that national minorities should be given a wider protection of their rights.⁶⁸ On the other hand, this did not materialize right away into any written and formal agreement between states parties to the Council of Europe. One could be surprised by the initial lack of interest by member states and their being so slow to adopt a common statement on national minorities, given the horrors that the Second World War brought, especially in the case of national minorities, many of whom took refuge in other countries during or after the war.⁶⁹ Then again, given the way past governments, such as that of National-Socialist Germany, used the minority card as an excuse for aggression, and the fear of balkanisation⁷⁰, we can discern a more complex state of affairs which prevented an agreement on the issue.

Recommendation 285 from 1961 also took notice of the need for an explicit protection of minority rights as it urged the Council of Europe's Committee of Ministers to include the following article in the Second Protocol to the European Convention on Human Rights: "Persons belonging to a national minority shall not be denied the right, in community with the other members of their group, and as far as compatible with public order, to enjoy their own culture, to use their own language, to establish their schools and receive teaching in the language of their choice or to

⁶⁸ *Idem*, para. 1;

⁶⁹ Here, I am not only referring to the usual examples of Jews, Roma and other minorities that fled their home countries, but also to the Germans that were deported from mainly Central and Eastern European countries on the principle of collective guilt, and especially to the Hungarians that sought refuge mainly in Austria after the failed 1956 Revolution.

⁷⁰ Nazi Germany used the issue of oppression of *Volksdeutsche* (Germans outside Germany), especially in Czechoslovakia, Danzig and Poland to justify its aggressive territorial expansion. Thus, Hitler saw Germany as the "kin state" that had to protect its offspring. This also justified the "*Heim ins Reich*" program, which aimed at resettling *Volksdeutsche* mainly in Germany, but also in parts of the newly conquered eastern territories, for colonization purposes.

profess and practice their own religion”.⁷¹ The communitarian elements of minority rights are again emphasized, together with references to culture, language, education and religion, though this is balanced with them being compatible with public order, a diplomatic approach of compromise that is nearly omnipresent in minority rights discourse, mainly because of the reluctance states usually have to giving free hand to internal self-determination, which they probably associate with secession. This is probably why minority rights are framed in such a way so as to still uphold respect for the integrity of states⁷².

1.2. LINK WITH THE ECHR?

Notwithstanding the fact that the Framework Convention ultimately turned out as a treaty separate from the ECHR, the Advisory Committee has always sought to link it with other international or regional treaties⁷³ that protect human rights in general and either contain provisions expressly directed at ethnic and national minorities or the rights enshrined thereof, such as freedom of religion, freedom of speech, anti-discrimination provisions etc, would also apply to persons belonging to minorities as such. And, unsurprisingly, one of the most invoked is the European Convention on Human Rights. What is especially relevant for the thesis is that the Advisory Committee, in its Fourth Thematic Commentary, has stressed the fact that, like the European Convention, the Framework Convention is a "living instrument". The concept, developed initially by the European Court of Human Rights in Strasbourg, presupposes that the European Convention's provisions must always be interpreted dynamically, in light of present-day conditions. The purpose of the "living instrument doctrine" or the principle of dynamic

⁷¹ See Recommendation 285 (1961), available online at: <http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=14322&lang=en> (last accessed on 22.11.2016);

⁷² The Framework Convention's Preamble clearly exemplifies this: "Considering that the realization of a tolerant and prosperous Europe does not depend solely on co-operation between States but also requires transfrontier cooperation between local and regional authorities *without prejudice to the constitution and territorial integrity of each State*".

⁷³ Such as the ICCPR, especially its article 27 on the rights of minorities.

interpretation is to assure not only interpretative consistency, but also to further new interpretations and shed light on nuances that were not initially envisaged at the signing of the Convention, but nevertheless stem from the need to keep the Convention actual. The same logic fits the Framework Convention.

Initially, as presented above, states did not include some groups in their declarations, but several states reviewed their stance by including some of them in the scope of application of the Framework Convention, as they interpreted it. This would be more or less due also to the Advisory Committee constantly stressing out the need to include these groups in the scope of application of the Framework Convention and its stance that: "Given that, in many cases, the declarations date back to the late 1990s, and taking into account the substantially changed conditions in states parties since then, their pertinence should be reviewed at regular intervals by the states parties concerned to ensure that the approach to the scope of application accurately reflects the present-day societal context."⁷⁴

1.3. *THE VALIDITY, INTERPRETATION AND EFFECTS OF STATE DECLARATIONS ACCORDING TO THE VIENNA CONVENTION ON THE LAW OF TREATIES*

When signing and ratifying the Framework Convention, states frequently issued declarations that contained either the criteria they would use to ascertain which national minorities they officially recognized or simply naming them directly. The practice varies from very abstract definitions to declarations that actually do not acknowledge the existence of any minority on the territory of the state in question.

⁷⁴ Thematic Commentary No. 4, para. 24.

As such, some countries, such as Austria, Estonia and Switzerland, refrain from naming specific minorities, but instead advance more or less abstract criteria by which national minorities will be determined. Austria, for example, declared at the time of ratification that it will treat as national minorities those groups which come within the ambit of its Law on Ethnic Groups (*Volksgrupengesetz*)⁷⁵ which “live and traditionally have their home in parts of the territory of the Republic of Austria and which are composed of Austrian citizens with non-German mother tongues and with their own ethnic cultures”⁷⁶.

Estonia has similar provisions, as it recognizes as national minorities its citizens which “reside in its territory, maintain long-lasting and firm ties with it, are distinct from Estonians on the basis of their ethnic, cultural, religious or linguistic characteristics and are motivated by a concern to preserve together their cultural traditions, their religion or their language, which constitute the basis of their common identity”⁷⁷.

Switzerland’s declaration features, besides the characteristics that have already been enumerated above, the criterion of numerical inferiority⁷⁸, which, although not expressly

⁷⁵ Jochen Abr. Frowein, Roland Bank, *The effect of Member States’ declarations defining ‘national minorities’ upon signature or ratification of the Council of Europe’s Framework Convention*, p. 650, 1999, Max-Planck-Institut für ausländisches öffentliches Recht und Völkerrecht. Austria’s declaration, deposited on 31 March 1998: “The Republic of Austria declares that, for itself, the term “national minorities” within the meaning of the Framework Convention for the Protection of National Minorities is understood to designate those groups which come within the scope of application of the Law on Ethnic Groups (*Volksgruppengesetz*, Federal Law Gazette No. 396/1976) and which live and traditionally have had their home in parts of the territory of the Republic of Austria and which are composed of Austrian citizens with non-German mother tongues and with their own ethnic cultures”.

⁷⁶ *Idem*.

⁷⁷ Estonia’s declaration, deposited on 6 January 1997: “The Republic of Estonia understands the term “national minorities”, which is not defined in the Framework Convention for the Protection of National Minorities, as follows: are considered as “national minority” those citizens of Estonia who:

- reside on the territory of Estonia;
- maintain longstanding, firm and lasting ties with Estonia;
- are distinct from Estonians on the basis of their ethnic, cultural, religious or linguistic characteristics;
- are motivated by a concern to preserve together their cultural traditions, their religion or their language, which constitute the basis of their common identity”.

⁷⁸ Switzerland’s declaration, deposited on 21 October 1998: “Switzerland declares that in Switzerland national minorities in the sense of the framework Convention are groups of individuals numerically inferior to the rest of the population of the country or of a canton, whose members are Swiss nationals, have long-standing, firm and lasting

mentioned in the cases of Austria and Estonia, are nonetheless implied. Luxembourg, on the other hand, while it declared that it protects as national minorities “groups of people that settled numerous generations on its territory, having the Luxembourg nationality and having kept distinctive characteristics in an ethnic and linguistic way”, it ultimately admits that it does not have any such national minorities which would fit in the criteria. Then again, Luxembourg did not ratify the Framework Convention⁷⁹.

From the above examples, a certain trend could be ascertained: they all rely on very similar criteria, such as the historical links with the majority or the State, the numerical inferiority, the difference in culture, language and religion, the common identity etc. A common criterion is also the requirement of citizenship, present in all the above-mentioned examples.

Another group of countries parties to the Framework Convention, including Denmark, Germany, Slovenia and Macedonia, have specified the exact groups they will recognize as national minorities for the purposes of the Framework Convention. Thus, Denmark protects the German minority in Jutland⁸⁰, while Germany⁸¹ recognizes the Danes and Sorbians as national minorities⁸². Interestingly enough, the German legislation makes a distinction between the above mentioned

ties with Switzerland and are guided by the will to safeguard together what constitutes their common identity, in particular their culture, their traditions, their religion or their language”.

⁷⁹ Thematic Commentary No. 4, para. 19.

⁸⁰ Denmark’s declaration, contained in a *Note Verbale* dated 22 September 1997, handed to the Secretary General at the time of deposit of the instrument of ratification, on 22 September 1997: “In connection with the deposit of the instrument of ratification by Denmark of the Framework Convention for the Protection of National Minorities, it is hereby declared that the Framework Convention shall apply to the German minority in South Jutland of the Kingdom of Denmark”.

⁸¹ Germany’s declaration, contained in a letter from the Permanent Representative of Germany, dated 11 May 1995, handed to the Secretary General at the time of signature, on 11 May 1995 and renewed in the instrument of ratification, deposited on 10 September 1997: “The Framework Convention contains no definition of the notion of national minorities. It is therefore up to the individual Contracting Parties to determine the groups to which it shall apply after ratification. National Minorities in the Federal Republic of Germany are the Danes of German citizenship and the members of the Sorbian people with German citizenship. The Framework Convention will also be applied to members of the ethnic groups traditionally resident in Germany, the Frisians of German citizenship and the Sinti and Roma of German citizenship”.

⁸² *Idem*.

national minorities and ethnic minorities, such as Friesians, Roma and Sinti which are “traditionally residing in Germany”⁸³. Slovenia recognizes the Italian and Hungarian minorities, as well as the Roma community, mentioned separately from the latter⁸⁴, while Macedonia declares that it has 6 national minorities on its territory: Albanians, Turks, Vlachs, Roma, Serbians and Bosniacs⁸⁵.

One last group of states, including the already mentioned Luxembourg, but also Malta⁸⁶ and Liechtenstein⁸⁷, while part to the Framework Convention, declared that, according to their legislation and interpretation, they have no national minorities. While Luxembourg did indeed describe its understanding of the notion of “national minority”, Malta and Liechtenstein did not, the latter even having stated that its ratification is to be interpreted as “an act of solidarity in the view of the objectives of the [Framework] Convention”. Interestingly enough, Portugal, while asserting that it too signs the Framework Convention out of solidarity, it stressed out the fact that it believes the Framework Convention to be targeting minorities in Central and Eastern Europe⁸⁸.

⁸³ *Idem*.

⁸⁴ *Idem*.

⁸⁵ Macedonia’s declaration, contained in a letter from the Minister of Foreign Affairs, dated 16 April 2004, registered at the Secretariat General on 2 June 2004: “Referring to the Framework Convention, and taking into account the latest amendments to the Constitution of the Republic of Macedonia, the Minister of Foreign Affairs of Macedonia submits the revised declaration to replace the previous two declarations on the aforesaid Convention:

The term “national minorities” used in the Framework Convention and the provisions of the same Convention shall be applied to the citizens of the Republic of Macedonia who live within its borders and who are part of the Albanian people, Turkish people, Vlach people, Serbian people, Roma people and Bosniac people.”.

⁸⁶ Malta’s declaration, contained in the instrument of ratification, deposited on 10 February 1998: “The Government of Malta reserves the right not to be bound by the provisions of Article 15 insofar as these entail the right to vote or to stand for election either for the House of Representatives or for Local Councils”.

⁸⁷ Liechtenstein’s declaration, contained in the instrument of ratification deposited on 18 November 1997: “The Principality of Liechtenstein declares that Articles 24 and 25, in particular, of the Framework Convention for the Protection of National Minorities of 1 February 1995 are to be understood having regard to the fact that no national minorities in the sense of the Framework Convention exist in the territory of the Principality of Liechtenstein. The Principality of Liechtenstein considers its ratification of the Framework Convention as an act of solidarity in the view of the objectives of the Convention.”.

⁸⁸ Report Submitted by Portugal Pursuant to Article 25, Paragraph 1 of the Framework Convention for the Protection of National Minorities, 23 December 2004, ACFC/SR(2004)002, p. 2: “At the time, in the light of the recent far-reaching political, economic and social changes in central and east European countries, the representatives of the

However, the above declarations seem to be contradicting some of the Advisory Committee's positions and practice that have emerged since the first monitoring cycle, most of which having been codified in its Thematic Commentary No. 4 on the scope of application of the Framework Convention. There, as in its previous work, the Advisory Committee took a very broad and flexible interpretation of the Framework Convention by firstly pointing out the fundamental nature of self-identification, as opposed to relying solely on, although complemented by, objective criteria, such as those listed above⁸⁹. Self-identification is strongly emphasized by the Advisory Committee as it considers that it may be trumped only in exceptional situations, such as when individuals claim minority status contrary to good faith, for reasons of accessing certain advantages⁹⁰. Paragraph 35 of the Framework Convention's explanatory report also expressly points out that article 3(1), which refers to self-identification⁹¹, "does not imply a right for an individual to choose arbitrarily to belong to any national minority"⁹² and that "the individual's subjective choice is inseparably linked to objective criteria relevant to the person's identity."⁹³

The Committee goes on to criticize objective criteria, which will be discussed at length in Chapter V, section 1.1., such as citizenship⁹⁴, length or residency⁹⁵, territoriality⁹⁶, the existence of a substantial population pertaining to the minority group⁹⁷, support from "kin-states"⁹⁸, specific

Council of Europe member States had decided to introduce a convention-type legal instrument geared to protecting national minorities settled in central and eastern Europe because of the "historical upheavals", thus helping to secure peace and stability continent-wide."

⁸⁹ Thematic Commentary No. 4, paras. 9, 10.

⁹⁰ *Idem*, para. 10.

⁹¹ Article 3(1): "Every person belonging to a national minority shall have the right freely to choose to be treated or not to be treated as such and no disadvantage shall result from this choice or from the exercise of the rights which are connected to that choice."

⁹² Explanatory report to the Framework Convention, para. 35.

⁹³ *Idem*.

⁹⁴ Thematic Commentary No. 4, paras. 29-30.

⁹⁵ *Idem*, para. 31.

⁹⁶ *Idem*, paras. 32-33.

⁹⁷ *Idem*, para. 34.

⁹⁸ *Idem*, paras. 35-36.

identity markers and ascribed categories⁹⁹ as discriminatory and restrictive. As seen above, many states include in their declarations their understanding of the meaning and ambit of the term “national minorities” and many of them precondition the recognition of groups as national minorities by imposing certain criteria.

Moreover, the Committee has even criticized formal recognition of national minority status as being exclusionary and not in line with the principles of the Framework Convention¹⁰⁰, citing the First State Report from Finland, where it stated that “the existence of minorities does not depend on a declaration by the Government but on the factual situation in the country”¹⁰¹. Thus, it adopts a functional interpretation of the Framework Convention and sees formal recognition as having a declaratory effect, not a constitutive one¹⁰². Formal recognition and the other criteria will be discussed at length in another chapter¹⁰³, though it is important to retain, for now, that many such pre-conditions, as the Advisory Committee has been constantly pointing out, can unjustly bar individuals pertaining to certain minorities from accessing the rights enshrined in the Framework Convention.

The existence of serious collision points between the Advisory Committee’s reading of the Framework Convention and state declarations begs the question of whether state declarations are reservations within the meaning of the Vienna Convention on the Law of Treaties (henceforth, VCLT) or interpretative declarations that only seek to give effect and meaning to the Framework Convention’s provisions. While the VCLT does not define the term “declaration”, it does give a

⁹⁹ *Idem*, paras. 37-38.

¹⁰⁰ *Idem*, para. 27.

¹⁰¹ *Idem*.

¹⁰² *Idem*, para. 28.

¹⁰³ See Chapter V, Section 1.1.

definition to the term “reservation”¹⁰⁴: “‘reservation’ means a unilateral statement, however phrased or named, made by a State, when signing, ratifying, accepting, approving or acceding to a treaty, whereby it purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that State”

While the Framework Convention is silent on the possibility to make reservations, its explanatory report points out that “no article on reservations was included; reservations are allowed in as far as they are permitted by international law.”¹⁰⁵ The only reservations that were also understood by the states making them as such were those by Belgium¹⁰⁶ and Malta¹⁰⁷, the rest being declarations.

