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Who Are The Minorities? The Role of the Right to Self-Identify within the European Minority Rights Framework

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Abstract

This article examines the implications of both individual and collective dimensions of the right to self-identify and reappraises the key challenges to its realisation. The article argues that the status of the right to self-identify as a fundamental right remains unclear, over a quarter of a century after its inclusion in the CSCE/OSCE Copenhagen Document in 1990. The article starts by revisiting some of the 'justice-oriented' arguments made in the early 1990s about the need for group-differentiated rights in order to highlight the importance of the right to self-identify as an integral part of the European minority rights framework. It then proceeds to argue that the case for giving greater prominence to this right is strengthened if the challenge of cosmopolitanism is also considered. The second part of the article is focused more specifically on the challenges to the realisation of the right, particularly the collective dimension. It argues that this can be attributed to the continued deference to States in relation to the scope of application of the Framework Convention for the Protection of National Minorities and that there needs to be a greater focus on the internalisation of the right at the domestic level.

Keywords: minority rights; national minorities; right to self-identify; Framework Convention for the Protection of National Minorities

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Introduction

‘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, CSCE/OSCE Copenhagen Document 1990)¹

The right to self-identify has been somewhat neglected in the expanding body of literature on the European minority rights framework.² Yet this is a right of considerable importance to both individuals and groups, forming an integral part of the developing framework. This article examines the implications of both individual and collective dimensions of the right to self-identify and reappraises the key challenges to its realisation. The article argues that its status as a fundamental right remains unclear, over a quarter of a century after inclusion of the principle of self-identification in the Copenhagen Document. The article contributes to and develops current debates over the future of minority nations and minority rights (e.g. Gagnon, 2014 and Tierney (ed), 2015) by arguing that more needs to be done to strengthen the right to choose to be treated as belonging to a national minority (or not) as a fundamental right. The article starts by revisiting some of the ‘justice-oriented’ arguments made in the early 1990s about the need for group-differentiated rights in order to highlight the importance of the right to self-identify as an integral part of the European minority rights framework. It then proceeds to argue that the case for giving greater prominence to this right is strengthened if the challenge of cosmopolitanism is also considered. Such accounts tend to adopt a more dynamic approach to identity and group membership, placing particular emphasis on the plurality of identities and the value of dialogue and contestation.³ The second part of the article is focused more specifically on the challenges to the realisation of both individual and collective dimensions of the right to self-identify. This part considers ambiguities over the scope and significance of the right at the time of the adoption of the Copenhagen Document and of the drafting of the analogous provision in the Council of Europe’s Framework Convention for the Protection of National Minorities 1995.⁴ It then proceeds to examine the challenges that have emerged since that time. It is argued that a primary problem is the continued deference to States in relation to the Framework Convention’s scope of application and the failure of States to internalise the right within their domestic legal systems. It concludes by considering the future of the right, arguing that there needs to be greater focus on the internalisation of the right at the domestic level.

1. The right to self-identify and the role and purpose of minority rights

‘We should view human cultures as constant creations, recreations, and negotiations of imaginary boundaries between “we” and the “other(s)”. The “other” is always also within us and is one of us....Struggles for recognition among individuals and groups are really efforts to negate the status of “otherness”, insofar as otherness is taken to entail disrespect, domination, and inequality.’ (Benhabib, 2002: 8)

The peace and security context for the development of European minority rights law after 1989 is well established (e.g. Kymlicka, 2007), and clearly reflected in the Preambles of both the CSCE/OSCE’s Copenhagen Document and the Framework Convention. So too is the historical focus in Europe on the protection of ‘national’ minorities in the traditional sense, i.e. groups which consider themselves to have a distinct ‘national character’ or identity to the majority population (Claude, 1955: 2) and have ‘longstanding, firm and lasting ties’ with the State in question.⁵ The broadening of the Framework Convention’s scope of application to cover immigrant groups and other ‘new minorities’ and non-citizens through the work of the Framework Convention Advisory Committee (ACFC) has been explored elsewhere (e.g. Ringelheim, 2010). This article does not therefore seek to contribute further to that debate. Instead, its focus is on discussions over the scope and application of the right in relation to national minorities in the more traditional sense, who were initially intended as the main beneficiaries. This section provides an overview of more ‘justice-oriented’ arguments in defence of minority rights, considering also the challenge of cosmopolitanism, in order to ascertain the importance of the right to self-identify as an integral part of the developing framework.

The first point to be made is that the development of minority rights post-1989 was strongly influenced by the predominant liberal paradigm, clearly evidenced in the emphasis on the individual rights of persons belonging to national minorities rather than the adoption of a more group-rights based approach. This is also reflected in the explicit recognition of minority rights as an integral part of the international protection of human rights in both instruments.⁶ Although there are some provisions in the Copenhagen Document and the Framework Convention with more of a collective focus, the clear predominance is of individual rights (Gilbert, 1996: 182-183). Noting the continued uncertainty and debate over how to define the term ‘minority’, Packer in the early 1990s put forward his own definition of a minority ‘as a group of people who freely associate for an established purpose where their shared desire differs from that expressed by the majority rule’ (1993: 45). This was linked to a philosophy of human rights based on the ‘maximization of freedom’, and the argument that

‘the added value of minority rights must reside in their contribution’ to that goal (1996: 122). At the time his approach received some support (Gilbert, 1996: 162) and Packer himself argued that paragraph 32 of the Copenhagen Document, quoted at the start of the article, was an important step towards resolving the definitional issue (1996: 163). This suggests that within this paradigm the collective dimension in identifying which groups are entitled to benefit as ‘national minorities’ under the rights provisions in the Copenhagen Document was considered as important as the right of individuals to make a subjective choice about their own affiliation. Historically the emphasis within minority protection frameworks was on protecting individuals declaring themselves to belong to a minority group from verification or dispute by State authorities.⁷ However, this is a very narrow application of the right to self-identify and, as will be shown, the approach adopted under the Framework Convention suggest a much more nuanced position, which reflects the increased influence of those making the case for group-differentiated and minority rights from within a multicultural framework.

