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The Development and Nature of Minority Rights in International Law

Azınlık Haklarının Uluslararası Hukukta Gelişimi ve Doğası

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Abstract

This study aims to demonstrate the weak legal value of minority rights in international law and the reasons of this weakness by approaching to the issue from a historical and legal perspective. In addition, the study also deals with the nature of minority rights. In this regard, the focus is on the debate revolving around whether they have individual or collective characteristics. The study approaches to the debate by analyzing various theoretical perspectives and showing how individual and collective elements in the international legal documents are presented.

Keywords: *Minority Rights, Nation-State, Individual Rights, Collective Rights*

Öz

Bu çalışma, konuya tarihsel ve hukuksal bir perspektifle yaklaşarak, uluslararası hukukta azınlık haklarının zayıf hukuksal değerini ve bu zayıflığın nedenlerini göstermeyi amaçlamaktadır. Öte yandan, çalışma, azınlık haklarının doğası üzerinde de durmaktadır. Bu doğrultuda, azınlık haklarının bireysel niteliğe mi, yoksa kollektif niteliğe mi sahip olduğu hususu etrafında dönen tartışmaya odaklanılmıştır. Çalışma, çeşitli kuramsal perspektifleri tahlil ederek ve bireysel ve kolektif unsurların uluslararası hukuksal belgelerde nasıl sunulduğunu göstererek tartışmayı ele almaktadır.

Anahtar Kelimeler: *Azınlık Hakları, Ulus-Devlet, Bireysel Haklar, Kolektif Haklar*

Introduction

Minority rights constitute a relatively less developed field in human rights regime. The tension between minority rights and the founding principles of the nation-state seems to be the main reason of this underdevelopment. The sensitiveness of the issue mostly takes root from the fact that this type of rights depend on a collective identity. This can often cause various worries for the nation-states and the dominant cultures on which the nation-states were built. With regard to this, the debate on the definition of minority rights -whether they have individual or collective characteristic- can be considered to be the core arguments on minority rights. Apart from universal individual rights, the debate concentrates on whether protection of minority cultures requires group-based rights or not.

This article will examine the same question by concentrating on opposite views and the Framework Convention of European Council on Protection of National Minorities. The study consists of two chapters. The first chapter begins with the theoretical background of minority rights and then deals with the development of minority rights in international law. The second chapter begins with showing the individualistic characteristic of the doctrine of human rights and then analyzes the theoretical debate about whether group identities require individual or group-based rights. The second chapter concludes with an analysis of the Framework Convention in terms of the above mentioned debate and attempts to demonstrate the relations between minority rights and the identity processes of groups.

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Theoretical and Historical Background of Minority Rights

The Nature of the Nation-State and the Concept of Citizenship as Sources of Tension

Minority rights appeared as a response to the founding principles of the nation-state, as well as the monolithic nature of citizenship which forms a main pillar of the nation-state. The nation-state assumes that the nation is racially or ethnically homogenous. This consequently requires minorities to be assimilated into the dominant culture, as the long history of nation states have shown. The assimilation was mainly based on linguistic homogeneity. From this perspective, citizenship can be considered as a tool of nation building and its homogeneity tendencies, as emphasized by Kymlicka and Norman (2000, p. 10-11) :

> " […] in many multi-ethnic and multinational states the rhetoric of citizenship has been used historically as a way of advancing the interests of the dominant national group. The discourse of citizenship has rarely provided a neutral framework for resolving disputes between the majority and minority groups; more often it has served as a cover by which the majority nation extends its language, institutions, mobility rights, and political power at the expense of the minority, all in the name of turning supposedly 'disloyal' or 'troublesome' minorities into 'good citizens'."