Thus, a first observation to be made is that the VCLT views as reservations unilateral statements that are made so as to exclude or modify “certain provisions” of the treaty in question. However, some of the declarations described above, by the very way they interpret the notion of “national minority”, have an exclusionary effect on entire groups who do not qualify according to the set criteria. Accordingly, these groups will be excluded from all the rights and all the provisions enshrined in the Framework Convention¹⁰⁸. Nevertheless, reservations that affect the implementation of treaties as a whole, the so-called “across-the-board” or “transversal”

¹⁰⁴ Article 2(1)(d) VCLT.

¹⁰⁵ Explanatory report to the Framework Convention, para. 98.

¹⁰⁶ “The Kingdom of Belgium declares that the Framework Convention applies without prejudice to the constitutional provisions, guarantees or principles, and without prejudice to the legislative rules which currently govern the use of languages. The Kingdom of Belgium declares that the notion of national minority will be defined by the inter-ministerial conference of foreign policy.” See Reservations and Declarations for Treaty No.157 - Framework Convention for the Protection of National Minorities, Belgium, available online at: http://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/157/signatures?p_auth=H8Jiykpc (last accessed on 19.08.2017).

¹⁰⁷ “The Government of Malta reserves the right not to be bound by the provisions of Article 15 insofar as these entail the right to vote or to stand for election either for the House of Representatives or for Local Councils.” See *idem*, Malta.

¹⁰⁸ Jochen Abr. Frowein, Roland Bank, *The effect of Member States’ declarations defining ‘national minorities’ upon signature or ratification of the Council of Europe’s Framework Convention*, p. 650, 1999, Max-Planck-Institut für ausländisches öffentliches Recht und Völkerrecht.

reservations¹⁰⁹, according to the International Law Commission's reports, "are a standard practice and, as such, have never raised any particular objection"¹¹⁰. Moreover, they can exclude or limit the application of a treaty to certain categories of persons¹¹¹. Therefore, if the state declarations omitting minorities are to be interpreted as reservations, they would, at least in theory, represent a valid form or type of reservation, which could, nevertheless, be legally invalid due to their content.

On the other hand, the state declarations cannot be seen as reservations unless they "purport to exclude or to modify the legal effect of certain provisions of the treaty". In other words, if the state making the declaration does not exclude groups which are recognized as national minorities under national or international law from the Convention's protection, it should not be understood that it makes a reservation unless it factually excludes such groups from the Convention's rights¹¹² and the state is aware that it excludes minorities. Otherwise, it should not be assumed that the state has made a reservation¹¹³.

However, if it is the case that a minority is recognized nationally or internationally as such and the state declaration fails to include it, then it would be possible to regard such a declaration not as an interpretation but as a reservation and, as a reservation, it must respect the VCLT's admissibility conditions, found in article 19: reservations must be compatible with the object and

¹⁰⁹ According to the ILC's guidelines, "A reservation purports to exclude or modify the legal effect of certain provisions of a treaty or of the *treaty as a whole* (emphasis added) with respect to certain specific aspects in their application to the State or to the international organization which formulates the reservation." See the Report of the International Law Commission on the work of its fiftieth session 20 April to 12 June, 27 July to 14 August 1998, General Assembly Official Records Doc.No. A/53/10, Chapter IX: Reservations to treaties, C.2, 1.1.1 [1.1.4] Object of reservation.

¹¹⁰ *Idem*, para. (5).

¹¹¹ *Idem*, para. (5), (a).

¹¹² *Idem*, p. 674.

¹¹³ *Idem*, pp. 660, 662-663.

purpose of a treaty. The general principle of good faith¹¹⁴ must also be respected. Thus, arbitrarily excluding minorities from the protection of the Framework Convention would contradict its purpose. Moreover, the Framework Convention mentions in article 1 and paragraph 30 of its explanatory report that the protection of national minorities does not fall within the reserved domain of States¹¹⁵. If states would have free hand to arbitrarily exclude national minorities from the protection of the Framework Convention, this would again defeat its whole purpose¹¹⁶.

In addition to article 19 of the VCLT, the Advisory Committee itself has expressed the opinion that interpreting the lack of a definition for national minorities in the Framework Convention in the sense that it would give leeway for states parties to simply choose the groups they wish to recognize as minorities and that, as such, determining the scope of application of the Framework Convention is within the discretion of the states parties, would also contradict article 26 of the VCLT, which enunciates the principle of *pacta sunt servanda*¹¹⁷. States parties' margin of appreciation must also respect articles 31 and 33 of the VCLT on interpretation of treaties¹¹⁸.

¹¹⁴ The principle of good faith is also to be found in the Framework Convention's text, in article 2: "The provisions of this framework Convention shall be applied in good faith, in a spirit of understanding and tolerance and in conformity with the principles of good neighbourliness, friendly relations and co-operation between States."

¹¹⁵ Explanatory report to the Framework Convention, para. 30. Article 1 has a different wording, although it reaches the same conclusion: "The protection of national minorities and of the rights and freedoms of persons belonging to those minorities forms an integral part of the international protection of human rights, and as such falls within the scope of international co-operation".

¹¹⁶ Jochen Abr. Frowein, Roland Bank, *op. cit.*, p. 657.

¹¹⁷ Thematic Commentary No. 4, para. 5: "The superficial conclusion is sometimes made that the application of the Framework Convention, given the absence of a definition of national minority, is in practice left solely to the discretion of states parties. This interpretation, however, is incorrect. It runs counter to Article 26 of the Vienna Convention on the Law of Treaties and the basic principle of *pacta sunt servanda*. The purpose of this Commentary is to make it clear that the absence of a definition in the Framework Convention is indeed not only intentional but also necessary to ensure that the specific societal, including economic and demographic, circumstances of states parties are duly taken into account when establishing the applicability of minority rights."

¹¹⁸ *Idem*, para. 6: "The Advisory Committee has consistently acknowledged that states parties have a margin of appreciation in this context, but has also noted that this margin must be exercised in accordance with the general rules of international law contained in Articles 31 to 33 of the Vienna Convention on the Law of Treaties. In particular it must be exercised in line with the obligation to interpret a treaty in good faith and in the light of its object and purpose."

Given the number of minorities presently not recognized officially as such by states¹¹⁹ and the fact that many of them are expressly and repeatedly mentioned by the Advisory Committee in its opinions, it might be possible that many of the state declarations, not taken by themselves, but corroborated with the clear reluctance and opposition of many governments to extend the application of the Framework Convention on a more than reasonable article-by-article basis to minorities long recognized as such by the Advisory Committee, are reservations. And not only would they be viewed as reservations, since there is international practice that recognizes these groups as minorities, but also as being invalid, since they contradict the very nature of the Framework Convention, which is to provide a flexible package of rights to minorities. Excluding the individuals who identify as members of these minorities from the ambit of at least some of the rights guaranteed by the Framework Convention is, in my view, contradicting its scope.

One must also not forget that the Framework Convention is, after all, a human rights treaty. According to article 1: “The protection of national minorities and of the rights and freedoms of persons belonging to those minorities forms an integral part of the international protection of human rights, and as such falls within the scope of international co-operation.” Like the European Convention on Human Rights, to which it refers on two occasions¹²⁰, the Framework Convention is a “minimum standard” human rights treaty, which mainly aims at providing a basic “package” of protection. As such, a discretionary right of states to decide which minorities to recognize for the purposes of the rights guaranteed by the Framework Convention would render it ineffective and dysfunctional. It would, again, contradict its object and purpose. In these cases, invalidity of

¹¹⁹ See Chapter I, Section 1.4.

¹²⁰ Firstly, in its Preamble: “Having regard to the Convention for the Protection of Human Rights and Fundamental Freedoms and the Protocols thereto”; and, secondly, in article 23: “The rights and freedoms flowing from the principles enshrined in the present framework Convention, in so far as they are the subject of a corresponding provision in the Convention for the Protection of Human Rights and Fundamental Freedoms or in the Protocols thereto, shall be understood so as to conform to the latter provisions.”

the reservation would mean that the state in question would be held by its ratification of the Framework Convention without considering the reservation¹²¹.

The Framework Convention is an instrument of compromise, its purpose is to bind as many European states as possible to as many articles as possible. In the Advisory Committee's words:

“[...] the Framework Convention was conceived as a pragmatic instrument to be implemented in diverse and evolving situations, and its application with respect to a group of persons does not necessarily require the formal recognition of the latter as a national minority, a definition of this concept or the existence of a specific legal status for such groups of persons.”¹²²

While effective protection of persons belonging to national and ethnic minorities is the purpose of the Framework Convention, formal recognition is also highly desirable. Indeed, the Advisory Committee stressed in the above opinion on Bulgaria the need for protection even in the absence of formal recognition. However, this should not be interpreted in the sense that the latter is not beneficial or that it is superfluous. On the contrary, most states parties to the Framework Convention only grant minorities rights to or adopt minorities-related measures regarding persons they already also firstly recognize officially as such.

There are, of course, exceptions, such as Roma people in Austria who are not citizens, so technically also not eligible for minority status, yet they receive funding from the state¹²³, while

¹²¹ Jochen Abr. Frowein, Roland Bank, op. cit., p. 672.

¹²² Advisory Committee, Compilation of Opinions of the Advisory Committee relating to Article 3 of the Framework Convention for the Protection of National Minorities (3rd cycle), Third Opinion on Bulgaria, adopted on 11 February 2014, p. 20.

¹²³ See *idem*, Third Opinion on Austria, adopted on 28 June 2011, p. 11.

Portugal¹²⁴ and Cyprus¹²⁵ have included their Roma populations under the *de facto* protection of the Framework Convention, even though they are not officially recognized as minorities. Denmark is another good example, since its Constitution does not have any definition of the term “national minority” and has declared to recognize only the German minority in South Jutland, yet it nevertheless guarantees the rights of Faroese and Greenlandic speakers¹²⁶. Finland, although splitting the Russian-speaking population into “Old” Russians and other, newly-arrived Russian speakers¹²⁷, made no practical difference between the two categories as to the application of the Framework Convention and the rights they enjoy:

“The Advisory Committee is pleased to note that, in current practice, there is no difference in the enjoyment of rights under the Framework Convention in everyday life for the Russian-speaking population, despite the fact that the legal distinction between the so-called Old Russians and other Russian-speaking groups is being upheld. This pragmatic approach to the Convention’s personal scope of application is commendable and should be pursued further”¹²⁸.

¹²⁴ See *idem*, Third Opinion on Portugal, adopted on 4 December 2014, p. 63.

¹²⁵ See Second State Report submitted by Cyprus, ACFC/SR/II(2006)006.

¹²⁶ “[...] the Advisory Committee welcomes the fact that the authorities continue to take into account specific needs of Faroese and Greenlandic language speakers by providing, under the existing legislation, teaching of these languages on the mainland territory, provided that a required minimum number of children apply for such tuition (see further comments below with respect to Article 14). This is a commendable example of flexibility, which the Advisory Committee would like to encourage also in respect of other groups.” See Advisory Committee, Compilation of Opinions of the Advisory Committee relating to Article 3 of the Framework Convention for the Protection of National Minorities (4th cycle), Fourth Opinion on Denmark, adopted on 20 May 2014, p. 12.

¹²⁷ “In this connection, the Government makes a distinction between the so-called “Old Russians”, a group it considers to be covered by the Framework Convention, and other Russians, who, in the Government’s view, are not covered by the Framework Convention. [...] In view of the foregoing, the Advisory Committee is of the opinion that the advisability of maintaining this theoretical distinction should be examined in consultation with those concerned.” Advisory Committee of the Framework Convention, First Opinion on Finland, ACFC/INF/OP/I(2001)002, para. 15.

¹²⁸ Advisory Committee of the Framework Convention, Third Opinion on Finland, ACFC/OP/III(2010)007, para. 24.

Moreover, the Advisory Committee has lauded efforts to include persons from groups not officially recognized as minorities in minorities protection mechanisms, thus granting a *de facto* protection¹²⁹. It is arguable whether in these situations, the state declarations would be viewed as reservations and, if they are, whether they would be valid, considering the official non-recognition of the minorities they *de facto* protect. Theoretically, according to the above considerations, the declarations of states such as Austria, Cyprus, Denmark or Finland are contradicted by their own state practices of granting some of the rights that are also listed in the Framework Convention to minorities they did not officially recognize. These declarations could be viewed as reservations. However, as stated above, state declarations must *factually* exclude minorities from the Framework Convention's rights. Given the fact that in these cases, states actually provide for some of the rights listed thereof and treat the mentioned groups as minorities, stronger arguments would support the validity of these reservations, if indeed they can be considered as such. The appraisal of the Advisory Committee in these cases and its flexible views on recognition¹³⁰ also point towards the validity of these would-be reservations.

Nevertheless, even though the Framework Convention should always be seen as a practical and pragmatic instrument, with the ultimate aim of guaranteeing practical and effective rights, the importance of official recognition, as measure in itself taken by the state, should not be underestimated. Related to this, one must understand why recognition, legal, but also social, is

¹²⁹ "The Advisory Committee has further observed that the *de facto* inclusion of beneficiaries under the protection of the Framework Convention or of certain of its articles often forms part of an evolutionary process that eventually may lead to formal recognition". See the Thematic Commentary No. 4, para. 28.

¹³⁰ The Advisory Committee stated in its Fourth Thematic Commentary, para. 28, that "[...] official recognition as a national minority or the granting of a specific status, do not constitute the beginning of the process of minority rights protection, nor are they essential for the application of the Framework Convention or of specific articles of it." Thus, even though the initial declarations might not have included certain minorities, consequent state practice could mitigate this omission.

vital not only in preserving diversity, but also in allowing the development of human personality itself, with all its multiple facets.

CHAPTER III. THE IMPORTANCE OF SELF-IDENTIFICATION AND RECOGNITION

According to article 3 (1) of the Framework Convention, “Every person belonging to a national minority shall have the right freely to choose to be treated or not to be treated as such and no disadvantage shall result from this choice or from the exercise of the rights which are connected to that choice”. Under this widely used formula¹³¹, the Framework Convention lays down one of its core provisions: the right to self-identity or the right to self-identification. If one reads further into the Explanatory Report’s clarification of the first paragraph, three main components of this right become apparent. The first and, probably, the most self-evident aspect, is the guarantee that every person belonging to a national minority is free to choose to be treated or not as such¹³² and whether that person wishes to fall under the scope of application of the Framework Convention¹³³.

However, since this provision is, as such, open to abuse, the Explanatory Report further extracts another element: the exclusion of arbitrary declarations from persons wishing to be treated as pertaining to certain national minorities and the link between the individual’s subjective choice

¹³¹ The 1990 Document of the Copenhagen Meeting of the Conference on the Human Dimension of the CSCE also lists the principle in a similarly worded fashion: “To belong to a national minority is a matter of a person’s individual choice and no disadvantage may arise from the exercise of such choice” (para. 32). The previously mentioned Recommendation 1201 of the Council of Europe’s Parliamentary Assembly also indicates, in article 2, that “Membership of a national minority shall be a matter of free personal choice” and that “no disadvantage shall result from the choice or the renunciation of such membership”. The same can be said of the OSCE Ljubljana Guidelines on Integration of Diverse Societies, which offers a very similar, though more broadly worded, definition in principle 6 (Primacy of voluntary self-identification): “Identities are subject to the primacy of individual choice through the principle of voluntary self-identification. Minority rights include the right of individual members of minority communities to choose to be treated or not to be treated as such. No disadvantage shall result from such a choice or the refusal to choose. No restrictions should be placed on this freedom of choice. Assimilation against one’s will by the State or third parties is prohibited.”

¹³² Explanatory Report, para. 34.

¹³³ *Idem*.

and objective criteria relevant to the person's identity¹³⁴. The third and last element is the guarantee that no disadvantage shall arise from this free choice and that no indirect obstacle exists in the way of exercising the rights connected to this choice¹³⁵. By deconstructing the right to self-identity, we can detect a subjective part, stemming directly from an individual's belief that he or she is part of a national minority, but also an objective counter-weight, of which the primary function is to test the authenticity of the individual's statement¹³⁶. Moreover, it is also essential, especially for the purpose of this thesis, to retain that individuals can self-identify for some purposes, but not for others¹³⁷. In my opinion, this should be the logical outcome when corroborating the article-by-article approach promoted by the Advisory Committee and the fact that the right to self-identify should be exercised freely. Thus, individuals wishing to be recognized as being part of a minority could rightly solicit recognition for the purpose of gaining the possibility to exercise some rights granted by the Framework Convention, but not others¹³⁸. In any case, as the Advisory Committee declared in its 4th Thematic Commentary, "the right to free self-identification (...) is a cornerstone of minorities rights"¹³⁹.