In order to explain what is meant by a justice-oriented or ‘multicultural’ approach to minority rights, we need to return to some of the literature from the early 1990s addressing the need for a new ‘politics of difference’. This is the term used by Iris Marion Young (1990) in making the case for a conception of justice that explicitly acknowledges and addresses differences between groups. This literature is important because it brings us back to the role and purpose of minority rights, a crucial aspect in the building of an argument for the strengthening of both the individual and collective aspects of the right to self-identify. First of all, it reminds us of the role of minority rights in challenging the domination and oppression of particular groups. For example, in making the case for group-differentiated rights, Young herself argued for a shift from distribution as the primary focus to the concepts of domination and oppression, manifest in exploitation, marginalization, powerlessness, cultural imperialism and /or violence (1990: ch 2). Secondly, it highlights the damage caused by non-recognition or misrecognition, and the link between the two is alluded to in the Benhabib quote at the start of this section. According to Charles Taylor:

[O]ur identity is partly shaped by recognition or its absence, often by the *misrecognition* of others, and so a person or group of people can suffer real damage, real distortion, if the people or society around them mirror back to them a confining or demeaning or contemptible picture of themselves. Non-recognition or misrecognition can inflict harm, can be a form of oppression, imprisoning someone in a false, distorted, and reduced mode of being. (1994: 25)

Here it is relevant that Taylor's concern is for both individual and group identity, linked to the ideal of authenticity. It is clear however that he is not only concerned with recognition by the State, but also 'the people or society' around them. A minority rights regime would therefore appear to have a key role in challenging domination and oppression, and in dealing with the problems of non-recognition or misrecognition within society as a whole.

Whilst Honneth has argued that the goal of redistribution can be subsumed within the struggle for recognition, Fraser's position is that a conception of justice should encompass both, without reducing one to the other (Fraser and Honneth, 2003). Fraser argues in particular that cultural injustice, which requires cultural or symbolic change and promotes group differentiation as a response, is distinct from socio-economic injustice, which requires redistribution and promotes 'group de-differentiation' (Fraser, 1995). The important thing for the purposes of this article is that a minority rights regime needs to do both. Although primarily conceived as an instrument aimed at the promotion of cultural identity, it is significant that Article 4 of the Framework Convention also stresses the need for the promotion of full and effective equality between individuals belonging to minority and majority groups. This is particularly relevant when it comes to the deconstruction of the right to self-identify in Article 3(1) of the Framework Convention, as it allows individuals and groups to identify as minorities for some purposes, but not for others, and provides that no disadvantage should arise from such a choice.

The literature discussed in this section is also significant because it highlights the role of groups in constituting identity (Young, 1990: 44-45), in contrast to approaches advocating a more contractarian approach. According to Walzer, Taylor's politics of recognition allows for a commitment by the State 'to the survival and flourishing of a particular nation, culture, or religion, or of a (limited) set of nations, cultures, and religions – so long as the basic rights of citizens who have different commitments or no commitments at all are protected' (1994: 99). This alternative form of Liberalism emphasises a universal potential 'for forming and defining one's own identity, as an individual, and also as a culture' (Taylor, 1994: 42). Will Kymlicka's work is more explicitly grounded within 'the dominant discourse of individualist liberalism' (Bowring, 1999: 13), and for him the goal is not cultural survival. Nevertheless, one of the key contributions that he made was to argue that cultural membership is 'qualitatively different to membership of other associations' (Kymlicka, 1994: 25). In *Liberalism, Community and Culture*, Kymlicka famously made the case for the recognition of cultural membership as a 'primary good' (in the Rawlsian sense) in any liberal conception of

justice due to the fact that our cultural heritage determines the range of options available to us (1989: 165). The 'cultural structure' being recognised is however a 'context of choice', the character of which can be modified by its individual members (1989: 166-167). His overall argument was that those belonging to minority cultural communities face disadvantages with respect to the good of cultural membership that can be rectified by minority rights (1989: 162). However, it is significant that he has also distinguished between the case made for external protections for those who identify as belonging to a recognised minority group, and for internal restrictions, which can result in oppression of the individual and the limitation of individual rights (1995: ch 3).

Minority rights for Kymlicka are, therefore, about promoting individual autonomy and freedom, and addressing inequality and a history of 'benign neglect'. Kymlicka does not specifically address the right to self-identify, although he does recognise that some may choose to move between cultures. He argues that such moves are rare and also costly (1995: 84-85), concluding that 'Leaving one's culture, while possible, is best seen as renouncing something to which one is reasonably entitled' (1995: 86). He therefore rejects the more fluid 'cosmopolitan alternative' presented by Waldron, who describes 'freewheeling cosmopolitan life, lived in a kaleidoscope of cultures', which has the effect of reducing the weight of minority claims to special support or assistance (1995: 99-100). He would, however, probably agree with Sen, who argues that it is the individual who is to decide on the relative importance of different identities, emphasising both their plurality and the role of choice within particular contexts to competing loyalties and priorities (2007: 19).

For Kymlicka, minority rights are an appropriate response to nation-building by the State, aimed at protecting minorities from injustices, and his particular concern has been with national minorities in the traditional sense, who often engaged in rival nation-building (2001: 1-2). Kymlicka himself has been quite critical of the limitations of the European minority rights framework, arguing that it was the security paradigm that prevailed over a more justice-oriented approach. He is particularly critical of the rights missing from the Framework Convention based on the claims often made by national minority groups in relation to territorial autonomy, official language rights, minority language universities and consociational power-sharing (2007: 215). However, for the purposes of this article, what is particularly relevant is the extent to which his arguments, and thereby also the liberal approach to minority rights adopted under the Framework Convention, are challenged by the 'cosmopolitan alternative' that has emerged.