In line with Kymlicka and Norman's argument, Brubaker (1994, p. 311-312) draws attention to the fact that citizenship which is something about *nationhood* at the age of the nation-state, requires not only being egalitarian and sacred but also being based on nation-membership. It means, "[t]he political community should be simultaneously a cultural community, a community of language, mores and character. Only thus can a nation-state be a nation's state, the legitimate representative and the authentic expression of the nation" (Brubaker, 1994, p. 312). It should be noted that the process of creating citizenship on such bases overlaps with the invention of nation or in other words the process of nation-building. As Tambini (2001, p. 198) points out, "[t]his process of nation-building drew on existing social, cultural, linguistic and religious divisions, and resulted in numerous disputes and conflicts"; because, "the language of nation tends to mask other important differences and sources of identity" (Tambini, 2001, p. 198). Furthermore, as mentioned above, the language of nation and the universal citizenship not only tend to mask other important differences and sources of identity but also seem to eliminate them in favour of the dominant cultural identity. In this respect, Kymlicka (1995a, p. 10) defends the argument that the framework of the nation-state supports the majority's language, history, culture, and calendar; and therefore, "it is not 'neutral' in its relationship to cultural identities."

The Development of Minority Rights

It is widely believed that the League of Nations could not establish a universal system for the protection of minorities (Çavuşoğlu, 2001, p. 22). As Eide (2005, p. 34) underlines, "[m]inority protection under the League was […] not based on the Covenant, but on special minority treaties signed at the Paris Peace Conference or contained in special chapters regarding minorities in peace treaties." Furthermore, the period between two World Wars witnessed the abuse of the existence of minorities by National Socialist Germany.

Unlike the League of Nations, the United Nations tended to handle minorities in the context of universal individual rights and exclude a separate system for the protection of minorities (Smith, 2003, p. 309). It can be said that the principle of non-discrimination was considered as an instrument supporting the rights of *persons belonging minorities*. However, the principle of self-determination which, to a certain extent, concerns minorities is mentioned in the Charter of the United Nations (Art. 1, para. 2 and Article 55). In addition, the United Nations seemed to draw attention to minorities by establishing the Sub-Commission on the Prevention of Discrimination and the Protection of Minorities (1947) aimed at dealing with the issues of minorities.

The United Nations declared its first obvious provisions for the protection of minorities in the International Covenant on Civil and Political Rights (ICCPR) (1966). Despite the recognition of the right to self-determination of peoples in Article 1, as it is considered, "[…] the history of the covenant shows that minorities, as such, do not have a right to self-determination (and secession) generally" (Ramcharan, 1993, p. 37). Therefore, the right to self-determination in the ICCPR can be ignored with regard to minorities. Hence, Article 27 of the ICCPR appears as the most visible provision:

> "In those States in which ethnic, religious or linguistic minority exists, persons belonging to such minorities shall not be denied the right, in community with other members of their group, to enjoy their own culture, to profess and practice their own religion, or to use their own language."

The weakest aspect of the ICCPR, which also reduces the legal value of Article 27 is that the Covenant recognizes a mechanism for supervision which forces the parties just to prepare reports showing the precautions taken by them in order to implement the provisions (Article 40). It is well known that the reporting system does not include a real enforcement mechanism for the implementation of rights. In addition to the reporting system, the ICCPR includes optional inter-state (Art 41) and individual applications (optional Protocol no: 1) to the Human Rights Committee. However, the Committee cannot give any judicial decision which might force the parties to adopt. In other words, like the reporting system, the applications to the Human Rights Committee cannot create any real enforcement.

Until the beginning of 1990's Article 27 seemed to be the only important norm with regard to minority rights. The serious ethnic conflicts which occurred after the fall of the Wall of Berlin and the collapse of the Soviet Union forced the international community to new strategies. Therefore, in 1992, the United Nations declared a specific declaration focusing on minority rights: the United Nations Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities. In the same period the Conference on Security and Co-operation in Europe (CSCE) handled ethnic issues and created the Geneva Declaration on the Rights of Minorities (1991). The provisions of two declarations can be rehearsed briefly (Ramcharan, 1993, p. 30-33):

- *The right to existence*: According to the Article 1 of the United Nations Declaration on the Rights of Persons Belonging to National or Ethnic Religious and Linguistic Minorities, States shall protect the existence of minorities within their respective territories.