The reason why the right to self-identification is so important for the recognition of ethnic and national minorities is that it represents the normative expression of ethnic or national

¹³⁴ *Idem*, para. 35.

¹³⁵ *Idem*, para. 36.

¹³⁶ However, according to the Advisory Committee, "these (objective) criteria must not be defined or construed in such a way as to limit arbitrarily the possibility of such recognition, and that the views of persons belonging to the group concerned should be taken into account by the authorities when conducting their own analysis as to the fulfilment of objective criteria" – Advisory Committee of the Framework Convention, Third Opinion on Bulgaria, ACFC/OP/III(2014)001, para. 28.

¹³⁷ Elizabeth Craig, *Who are the minorities? The role of the right to self-identify within the European minority rights framework*, Journal on Ethnopolitics and Minority Issues in Europe Vol 15, No 2, 2016, 6-30, p. 10.

¹³⁸ The Advisory Committee highlights this in their Fourth Thematic Commentary: "Moreover, it [the Advisory Committee] has considered that free self-identification implies the right to choose on a situational basis when to self-identify as a person belonging to a national minority and when not to do so." (para. 11); "In practice, this means that each person belonging to a national minority may freely decide to claim specific rights contained in the Framework Convention, while under certain circumstances or with respect to certain spheres of rights, he or she may choose not to exercise these rights" (para. 12).

¹³⁹ Thematic Commentary No. 4, para. 9.

consciousness, the instrument by which individuals can legally identify as members of a community. And even though these latter forms of consciousness have obvious communitarian undertones, they are, after all, the product of individual self-identification. The individual is the fabric of the “cultural structure” that constitutes the basis of ethnic or national identity and it is the individual that can modify it from within¹⁴⁰, since it is his or her free choice to act as such. In the end, the right to self-identify, like the majority of the rights guaranteed by the Framework Convention, is an individual right, although it also has a collective dimension to it, which should, nevertheless, not be neglected.

Opposite the right to self-identification lies the obligation of states to recognize the assertion of individuals that they belong to such ethnic and national minorities. Recognition, in this sense, would function as a form of justice, not in a distributive sense, but as a guarantee against oppression, marginalization or forced assimilation¹⁴¹. Of course, legal recognition, alone, is not sufficient to combat injustice, reduce discrimination or integrate ethnic and national minorities into the wider society. It is, however, one of the basic requirements of any policy on minorities. The alternative, nonrecognition or misrecognition, can, in the words of philosopher Charles Taylor, “inflict harm, can be a form of oppression, imprisoning someone in a false, distorted, and reduced mode of being”¹⁴². Recognition by the state has a legitimizing effect on the presence of ethnic or national minorities and, in my opinion, is rather a precondition to, or at least presents itself as a catalyst of, social acceptance than its effect. Even the Advisory Committee, which, as was

¹⁴⁰ Will Kymlicka, *Liberalism, Community and Culture*. Oxford: Clarendon Press, 1989, pp. 166-167 *apud*. Elizabeth Craig, *Who are the minorities? The role of the right to self-identify within the European minority rights framework*, p. 11.

¹⁴¹ Elizabeth Craig, *Who are the minorities? The role of the right to self-identify within the European minority rights framework*, p. 9.

¹⁴² Charles Taylor, *The Politics of Recognition*, in *Multiculturalism: Examining the Politics of Recognition*, ed. A. Gutmann, 25-73, Princeton University Press, 1994, p. 25.

consistently proven above, sees the recognition of minorities in a pragmatic light, taking account of the rights individuals belonging to minorities factually enjoy, once said of the Estonian authorities' policy of excluding non-citizens from the personal scope of the Framework Convention that: "this formal exclusion of non-citizens from the personal scope of application of the Framework Convention, retains a strong symbolic importance among persons belonging to national minorities."¹⁴³ This was its position notwithstanding the fact, acknowledged by the Advisory Committee itself, that in Estonia, citizens and non-citizens belonging to ethnic or national minorities have equal rights, except for political rights¹⁴⁴. Thus, even if individuals have access to rights, their identities should nevertheless be recognized. Recognition is not only a means to obtain rights, but also an end in itself.

However, notwithstanding its clear focus on the individual, the right to self-identification does have a collective or communitarian part to it. Humans develop their identities, whether individual or shared, in the context of a larger society¹⁴⁵. This can best be seen when recognition by peers is taken into account. For example, the Advisory Committee has criticized the fact that in Bosnia and Herzegovina some political parties included on their electoral lists candidates that changed their declared ethnic affiliation from one election to another in order to gain seats reserved for those national minorities, although these candidates are not recognized by the national minorities they claim to be members of¹⁴⁶. The fact that candidates for national minorities require fewer signatures in order to be validated as such for elections, combined with the legal possibility

¹⁴³ Advisory Committee, Compilation of Opinions of the Advisory Committee relating to Article 3 of the Framework Convention for the Protection of National Minorities (4th cycle), Fourth Opinion on Estonia, adopted on 19 March 2015, p. 13.

¹⁴⁴ *Idem*.

¹⁴⁵ Charles Taylor, *op. cit.*, p. 33.

¹⁴⁶ Advisory Committee of the Framework Convention, Third Opinion on Bosnia and Herzegovina, ACFC/OP/III(2013)003, para. 151.

to change one's declared ethnic identity¹⁴⁷ meant that it was relatively easy to abuse¹⁴⁸ the right of self-identification granted by article 3 (1) of the Framework Convention and implemented, in this case, by legislation in Bosnia and Herzegovina. Not only does this particular abuse exemplify the necessity of objective criteria in the self-identification process, but also the collective dimension of the right, the Advisory Committee rightly pointing out the lack of recognition of these candidates by the national minorities they claimed to represent¹⁴⁹. Thus, it can be rightly pointed out that recognition by co-ethnic or co-national peers or our "significant others"¹⁵⁰, as Charles Taylor puts it, is to be taken into account as another criterion to be met in order for a person to be correctly recognized as a member of a particular ethnic or national minority.

Of course, this reliance on other members of a particular ethnic or national minority should not itself be disproportionate, or else the door opens for abuse coming from the community and directed against the individual. Although a case from the United States Supreme Court, *Hurley v. Irish-American GLIB Association*¹⁵¹ illustrates, in my view, how recognition should be based on the principle of effective equality¹⁵² between individuals pertaining to ethnic or national minorities¹⁵³. The case concerned an LGBT organization which requested to join the St. Patrick's Day Parade in Boston and was refused by the organizers. Notwithstanding the fact that the Supreme Court framed the issue as a problem of free speech, rather than equality, what is relevant

¹⁴⁷ *Idem.*

¹⁴⁸ *Idem*: "While acknowledging the principle of free self-identification laid down in Article 3 of the Framework Convention, the Advisory Committee is concerned at the abuse of this system, which was intended to promote the effective participation of national minorities at local level."

¹⁴⁹ *Idem.*

¹⁵⁰ Charles Taylor, *op. cit.*, p. 32. According to him, humans learn to better articulate their identities not alone, through a monological process, but through dialogue, debate and interaction with our peers, our "significant others".

¹⁵¹ *John J. Hurley and South Boston Allied War Veterans Council v. Irish-American Gay, Lesbian and Bisexual Group of Boston, Etc* (1995), 515 U.S. 557.

¹⁵² As required by article 4(2) of the Framework Convention.

¹⁵³ Elizabeth Craig, *Who are the minorities? The role of the right to self-identify within the European minority rights framework*, p. 10.

for the present discussion is that effective equality, as required by the Framework Convention and the Advisory Committee's interpretations thereof, would necessitate, in similar situations, that the individual be protected from exclusion, marginalization or oppression from the minority group itself, not only from the majority group (in this particular case, Irish LGBT individuals from the Irish minority). Of course, in the US legal context, the interpretation of the case in the light of the right to free speech, as guaranteed by the First Amendment, would make sense. However, seen through the lenses of the right to self-identification, it seems apparent that in the process of recognizing ethnic or national minorities, states should pay equal attention to other "in-group" minorities, such as sexual, religious or even language groups.

The ECtHR case of *Ciubotaru v. Moldova*¹⁵⁴ is also relevant to this discussion. There, the applicant, a Moldovan citizen, was refused his application for an identity card by the Moldovan authorities because he indicated that his ethnicity was Romanian, instead of Moldovan. Since in Moldova, ethnic identities were recorded on the basis of the ethnic identities of one's parents, the applicant's request was rejected because he had not provided sufficient proof that his parents were of Romanian ethnicity. Personal affiliation of the individual in this case was obviously not taken into consideration. Instead, he was recognized on the basis of third-parties' identities. Consequently, the European Court of Human Rights found a violation of article 8 of the ECHR¹⁵⁵, since there were "objectively verifiable links with the Romanian ethnic group"¹⁵⁶, such as language, name, empathy and others"¹⁵⁷. Although the Court makes it clear that one needs to provide more than one's subjective perception of one's own ethnicity, the inclusion of "empathy" in the

¹⁵⁴ *Ciubotaru v. Moldova* (2010), application no. 27138/04.

¹⁵⁵ *Idem*, para. 59.

¹⁵⁶ Here, the European Court seems to use the term "ethnic group" to refer to what Kymlicka would consider a national minority.

¹⁵⁷ *Idem*, para. 58.

“objectively verifiable” links with a particular ethnicity shows that the Court’s assessment leans more towards the individual’s personal appraisal of his or her own identity than on purely objective elements. Ultimately, one’s “empathy” for a specific ethnic or national identity can be objectively proved through one’s actions and declarations. What is clear is that the applicant’s identity in this case was not tied to his peers’, but to his own subjective appraisal, combined with some objective elements, although even these are intrinsically linked with the person of the individual concerned and not with recognition by third parties.

In addition to the above aspects, the right to self-identify is also viewed by the Advisory Committee as being optional, as any right should be. This logically stems from the free exercise of rights in general, where the intrinsic nature of rights consists of the fact that they are at the disposition of the individuals that have them. Therefore, no one should be forced to identify as a specific ethnic or national minority if he or she would not do so out of his or her free will. In its opinions, the Advisory Committee found several cases in which states failed to guarantee a free and optional right to self-identification.

In the case of Cyprus, for example, the Advisory Committee found that the three “religious groups” there (Armenians, Maronites and Latins) were obliged by article 2 of the Cypriot Constitution to affiliate themselves to one of the two majority communities, the Greek Cypriots or Turkish Cypriots¹⁵⁸. Moreover, it also criticized their designation as “religious groups”, especially in the case of Armenians and Maronites, related to whom the Committee noted “a general consensus that (...) above and beyond their distinctive religious characteristics, (they) possess a linguistic, cultural and historical identity by which they may be regarded more broadly as ethnic

¹⁵⁸ Advisory Committee of the Framework Convention, Second Opinion on Cyprus, ACFC/OP/II(2007)004, para. 25; Third Opinion on Cyprus, ACFC/OP/III(2010)002, para. 28; Fourth Opinion on Cyprus, ACFC/OP/IV(2015)001, para. 12.

minorities”¹⁵⁹. The questionnaire used for the 2011 housing and population census also failed to meet the standards of required by the Framework Convention, as it gave no possibility for Roma people to identify as such and neither did it allow for responses such as “other” or “none”¹⁶⁰. Also, the Roma were not presented with the possibility to choose between the main two communities (Greek and Turkish)¹⁶¹. Most of the Roma people were affiliated with the Turkish community, since they were Muslims and spoke Turkish, while a small part was included in the Greek community, as they were Christians and spoke Greek¹⁶².

The subjective core of the right to self-identification is, thus, undermined if states, such as Cyprus, construct rigid national identities to which members of ethnic or national minorities are obliged to adhere. Moreover, in the case of individuals of Roma origin, we can see that even though objective aspects related to the individuals’ identities were taken into consideration, the mechanism through which they were associated with one community or another did not take into consideration the subjective appraisal and the desire of the individual.

A similar problem was discovered by the Advisory Committee in Italy during its first monitoring cycle¹⁶³. As part of a package of measures taken by the Italian state in favor of the German-speaking population of Trento-Alto Adige/Südtirol, a declaration of affiliation to a minority language was instituted as part of a census in the province of Bolzano/Bozen¹⁶⁴. However, the Advisory Committee noted that the declaration remains valid for 10 years, cannot be changed during this period and is retained by district courts, so there is no guarantee of confidentiality¹⁶⁵.

¹⁵⁹ *Idem*, Second Opinion on Cyprus, para. 28.

¹⁶⁰ *Idem*, Fourth Opinion on Cyprus, para. 12.

¹⁶¹ *Idem*, para. 11.

¹⁶² *Idem*.

¹⁶³ Advisory Committee of the Framework Convention on National Minorities, First Opinion on Italy, ACFC/INF/OP/I(2002)007.

¹⁶⁴ *Idem*, para. 18.

¹⁶⁵ *Idem*, paras. 19-20.

Moreover, even though there is a neutral category (“other”), unlike the situation in Cyprus, where it lacked, individuals must still be affiliated to one of the three linguistic minorities in Bolzano (German-speakers, Ladin-speakers and Italian-speakers) in order to stand as candidate in elections or to apply for public service posts¹⁶⁶. Consequently, anyone who is not affiliated to one of the above-mentioned linguistic minorities will be economically and politically disadvantaged¹⁶⁷. The situation changed has since then and, during its third monitoring cycle¹⁶⁸, the Advisory Committee was pleased to note that the declaration was now confidential, with the cases in which it can be disclosed now being limited, but that the change takes effect only after a period of 18 months¹⁶⁹. Also, the Committee noted that, notwithstanding the improvements, the declaration mechanism still obliges individuals to choose one of the three linguistic minorities¹⁷⁰.

What the above criticisms show is that the right to self-identify should take account of the dynamic and complex identities individuals have. Ethnic and national identities change over time, they are neither static, nor homogenous. Moreover, individuals are characterized by a pluralism of identities, whether they be multiple ethnic, national or other (religious, linguistic, sexual etc). As Brigitta Busch, the Austrian member of the Advisory Committee, once said¹⁷¹, in the past,

“identity was seen as stable and defined as a bundle of characteristics ascribed to a particular group (traditional minorities rights).

Now, given that today individual biographies are complex and

¹⁶⁶ *Idem*.

¹⁶⁷ *Idem*, para. 21.

¹⁶⁸ Advisory Committee of the Framework Convention on National Minorities, Third Opinion on Italy, ACFC/OP/III(2010)008.

¹⁶⁹ *Idem*, para. 53.

¹⁷⁰ *Idem*.

¹⁷¹ Her remarks here were taken from the conference that launched the Advisory Committee’s Fourth Thematic Commentary on the Scope of Application of the Framework Convention, see *supra* note 28.

multilayered, due to mobility, such ideas of fixed identity can no longer be upheld”.

This broad and flexible approach can be seen also in the Fourth Thematic Commentary, where the Advisory Committee said that: “Multiple identities and increasing mobility, for instance, have become regular features of European societies. However, such features must not limit access to minority rights”¹⁷².

Indeed, while in premodern times, issues of identity existed, they were not debated with such detail as in the present¹⁷³. But this is not due to people not having identities or not needing recognition, but more to the lack of instruments of expression, whether linguistic, philosophical, political, ideological or others. We have now learned to better articulate our identities as a complex of multiple, often overlapping and interchangeable set of characteristics. The present focus on the complex nature of human identity is also expressed in legal instruments such as the Framework Convention, which, according to the drafters of the thematic commentary, is constructed on a broad and flexible understanding of identity which allows for pluralism and dynamism¹⁷⁴. What the Framework Convention does presently, in this interpretation, is to offer the possibility for a richer articulation of identity in the legal dimension of minorities issues.

¹⁷² Thematic Commentary No. 4, para. 5.

¹⁷³ Charles Taylor, *op. cit.*, p.

¹⁷⁴ The Ljubljana Guidelines also highlights this aspect its 5th principle (Recognition of diversity and multiple identities): “Diversity is a feature of all contemporary societies and of the groups that comprise them. The legislative and policy framework should allow for the recognition that individual identities may be multiple, multilayered, contextual and dynamic”.