According to Waldron, ‘the cosmopolitan alternative’ challenges ‘first, the assumption that the social world divides up neatly into particular distinct cultures, one to every community, and secondly, the assumption that what everyone needs is just *one* of these entities – a single coherent culture – to give shape and meaning to life’ (1995: 105). His particular criticism is focused on Kymlicka’s approach, but has a wider relevance. He also, significantly, goes on to consider the role of ‘the *self* in the cosmopolitan picture’, noting that in contrast to the person drawing his identity from a single culture who ‘will obtain for himself a certain degree of coherence or integrity..., the self constituted under the auspices of a multiplicity of cultures might strike us as chaotic, confused and even schizophrenic’ (1995: 110). He warns against the dangers of essentialising and fixing culture, and of cultural exclusiveness (1995: 113), as does Sen, who notes that many of the world’s conflicts ‘are sustained through the illusion of a unique and choiceless identity’ (2007: xv). Meanwhile Benhabib has argued that narrative accounts of culture are both ‘contested and contestable’ (2002: 5) and has criticised Kymlicka for his focus on ‘societal cultures’ and reliance on objective criteria such as territorial concentration, shared language and providing members with meaningful ways of life.⁸ Taking the example of Catalonia, she argues that these criteria do not help in understanding ‘the dilemmas of contemporary Catalan identity’ (2002: 64). Although Kymlicka himself has argued that the differences between ‘liberal nationalism’ and cosmopolitanism have been exaggerated, he asserts that one of the key differences between his own position and Benhabib’s is that she sees cosmopolitan citizenship as ‘transcending’ rather than ‘taming liberal nationhood’ (2006: 130). This has particular implications in relation to questions about the role of the State in positively promoting and protecting the identities of national minorities (Kymlicka, 2001: 219). However, the role of the right to self-identify is also key and therefore merits a prominent role.

Whilst a persuasive case has been made for the development of a cosmopolitan approach to contemporary global politics (e.g. Held, 2010), it is argued that, in the context of the developing European minority rights regime, Kymlicka’s approach is the right one. The very existence of the Framework Convention suggests that it is widely accepted that the State has a role to play in positively promoting and protecting national minorities and their identities. Indeed the protection of such groups was considered by the drafters of the Framework Convention to be ‘essential to stability, democratic security and peace’ and to form ‘an integral part of the international protection of human rights’.⁹ The Framework Convention has now been ratified by 39 State Parties,¹⁰ although as will be seen the approach

of States to minority issues and to its scope of application varies considerably.¹¹ However, the increasing influence of cosmopolitan ideas means that more attention is now being given to the individual dimensions of the right to self-identify in the development and application of more group-oriented protections. This does not mean that challenges to the individual dimension do not persist, particularly in relation to tensions with the peace and security agenda. This is discussed further below. There are nonetheless particular harms and injustices that people suffer as members of groups. The points made above about domination and oppression, and about misrecognition, highlight the problems of imposition of minority status or identity by the State or others (in particular majorities) and of non-recognition. The rest of the article focuses on the current status of the right to self-identify at the European level. It argues that its status as a fundamental right remains unclear and makes the case for giving greater prominence to the right, focusing in particular on the need for a greater emphasis on internalisation of the right at the domestic level.

2. A European right to self-identify?

A brief overview of the development of the right to self-identify within the European minority rights framework reveals challenges to its status as a fundamental right from the outset. The CSEC/OSCE Copenhagen Document was the first minority rights initiative following the end of the Cold War, with section IV focused on questions relating to national minorities. Although there is no definition of the term ‘national minority’, it will be recalled that para. 32 provides that: ‘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.’ Packer’s assertion that this was an important step towards resolving the definitional issue was however rather optimistic. Discussions continued, and some State representatives pushed the following year at the CSCE Meeting of Experts on National Minorities for inclusion of the express statement that: ‘[n]ot all ethnic cultural, linguistic or religious differences necessarily lead to the creation of national minorities’.¹² This was described at the time as ‘a somewhat dangerous formula as it may be used by States to deny minority status to persons who feel they share with others an ethnic, cultural, linguistic or religious identity; in any event, it leaves it wide open who decides whether a minority exists: the State or the persons who share the common identity’ (Roth, 1991: 331) . The view of a number of State delegates was that this was not in accordance with the approach taken in the earlier Copenhagen Document (*ibid*). As will be

seen, this remains a key tension and one that remains unresolved over two and a half decades later.

A slightly different formulation of the right to self-identify is included in Article 3(1) of the Framework Convention, which provides that: ‘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’ (emphasis added). The reference to disadvantage was intended to ensure that the freedom of the individual to choose was not ‘impaired indirectly’ (Council of Europe, 1995: para. 36). Particularly significant for the purpose of this article is the fact that Article 3(1) is one of the few provisions in the Framework Convention directly articulated as a right that is potentially directly applicable, unlike other provisions that are programmatic in nature and formulated in terms of obligations on the State rather than the rights of individuals.¹³ The drafters of the Framework Convention notably elected to focus on choice of treatment and on consequences of the choice rather than emphasising that membership itself was a matter of individual choice. It is, however, clear that neither special entitlements nor disadvantages associated with membership of a particular group can be imposed on individuals who choose to claim or exercise this right. Meanwhile it is the Explanatory Report that clarifies the limits of the individual dimension. It stipulates that the right ‘does not imply a right for an individual to choose arbitrarily to belong to any national minority. The individual’s subjective choice is inseparably linked to objective criteria relevant to the person’s identity’ (Council of Europe, 1995: para. 35).