- *The right to identity*: Article 1 of the United Nations Declaration underlines that States shall protect the national or ethnic, cultural, religious and linguistic identity of minorities within their respective territories, and *shall encourage conditions for the promotion of that identity*. The CSCE Geneva Declaration on the Rights of Minorities (1991) states that persons belonging to national minorities have the right freely to express, preserve and develop their ethnic, cultural, linguistic or religious identity and to maintain *and develop their culture in all aspects, free of any attempts at assimilation against their will.*

- *The right to participation*: Article 2 of the United Nations Declaration provides that persons belonging to minorities have the right to participate effectively in cultural, religious, social, economic and public life. Similarly, principle III of the CSCE Geneva Declaration grants the right of persons belonging to minorities to effective participation in public affairs.

- *The right to establish associations*: Both of the declarations recognize this right clearly.

- *The right to establish and maintain contact*: Article 2 of the United Nations Declaration grants persons belonging to minorities the right to establish and maintain, without any discrimination, free and peaceful contacts with all members of their group, with persons belonging to all minorities as well as contacts across frontiers with citizens of other States to whom they are related by national, or ethnic, religious or linguistic ties. Similarly, the CSCE Geneva Declaration implies the same right.

- *The right to culture*: This refers to the right to enjoy one's own culture, to profess and practice one's own religion, and to use one's own language. Article 2 of the United Nations Declaration grants these rights as well.

- *The right to protection*: This right includes not only being protected against external pressures but also having facilities to promote cultural identity. It means that State is expected to present positive action. The CSCE Geneva Declaration expresses this right. It is mentioned that the participating States are expected to take the necessary measures to protect the ethnic, cultural, linguistic and religious identity of national minorities and create conditions for the promotion of that identity.

It seems to be important that both texts are *declarations*. There is no doubt that both of them have an intention to overcome or, at least, mitigate ethnic conflicts. However, a significant deficiency in achieving the purpose must be noted. This arises from their non-binding legal status. In addition, like the ICCPR, they do not have enforcement mechanisms, which causes another weakness.

The Council of Europe adopted the European Charter for Regional or Minority Languages (1992) whose aim is to protect and promote regional and minority languages as well as enable speakers of a regional or minority language to use it in private and public life.[1] Even though the Charter forms a component of the development of minority rights in international law, it covers only language rights. In other words, it protects a part of minority rights. After three years following the declaration of the Charter, the Council of Europe adopted the Framework Convention for the Protection of National Minorities (1995) which constitutes a significant step for recognition of the rights of minorities in international law.[2] Despite appearing as a regional attempt, it has relatively higher value as being a binding convention and including a wide range of minority rights.

The Framework Convention includes the right of every person belonging to a national minority to freedom of peaceful assembly, freedom of association, freedom of expression, and freedom of thought, conscience and religion (art. 7), the right to profess and practice religion (art.8), the right to use minority language in media (art.9), the right to use minority language in private and in public orally and in writing (art.10), -under certain circumstances- the responsibility for the Parties to provide the access to administrative authorities in minority language (art. 10/2), the right to use surname and first names in minority language (art. 11/1), the right to display in minority language signs, inscriptions and other information (art. 11/2), -under certain circumstances- the obligation for the Parties to allow to display traditional local names, street names and other topographical indications in the minority language (art. 11/3), the right to set up and to manage private educational and training establishments (art.13), the right to learn minority language (art.14/1), -under certain circumstances- the obligation for the Parties to provide education in minority language (art.14/2), the right to participate in decision-making process (art.15), the obligation for the Parties to refrain from measures which alter the proportions of the population (art. 16), the right of persons belonging to national minorities to establish and maintain free and peaceful contacts across frontiers with persons with whom they share an ethnic, cultural, linguistic or religious identity or a common cultural heritage (art. 17/1), the right to participate in the activities of non-governmental organizations, both at the national and international levels (art. 17/2).