CHAPTER IV. CITIZENSHIP AND NATIONAL NARRATIVE

Having established how the Framework Convention, as viewed presently by the Advisory Committee, is the product of a relatively new and modern approach to minorities rights which takes account of the diversity of human identity, I believe it would be appropriate to further ascertain how states have changed their own collective identities in view of the rising demand for recognition by minorities. I will not engage in a discussion over national identity *lato sensu*, but instead focus on how states have defined citizenship in the recent past and if there have been any changes that can be linked to the growing factual multiculturalism that has become the case for many societies. While the notion of citizenship has been traditionally linked with the nation-state and that state's national identity or, better put, the majority's national identity, it can be said of today's societies, with its individuals more conscious of their own identities than ever before, that the strict, exclusive and homogenous interpretation of "nation" and, consequently, of its legal emanation – citizenship – no longer expresses a realistic paradigm. Moreover, the relatively recent debate over "new minorities" also exposes the shortcomings of many present state definitions of citizenship, which are still strongly intertwined with the idea of nation-state. I will focus mostly on European states, especially Germany, although I will also mention Canada as well, since its concept of citizenship was deeply changed by multiculturalism's challenge. I believe Germany and Canada function as appropriate elements for comparison mainly because they are both presently very diverse societies with high numbers of individuals with migration backgrounds, but, on the other hand, they dealt with this growing diversity in different ways. On the other hand, Central and Eastern European states, such as Romania, the Czech Republic, Poland and Hungary will also be looked upon to see their approaches to recognizing minorities.

1.1. GERMANY

I will start with Germany, since it has become an interesting example of a country whose policy makers refused to view it as a country of immigration and, consequently, initially upheld a conception of citizenship strongly infused with the *jus sanguinis* principle.¹⁷⁵ German law on nationality was, of course, based on a German understanding of nation or *Volk*, which harked back to the end of the Wars of Liberation (*Befreiungskriege*) against Napoleon and German national identity consequently formed itself on primarily ethnic and cultural commonalities, as did the German conception of citizenship.

However, post-war migration, especially of Turkish guest workers (*Gastarbeiter*), changed all this. The initial guest workers were met with a policy of “returnist multiculturalism”, as Kymlicka describes it¹⁷⁶, which meant that German authorities did not aim for the integration of guest workers in German society, but merely accommodated them and sought to reintegrate them in their countries of origin¹⁷⁷. Language or education measures were only meant to offer a temporary assistance to foreign workers, their families and, especially, their children, who needed to continue their education in their native tongue. For example, during this initial migration period of guest workers, some German states even established separate schools for migrant children so that they could be educated in their own language¹⁷⁸. At first glance, one might confuse this measure to be one implementing a right of minorities to be educated in their own language. However, the policy actually aimed at reintegrating migrant children in their home countries once

¹⁷⁵ The 1913 German Law on Nationality (*Reichs- und Staatsangehörigkeitsgesetz*, abbreviated as *RuStAG*) created the first all-encompassing German citizenship, which included the citizenships of the federal states and did not replace them. The law would remain in force, albeit heavily modified, until 2000.

¹⁷⁶ Will Kymlicka, *Multiculturalism without citizenship?*, 2017, available online at: https://www.academia.edu/33677436/Multiculturalism_without_Citizenship_2017 (last accessed on 24.07.2017).

¹⁷⁷ Yaşar Aydın, *The Germany-Turkey migration corridor: Refitting policies for a transnational age*, February 2016, Migration Policy Institute, Washington, DC, p. 13.

¹⁷⁸ See Simon Green, *The politics of Exclusion: Institutions and Immigration Policy in Contemporary Germany*, Manchester University Press, Manchester, UK, 2004, *apud*. Yaşar Aydın, *op. cit.*, p. 13, footnote 47.

they returned together with their parents, not at accommodating their particular cultural needs in Germany.

The Turkish community in Germany is a particularly relevant example here. Initially, since the signing of the Bilateral Recruitment Agreement with Turkey in 1961 and up until 1973, when the German Economic Miracle (or *Wirtschaftswunder*) ended, the vast majority of Turks came for labor purposes on a temporary basis, on the principle of rotation¹⁷⁹. The idea was that the overwhelming part of contracts would be short-term, but this was soon abandoned due to pressures coming from employers, who preferred to keep their old employees¹⁸⁰. Most guest workers did return to their home country, while the remaining started to bring their families to Germany¹⁸¹. Consequently, the next phase of migration to Germany was characterized by the predominance of family reunification¹⁸². In this context, it became apparent that the initial “returnist” policies could not cope with the vast numbers of guest workers and their family members¹⁸³.

To contend with such a challenge, German migration policy changed accordingly, albeit slowly and with considerable opposition. The above-mentioned German law on Nationality, for example, changed substantially in 2000, when elements of *jus soli* were also introduced, so children born out of non-German parents residing in Germany for at least 8 years (formerly it was

¹⁷⁹ Yaşar Aydın, *op. cit.*, p. 4.

¹⁸⁰ *Idem.*

¹⁸¹ *Idem.*

¹⁸² *Idem.*

¹⁸³ According to a 2015 census done by the German Federal Statistical Office (*Statistisches Bundesamt*), there are 2.851 million people with a Turkish migration background (*Migrationshintergrund*). The term “migration background” is used to refer to any person not born in Germany, foreign nationals (even if born in Germany) and those which have at least one parent not born in Germany. See Yaşar Aydın, *op. cit.*, p. 6, footnote 20. Also see the German Federal Statistical Office’s 2015 census (*Bevölkerung und Erwerbstätigkeit, Bevölkerung mit Migrationshintergrund, Ergebnisse des Mikrozensus 2015*, Fachserie 1 Reihe 2.2), p. 177, available online at: https://www.destatis.de/DE/Publikationen/Thematisch/Bevoelkerung/MigrationIntegration/Migrationshintergrund2010220157004.pdf;jsessionid=85A7339F5B34916BE4AB300E6487C349.cae1?_blob=publicationFile (last accessed on 24.07.2017).

15 years) and holding a permanent right of residence would automatically receive German citizenship at birth¹⁸⁴. The downside of this was that, unlike EU citizens, which could keep double citizenship starting with 2007, non-EU citizens born in Germany would have had to choose upon reaching the age of 21 whether they would like to keep their German citizenship or adopt the citizenship of their parents¹⁸⁵. Hence, the small number of Turks today that have both citizenships, many preferring to keep the German citizenship when confronted with the choice between Turkish and German citizenship¹⁸⁶. Many individuals pertaining to the Turkish diaspora in Germany were, of course, split between opting for German or for Turkish citizenship. Luckily, the situation improved again in 2014, when a new law exempted people growing up in Germany from opting between two. These include persons habitually residing in Germany for at least 8 years, those who attended school in Germany for at least 6 years or those who completed their schooling or vocational training in Germany¹⁸⁷.

The potentiality of scaring away a substantial part of their workforce determined German authorities to relax their citizenship criteria. But the change can also be attributed to the fear of impeding integration, the threat of alienating a part of its populace which, by then, already constituted its largest minority. Most importantly for the purpose of this thesis, however, the change in Germany's definition of citizenship from a mostly ethnic notion to a more open and diversity-friendly conception not only resonates more with the factuality of Germany's multicultural society, but also brings the German legal framework closer to the desiderata of the

¹⁸⁴ See the German Federal Foreign Office's site for the information on the Law on Nationality: http://www.auswaertiges-amt.de/EN/EinreiseUndAufenthalt/04_Recht/Staatsangehoerigkeitsrecht_node.html (last accessed on 24.07.2017).

¹⁸⁵ *Idem.*

¹⁸⁶ Only a small number of Turks are dual citizens: 246,000, or 8.6% of the total number of people with Turkish migration background. See the 2015 census by the German Federal Statistical Office, p. 167.

¹⁸⁷ *Idem.*

Framework Convention and the views of the Advisory Committee. A notion of citizenship that allows for multiple identities (including multiple citizenships) respects the multilayered and complex identities that individuals have, especially individuals who are members of ethnic or national minorities. This change, of course, does not mean that the scope of application of the Framework Convention has been extended to people of Turkish origin in Germany, or to any other minority as a matter of fact. It does, however, mark a significant improvement that could, in the end, lead to recognition and, possibly, as a next logical step, to extending the personal scope of the Framework Convention to cover minorities not previously included.

Even though, as we will see¹⁸⁸, the Advisory Committee has been consistent in its view that citizenship should not be regarded as a condition for recognition, but of granting specific rights from the Framework Convention, one should not be oblivious to the fact that most countries do require citizenship as a pre-condition to granting official minority status. From one point of view, this is understandable, because many countries probably have a more or less homogenous view of their societies and, for various reasons, including costs in administration, are reluctant to recognize other ethnic or national minorities.

Another reason is that they do not view some minority groups as being part of the “national narrative”, they do not see them as state-constituting actors. In this sense, I am using “national narrative” to refer to the historical and social self-perception and self-identification of one nation, which is usually confused with the majority (or dominant) national group, the one we find regularly as defining the identity of the whole country¹⁸⁹. While some ethnic or national minorities might be considered a part of the history and cultural fabric of one nation, some might not, as they are not

¹⁸⁸ See Chapter V, Section 1.1.

¹⁸⁹ Such as Romanians, Germans, Hungarians defining their countries as Romania, Germany, Hungary and the nation as Romanian, German, Hungarian.

viewed as being autochthonous. This “judgment” of whether a minority group is part of the nation or not is usually “decided” by the majority national group, but this does not exclude social non-recognition by other, recognized minorities as well. This type of recognition can be seen, for example, in history books officially endorsed by a government, where the participation of ethnic or national minority groups in the country’s history and foundation might be omitted or not seen as amounting to being part of the “national narrative”. And sometimes, this attitude is shared by the dominant national group, although it might not always be the case that omitting the contribution of ethnic or national minorities to the country’s history from officially endorsed history books mirrors an equivalent social non-recognition.

On the other hand, “nation” can also overlap with the concept of citizenship in a more *lato sensu* meaning, encompassing not only the majority, but also traditional minorities. For example, in the case of Romania, even the Constitution lays down, in article 4 (1) the foundation of the state of Romania as being “laid on the unity of the Romanian people and the solidarity of its citizens.” Even if the second paragraph of this articles establishes that Romania is the homeland of all its citizens, without discrimination on account of, among others, race, ethnic origin, language and nationality, it is clear that the State, which views itself as a unitary state, identifies more with the majoritarian culture, which is mentioned expressly¹⁹⁰. Other groups, including old minorities such as Hungarians and Germans, while not part of the majoritarian nation, nevertheless are part of the “national narrative”, i.e. their history and culture are intertwined with that of the majority culture. One example of this link is the simple fact that pupils and students are also taught in history classes

¹⁹⁰ This constitutional combination between the choice for a unitary state and non-recognition of other languages as official languages could draw parallels with the French Constitution, which also lays the foundation of a unitary state and recognizes French as the sole official language of the Republic. However, while Romania signed and ratified both the Framework Convention and the European Charter of Regional or Minority Languages, France did not, mainly because of France’s highly centralized form of governance which it inherited from the time of the French Revolution.

about these “traditional” minorities, but there is also a national consciousness that their history and culture are closely linked with those of the Romanian nation and that they are “at home” in Romania. New minorities, on the other hand, are not part of this “national narrative” and are instead viewed as outsiders.

Defining national identity might be selective and it can also have legal manifestations under the form of constitutions outlining a state as unitary or national, as in the above case. Thus, it might seem as if the constitution creates second class citizens out of individuals belonging to national minorities. But while this is the case with traditional minorities, new minorities are not even considered state-constituting actors or part of the “national narrative”. In this sense, Bhikhu Parekh stresses out the need for political communities to self-identify and self-define themselves not in ethnic or cultural terms, but in politico-institutional terms¹⁹¹, whereby ethnic and national minorities would not feel left out or be seen, as he puts it, as “less authentic 'sons of the soil', less reliable and patriotic than the rest, less entitled to demand respect for their culture and religion, and passed over in politically sensitive appointments.”¹⁹² By defining the state as “the national home of the majority community”¹⁹³, minorities’ presence in the said state is seen as less legitimate, hence the need to re-define the “nation” in broader terms.

In my view, one must not “wait” for a particular ethnic, religious or cultural group to become part of the “national narrative” or the national consciousness of one state’s nation. Thus, minority groups may be part of the population¹⁹⁴, but not of the nation. Legal recognition should

¹⁹¹ Bhikhu Parekh, *Rethinking Multiculturalism*, Macmillan Press, 2000, p. 231.

¹⁹² *Idem*, p. 234.

¹⁹³ *Idem*.

¹⁹⁴ The term “population” would probably be better placed in this context than “nation” (understood *stricto sensu* in ethnic terms), since I refer not only to the majoritarian nation, which usually also defines a state’s name, history and culture, but also to the other national or ethnic minorities that have been, in the meantime, interwoven in a state’s history and, hence, have become part of the so-called “national narrative”. “Population”, in my view, is more statistical and factual than “nation” and would probably be better suited to today’s ever more multicultural societies than a rigid

not be bestowed upon a minority after there has been a social recognition or acceptance into the “national narrative”. On the contrary, I believe that legal recognition should come first, as an official form of recognition by the state. This official recognition, which would grant minorities the rights offered by national, regional and international legal instruments, would have a legitimizing effect on their existence and would also accelerate the integration process, which, as a matter of fact, functions in a two-way manner¹⁹⁵: the minorities’ desire to integrate into the mainstream society, while also retaining its distinctiveness, is to be mirrored by the host state’s openness. And since social acceptance is a matter of time and various other factors that cannot be exactly ascertained, legal acceptance should precede it, as it involves actions by the state, which should be, by their very nature, predictable, certain and not subject to societal factors, which are more dynamic.

As in the case of the above-mentioned Turks in Germany, new minorities that are excluded from citizenship because of a *jus sanguinis*-infused concept of citizenship are also denied social acceptance¹⁹⁶. The end result is the creation of parallel societies, as a symptom of the state’s inability to properly integrate minorities, but also of the resistance of the minority itself from being assimilated or assimilating itself voluntarily. The Turkish *Gastarbeiter* in Germany are such a good example because, initially, members belonging to this minority traveled to Germany as economic migrants, albeit on the invitation of a host country that expected them to return to their

and overly historical interpretation of “nation”. Of course, some states might have a more open understanding of “nation”, than others. Canada, for example, sees itself as a country of immigration and, consequently, requires fewer years of physical presence there (4 years) for granting citizenship than most European countries.

¹⁹⁵ The Advisory Committee too highlighted this aspect in its Thematic Commentary No. 4, at para. 44: “The Advisory Committee’s established position is that integration is a process of give and-take and affects society as a whole. Efforts cannot therefore be expected only from persons belonging to minority communities, but they must also be made by members of the majority population”

¹⁹⁶ As Kymlicka rightly points out, the German conception of nationhood would more quickly accept Germans in Russia as citizens than Turks, even if the former have lived all their lives in Russia, while the latter have been living in Germany for three or four generations. See Will Kymlicka, *Multicultural Citizenship*, p. 23.

country of origin afterwards¹⁹⁷. Consequently, initial German policies did not focus on integration, but temporary accommodation¹⁹⁸. Given the lack of state support for integration, social acceptance was also hampered, since many of the first generations of *Gastarbeiter* did not know German and could not integrate properly. Moreover, because of an incoherent integration policy of migrants¹⁹⁹, the threshold for becoming a part of the German “national narrative” is higher for new minorities than for old ones and new minorities are obliged to go to greater lengths to integrate than “established” minorities.

1.2. ROMANIA, THE CZECH REPUBLIC, POLAND, HUNGARY: DIVERGING APPROACHES

Some other states, such as Hungary²⁰⁰ and Poland²⁰¹, require minorities to have lived on their territory for a certain period of time – in this case, one hundred years. I believe that this requirement, which obviously seriously impedes recognition of new minorities²⁰², would probably be justified by the fact that these states only wish to recognize as minorities those groups which have been traditionally residing the territories now belonging to them and, consequently, have become part of the “national narrative”. Societal acceptance is, again, preceding legal recognition.

¹⁹⁷ See James Angelos, *What Integration Means For Germany's Guest Workers. The Debate Over Multiculturalism Alienates the Immigrants Germany Needs Most*, from Foreign Affairs, 28th October, 2011, available online at: <https://www.foreignaffairs.com/articles/europe/2011-10-28/what-integration-means-germanys-guest-workers>.

¹⁹⁸ *Idem*.

¹⁹⁹ *Idem*.

²⁰⁰ The Hungarian Act LXXVII of 1993 on the Rights of National and Ethnic Minorities defines minorities in article 1 (2) as those ethnic groups “with a history of at least one century of living in the Republic of Hungary”.

²⁰¹ The Polish Regional Language, National and Ethnic Minorities Act defines minorities in article 2 as a group of Polish citizens who, among other criteria, has had ancestors residing within the present territory of the Republic of Poland for at least a hundred years.