The extent to which an individual’s declaration of affiliation can be disputed or denied by the State, or indeed by the other members of a group is less clear, particularly given the vagueness of the references to objective characteristics in the Explanatory Report. The UN Human Rights Committee has addressed this issue, and its view is that any denial of membership cannot be arbitrary and that objective criteria cannot be ignored.¹⁴ This is particularly relevant in relation to the Framework Convention given that Article 22 provides that: ‘Nothing in the present framework Convention shall be construed as limiting or derogating from any of the human rights and fundamental freedoms which may be ensured under the laws of any Contracting Party or under any other agreement to which it is a Party.’

In relation to the collective dimensions of the right, there is of course no definition of the term ‘national minority’ in the Framework Convention. The drafters opted instead ‘for 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' (Council of Europe, 1995: para 12). It was further recognised that, whilst some national minorities were easily identifiable, others were less so.¹⁵ The fact that this appeared to leave it open to States to arbitrarily deny recognition to certain groups has been strongly criticised (e.g. Alfredsson, 2000). The drafting of Article 3 and the accompanying sections in the Explanatory Report were clearly the result of political compromise, and a number of questions about the scope and significance of the right to self-identify therefore remained unresolved. The end result notably contrasts with the approach in ILO Convention No 169 on Indigenous and Tribal Peoples adopted 27 June 1989, which provided in Article 1(2) that: "Self-identification as indigenous or tribal shall be regarded as a fundamental criterion for determining the groups to which the provisions of this Convention apply.' The next two sections consider in more depth some of the challenges and controversies that have arisen in relation to both the individual and collective dimensions of the right, with a view to establishing the significance of the inclusion of such a right in the Framework Convention and its current status.

3. The individual dimension of the right to self-identify

Particular emphasis has been placed within the developing European minority rights framework on the individual dimension of the right to self-identify, reflecting the adoption of an increasingly cosmopolitan approach. A very obvious example of this is the approach of the Framework Convention Advisory Committee (ACFC) to the conduct of housing and population censuses. Frequent references are made in this regard to Committee of Ministers' Recommendation No. 97 (18) concerning the protection of personal data collected and processed for statistical purposes,¹⁶ which requires both anonymity and confidentiality, and the Conference of European Statisticians' Recommendations (2006) for the 2010 Censuses for Population and Housing. The latter addresses a number of issues pertinent to the right to self-identify, recommending that representatives of minority groups be consulted in the drafting, and conduct of censuses (*ibid*: para 417) and special monitoring systems in relation to the collection of data on 'ethnocultural characteristics' (*ibid*: para 418). They require information on ethnicity to be based on free self-declaration, with the inclusion of open questions and freedom to indicate more than one ethnic affiliation or combination of affiliations (*ibid*: paras 425-6) or 'none' (*ibid*: para 427). A number of recommendations to States made by the ACFC

have subsequently reflected these requirements, and improvements have been made in the conduct of censuses in many States (ACFC Secretariat, 2016: Article 3). A more cosmopolitan approach is also reflected in the ACFC Commentary on Language, which notes that respect for the principle of self-identification is ‘of paramount importance in the interpretation and implementation of the Framework Convention’ (2012: para. 16). It stresses the importance of recognising that some people have multiple affiliations and that a person may identify in different ways for different purposes. This means, for example, that a person can claim linguistic rights with regard to a number of different languages (*ibid*: para. 18). The Commentary on Language confirms that the personal choice must ‘be based on some objective criteria relevant to the person’s identity’ (*ibid*: para. 17). However, the emphasis here is very much on the consent of the individual and the importance of self-identification: ‘The association of persons of a specific group based on visible or linguistic characteristics or on presumption without their consent is not compatible with the Framework Convention’ (*ibid*).

Despite these strong affirmations of the importance of the right to self-identify, challenges remain. Whilst the ACFC’s consistent view has been that data on ethnic origins can be collected for statistical purposes in a way that does not undermine this right, some States have continued to argue that the right to self-identify is in tension with the collection of statistical data as part of a wider agenda to promote equality. For example, Germany has invoked the right in rejecting ACFC recommendations on the need to obtain ‘more data on the composition and situation of national minorities’ (ACFC, 2010: para. 58 and 2015: para. 32) and not to rely only on information provided by the minorities themselves in order to ensure full and effective equality in accordance with Article 4(2) of the Framework Convention.¹⁷ The collection of such data is, however, important in terms of establishing the sufficiency of demand referred to in various provisions in the Framework Convention, and often required for access to minority rights. So for example, in the Czech Republic there is a link to the right to establish Committees of National Minorities, to display topographical signs in minority languages and to set up minority language schools (ACFC, 2011: para. 36). Another problem is that the right to self-identify is also a right that is open to abuse. There have, for example, been problems in Bosnia and Herzegovina, and in other jurisdictions which recognise a right to self-identify in domestic law, with some identifying as belonging to national minorities to gain electoral or other advantages but who are not recognised as such by other members (ACFC, 2013 (Bosnia): para. 151).¹⁸