It should be underlined that some expressions used by the Framework Convention seem to weaken the obligations of the parties. In many places, the Convention conditions the rights with the words like "as far as possible" (in art. 10), "where such a request corresponds to a real need" (in art. 10), "parties shall endeavour" (in art. 10, 11, 14), "where appropriate" (in art. 11, 12), "when there is a sufficient demand" (in art. 11). It can be argued that such expressions may seem to be conceivable in a convention titled *framework*. However, it is obvious that these expressions provide a wide range of opportunities for the parties to ignore the obligations mentioned in the Framework Convention.

As ICCPR does, the Framework Convention recognizes the *reporting system* as the mechanism for supervision (art. 25). As mentioned above, it seems difficult to achieve the aims of the Convention through such a system, which excludes judicial processes or any kind of effective sanctions. This is not to say that the Framework Convention has no value. On the contrary, it still maintains its unique position as being the most comprehensive and systematic text dealing with minority rights directly. In addition, as Çavuşoğlu (2001, p. 133) points out, the Framework Convention may affect the European Court of Human Rights; the Court might consider the Convention as a supporting secondary norm.

1 The Charter entered into force in 1998. So far, it has been signed by 33 states and ratified by 25 states.

2 The Convention entered into force in 1998. So far, it has been signed by 43 states and ratified by 39 states.

The Nature of Minority Rights: Are They Individual or Collective Rights?

As Donders (2002, p. 63) emphasizes, "[w]hile the value of cultural membership for individuals is generally agreed on, the question remains of how the cultural identity of communities and individuals can be best protected." It can be said that, the debate on whether the minority rights should be approached in an individualistic or a collectivistic way forms the centre of gravity in this issue.

It is well known that the development of the principles of the human rights is closely related with the rise of the *individual* through the modernity and is thus strongly connected to idea of independent and free individual as emphasised in liberalism. According to Glazer (1995, p. 126),

> " […] the language and theory of the protection of human rights developed in a time and place (England in the seventeenth century) when the issue was seen as one of deprivation because of conscience, because of individual decision and action, rather than one of deprivation because of race, color, or national origin**.** England was relatively homogeneous, except for religion and political attitudes… These were seen as individual decisions, and protecting diversity was seen as an issue of protecting the diversity that flowed from individual decisions."

Indeed, the classical human rights consisting of the rights such as the freedom of expression, and the right to live were developed based on the individual. Although social rights following classical human rights have strong collective aspects, they have been considered as individual rights. There is no doubt that, this individual-centric development emerged from the above described nature of the doctrine of human rights. In this regard, it should be remembered that, " […]the doctrine of human rights consecrated in the Universal Declaration of Human Rights and in earlier national declarations such as the English, American and French bills of rights, emphasizes protection of the mental and corporal integrity of the individual" (Ramcharan, 1993, p. 28).

In this evolution some legislations, to a certain extent, occurred as exceptions. First article of both the International Covenant on Civil and Political Rights (1966) (ICCPR) and the International Covenant on Economic Social and Cultural Rights (1966) (ICESCR) focused on the right of self-determination which has obvious collective aspects. Furthermore, it can be said that Article 27 of the ICCPR brings the individualist approach under pressure even though it was mostly formulated with an individualist approach.

It is a striking point that in spite of its individualistic formulation ("persons belonging to such minorities"), the provision seems to carry a hidden reference to the requirement for the protection of the collective identity of the minority by mentioning "[…] in which ethnic, religious or linguistic minority exists". As Dunbar (2001, p. 94) underlines, "[w]hile the Article 27 rights is enjoyed by individuals, in order to claim the protection of Article 27, both a 'minority' must exist and the individual must be a member of that minority." Thus, the article confirms that minority rights present collective aspect even if they are formulated mainly with an individualistic approach.