²⁰² In its recent Thematic Commentary No. 4 on the scope of application of the Framework Convention for the Protection of National Minorities, the Advisory Committee stressed out the fact that length of residency of minority groups in a particular country should not be a determining factor for the application of the Framework Convention as a whole. The same view is held by the UN Human Rights Committee, which interpreted article 27 of the ICCPR (on the right of minorities to enjoy their own culture, to profess and practice their own religion, or to use their own language) in the sense that even migrant workers or visitors should benefit from it, not just permanent residents. See the Thematic Commentary No. 4, p. 13, para. 31 and the General Comment of the UN Human Rights Committee No. 23(50), CCPR/C/21/Rev.1/Add5/26 April 1994, para. 5.2.

Consequently, those that do not qualify as such are also viewed as alien to the cultural landscape of the host country.

Other countries, such as Romania²⁰³ do not have such temporal conditions and, while Romanian legislation does not have any definition of the term “national minority” and, theoretically, according to Romanian legislation, any ethnic group that forms an organization representing them and gathers a specific number of votes will be represented in the Council of National Minorities and, consequently, recognized as a minority²⁰⁴. While social acceptance would remain a problem even in these countries, as it already is the case with the United Kingdom and its new minorities and Romania with some of its old minorities, at least the legal recognition would open a wide range of possibilities for new minorities to integrate.

The Czech example is also interesting, given the 2013 recognition of Belarusians and Vietnamese as (new) minorities²⁰⁵. The Czech system resembles more or less the Romanian one, in both cases there is lack of legal certainty regarding the recognition process of minorities, but, on the other hand, they are both theoretically flexible in the case of recognizing new minorities, because in both cases acceptance in their respective state council for minorities would mean that

²⁰³ Romania has a draft Law on the Status of Minorities which has been proposed in 2005, but has not been, as of yet, adopted. The first draft defined national minorities as “any community of Romanian citizens, which lives on the territory of Romania from the moment *when the modern Romanian state was founded* (emphasis added), which is numerically inferior to the majority population, having its own national identity expressed through culture, language or religion, which it desires to keep, express and develop”. The Venice Commission has criticized this definition in its Opinion no. 345/2005, CDL-AD 2005 026, stating that: “the requirement that the community must have lived on the territory of Romania from the moment the modern Romanian state was established in order to qualify as a national minority. (...) This seems to indicate that the relevant time is 1919, although the creation of a modern state may be seen as a process rather than a definite event”. Consequently, the draft proposal has been changed accordingly and now the definition is rather similar to those of Hungary and Poland, by requiring minority groups to have lived in Romania for at least 100 years.

²⁰⁴ See Law 208/2015 on elections. Under the conditions laid down by the said law, if an organization representing a minority gains somewhere between 200 and 3000 votes, it will be represented in the Parliament by one seat in the Council of National Minorities and, as a consequence, will be granted official recognition as a protected minority. The requirement for citizenship is, however, still present.

²⁰⁵ See Marián Sloboda, *Historicity and citizenship as conditions for national minority rights in Central Europe: old principles in a new migration context*, Journal of Ethnic and Migration Studies, 2016, 42:11, 1808-1824.

the state has recognized a new minority²⁰⁶. In the Czech example, the Vietnamese and Belarusians have been requesting recognition for a long time and in 2013, the Czech Government passed a resolution that amended the charter of their Council for National Minorities to include representative from the two aforementioned groups²⁰⁷. While this is quite unique in Europe and especially in Central and Eastern Europe, where definitions of minorities, where they exist, usually include both citizenship and historicity of their presence on the territories of those countries and, as such, would probably exclude new minorities from the start, it is important to note that the Czech Republic had previously included representatives of a Serbian minority NGO, in 2004, although the Serbian minority there consists mostly of immigrants from the 1990's²⁰⁸. A precedent existed, therefore. And while inclusion of representatives in the Czech Council of National Minorities via a resolution of the executive has been described as “legally unsound”²⁰⁹ and lacking in legal certainty²¹⁰, the conclusion was that it amounted to an official recognition of those minorities by the state²¹¹ and, logically, of the scope of application of the Framework Convention.

The Romanian legislation in this field is also pretty vague, as mentioned above. Thus, for electoral purposes, Law 208/2015 on elections understands the term “national minority” as referring to those ethnicities²¹² represented in the Romanian Council of National Minorities²¹³. Other national minorities’ organizations can also participate if they are of “public utility” and if they can produce a list of persons representing 15% of the total number of citizens that have

²⁰⁶ *Idem*, p. 1819.

²⁰⁷ *Idem*, p. 1814.

²⁰⁸ *Idem*, p. 1815.

²⁰⁹ *Idem*, p. 1819.

²¹⁰ *Idem*, p. 1815.

²¹¹ *Idem*, p. 1816.

²¹² Here, I am merely reproducing the term used by Law 208/2015, which does not make the distinction between national and ethnic minorities, but instead refers to “ethnicities” as synonymous with “national minority”.

²¹³ Law 208/2015, art. 56 (3).

declared themselves as belonging to that national minority²¹⁴. According to the current above mentioned elections' law, the threshold applied to these organizations is 5% of the average number of votes given to a Deputy²¹⁵. The same 5% threshold is required of regular parties²¹⁶, although it relates to the total number of votes. This last threshold is also to be applied to national minorities' organizations which participate in electoral alliances²¹⁷.

In these circumstances, the only national minority organization that has consistently managed to reach the threshold for regular parties is the Democratic Alliance of Hungarians in Romania, mainly due to its largely loyal electorate and high number of individuals belonging to this minority²¹⁸.

Thus, in theory, the legislation is very permissive with its understanding of the term “national minority”, with no single, general definition existing at any legislative level, except for the one mentioned above, which links the recognition of a national minority with its representation within the Council of National Minorities²¹⁹. As a direct consequence of this policy, since any organization representing national minorities can achieve official recognition, provided they attain the required number of votes, the number of organizations grew from the initial 12 in 1990²²⁰,

²¹⁴ *Idem*, art. 56 (4).

²¹⁵ *Idem*, art. 56 (1).

²¹⁶ *Idem*, art. 94 (2).

²¹⁷ *Idem*, art. 56 (8).

²¹⁸ According to the latest census which took minorities into consideration, from 2011 (there is a 2016 census, but it does not include data on national minorities), there were 1.227.623 Hungarians living in Romania, representing 6.5% of the total population. The census data is available in English at: <http://www.insse.ro/cms/files/statistici/comunicate/alte/2012/Comunicat%20DATE%20PROVIZORII%20RPL%202011e.pdf> [last accessed on 14.02.2017].

²¹⁹ Monica Călușer, *Reprezentarea minorităților naționale pe locurile rezervate în parlament* (The representation of national minorities on the reserved seats in parliament), in Levente Salat (ed.), *Politici de integrare a minorităților naționale în România* (National minorities integration policies in Romania), Centrul de Resurse pentru Diversitate Etnoculturală, Cluj-Napoca, 2008, p. 170

²²⁰ By the rules established by article 4 of Decree-law no. 92/1990 for the organization of elections, 13 minorities (besides the Hungarians, which entered directly into Parliament, with 41 Senators and Deputies) were initially represented in the Romanian Parliament's Council for National Minorities by 11 organizations: Germans, Roma, Lipovan Russians, Armenians, Bulgarians, Czechs, Slovaks, Serbians, Greeks, Polish, Tatars, Turks and Ukrainians.

when the first free elections were held, to the present 18 (including both those represented by one depute in the Council and the Hungarians represented in the Parliament). Given that the number of votes required of national minorities to be represented in the Council and, thus, also recognized is small²²¹, the chances that a new minority would be recognized in Romania are indeed high. At least in theory.

In the Czech example, while there was a definition of what national minorities are, it included, besides the citizenship criterion, a historicity criterion as well, it was formulated in vague terms²²². It allowed, therefore, for negotiation²²³ on the historicity of a minority's presence in the Czech Republic. In the case of Romania, however, there is no official definition of what constitutes a national minority yet. While the Advisory Committee urged²²⁴ the Romanian government to ensure that an open and flexible approach to the scope of application of the Framework Convention was reflected in the above-mentioned draft Law on the Status of National Minorities, the existing draft law contains a definition that requires both citizenship and that the minority must have been living in Romania for 100 years²²⁵. However, in light of the Czech case with the Belarusians and Vietnamese, I believe that the adoption of the law in this form would severely limit the possibility to negotiate a group's minority status in the future. While the present state of Romanian legislation

The Czechs and Slovaks formed just one organization – The Democratic Union of Slovaks and Czechs in Romania. Shortly after, the Turks and Tatars factions split and former distinct organizations, bringing the total number of seats in the Council to 12 and the number of organizations in Parliament, as a whole, to 13 (including the Hungarians). For more details, see Monica Călușer, *op. cit.*, pp. 169-170.

²²¹ The required number of votes was 1336 in 1992, 1494 in 1996, 1273 in 2000, 2841 in 2004 (when the threshold was lifted to 10% instead of 5%, but this was reverted to 5%), etc.

²²² “A national minority is a community of citizens of the Czech Republic living in the present-day Czech Republic who differ from other citizens, as a rule, in their common ethnic origin, language, culture and traditions, constitute a numerical minority of the population, and demonstrate their will to be considered a national minority for the purpose of their joint efforts to preserve and develop their own identity, language, and culture, as well as for the purpose of expressing and protecting the interests of their historically constituted community”. See the Czech Minorities Act No. 273/2001, Sec. 2.1. (Translated by Marián Sloboda in *op. cit.*, note 4, p. 1820)

²²³ Marián Sloboda, *op. cit.*, p. 1811.

²²⁴ Advisory Committee of the Framework Convention, Third Opinion on Romania, para. 32, ACFC/OP/III(2012)001.

²²⁵ See *supra* note 203.

on minorities leaves a lot to be desired, it does offer more room for flexibility when speaking strictly about official recognition.

1.3. THE UNITED KINGDOM AND CANADA

Other countries, such as the United Kingdom and Canada, have a much more liberal approach. The United Kingdom, for example, has been praised by the Advisory Committee of the Framework Convention for its broad interpretation of the term “ethnic minorities”.²²⁶ The Fourth Opinion of the Advisory Committee on the United Kingdom even starts by acknowledging that it is “traditionally a multi-ethnic society where efforts to guarantee and extend the protection of the rights of persons belonging to national and ethnic minorities have been carried out for decades”²²⁷ Besides this, the United Kingdom has undergone a series of devolutions (the granting of powers to regional legislative and executive bodies from the Parliament of the United Kingdom), namely the ones granting powers to the Scottish, Welsh and Northern Irish legislatures and executive bodies, have increased the political participation of these minorities. Moreover, since the 2014 recognition of the Cornish people as a minority²²⁸, there have been talks and also an agreement reached in 2015 for a devolution in the case of Cornwall as well²²⁹.

²²⁶ Advisory Committee, First Opinion on the United Kingdom, 30 November 2001, ACFC/INF/OP/I(2002)006, para. 14: “The Advisory Committee strongly welcomes the inclusive approach of the United Kingdom in its interpretation of the term “national minority”. The Advisory Committee notes that the term “national minority” is not a legally defined term within the United Kingdom, but that the State Report is based on the broad “conventional” definition of “racial group” as set out in the Race Relations Act (1976). Under this Act “racial group” is defined as “a group of persons defined by colour, race, nationality (including citizenship) or ethnic or national origin”. This includes the ethnic minority communities. The Courts have furthermore interpreted the term and found it to include the Scots, Irish and Welsh by virtue of their national origin. On a case-by-case basis the Courts have also included Roma/Gypsies as well as Irish Travelers (also defined as a racial group for the purposes of the Race Relations (Northern Ireland) Order (1997)), Sikhs and Jews.”

²²⁷ Advisory Committee, Fourth Opinion on the United Kingdom, 25 May 2016, ACFC/OP/IV(2016)005, para. 1.

²²⁸ *Idem*, para. 6.

²²⁹ *Idem*, para. 14.

Canada, as well, has been defining themselves as multicultural for some time now. Its multicultural policy shifted from the 1960's view that multiculturalism is an extension of citizenship²³⁰ and, thus, applying to persons that are already citizens (such as long-standing communities of Ukrainians, Poles or Italians), to the present extension of multicultural integrative measures to immigrants as well²³¹. The 1988 Canadian Multiculturalism Act, for example, officially defines Canada's multiculturalism as being fundamental to the Canadian identity:

“It is hereby declared to be the policy of the Government of Canada
to:

(a) recognize and promote the understanding that multiculturalism reflects the cultural and racial diversity of Canadian society and acknowledges the freedom of all members of Canadian society to preserve, enhance and share their cultural heritage

(b) recognize and promote the understanding that multiculturalism is a fundamental characteristic of the Canadian heritage and identity and that it provides an invaluable resource in the shaping of Canada's future”²³²

The fact that Canadian society view itself as intrinsically multicultural means that their definition of the Canadian nation leaves the possibility open for “new minorities” to become part of it without having to renounce their distinctiveness. They are, in other words, “state actors”, constituent parts of the national narrative and of the nation itself²³³. The contrast with the German

²³⁰ Will Kymlicka, *Multiculturalism without citizenship?*, p. 1.

²³¹ *Idem*, p. 2.

²³² Canadian Multiculturalism Act, 1988, section 3 (1).

²³³ Will Kymlicka, *Multiculturalism without citizenship?*, p. 2.

example is obvious: whereas Germany has been reluctant to see itself as a country of immigration and has only recently started to tone down on its citizenship requirements in the face of growing disenchantment within communities of persons with immigrant background, Canada has taken its multicultural role seriously and, although initially reliant on Anglo-conformity or Anglocentrism²³⁴, the practice of requiring immigrants to conform to the English-speaking majority's culture, it has shifted towards recognizing multiculturalism as the basis of Canadian identity itself and not only as an institutional mitigation aimed solely at foreigners. Of course, it has to be borne in mind that Canada started to be confronted with the paradigm of it being a country of immigration at a time when Germany was still a country of emigration. Nevertheless, German authorities' slow response in facilitating access to citizenship to its increasing population of individuals with migrant background should always be put into the context of Germany's particular socio-historical and cultural situation, which is markedly different from Canada's.

Then again, Germany's *Leitkulturdebatte* or "leading culture" debate, which started in the early 2000's, presents similarities with the notion of Anglo-conformity. Catalyzed by the intention of the social democrats and greens, which came to power in Germany in 1998, to reform the country's immigration and citizenship policies, the debate was sparked between the progressive left and conservatives (represented by the CDU and its Bavarian sister-party, the CSU) as to whether Germany should tilt towards more multicultural policies and, consequently, also towards a more diversity-friendly self-perception of the German nation, or, as the conservative camp argued, in a more or less Huntington-esque tone, immigrant cultures should be kept separated and those that wished to "join" the nation and also become citizens should conform to a German

²³⁴ "Anglocentrism required migrants to abandon the traditions and cultures of their homelands and instead adopt the values and behaviors of English-speaking Canadians". For further details on Canada's initial assimilationist policies, see Jatinder Mann, "*Anglo-Conformity*": *Assimilation Policy in Canada, 1890s–1950s*, *International Journal of Canadian Studies*, Volume 50, 2014, pp. 253-276.

Leitkultur. In this case, what was meant by *Leitkultur* was the more general Western liberal-democratic culture with roots in the Enlightenment and, following internal debates in the CDU, “German” *Leitkultur* was transformed into the broader European *Leitkultur*. European Western ideals were viewed as the yardstick against which immigrants’ integration was to be measured²³⁵. As one might assume, the concept of *Leitkultur* is deeply suspicious of immigrant communities and presupposes the superiority of the European culture to which German culture is ascribed in order to demand assimilation.

The leading culture paradigm is a reaction to transnationalism, free movement and, to a certain extent, globalism in general, and, as such, is not necessarily a specifically internal German issue, but merely the internalization of a wider debate, which is present all across Europe and beyond. Although Germany, for example, succeeded in reforming its citizenship law in order to ease its granting to persons with migration background, it has done so after lengthy political debates.