A classic example of a State's failure to respect an individual's right to self-identify can be seen in the case of *Ciubotaru v Moldova* (2010).¹⁹ The applicant had been advised that his identity card application would only be accepted if he indicated that his identity was Moldovan and not Romanian, and his request for the recorded entry to be changed had been refused because he had not provided sufficient proof that his parents were of Romanian ethnic identity (paras. 7-13). The European Court of Human Rights noted that the relevant domestic law included a provision that was very similar to Article 3(1) of the Framework Convention but that the practice in Moldova, as it had been in the former Soviet Union, was that an individual's ethnic identity was recorded on the basis of the identities of his or her parents (*ibid*: paras. 15 and 21). The Government meanwhile put forward practical reasons for not recording ethnicity purely on the basis of an individual's declaration, arguing that this 'could lead to serious administrative consequences and to possible tensions with other countries' (*ibid*: para. 56). The European Court of Human Rights notably did 'not dispute the right of a Government to require the existence of objective evidence of claimed ethnicity' (*ibid*: para. 57). In this case there were objectively verifiable links to the Romanian minority, including language, name and 'empathy'. However, these could not be relied upon under Moldovan law (*ibid*: para. 58). The Court therefore concluded that 'the State's failure consists in the inability for the applicant to have examined his claim to belong to a certain ethnic group in the light of the objectively verifiable evidence adduced in support of that claim' and that there was a failure to comply with the State's positive obligations under Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 (ECHR) (*ibid*: para. 59).

The ACFC's role is obviously very different. Nevertheless the reporting system under the Framework Convention has revealed a number of inadequacies in State approaches in relation to the individual dimensions of the right to self-identify. So, for example, the ACFC has declared that the constitutional position in Cyprus whereby the Armenians, Latins and Maronites have to choose to affiliate to either the Greek Cypriot or Turkish Cypriot Communities does not conform to Article 3 (ACFC, 2010: para. 39 and 2015: paras. 11-12). The ACFC also heavily criticized the system for the declaration of linguistic affiliation in South Tyrol where anyone choosing the category of 'other' still had to affiliate to one of the three main groups to be eligible for certain jobs and offices (e.g. Lantschner and Poggeschi, 2008). When Italy first ratified the Framework Convention, the declaration was compulsory and could not be made anonymously or changed until the next census. Furthermore, if you

failed to declare an affiliation, you would not be eligible to occupy reserved posts or to stand as a candidate in elections (ACFC, 2001: paras. 19-20). Improvements have subsequently been made, and the declaration is now anonymous and can also be changed. However, such a change only takes effect after 18 months, and the ACFC in the third monitoring cycle noted that affiliation was still obligatory with serious consequences for non-compliance (ACFC, 2010: para. 53). The ACFC has also raised questions about employment monitoring in Northern Ireland, which allows employers to designate perceived community background where an employee does not provide this information (ACFC, 2011: paras. 44-47). This can be linked to wider questions raised about the predominance of the ‘two communities’ paradigm and of identity politics, which often works to the exclusion of smaller minority groups or those who choose not to affiliate with a particular group.

Similar questions have been raised in relation to consociational arrangements in Bosnia and Herzegovina. Even before the judgment of the European Court of Human Rights in the case of *Sejdić and Finci v Bosnia and Herzegovina* (2009)²⁰ and the finding that the ineligibility of ‘Others’ to stand for elections to the tripartite Presidency and to the House of Peoples was discriminatory, the ACFC found that existing safeguards to protect the right to self-identify were also insufficient (ACFC, 2004: paras. 30-31). The problem was that declarations of ethnic affiliation were a requirement for certain employment and political posts. In the most recent monitoring cycle the ACFC stated that it continued ‘to be deeply concerned by this prolonged and exaggerated emphasis on ethnicity’ in Bosnia and Herzegovina, and called ‘on the authorities to take resolute measures to ensure the right to free and optional self-identification ... is fully respected in legislation governing access to political and public service posts and is duly applied in practice’ (ACFC, 2013: paras. 42-43). The ACFC has also noted indirect pressure exerted on individuals which impinges on the right to self-identify, expressing its deep regret at reports of politicians calling on people not to identify as Bosnian in the census because of the potential impact on the position of the constituent peoples in light of the principles in Article 3 (*ibid*: para. 49).

What many of these arrangements have in common is that the mechanisms in place to protect particular groups in a post-conflict situation have resulted in issues under Article 3. Despite strong criticism of the Council of Europe’s approach to such arrangements (e.g. McCrudden and O’Leary, 2013), it is argued here that the move away from the more security-dominated agenda and the emphasis by the ACFC on a more individual rights based approach is the right one from a minority rights perspective. Smaller minorities and those who choose

not to affiliate with one particular group are often the most marginalised and in need of protection, and the more justice-oriented approach reflected in the work of the Framework Convention Advisory Committee is to be welcomed (Craig, 2012). Unlike the Office of the OSCE High Commissioner on National Minorities, the ACFC exists as a human rights monitoring body rather than an instrument of conflict prevention (*ibid*). The importance of recognition was emphasised in the discussion in the first section of this article, with the argument made that the increasing influence of cosmopolitanism further strengthened the case for protecting both the individual right to self-identify and the right not to be placed at a disadvantage as a result of this choice. This does not mean that the arrangements should be dismantled, rather that it is right that the human and minority rights implications are properly discussed and decisions made about whether the sacrifice of individual rights and the rights of smaller minorities is justified with reference to the peace and security goals that might thereby be achieved. The peace and security context explains the decision to focus on the rights of *national* minorities at the time the Framework Convention was adopted, but should not be used to promote fixed identities and to entrench differences to the detriment of the rights of individuals. It further needs to be recognised that such arrangements constitute a considerable threat to the right to self-identify, and to more cosmopolitan approaches to identity. It was argued in the first section of this article that the taming of nationalism should be the goal of minority rights in light of the increasing influence of cosmopolitan ideas and of globalisation. The next section of the article therefore focuses in particular on the collective dimensions of the right to self-identify. This should play a key role in determining which groups come under the Framework Convention's scope of application, which can be a crucial but often neglected first step for wider societal recognition.