As Eide (2005, p. 41) points out, "[t]his provision was substantially weaker than that which the Sub-Commission had originally intended. First of all, the right was vested in individuals rather than groups, and secondly, it imposed passive obligations on states." However, it can be claimed that the emphasis in the article brings a safeguard for group identity. As it is mentioned, "[…] the collective element found in the language of this provision clearly shows that States are at least under a positive obligation to protect the very existence of ethnic, religious and linguistic minorities" (Ramcharan, 1993, p. 33). Furthermore, "[t]he necessity for a group identity of a minority was reinforced by the inclusion of 'in community with other members of their group'. The rights enshrined in Article 27 are thus based on the interests of a collective group, the individual can exercise those rights solely on the basis of his or her membership of the group" (Smith, 2003, p. 313).

The evolution of human rights throughout the post-war period posed mostly individualistic characteristic due to classical liberal effects. According to this classical liberal position as described by Donders

(2002, p. 53), "[…] cultural membership is adequately protected by universal individual human rights […] in principle, cultures do not need State support to survive. If a culture is worth saving, its members will do so." It can be said that this position, which does not give independent weight to group identities, assumes that the individualistic approach is integrationist and connective and that in contrast to it, the group-based approach is discriminatory. Glazer (1995, p. 133-134) who declares himself openly as the supporter of individual-rights approach at least for the United States, describes that:

> "I believe the key principle that does in fact and should determine for a multiethnic state –including the United States- whether it elects the path of group rights or individual rights, is whether it sees the different groups as remaining permanent and distinct constituents of a federated society or whether it sees these groups as ideally integrating into, eventually assimilating into, a common society."

Furthermore, Glazer tends to define individualistic approach as colour-blind (Glazer, 1995, p. 132) which refers to removing any ethnic meaning from citizenship. In addition to that, he argues against the group-based approach as it has "considerable social costs", causing disintegration as result of protecting group identities (Glazer, 1995, p. 136).

Kymlicka is very critical of the classical perception and the claims made by Glazer. He does not agree with the argument that individual-based universal human rights provide equal protection for all citizens, nor that any nation-state based on the individualistic approach, can be defined as being neutral or colour-blind (Kymlicka, 1995b, p. 51-52). According to him, universal human rights have resulted in the erosion of the differences between communities and caused assimilation and homogenisation of minority groups (Kymlicka, 1995b, p. 28-31). Kymlicka is therefore not convinced that a nation-state based on individual rights is colour-blind and it treats the various cultural groups within its boundaries equally. He challenges Glazer's claims by underlining these points:

> " […] is the United States neutral with respect to language, for example, or history, or the calendar? English is the language of public schools in the United States, and of court proceedings, and of welfare agencies. Government legislation and regulations are printed in English… the 'neutral state' can be seen, in effect, as a system of 'group rights' that supports the majority's language, history, culture, and calendar… This is a system of 'non-discrimination', in the sense that minority groups are not discriminated against within the mainstream institutions of the majority culture, but it is not 'neutral' in its relationship to cultural identities" (Kymlicka, 1995a, p. 10).

In this regard, Kymlicka points out that the nature of the nation-state depends on the pre-supposition that the nation is racially or ethnically homogenous. In order to put such a fictional description into practice, the nation-state has tended to assimilate minorities into a dominant culture often based on linguistic homogeneity. As Kymlicka tries to emphasize, the individualistic doctrine of universal human rights may have supported this policy. In most cases citizenship overlaps with the identity of dominant culture and the framework of individual rights appears to be a catalyst within this process. Indeed, in Glazer's description, individualistic way aims to "ideally" integrate minority groups, even "eventually" assimilate them, into a common society (Glazer, 1995, p. 134).