Thus, while the broadest interpretations of “national minority” come from the United Kingdom and Canada, both of whom having been considering their respective societies as multicultural, other countries, such as Germany, are slowly starting to view themselves as countries as immigration. Central and Eastern European countries, such as Romania, the Czech Republic, Poland and Hungary, actually have approaches that are quite different to one another, notwithstanding the fact that these societies usually view themselves as nationally and ethnically homogenous. But these differences can all be explained, at least in part, by these countries’ respective histories. While the United Kingdom now faces the legacy of its world-wide empire and

²³⁵ Hartwig Pautz, *The politics of identity in Germany: the Leitkultur debate*, Race & Class, Institute of Race Relations 0306-3968 Vol. 46(4), 2005, pp. 39–52, p. 44.

both it and Canada have had to react to the growing numbers of migrants coming to their shores, Germany, as previously explained, did not become a popular choice for immigration until the second half of the 20th century and is presently coping with issues probably similar to those with which the latter two countries had to cope in the past. Most of the Central and Eastern European countries, on the other hand, have only recently started to experience immigration, although many are still countries of emigration. Their societies' concept of nationality is more or less built on ethnic lines due to them forming modern and independent states quite recently and not being challenged by immigration as much as the United Kingdom, Canada and Germany have been. However, their approaches on recognizing minorities varies from theoretically broad (Romania) and even recognizing new minorities (the Czech Republic) to stricter interpretations (Poland and Hungary).

1.4. IMPROVEMENTS IN CITIZENSHIP LAWS

Apart from Germany, the sensitivity of the issue of citizenship can be seen also in Italy, where, recently, a bill which proposed a more *ius soli*-oriented approach to citizenship and facilitated naturalization for immigrants was delayed owing to intense political opposition²³⁶. Switzerland, on the other hand, overwhelmingly voted in favor of a law that eases the naturalization process for third-generation foreigners no older than 25 years²³⁷, while in 2014, the Czech Republic reformed its citizenship legislation²³⁸, one of the major changes being the

²³⁶ See James Politi, *Italy delays vote on citizenship for immigrants' children*, Financial Times, July 17, 2017, available online at: <https://www.ft.com/content/bb0203a4-6ace-11e7-bfeb-33fe0c5b7eaa> (last accessed on 08.08.2017) and Manuela Perrone, *Italian parties clash over citizenship rights for immigrant children*, Italy24, 26 June 2017, available online at: <http://www.italy24.ilsole24ore.com/art/politics/2017-06-22/italian-parties-clash-over-citizenship-rights-for-immigrant-children-171609.php?uuid=AEgjWckB> (last accessed on 08.08.2017).

²³⁷ Philip Oltermann, *Switzerland votes to ease citizenship process*, The Guardian, 12 February 2017, available online at: <https://www.theguardian.com/world/2017/feb/12/switzerland-votes-immigrants-citizenship-rights-islamophobia> (last accessed on 08.08.2017).

²³⁸ Act No. 186/2013 concerning the nationality of the Czech Republic and amending certain acts or "Czech Nationality Act".

introduction of dual or multiple citizenship, in contrast with the old legislation, according to which Czech citizenship would be withdrawn from persons acquiring foreign citizenship²³⁹. Estonia also eased its citizenship requirements in 2015 and allowed double citizenship, granted citizenship retroactively to stateless children under 15 years old born in Estonia and, most importantly, abolished the principle of *jus sanguinis*²⁴⁰.

Of course, easier access to citizenship status, while definitely enticing integration and signifying a form of acceptance and recognition, does not constitute *per se* a recognition of minority status. It does, however, permit unrecognized minorities to organize politically and demand further recognition and protection, while also overcoming the citizenship criterion used by many states as a pre-condition to minority status.

Nevertheless, while these changes are indeed welcomed, they do not necessarily signify a shift or a redefinition of those countries' societies' understanding of "nation", nor does it highlight any particular or sudden shift of support for recognizing migrant communities as minorities. On the contrary, as the post-2015 political scene in Europe has shown us already, a new strand of populist parties and movements have begun to rely heavily on anti-migration discourse and have gained considerable support from their constituencies. If this rise in popularity of populist figures has have shown anything, it is that following the European migrant crisis, a great part of the European electorate, especially in Central and Eastern Europe, but also in Western Europe, is against the presence of migrants, in particular those from the Middle East, in their countries. Thus,

²³⁹ The Advisory Committee of the Framework Convention took notice of this change in its Fourth Opinion on the Czech Republic: "The Advisory Committee welcomes this change as it is likely to encourage foreign citizens to apply for Czech citizenship, thus formally including them in the scope of application of domestic legislation on national minorities and the Framework Convention." See Advisory Committee, Compilation of Opinions of the Advisory Committee relating to Article 3 of the Framework Convention for the Protection of National Minorities (4th cycle), Fourth Opinion on the Czech Republic, adopted on 16 November 2015, p. 10.

²⁴⁰ The Advisory Committee also praised these reforms in its Fourth Opinion on Estonia. See *idem*, Fourth Opinion on Estonia, adopted on 19 March 2015, pp. 13-14.

they are also probably at least indifferent to improving their integration process, not to mention their recognition as minorities.

The fact that we are witnessing a process of “securitization” of discourses on minority rights and of migration or asylum issues, by which the public’s attention is diverted to seeing minorities and migrants as security issues, only underlines the increased difficulties new minorities have in integrating into their receiving societies. Societal recognition and acceptance represent a time-consuming process, as part of the process of integration, one of carefully studied accommodation and compromise. Legal recognition as citizens and as minorities should function as a doorway to societal recognition.

Nevertheless, even in this most hostile environment, governments are bound to realize that pluralism is unavoidable and identity is dynamic and that official recognition of new minorities would not only increase loyalty towards the state from a group that factually reside there in one form or another, but also bridge the typical gap that always exists between law and the reality to whom it seeks to offer a normative framework.

CHAPTER V. THE ADVISORY COMMITTEE’S THEMATIC COMMENTARY ON THE SCOPE OF APPLICATION OF THE FRAMEWORK CONVENTION

The Thematic Commentary No. 4 of the Advisory Committee has been consistently referred to above, given its relevance and compilatory nature. In what follows and taking into account the past references to it, the Thematic Commentary on the scope of application of the Framework Convention will be analyzed so as to outline even better the Advisory Committee’s position on the scope of application and, of course, corroborated with what has already been discussed. Probably one of the most important and basic assumptions we must be aware of from

the start is that the Advisory Committee views the Framework Convention as a highly flexible and pragmatic instrument which should be used to manage diversity. And doing so requires, of course, the participation of the majority. Thus, we will see that some of the provisions containing rights apply also to individuals that are not considered as minorities. This is because the Framework Convention does not subscribe to the classical type of human rights treaties: first, and most obviously, because it deals with a very precise domain – minority rights; and second, and most importantly, because it does not grant rights only to protect individuals, but also to manage diversity as a state of fact. Its ultimate aim is, thus, greater than the protection of the individual.

1.1. THE CRITERIA APPLIED BY STATES TO DETERMINE MINORITIES

The Advisory Committee first discusses the criteria applied by states parties to determine which groups are national minorities and fall under the personal scope of application of the Framework Convention. There are a total of seven types of criteria listed in the thematic commentary: formal recognition, citizenship, length of residency, territoriality, substantial numbers, support by "kin-states" and specific identity markers and ascribed categories.

Given that the first criterion, formal recognition, was already discussed in other parts of the thesis²⁴¹, I consider it appropriate to just summarize the main points of the Advisory Committee. Thus, the Advisory Committee has consistently opposed the use of formal recognition as a rigid pre-condition for access to minority rights²⁴² and used instead a much more functional and substantial interpretation of how minority protection should be implemented. With this logic in mind, one that, unsurprisingly, characterizes the Framework Convention as a whole, it is essential that states factually grant and guarantee the rights enshrined thereon, whether or not they

²⁴¹ See Chapter III.

²⁴² Thematic Commentary No. 4, para. 27.

first formally recognize specific groups as national minorities²⁴³. Formal recognition, in the view of the Advisory Committee, does not necessarily constitute the first step in the process of protecting minorities rights²⁴⁴. On the contrary, it might even be a subsequent measure following *de facto* inclusion in the scope of application of the Framework Convention²⁴⁵. Recognition, therefore, has a declarative effect, not a constitutive one²⁴⁶. Notwithstanding this pragmatic approach, it is nevertheless important to recall that the Advisory Committee has, on occasion, noted the importance of formal recognition as an end in itself, albeit not as condition for access to minorities rights, but as an improvement thereof²⁴⁷.

The next criterion, citizenship, has also been discussed at length previously, in Chapter IV, yet I will again briefly mention the position of the Advisory Committee. Similarly to the criterion of formal recognition, the Advisory Committee has consistently held that citizenship cannot be used as a pre-condition to recognition and to extending the personal scope of application of the Framework Convention, but to granting specific rights²⁴⁸ on an article-by-article approach. Besides this, the Committee also stressed the restrictive and discriminatory effect this condition may have in the case of disadvantaged groups and minorities, which might face difficulties in obtaining citizenship or are stateless²⁴⁹, but, on the other hand, has praised the extension of minority rights to non-citizens²⁵⁰.

Regarding the third criterion, length of residency, the Committee notices that certain states parties to the Framework Convention have used various criteria to delimitate their understanding

²⁴³ *Idem*, para. 28.

²⁴⁴ *Idem*.

²⁴⁵ *Idem*. See also Chapter II, Section 1.3.

²⁴⁶ *Idem*.

²⁴⁷ See Chapter III.

²⁴⁸ See the Thematic Commentary No. 4, para. 30.

²⁴⁹ *Idem*, para. 29.

²⁵⁰ *Idem*, para. 30.

of the term "national minority", such as "prior to the 20th century", "100 years" or other notions such as "traditional residence", "traditional minorities", "autochthonous national minorities", "long-lasting ties to a particular region" etc²⁵¹. While the first two criteria have a clear temporal delimitation, the rest are more interpretable and open to abuse²⁵². An example of this ambiguity, although from a piece of legislation not yet entered into force and, hence, not discussed by the Advisory Committee, is the Romanian Law on the Status of Minorities, which contained a definition of national minorities that included only those citizens pertaining to communities that have been living on the territory of Romania since the founding of the modern Romanian state. As stated in another chapter, the definition was changed after the Venice Commission said in its opinion on the law that, even though the relevant date might be considered 1919, the founding of a modern state may be seen as a process rather than a singular event²⁵³.

Even though states seem to prefer to include length of residency in their definitions of "national minority" themselves, the Advisory Committee makes it clear that apart from certain guarantees contained in the Framework Convention, such as those found in articles 10(2), 11(3) and 14(2) on the use of a minority's language in front of administrative authorities, display of topographical indications in a minority language and receiving education in a minority language, respectively, length of residency cannot be considered a determining factor for applying other provisions of the Framework Convention²⁵⁴.

Some other countries use territoriality or "substantial numbers" as criteria for determining the personal scope of application of the Framework Convention. Denmark, for example, explicitly

²⁵¹ *Idem*, para. 31.

²⁵² *Idem*.

²⁵³ See *supra* note 203.

²⁵⁴ Thematic Commentary No. 4, para. 31.

recognized in its declaration the German minority in South Jutland, Italy has delimited specific geographical areas inhabited by substantial numbers of persons belonging to minorities where laws on minorities apply, such as the German-speaking minority in Trentino-AltoAdige/Südtirol, Valle d'Aosta/Vallée d'Aoste and Friuli Venezia Giulia or the Slovenian-speaking minority in the Friuli Venezia Giulia region²⁵⁵. While understanding that residence in a specific area can result in a more effective protection of minority rights²⁵⁶ and that it might be problematic to ensure the exercise of specific minority rights in the case of minorities living dispersed and not in compact settlements²⁵⁷, it nevertheless recalls that only the application of the rights contained in articles 10(2), 11(3) and 14(2), enumerated above, are determined by territorial and numerical criteria. All the other rights and guarantees found in the Framework Convention are not determined by such criteria and, consequently, a rigid denial of all minority rights simply because of lack of residency in a particular area or of “substantial numbers” or compact communities can be arbitrary and contrary to the spirit of the Framework Convention²⁵⁸.

A smaller number of states also use the concept of “kin-state” to delineate national minorities, i.e. those that have links with a kin-state, from ethnic or ethno-linguistic minorities, which do not boast such links²⁵⁹. While the distinction has also been made by scholars such as Kymlicka, the Advisory Committee cautiously notes that such distinctions must not result in the

²⁵⁵ Advisory Committee, Compilation of Opinions of the Advisory Committee relating to Article 3 of the Framework Convention for the Protection of National Minorities (4th cycle), Fourth Opinion on Italy, adopted on 19 November 2015, p. 24.

²⁵⁶ Thematic Commentary No. 4, para. 33.

²⁵⁷ *Idem*, para. 34.

²⁵⁸ *Idem*, paras, 33 and 34: “the Advisory Committee has pointed out repeatedly that their recognition as national minorities and their access to minority rights in general must not be impeded through the use of numerical criteria”.

²⁵⁹ *Idem*, para. 35.

process of recognizing or granting access to minority rights to persons belonging to these two types of groups and must not create hierarchies and unjustified distinctions²⁶⁰.

One final criterion mentioned by the Advisory Committee is that of specific identity markers and ascribed categories²⁶¹. According to the Committee, some states list particular characteristics in order to differentiate minority groups from the majority, including language, religion, culture, ethnic background, specific traditions or visible features among others²⁶². However, it also draws the attention to the fact that many of these characteristics are externally imposed and might have the effect of excluding individuals from self-identifying with a particular group²⁶³. Obviously, in these cases, states rely too much on objective criteria in the process of self-identification, and, as previously discussed²⁶⁴, self-identification must be free and although objective criteria are required in order to prevent abuse, individual identities must prevail.

1.2. THE MATERIAL SCOPE OF APPLICATION OF THE FRAMEWORK CONVENTION

The Advisory Committee then moves on to discuss the scope of application of the rights and guarantees enshrined in the Framework Convention. Unlike other human rights instruments, such as its bigger sister, the European Convention on Human Rights, the rights found in the Framework Convention have varying scopes of application and, of course, may apply to different individuals from different minorities and with different needs. While the Framework Convention does try to establish a minimum standard of protection of minorities, this does not entail uniformity in the application of its rights. On the contrary, the Framework Convention contains, besides its

²⁶⁰ *Idem*.

²⁶¹ *Idem*, paras. 37, 38.

²⁶² *Idem*, para. 37.

²⁶³ *Idem*.

²⁶⁴ See Chapter III.

fundamental principles, rights that apply to all persons in a particular state, rights that apply only to individuals belonging to minorities, whether they are recognized or not, and have a broad scope of application and, finally, those rights, which are few in number and rather specific, which apply only to certain areas where minorities have traditionally been residing and in substantial numbers. What is important here for the purpose of this thesis is to ascertain which rights ought to be applied also to persons belonging to minorities that are not recognized and to the so-called “new minorities” and to which extent should states parties to the Framework Convention extend the rights guaranteed thereof to them as well.

1.1.1. FUNDAMENTAL PRINCIPLES

As a general comment, paragraph 11 of the Explanatory report to the Framework Convention outlines broadly how those rights should be envisaged in what their national application by states parties is concerned:

“In view of the range of different situations and problems to be resolved, a choice was made for a framework Convention which contains mostly programme-type provisions setting out objectives which the Parties undertake to pursue. These provisions, which will not be directly applicable, leave the States concerned a measure of discretion in the implementation of the objectives which they have undertaken to achieve, thus enabling them to take particular circumstances into account”.

However, even though most of the provisions set out in the Framework Convention are more or less obligations of result or output-based obligations, meaning that they prescribe a certain result that has to be attained, leaving the obliged party (in this case, the states parties to the Framework Convention) the discretion to choose the manner in which the result is to be attained,

the states parties, as discussed above, are not entirely free to choose these means, being obliged not only to act in good faith and in a non-discriminatory manner, but to observe other principles of the Framework Convention and of international public law as well.

Thus, the fundamental principles of the Framework Convention are to be found in articles 3-6 on the right to self-identification, equality, culture and protection against discrimination, respectively, which, according to the Thematic Commentary “are interlinked and which must inform the interpretation of the instrument as a whole”²⁶⁵.

Reinforcing the individual-oriented approach of the Framework Convention, the Advisory Committee notes that states should take account of the diversity existing within minorities themselves, with self-identification going further than just the national or ethnic level and individuals self-identifying on the basis of gender, sexual orientation, age, disability, religion, political beliefs or access to economic resources²⁶⁶. Accordingly, this diversity in individual identities is also mirrored in what priorities individuals belonging to ethnic or national minorities have. While some would prefer equality and integration, others would prefer to maintain and promote their minority identity²⁶⁷. Of course, while the Framework Convention forbids forced assimilation in article 5 (2)²⁶⁸, voluntary assimilation is not²⁶⁹ and constitutes another option for minorities, if individuals pertaining to them desire so.

²⁶⁵ Thematic Commentary No. 4, para. 39.

²⁶⁶ *Idem*, para. 40. See also Thesis, pp. 47-48.

²⁶⁷ *Idem*.