4. The collective dimension

It is submitted that a key obstacle to the protection and promotion of minority rights in Europe has been differences in the approach of States to the Framework Convention's scope of application. Due to the lack of a definition of the term 'national minority', Article 3 has been the focus of particular attention. The fact that the ACFC adopts a pragmatic approach, encouraging States to consider extending its application to additional groups on an 'article by article' basis, is well documented (ACFC Secretariat, 2016). This is particularly relevant to debates over the application of the Convention to 'new' as well as 'old' minorities (Medda-Windischer, 2009). It was, for example, noted in the ACFC's Second Opinion on the UK that

some British Muslims are excluded from the UK's approach, which is based on the definition of a 'racial group' under domestic law (ACFC, 2007: para. 34). It was reported during the third cycle that representatives of the Muslim population had requested recognition and protection for Muslims as a minority group, and the suggestion made that the Government consult with representatives on this issue with a view to addressing their concerns (ACFC, 2011: paras. 33 and 36). This is in line with the standard approach of the ACFC, which is based on finding 'pragmatic solutions in close consultations 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' (e.g. ACFC, 2012 (Ukraine): para. 88).

There are of course examples of differences of opinion within groups on the question of recognition. To take just one example, approaches have been made to the ACFC under the Framework Convention by those representing the Basque, Catalan and Galician cultures and languages. The position of the Spanish State is that these groups do not need the benefit of minority protection because of the special arrangements in place in the Autonomous Communities. Whilst the ACFC has noted that such arrangements do not preclude the applicability of the Framework Convention, it has referred the question back to the relevant authorities and suggested that they engage in consultations with the groups in question to ascertain if those views are shared by other representatives of these languages and cultures (ACFC, 2014: paras. 11-14). Here we already see a hint of the complexity of the issues. The ACFC is recognising that, whilst some representatives might aspire to such recognition, others affiliated with these languages and cultures might adopt a different stance. There are other examples of different views existing within groups. For example, the existence of a separate Macedonian national identity has long been contested in both Bulgaria and Greece (Cowan, 2001). However, the individual dimensions of the right to self-identify should ensure that those who do not self-identify as Macedonian cannot be forced to do so against their will, and the ACFC has focused in particular on encouraging dialogue with those self-identifying as such (ACFC 2014 (Bulgaria): para. 30). Similarly the ACFC has emphasized the right of the individual to choose freely in the light of ongoing contestation around whether or not Kurds and Yezidis in Armenia have separate national identities or are part of the same group with separate religious identities (ACFC, 2010: para. 29). It also needs to be recognized that some groups choose to reject recognition as a national minority under the Framework

Convention.²¹ There are, however, other groups with a significant proportion of members who claim national minority recognition and are denied such recognition by the State.

A particular problem lies in the ongoing contestation in relation to particular groups that perceive themselves as national minorities in the more traditional sense, but are not recognised as such by the State. One notable example was considered by the European Court of Human Rights in *Gorzelik and Others v Poland* (2004).²² The association in question had been refused registration under the title ‘Union of People of Silesian Nationality’, describing itself as ‘an organization of the Silesian national minority’ (*ibid*: paras. 18-36). In concluding that there was no violation of Article 11 of the ECHR, the stance of the European Court of Human Rights on the definitional issue was non-committal. Here it is worth noting that the domestic court had referred specifically to the linking of subjective choice to objective criteria in the Explanatory Report of the Framework Convention, concluding that: ‘a subjective declaration of belonging to a specific national group implies prior social acceptance of the existence of the national group in question’ (*ibid*: para. 36). This raises a number of issues from a minority protection perspective, which should be aimed at protecting marginalized groups from the disadvantage often caused by the dominance of the majority. There are also questions to be asked about why the European Court of Human Rights did not give more attention to Article 3 of the Framework Convention, focusing instead on the fact that the term ‘national minority’ was not defined in the Framework Convention and on the fact that Poland had declared that it understood the term as applying to national minorities residing in Poland whose members are Polish citizens (*ibid*: paras. 46-47). Indeed the Court specifically noted that there was no obligation on the State either to adopt a particular concept of ‘national minority’ in domestic law, or to have an internal procedure for official recognition (*ibid*: para. 68).

The ACFC has adopted a much more robust approach, but its powers and profile are limited in comparison to those of the European Court of Human Rights. The Committee of Ministers has also taken up the matter, but its approach has also been quite deferential to the State. In its first Opinion on Poland, the ACFC had questioned the reliance on the registration procedure on the Law on Associations for determining whether a group is a national minority, noting that more identified as Silesian in the 2002 Census than identified as belonging to any of the 13 groups identified as national minorities in the State report (2003: paras. 21 and 28). It therefore urged ‘the Polish authorities to continue their dialogue with the Silesians on this matter and to take care that persons claiming to belong to the Silesian group are able to

express their identity' (*ibid*: para. 28). Subsequent legislation in Poland provided definitions of national and ethnic minorities, with the existence of a kin-State required for the former. However, it was noted with regret that Silesians were not included, and the opening up of a dialogue with a view to including them within its scope was recommended (ACFC, 2009: paras. 30, 36 and 38). The Committee of Ministers noted after the second monitoring cycle that there had been no follow-up or dialogue with those concerned after the first cycle²³ and after the third cycle that there were divergent opinions on the options available.²⁴ It appears therefore that little substantial progress has been made, highlighting one of the limitations of the Framework Convention's monitoring system compared to the stronger enforcement system under the ECHR. The failure of the Committee of Ministers to follow through on the ACFC's more robust approach on this issue is also unfortunate, and reinforces the impression that States remain very much in control and that significant obstacles remain to the realization of the collective dimensions of the right to self-identify in any meaningful sense.

Further problems with State approaches include differences of opinion in relation to nominations/labeling; territorial limitations and the use of citizenship criteria (Heintze, 2005: 120-126). Here it should be noted that the view of the ACFC is that the question of territorial application should also take into account the right to self-identify (e.g in relation to contestation about whether those residing in certain parts of Italy should be considered as part of the Slovene minority or as a distinct group (ACFC, 2010: paras. 38-39) and that citizenship might be considered as a precondition to accessing certain minority rights but should not be considered an element in the definition (e.g. ACFC, 2013 (Serbia): para. 36). Unsurprisingly, the ACFC has emphasized the need for both objective and subjective criteria to be taken into account in relation to nomination and labelling. It has further stated that objective criteria for recognition as minorities '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 fulfillment of objective criteria' (ACFC, 2014 (Bulgaria): para. 28). The need to avoid reinforcing negative stereotypes by the use of labels not accepted by the minorities in question has also been emphasized.²⁵

As well as the symbolic importance of recognition for disadvantaged and marginalised groups, there are also significant practical implications. Once a State has accepted that a group should be considered as a national minority under the Framework Convention, then the State is required to provide 'full information on the legislative and other measures taken to

give effect to the principles set out in this framework Convention' (Article 25). Furthermore, when the ACFC visits the State, there will be meetings with representatives of minority groups. It is also recognised that such inclusion will often serve as a lobbying tool for change at the domestic level. The Cornish in the UK provide one notable example, having lobbied for inclusion within the scope of the Framework Convention from the outset.²⁶ The ACFC recommended to the UK that requests in relation to Cornish be examined following the second and third monitoring cycles. It was noted during the third cycle that the numbers self-identifying as Cornish had increased significantly since the Framework Convention was ratified, with concerns expressed about a lack of recognition generally in public life, including the exclusion of Cornish national identity in the UK census (ACFC, 2011: para. 42). The Government's standard response had been that Cornish did not fit within the definition of a racial group, and that non-inclusion was not a barrier to them being able 'to maintain and celebrate their distinct identities'.²⁷ Indeed it was only the inclusion of the Liberal Democrats in the Coalition Government in 2010, and the election of three Liberal Democrat MPs in Cornwall, that led to a change in approach.²⁸ The decision to recognize Cornish as a national minority was announced on 24 April 2014.²⁹ This recognition has subsequently been used to further other claims, including calls for inclusion of Cornish national identity in the 2021 census,³⁰ in challenging development plans³¹ and to argue against electoral boundary changes.³²

4. Conclusion: What next for the right to self-identify?

Although the ACFC has adopted a robust approach to the individual dimensions of the right to self-identify, this article has argued that considerable obstacles remain to its effective realization. This is partly because its status as a fundamental right remains unclear. For example, the inclusion of a right to self-identify as belonging to a particular community or minority in any future Bill of Rights for Northern Ireland has proved highly controversial because of tensions with employment monitoring and the Northern Ireland Assembly voting arrangements (McCrudden, 2007). Of particular relevance here is that, in providing advice to the Northern Ireland Human Rights Commission on the possible inclusion of such a right, it was noted by Council of Europe experts consulted that it was 'rare for a bill of rights or constitution to address such matters.'³³ According to the OSCE Ljubljana Guidelines on Integration of Diverse Societies: 'Identities are subject to the primacy of individual choice through the principle of voluntary self-identification' (2012: principle 6). The Guidelines

further recommend that legislative and policy frameworks should allow for the recognition that individual identities may be multiple, multilayered, contextual and dynamic' (*ibid*: principle 5). It is unfortunate therefore that greater emphasis has not been placed by the ACFC on the incorporation of the right to self-identify into domestic law and on the failure of States that do provide for such a right in legislation to give proper effect to it.

It is submitted, however, that the real untapped potential in the right to self-identify lies in relation to the collective dimensions and in challenging the continued resistance of many States to extending the Framework Convention's scope of application to groups that have longstanding, firm and lasting ties with the State, but who perceive themselves as having a distinct national identity to the majority. This can be attributed to one of the fundamental weaknesses of the Framework Convention, the failure to define the term 'national minority' and the decision to leave the determination of the scope of application to States. The arguments in support of group-differentiated rights for minority groups are highly persuasive, and the current system is encouraging both non-recognition and misrecognition by States. Work is currently underway on a new thematic commentary on the Framework Convention's scope of application,³⁴ which is likely to recognise that in practice both objective and subjective criteria are used to identify rights-holders.³⁵ It is intended not only to draw together the analyses developed by the ACFC during the monitoring process, but also to help States 'to find solutions to future or as yet unresolved problems in this field.'³⁶ Although this is to be welcomed, it is clear that there are limits to what can be achieved by the ACFC without further reinforcement by other bodies, including the Committee of Ministers, the Parliamentary Assembly of the Council of Europe and the European Court of Human Rights, to challenge the approach of individual Member States to the Framework Convention's scope of application.

Who decides if a minority exists and why does it matter? It is clear from the evidence considered here that the right to self-identify has an important role to play in this regard. This article has demonstrated that there is considerable ambivalence regarding the right to self-identify within the developing European minority rights regime. States in particular continue to be resistant to challenges presented in terms of a failure to give effect to this right. The minority rights framework itself reflects a shared conviction amongst Member States of the Council of Europe (Belgium, France, Greece and Turkey are the notable exceptions) that States have a role to play in positively promoting and protecting *national* minorities as collective entities, as well as to protect the rights of individuals. It is recognised that there

remains a lack of consensus in relation to the inclusion of ‘new’ minorities within that framework. However, this article has revealed that there is still considerable work to be done in relation to more established national minority groups. In particular, there needs to be greater focus on what is happening at the domestic level both in terms of internalisation of the right to self-identify and in relation to ongoing debates over the Framework Convention’s scope of application. The prospect of a new ACFC Commentary on this issue is to be welcomed, and it is to be hoped that the right to self-identify will feature prominently. However, there is a clear need for the mainstreaming of the right to self-identify and greater attention to its incorporation at the domestic level in order to challenge more effectively the approach of States in this area.