²⁶⁸ “Without prejudice to measures taken in pursuance of their general integration policy, the Parties shall refrain from policies or practices aimed at assimilation of persons belonging to national minorities against their will and shall protect these persons from any action aimed at such assimilation”.

²⁶⁹ Explanatory Report to the Framework Convention, para. 45: “The purpose of paragraph 2 (of article 5) is to protect persons belonging to national minorities from assimilation against their will. It does not prohibit voluntary assimilation”.

Equality, another fundamental principle at the core of the Framework Convention's provisions, must also guide minority rights measures and protection mechanisms. For the effective implementation of equality, state authorities must, on the one hand, tailor their actions to the specific needs of the various groups of minorities existent on their countries when considering equal opportunities²⁷⁰, but, on the other hand, the basic approaches and rights standards must be equal²⁷¹.

Showing that the fundamental principles listed in the beginning of the text of the Framework Convention are interlinked and support each other, the Advisory Committee observes that the full equality required by the Framework Convention cannot be effectively achieved unless diversity, probably referred to here as a factual state of affairs, is accepted and hierarchies among minorities are removed²⁷². Most importantly, however, the Committee notes that “an environment in which diversity is viewed as ‘alien’ or ‘imported’ and rather disconnected from mainstream society does not offer the appropriate conditions for the expression, preservation and development of minority cultures”²⁷³. One might recall the earlier example from another chapter of the Canadian multicultural system, which, far from rejecting major sources of diversity, such as migration, has adopted a multicultural notion of citizenship which is very open to individuals belonging to minorities, including those groups formed as a result of migration²⁷⁴. Highly inclusive models such as these speed up integration by creating a welcoming environment which fosters mutual respect

²⁷⁰ Thematic Commentary No.4, para. 42.

²⁷¹ *Idem*.

²⁷² *Idem*, para. 43.

²⁷³ *Idem*.

²⁷⁴ See Chapter IV, Section 1.3.

between the various minorities and between themselves and the majority, as article 6 would require²⁷⁵.

1.1.2. SUBSTANTIAL RIGHTS

Following this introduction into the basic fundamental principles of the Framework Convention, the Advisory Committee moves on to delimitate between three categories of rights contained by the Convention: those that apply to all persons, whether minorities or not, those that have a broad scope of application and, finally, those rights that have a very specific scope of application. As we will see, the great majority of the rights contained by the Framework Convention either apply to all persons or have a broad scope of application, while only a handful are conditioned on specific requirements or criteria.

As such, protection against discrimination, guaranteed by article 6, and some aspects related to education and the media, as found in articles 6(1), 12(1) and 12(2), apply to all persons on the territory of states parties, including those not belonging to national minorities²⁷⁶. What is interesting to note is the language used here by the Committee, which does not condition these rights on any requirement, such as citizenship, length of residence, the number of individuals belonging to national minorities or even official recognition. But then again, neither does the text of these provisions, which would indicate, as already mentioned above, that unless rights are specifically limited by particular requirements or criteria in the text of the Framework Convention, they are to be applied to all persons belonging to national minorities or even to persons not belonging to minorities as well. This is particularly relevant for individuals belonging to new

²⁷⁵ Article 6 (1): “The Parties shall encourage a spirit of tolerance and intercultural dialogue and take effective measures to promote mutual respect and understanding and co-operation among all persons living on their territory, irrespective of those persons’ ethnic, cultural, linguistic or religious identity, in particular in the fields of education, culture and the media”.

²⁷⁶ Thematic Commentary No. 4, para. 50.

minorities or other minorities which are not officially recognized, which could, according to the Advisory Committee, benefit from these rights.

As a matter of fact, in the case of prohibition of discrimination, for example, the Advisory Committee expressly mentioned migrants, refugees and asylum-seekers as benefiting from the broad scope of article 6 due their subjection to ill-treatment or lack of respect²⁷⁷.

Recalling again the aim and purpose of the Framework Convention to address diversity in general, the Advisory Committee moves on to state that:

“an exclusive view that separates the issue of traditional minority protection from broader questions surrounding the integration of society does not do justice to the aim and purpose of the Framework Convention but rather hinders the enjoyment of the rights of persons belonging to national minorities”²⁷⁸

Consequently, protection from discrimination, as well as the creation of a welcoming environment where mutual respect between various ethnic or national groups and intercultural dialogue creates a hospitable and appropriate background for integrating minorities constitutes one of the key aims of the Framework Convention and also makes self-identification of individuals belonging to minorities possible²⁷⁹. In order to achieve integration, all segments of society must be engaged with so that diversity is accepted through “recognition, mutual accommodation and active engagement on all sides”²⁸⁰.

²⁷⁷ *Idem*, para. 52.

²⁷⁸ *Idem*, para. 53.

²⁷⁹ *Idem*.

²⁸⁰ *Idem*, para. 54.

Fostering intercultural dialogue and mutual respect is also achieved through the fields of education, culture, the media and, according to article 12(2), through facilitating “contacts among students and teachers of different communities” or disseminating information regarding the composition of society, including national and *other* minorities (emphasis added)²⁸¹. States thus have a general obligation to create a hospitable environment where individuals belonging to minorities could feel free to self-identify as such, participate actively in society with the ultimate aim to integrate and, hopefully, identify with society as a whole. On the other side, the majority is also to be encouraged to engage with individuals belonging to minorities and accept or recognize the identities that the latter have chosen to take upon themselves. Ideally, this would probably lead to an enlargement of the majority’s conception of “nation” and of the national narrative in such a way as to include (consciously or not) minorities into it. Even though the Advisory Committee does not expressly mention this, the process of recognition, mutual accommodation and active engagement it refers to also inevitably produces gradual changes in how society defines and delimitates their conception of “nation”, with a view to broadening its meaning²⁸². Also, the fact that the Committee speaks of national and “other” minorities could also stress the very broad scope of application of these provisions and that they cover new minorities as well.

New minorities and other minorities that are not recognized officially should also benefit from a wide range of rights that have a broad scope of application, such as those on equality (article 4), culture (article 5), association and religion (articles 7 and 8), media (article 9), language

²⁸¹ *Idem*, para. 59.

²⁸² In its first opinion on Poland, for example, the Advisory Committee noted the following: “Poland still too often seems to be presented as an ethnically and linguistically homogeneous country. The Advisory Committee therefore expresses the hope that the authorities will take further steps to increase the multicultural and multiethnic content of the curriculum and that, more generally, efforts to raise both the majority’s and minorities’ awareness of minority cultures will be intensified”. It thus invites the authorities to raise awareness of the presence of minorities in Polish society as a step towards further integration and acknowledgement of diversity.

(articles 10, paragraphs 1 and 3 and 11, paragraphs 1 and 2), education (articles 12, paragraph 3 and 14, paragraphs 1 and 3) and participation (article 15). Reminding that the Framework Convention is a pragmatic instrument, the Advisory Committee underlines its purpose – to monitor effective access to rights²⁸³. Issues of official recognition or status come only secondarily²⁸⁴. While some of these rights are also covered by other human rights instruments, such as the ECHR, they do focus on specific issues concerning minorities, such as printed media, radio and television broadcasting in minority languages, teacher training and access to textbooks for persons belonging to minorities and others.

However, some of these rights are vaguely worded and contain either negative obligations for the states or limit the extent to which states are obliged to act. In the case of education, for example article 12 speaks of “facilitating contacts between students and teachers of different communities”, while article 15 on participation only requires states parties to “create the conditions necessary” for cultural, social and economic participation, as well as participation in public affairs. The last part of article 9(3) also contains a limitation: “In the legal framework of sound radio and television broadcasting, they shall ensure, *as far as possible*, and taking into account the provisions of paragraph 1, that persons belonging to national minorities are granted the possibility of creating and using their own media” (emphasis added). These obligations are, therefore, qualified and account must be taken of the state’s resources²⁸⁵. Moreover, according to article 9(3), states “should not hinder the creation of and use of printed media by persons belonging to national

²⁸³ Thematic Commentary No. 4, para. 64.

²⁸⁴ *Idem*.

²⁸⁵ *Idem*, para. 83. Also, para. 75 of the Explanatory Report to the Framework Convention says that: “This provision concerns teaching of and instruction in a minority language. In recognition of the possible financial, administrative and technical difficulties associated with instruction of or in minority languages, this provision has been worded very flexibly, leaving Parties a wide measure of discretion (...) The wording “as far as possible” indicates that such instruction is dependent on the available resources of the Party concerned.”

minorities”, while article 13(2) expressly mentions that there is no obligation for states parties to financially support private education established by persons belonging to national minorities. As such, there is no specific positive obligation to support printed media or private education belonging to national minorities, except for the broad principles of mutual tolerance and promotion of intercultural dialogue and culture already mentioned above, which do not mention any specific positive obligation.

Finally, only a handful of rights are strictly qualified and have a rather precise scope of application. These are the rights covered by articles 10 (2), 11(3) and 14(2) on the right to use a minority language in relations with local administrative authorities, the right to have topographical indications and signposts also displayed in the minority language, and the right to learn minority languages or receive instruction in minority languages, respectively. Their application is therefore restricted only to those areas where particular minorities have been traditionally residing or are to be found in substantial numbers. In the case of the right to display topographical signposts in minority languages, the Advisory Committee noted that both territorial and numerical conditions may be imposed²⁸⁶. Given the vagueness of these expressions and also, probably, the administrative costs related to implementing these rights, states traditionally have had a wide margin of appreciation in translating these provisions into their national legislations and have required specific quotas as criteria. Some legislations have been welcomed by the Advisory Committee, such as those of Austria²⁸⁷, Czech Republic²⁸⁸, Slovakia²⁸⁹, the Former Yugoslav

²⁸⁶ *Idem*, para. 79.

²⁸⁷ Advisory Committee of the Framework Convention, First Opinion on Austria, ACFC/INF/OP/I(2002)009, paras. 44-45.

²⁸⁸ *Idem*, Second Opinion on the Czech Republic, ACFC/INF/OP/II(2005)002, para. 114.

²⁸⁹ *Idem*, First Opinion on Slovakia, ACFC/INF/OP/I(2001)001, para. 36.

Republic of Macedonia²⁹⁰, Romania²⁹¹ which require that 10% (for the first two) and 20% (in the case of the latter three countries), respectively, of a particular area's population be represented by a national minority in order for that minority's language to be used in relations with the public administration. Other thresholds have been criticized, such as the 50% in Bosnia and Herzegovina²⁹², Croatia²⁹³, Estonia²⁹⁴, Moldova²⁹⁵ and Ukraine²⁹⁶ as being too high²⁹⁷.

Some have expressed their dissatisfaction with the substantial provisions of the Framework Convention. Kymlicka, for example, finds the Framework Convention a disappointment, since it does not address the issues he considers as the most pressing: self-government, official language status, mother tongue universities or consociationalism²⁹⁸. However, given the purpose and object of the Framework Convention and also it being a product of compromise between the signatory parties, I believe that, in combination with the Advisory Committee's constant monitoring process and its opinions, it emerges as a powerful tool for integration and managing diversity. The fact that many states have improved their legislation on national minorities in line with the recommendations of the Advisory Committee since ratifying the Framework Convention and that many have even extended the scope of application to other minorities as well²⁹⁹.

²⁹⁰ *Idem*, First Opinion on the Former Yugoslav Republic of Macedonia, ACFC/INF/OP/I(2005)001, para. 69.

²⁹¹ *Idem*, First Opinion on Romania, ACFC/INF/OP/I(2002)001, para. 49.

²⁹² *Idem*, First Opinion on Bosnia and Herzegovina, ACFC/INF/OP/I(2005)003, paras. 79-81.

²⁹³ *Idem*, First Opinion on Croatia, ACFC/INF/OP/I(2002)003, paras. 43-45.

²⁹⁴ *Idem*, First Opinion on Estonia, ACFC/INF/OP/I(2002)005, para. 40.

²⁹⁵ *Idem*, First Opinion on Moldova, ACFC/INF/OP/I(2003)002, para. 62.

²⁹⁶ *Idem*, First Opinion on Ukraine, ACFC/INF/OP/I(2002)010, para. 51.

²⁹⁷ See also A. Verstichel, A. Alen, B De Witte, P. Lemmens (eds.), *The Framework Convention for the Protection of National Minorities: A useful pan-European instrument?*, Intersentia, 2008.

²⁹⁸ W. Kymlicka, *Reply and Conclusion*, in W. Kymlicka and M. Opalski (eds.), *Can Liberal Pluralism be Exported?*, Western Political Theory and Ethnic Relations in Eastern Europe (Oxford University Press, Oxford, 2001) pp. 345–413, p. 373, *apud*. Elizabeth Craig, *The Framework Convention for the Protection of National Minorities and the Development of a 'Generic' Approach to the Protection of Minority Rights in Europe?*, 17 (2010) International Journal on Minority and Group Rights, pp. 307-325 p. 317.

²⁹⁹ For example, Slovakia has included the Serbian minority under the scope of application in 2010 and the United Kingdom has extended the scope of application of the Framework Convention to the Cornish people in 2014. Most

CONCLUSION

The principle aim of this thesis was to offer a broad appraisal of the state of minority rights, mainly in Europe, in what recognition is concerned. Although the main European-wide instrument dealing with minority rights – the Framework Convention – should, in my opinion, be considered as a successful treaty, the implementation of its provisions still relies heavily on the effectiveness of the legal framework of the states-parties, the ones mainly responsible for determining the scope of application of the Framework Convention’s provisions. Considering the sensitive nature of its aim, I believe that it offers an excellent point of reference for states’ policies on national and ethnic minorities. When one further takes into consideration the Advisory Committee’s very broad and flexible opinions, it becomes clear that the Framework Convention promotes a very modern approach to minority rights, opting for a flexible right of self-identification, which allows a complex and multilayered identity, as well as a broad material scope of application for the great majority of its rights.

Nevertheless, given its subject and nature, states parties retain a great margin of discretion when considering to whom they will apply the Framework Convention’s rights. This aspect remains problematic still and, as we have seen, the Advisory Committee has consistently recommended states to keep their approach inclusive and seek to include other groups as minorities as well. Some states have resisted and failed to effectively extend the scope of application of the Framework Convention to other groups, while others have chosen to respect the Advisory Committee’s opinions and consequently included other groups by either officially recognizing them or granting them the rights enshrined in the Convention directly, without formal recognition.

interestingly, the Czech Republic recognized Belarusians and Vietnamese people as minorities in 2013, even though they are immigrant or new minorities. See Chapter IV, Sections 1.2. and 1.3.

In this case, I find it important to remember that, while the Advisory Committee has consistently held a very functional, as opposed to formalistic, approach to the Framework Convention's rights, formal legal recognition of a particular minority by a state is still desirable, since it functions as a further attestation of the existence and the legitimacy of the presence of that minority in the country that recognized it.

In any case, whether considering legal recognition (either formal or through granting effective access to rights) or societal recognition, it must be borne in mind that a more or less successful process of integration presupposes mutual understanding and also mutual identity recognition. And for this to be possible, in my view, one of the most essential changes that must occur in the dynamics of the relationship between minorities (especially new minorities) and the majority population relates to how the majority perceives the nation that they form. A broad conception of "nation", one which encompasses minorities and newcomers as well, will allow individuals pertaining to these groups, whether traditional or new minorities to feel accepted and also ease the mutual compromises that are characteristic to the process of integration.

Another element that could speed up integration and also the granting of the minority status required by some states in order to grant access to the rights contained in the Framework Convention is citizenship. As we have seen, in many cases, citizenship is still intertwined with ethnicity, although in many other countries there is a gradual move towards abandoning *jus sanguinis* and adopting less restrictive citizenship laws. Being a citizen of a state, however, does not necessarily entail recognition of minority status, but it does constitute a big step towards that end.

Regarding the rights enshrined in the Framework Convention, it must be borne in mind that while the discussion on this topic did not have as its purpose the detailing of the content of

these rights, it aimed more precisely to show how the Convention is designed and how its material scope of application is actually quite broad and encompassing. The Framework Convention is thus conceived as an instrument that can address diversity existing in a society and to help states adopt policies that, instead of viewing society as a whole or even national minority groups themselves as homogenous entities, take account of the multitude of identities that exist in reality. Moreover, contrary to what many states parties' legal frameworks on minorities show, most of the Framework Convention's provisions apply to individuals that are not recognized as minorities officially and/or are not citizens, have not lived in a particular area traditionally and/or in substantial numbers. In this case, the Framework Convention is broad both in its personal and material scope.