Notes

¹ The Conference on Security and Cooperation in Europe became the Organization for Security and Cooperation in Europe in 1995. The Document of the Copenhagen Meeting of the Conference on the Human Dimension of the CSCE was adopted 29 June 1990.

² For a brief discussion, see Vrdoljak (2013: 41-43). See also Heintze (2005: 118-126).

³ Benhabib argues, for example, that ‘cultures are formed through complex dialogues and interactions with other cultures; that the boundaries of cultures are fluid, porous and contested. Cultural identities in complex, pluralist democratic societies should seek public recognition of their specificity in ways that do not deny their fluidity’ (2002, p. 184).

⁴ ETS 157 (adopted 1 February 1995, came into force 1 February 1998).

⁵ This was a requirement of the definition proposed by the Parliamentary Assembly of the Council of Europe in Recommendation 1201 (1993).

⁶ Para. 30 of the Copenhagen Document and Art 1 of the Framework Convention.

⁷ E.g. Art 131(1) German-Polish Convention Concerning Upper Silesia, 15 May 1922 relating to education and the Bonn-Copenhagen Declarations, 29 March 1955, outlining the rights of the German and Danish minorities in South Jutland and North Schleswig respectively.

⁸ Kymlicka defines a societal culture as ‘a culture which provides its members with meaningful ways of life across the full range of human activities, including social, educational, religious, recreational, and economic life, encompassing both public and private spheres. These cultures tend to be territorially concentrated, and based on a shared language’ (1995: 76).

⁹ Preamble and Art 1.

¹⁰ Chart of Signatures and Ratifications of Treaty 157

http://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/157/signatures?p_auth=u7kf3oLH Date accessed: May 23, 2016.

¹¹ E.g. Reservations and Declarations for Treaty No 157

http://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/157/declarations?p_auth=u7kf3oLH Date accessed: May 23, 2016.

¹² Report of the CSCE Meeting of Experts on National Minorities, Geneva, 19 July 1991, II, para 4.

¹³ CAHMIN (94) 14, Proposals Concerning the Preliminary Draft Framework Convention for the Protection of National Minorities, p. 17 (the Romanian delegation).

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- ¹⁴ E.g. *Lovelace v Canada*, Communication No. 24/1977, CCPR/C/13/D/24/1977 (30 July 1981) and *Kitok v Sweden*, Communication No. 197/1985, CCPR/C/33/D/197/1985 (27 July 1988).
- ¹⁵ CAHMIN (94) 13, 3rd meeting, 11-15 April 1994, pp. 5-6.
- ¹⁶ Adopted 30 September 1997.
- ¹⁷ E.g. ‘Comments of the Government of Germany on the Third Opinion of the Advisory Committee on the Implementation of the Framework Convention for the Protection of National Minorities by Germany’, 6 December 2010, GVT/COM/III(2010)005, p. 20.
- ¹⁸ See also recent reports of abuse of reserved quota system in relation to higher education in Kosovo (European Centre for Minority Issues, 2015).
- ¹⁹ Application no 27138/04, 27 April 2010 (ECtHR) Fourth Section.
- ²⁰ Application nos 27996/06 and 34836/06, 22 December 2009 (ECtHR) Grand Chamber.
- ²¹ Examples include the Roma and representatives from Greenland and the Faroe Islands in relation to Denmark, and the Sami in Norway.
- ²² Application no 44158/98, 17 February 2004 (ECtHR) Grand Chamber.
- ²³ Resolution CM/ResCMN(2012)20 on the implementation of the Framework Convention for the Protection of National Minorities by Poland (Adopted by the Committee of Ministers on 28 November 2012 at the 1156th meeting of the Ministers’ Deputies).
- ²⁴ Resolution CM/ResCMN(2015)3 on the implementation of the Framework Convention for the Protection of National Minorities by Poland (Adopted by the Committee of Ministers on 4 March 2015 at the 1221st meeting of the Ministers’ Deputies).
- ²⁵ For example, the ACFC noted the use of the term ‘tsigan’, considered to be derogatory, to refer to the Roma in Romania (2012: para. 42).
- ²⁶ ‘Cornish Fight for Ethnic Status’, *Western Morning News (Plymouth)*, January 11, 1999, p 8.
- ²⁷ Hansard, 6 March 2007, col 1872W, Meg Munn, Communities and Local Government.
- ²⁸ Morris, S. ‘Cornish recognised as national minority group for the first time’, *The Guardian*, April 24, 2014, UK news.
- ²⁹ Hansard, 6 May 2014: Column WS148, written statement Secretary of State for Communities and Local Government (Eric Pickles) made on 28 April.
- ³⁰ ‘Census is in the wrong over the important question of identity’, *Cornish Guardian*, August 13, 2015, pp. 14-15.
- ³¹ *The Cornishman*, July 2, 2015, p 16.
- ³² ‘It’s back: ‘Devonwall’ constituency talk’, *West Briton*, May 13, 2015, pp 30-31
- ³³ Aalt Heringa, Giorgio Malvinverni and Joseph Marko, Comments by Council of Europe experts on certain aspects of a future Bill of Rights for Northern Ireland (2004) para 65.
- ³⁴ This is due to be adopted by the ACFC in 2016.
- ³⁵ ACFC, 49th meeting Strasbourg, 10-12 February 2014, ACFC/MR(2014)001, para. 20
- ³⁶ ACFC, 52nd meeting, Strasbourg, 16-19 March 2015, ACRC/MR(2015)001, para. 13

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