However, the fact is that there still is a great cleavage between the Advisory Committee's opinions and actual state policies, not only in the case of what rights individuals belonging to minorities actually enjoy, but also in what recognition is concerned. Be it societal recognition or acceptance, on the one hand, or the granting of legal status, on the other hand, it is obvious that many European states are lagging behind, partly due to their choice of a restrictive definition of "national minority" or other similar terms (such as "ethnic minority") which rule out not only new minorities from official recognition, but also some traditional or "old" minorities. But it should be understood that recognition does not entail access to all of the rights enshrined in the Framework Convention or in national legislation for that matter.

Thus, while minority rights scholars, such as Eide³⁰⁰ and Elias³⁰¹, have concluded that the Framework Convention can be applied to new minorities, it is also true that, in the case of

³⁰⁰ Asbjørn Eide, *The Rights of 'New' Minorities: Scope and Restrictions*. In *Double Standards Pertaining to Minority Protection*, edited by Kristin Henrard, 165–193. Leiden: Martinus Nijhoff Publishers.

³⁰¹ Stella Burch Elias, *Regional Minorities, Immigrants, and Migrants: The Reframing of Minority Language Rights in Europe*. *Berkeley Journal of International Law* 28 (1): 261–312.

particular rights, the Advisory Committee's article-by-article approach is also accepted among scholars and differentiations between "old" and "new" minorities can be made when it comes to what rights each can have in practice. Eide, for example, in the 2016 Conference that launched the Thematic Commentary No. 4 pointed out that "the best approach is therefore to avoid absolute distinctions between new and old minorities, but to recognize that in the application of the FCNM, the old minorities may have some entitlements that the new ones do not have". The granting of particular rights can be negotiated, as well as the quantity of resources states pour to implement those rights or even the way the rights are implemented, as long as they are effective and accessible by persons belonging to minorities. When it comes to recognition, however, it becomes apparent that there are fewer such arguments against extending the scope of application of the Framework Convention to include other minorities, including new minorities.

BIBLIOGRAPHY

1.1. *PRIMARY SOURCES*

1. The Framework Convention for the Protection of National Minorities (entered into force in 1998);
2. The European Convention for the Protection of Human Rights and Fundamental Freedoms/ European Convention on Human Rights (entered into force in 1953);
3. The Vienna Convention on the Law of Treaties (entered into force in 1980);
4. Advisory Committee of the Framework Convention for the Protection of National Minorities, Thematic Commentary No. 4 on the Scope of Application of the Framework Convention for the Protection of National Minorities, ACFC/56DOC(2016)001, Strasbourg, 27 May 2016;
5. Advisory Committee, Compilation of Opinions of the Advisory Committee relating to Article 3 of the Framework Convention for the Protection of National Minorities (3rd cycle), Strasbourg, 13 May 2016;
6. Advisory Committee, Compilation of Opinions of the Advisory Committee relating to Article 3 of the Framework Convention for the Protection of National Minorities (4th cycle), Strasbourg, 1 March 2017;
7. Conference on Security and Co-operation in Europe Final Act, Helsinki 1975;
8. International Covenant on Civil and Political Rights;
9. Parliamentary Assembly of the Council of Europe, Recommendation 1201 (1993);
10. Parliamentary Assembly of the Council of Europe, Recommendation 285 (1961);

11. Reservations and declarations for Treaty No. 157 – Framework Convention for the Protection of National Minorities (https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/157/declarations?p_auth=wnKT3PKD);
12. Report Submitted by Portugal Pursuant to Article 25, Paragraph 1 of the Framework Convention for the Protection of National Minorities, 23 December 2004, ACFC/SR(2004)002;
13. Report of the International Law Commission on the work of its fiftieth session 20 April to 12 June, 27 July to 14 August 1998, General Assembly Official Records Doc. No. A/53/10, Chapter IX: Reservations to treaties, C.2, 1.1.1 [1.1.4] Object of reservation;
14. Second State Report submitted by Cyprus, ACFC/SR/II(2006)006;
15. Advisory Committee of the Framework Convention, First Opinion on Finland, ACFC/INF/OP/I(2001)002;
16. Advisory Committee of the Framework Convention, Third Opinion on Finland, ACFC/OP/III(2010)007;
17. Organization for Security and Co-operation in Europe, Document of the Copenhagen Meeting of the Conference on the Human Dimension of the CSCE, 29 June 1990;
18. Organization for Security and Co-operation in Europe, Ljubljana Guidelines on Integration of Diverse Societies, 7 November 2012;
19. Advisory Committee of the Framework Convention, Third Opinion on Bulgaria, ACFC/OP/III(2014)001;
20. Advisory Committee of the Framework Convention, Third Opinion on Bosnia and Herzegovina, ACFC/OP/III(2013)003;

21. U.S. Supreme Court: *John J. Hurley and South Boston Allied War Veterans Council v. Irish-American Gay, Lesbian and Bisexual Group of Boston, Etc* (1995), 515 U.S. 557;
22. ECtHR: *Ciubotaru v. Moldova* (2010), application no. 27138/04;
23. Advisory Committee of the Framework Convention, Second Opinion on Cyprus, ACFC/OP/II(2007)004;
24. Advisory Committee of the Framework Convention, Third Opinion on Cyprus, ACFC/OP/III(2010)002;
25. Advisory Committee of the Framework Convention, First Opinion on Italy, ACFC/INF/OP/I(2002)007;
26. Advisory Committee of the Framework Convention, Third Opinion on Italy, ACFC/OP/III(2010)008;
27. The German Nationality Act or Nationality Act of 22 July 1913 (Reich Law Gazette I p. 583 Federal Law Gazette III 1021), as last amended by Article 3 of the First Act to Amend the Federal Act on Registration and other legislation of 11 October 2016 (Federal Law Gazette I p. 2218);
28. Hungarian Act LXXVII of 1993 on the Rights of National and Ethnic Minorities;
29. Polish Regional Language, National and Ethnic Minorities Act of 2005;
30. General Comment of the UN Human Rights Committee No. 23(50), CCPR/C/21/Rev.1/Add5/26 April 1994;
31. Romanian Draft Law on the Status of Minorities (proposed in 2005);
32. Romanian Law 208/2015 on Elections;
33. Romanian Decree-law no. 92/1990;
34. The Romanian Constitution of 1991 (as modified in 2003);

35. Romanian Law 215/2001 on Public administration;
36. Czech Minorities Act No. 273/2001;
37. Advisory Committee of the Framework Convention, Third Opinion on Romania, ACFC/OP/III(2012)001;
38. Advisory Committee of the Framework Convention, First Opinion on the United Kingdom, 30 November 2001, ACFC/INF/OP/I(2002)006;
39. Advisory Committee, Fourth Opinion on the United Kingdom, 25 May 2016, ACFC/OP/IV(2016)005;
40. Canadian Multiculturalism Act, 1988;
41. Czech Act No. 186/2013 concerning the nationality of the Czech Republic and amending certain acts or “Czech Nationality Act”;
42. Advisory Committee of the Framework Convention, First Opinion on Austria, ACFC/INF/OP/I(2002)009;
43. Advisory Committee of the Framework Convention, Second Opinion on the Czech Republic, ACFC/INF/OP/II(2005)002;
44. Advisory Committee of the Framework Convention, First Opinion on Slovakia, ACFC/INF/OP/I(2001)001;
45. Advisory Committee of the Framework Convention, First Opinion on the Former Yugoslav Republic of Macedonia, ACFC/INF/OP/I(2005)001;
46. Advisory Committee of the Framework Convention, First Opinion on Romania, ACFC/INF/OP/I(2002)001;
47. Advisory Committee of the Framework Convention, First Opinion on Bosnia and Herzegovina, ACFC/INF/OP/I(2005)003;

48. Advisory Committee of the Framework Convention, First Opinion on Croatia, ACFC/INF/OP/I(2002)003;
49. Advisory Committee of the Framework Convention, First Opinion on Estonia, ACFC/INF/OP/I(2002)005;
50. Advisory Committee of the Framework Convention, First Opinion on Moldova, ACFC/INF/OP/I(2003)002;
51. Advisory Committee of the Framework Convention, First Opinion on Ukraine, ACFC/INF/OP/I(2002)010;

1.2. BOOKS

1. Will Kymlicka, *Multicultural Citizenship: A liberal theory of minority rights*, Oxford University Press, New York, 2003;
2. Will Kymlicka, *Multicultural Odysseys. Navigating the New International Politics of Diversity*, New York: Oxford University Press, 2007;
3. Will Kymlicka, *States, Nations and Cultures*, Spinoza Lectures, University of Amsterdam, Assen: Van Gorcum 1997;
4. Lucian Boia, *Cum s-a românizat România* (Transl.: *How Romania Romanianized*), Humanitas, Bucharest, 2015;
5. Will Kymlicka, *Liberalism, Community and Culture*. Oxford: Clarendon Press, 1989;
6. Simon Green, *The politics of Exclusion: Institutions and Immigration Policy in Contemporary Germany*, Manchester University Press, Manchester, UK, 2004;
7. Bhikhu Parekh, *Rethinking Multiculturalism*, Macmillan Press, 2000;

8. W. Kymlicka, *Reply and Conclusion*, in W. Kymlicka and M. Opalski (eds.), *Can Liberal Pluralism be Exported?, Western Political Theory and Ethnic Relations in Eastern Europe* (Oxford University Press, Oxford, 2001);
9. A. Verstichel, A. Alen, B De Witte, P. Lemmens (eds.), *The Framework Convention for the Protection of National Minorities: A useful pan-European instrument?*, Intersentia, 2008;

1.3. ARTICLES, CONFERENCES, STATISTICS, WEBSITES AND STUDIES

1. Francesco Capotorti, *Study on the rights of persons belonging to ethnic, religious and linguistic minorities*, New York, United Nations, 1979 E/CN.4/Sub.2/384/Rev.1;
2. Asbjørn Eide, *Possible ways and means of facilitating the peaceful and constructive solution of problems involving minorities*, 1993, E/CN.4/Sub.2/1993/34;
3. Stanislav Chernichenko, *Definition of minorities*, second working paper, 1997, E/CN.4/Sub.2/AC5/1997;
4. Roberta Medda-Windischer, *New minorities, old instruments? Diversity governance from the perspective of minority rights*, in *Migration Letters*, Volume 13, No. 2, May 2016;
5. Alan, B. Anderson, *Ethnic minorities and minority rights in Europe: Theoretical Typologies*, ECMI Working Paper No. 99, September 2017;
6. Darian Heim, *“Old” natives and “new” immigrants: beyond territory and history in Kymlicka’s account of group-rights*, in *Migration Letters*, Volume 13, No. 2, May 2016;
7. Roberta Medda-Windischer, *Changing Paradigms in the Traditional Dichotomy of Old and New Minorities*, in Kristin Henrard (ed.), *Double Standards Pertaining to Minority Protection*, Netherlands, 2010;

8. Conference on the Advisory Committee's Fourth Thematic Commentary on the Scope of Application of the Framework Convention, held in Strasbourg on the 11th of October, 2016 (http://www.coe.int/en/web/minorities/tc4_conference);
9. Statistik Austria, *Migration & Integration. Zahlen. daten. indikatoren 2012*, Vienna, 2012 (http://medienservicestelle.at/migration_bewegt/wp-content/uploads/2012/07/IBIB_2012_Integrationsbericht.pdf);
10. Minority Rights Group International (<http://minorityrights.org/minorities/turks/>);
11. Instituto Nacional de Estadística, *Population Figures at 1 January 2014. Migration Statistics 2013*, 30 June 2014 (http://www.ine.es/en/prensa/np854_en.pdf);
12. Instituto Nacional de Estadística, *Cifras de Población a 1 de enero de 2017. Estadística de Migraciones 2016*, 29 June 2017 (http://www.ine.es/en/prensa/cp_2017_p_en.pdf);
13. CEPS Projectes Socials, *National Report. Romanian immigrants in Spain*, Barcelona, December 2011 (<http://www.participation-citoyenne.eu/sites/default/files/report-spain.pdf>);
14. Statistiche Demografiche (<http://demo.istat.it/str2015/index.html>);
15. Isilda Mara, *Surveying Romanian Migrants in Italy Before and After the EU Accession: Migration Plans, Labour Market Features and Social Inclusion*, Vienna Institute for International Economic Studies, Research Reports, 378, July 2012;
16. Statistisches Bundesamt (Destatis), *Bevölkerung und Erwerbstätigkeit, Bevölkerung mit Migrationshintergrund, Ergebnisse des Mikrozensus 2015*, Fachserie 1 Reihe 2.2 (https://www.destatis.de/DE/Publikationen/Thematisch/Bevoelkerung/MigrationIntegration/Migrationshintergrund2010220157004.pdf;jsessionid=85A7339F5B34916BE4AB300E6487C349.cae1?__blob=publicationFile);

17. Julie Ringelheim, *Minority Rights in a Time of Multiculturalism: The Evolving Scope of the Framework Convention on the Protection of National Minorities*, Human Rights Law Review 10:1, 2010;
18. Jochen Abr. Frowein, Roland Bank, *The effect of Member States' declarations defining 'national minorities' upon signature or ratification of the Council of Europe's Framework Convention*, Max-Planck-Institut für ausländisches öffentliches Recht und Völkerrecht, 1999;
19. Elizabeth Craig, *Who are the minorities? The role of the right to self-identify within the European minority rights framework*, Journal on Ethnopolitics and Minority Issues in Europe Vol 15, No 2, 2016;
20. Charles Taylor, *The Politics of Recognition*, in *Multiculturalism: Examining the Politics of Recognition*, ed. A. Gutmann, 25-73, Princeton University Press, 1994;
21. Will Kymlicka, *Multiculturalism without citizenship?*, 2017 (https://www.academia.edu/33677436/Multiculturalism_without_Citizenship_2017_);
22. Yaşar Aydın, *The Germany-Turkey migration corridor: Refitting policies for a transnational age*, February 2016, Migration Policy Institute, Washington DC;
23. James Angelos, *What Integration Means For Germany's Guest Workers. The Debate Over Multiculturalism Alienates the Immigrants Germany Needs Most*, from Foreign Affairs, 28th October, 2011 (<https://www.foreignaffairs.com/articles/europe/2011-10-28/what-integration-means-germanys-guest-workers>);
24. Marián Sloboda, *Historicity and citizenship as conditions for national minority rights in Central Europe: old principles in a new migration context*, Journal of Ethnic and Migration Studies, 2016, 42:11;

25. Romanian national census from 2011
<http://www.insse.ro/cms/files/statistici/comunicate/alte/2012/Comunicat%20DATE%20PROVIZORII%20RPL%202011e.pdf>);
26. Monica Călușer, *Reprezentarea minorităților naționale pe locurile rezervate în parlament* (*The representation of national minorities on the reserved seats in parliament*), in Levente Salat (ed.), *Politici de integrare a minorităților naționale în România* (*National minorities integration policies in Romania*), Centrul de Resurse pentru Diversitate Etnoculturală, Cluj-Napoca, 2008 ;
27. Jatinder Mann, “Anglo-Conformity”: *Assimilation Policy in Canada, 1890s–1950s*, *International Journal of Canadian Studies*, Volume 50, 2014;
28. Hartwig Pautz, *The politics of identity in Germany: the Leitkultur debate*, *Race & Class*, Institute of Race Relations 0306-3968 Vol. 46(4), 2005;
29. James Politi, *Italy delays vote on citizenship for immigrants’ children*, *Financial Times*, July 17, 2017 (<https://www.ft.com/content/bb0203a4-6ace-11e7-bfeb-33fe0c5b7eaa>);
30. Manuela Perrone, *Italian parties clash over citizenship rights for immigrant children*, *Italy24*, 26 June 2017 (<http://www.italy24.ilsole24ore.com/art/politics/2017-06-22/italian-parties-clash-over-citizenship-rights-for-immigrant-children-171609.php?uuid=AEgjWckB>);
31. Philip Oltermann, *Switzerland votes to ease citizenship process*, *The Guardian*, 12 February 2017 (<https://www.theguardian.com/world/2017/feb/12/switzerland-votes-immigrants-citizenship-rights-islamophobia>);

32. Elizabeth Craig, *The Framework Convention for the Protection of National Minorities and the Development of a 'Generic' Approach to the Protection of Minority Rights in Europe?*, 17 (2010) *International Journal on Minority and Group Rights*;
33. Asbjørn Eide, *The Rights of 'New' Minorities: Scope and Restrictions*, in *Double Standards Pertaining to Minority Protection*, edited by Kristin Henrard, 165–193. Leiden: Martinus Nijhoff Publishers;
34. Stella Burch Elias, *Regional Minorities, Immigrants, and Migrants: The Reframing of Minority Language Rights in Europe*, *Berkeley Journal of International Law* 28 (1);