It should be noted here that, as a liberalist thinker, Kymlicka does not seem to be against individual rights or against the concept of nation-state as a whole. Rather, he stresses that the individualistic formulation of human rights can provide protection for individuals to a certain extent, based on the universal citizenship but not for the individual as a member of a particular group. Therefore, apart from the universal individual rights, he defends group-differentiated rights which mainly aim to protect minority groups against the interventions of the central political power (Kymlicka, 1995b, p. 27-33). However, Kymlicka (1995b, p. 75), as a liberalist thinker, also in favour of providing a check-balance system by giving priority to individual against internal oppression of group.[3]

3 In this regard, Kymlicka shares the same position with Charles Taylor. Taylor (1994, p. 62) who also defends a sort of group-differentiated rights, gives priority to the individual rights such as the right to life and the freedom of expression when cultural practices of a particular group are in contradiction with the above mentioned rights.

Examining the Framework Convention of European Council on Protection of National Minorities in Terms of the Theoretıcal Debate

Although the Framework Convention mainly tends to handle the rights with an individualistic approach by insisting on using the expression of "persons belonging to those minorities", in some provisions however, it seems not to refrain from mentioning collectivistic expressions. Furthermore, some rights arranged in the Convention present structurally collective characteristics.

The Preamble of the Convention gives independent weight to "national minorities" in addition to "persons belonging to those minorities" in paragraph 12 by saying "the effective protection of national minorities and of the rights and freedoms of persons belonging to those minorities". This can be interpreted as recognizing group identity as a separate phenomenon.

Article 3/2 declares that "Persons belonging to national minorities may exercise the rights and enjoy the freedoms flowing from the principles enshrined in the present framework Convention individually as well as in community with others." It can be claimed that the provision indicates collective characteristic of minority rights. This type of rights can be enjoyed through a collective unit and generally through collective activities. Therefore, the article seems to acknowledge this basic fact.

Article 10, imposing the obligation for administrative authorities to use the minority language in relations with the persons belonging the minority, requires a collective demand by mentioning "if those persons so request". There is no doubt that the demand is expected to come from the collective unit with a collective action. The same condition also appears in article 11/3, which provides "the Parties shall endeavour […] to display traditional local names, street names and other topographical indications intended for the public also in the minority language when there is a sufficient demand for such indications."

An obvious emphasis on the group identity as a whole can be seen in article 15. According to the provision, "The Parties shall create the conditions necessary for the effective participation of persons belonging to national minorities in cultural, social and economic life and in public affairs, in particular those affecting them." The right can shortly be described as the collective right to participate in decision-making process or to political participation. Some of the measures which, according to the Explanatory Report (paragraph 80), the provision forces the Parties to take are:

- "involving these persons in the preparation, implementation and assessment of national and regional development plans and programmes likely to affect them directly"
- "effective participation of persons belonging to national minorities in the decision-making processes and elected bodies both at national and local levels."
- "decentralised or local forms of government"

The provision and its explanation partly overlap with one of the categories of Kymlicka's group-differentiated rights: self-government rights (Kymlicka, 1995b, p. 27). Such measures most likely require a certain representative quota for the minority, which means recognizing the group as a whole. There is no doubt that the representatives are expected to participate in decision-making process in the name of the group.[4]

Article 16 declares that "The Parties shall refrain from measures which alter the proportions of the population in areas inhabited by persons belonging to national minorities and are aimed at restricting the rights and freedoms flowing from the principles enshrined in the present framework Convention." This provision also reminds of Kymlicka's theoretical framework which insists on the external protection of the group as a whole against state intervention (Kymlicka, 1995b, p. 64-70).

Finally, Article 17/2 arranges the right of persons belonging to national minorities to participate in the activities of non-governmental organizations, both at the national and international levels. It is obvious that representatives are expected to participate in such activities in the name of the group. This provision also gives an indirect emphasis on group identity.

4 According to Çavuşoğlu (2001, p. 110), even though such measures are formulated with an individualistic approach, they aim to recognize and protect the community and therefore pose collective charactersitic.

Conclusion

The aim of this article was to show the development of minority rights and their collective aspects by focusing on theoretical debates and examining the Framework Convention for the Protection of National Minorities. The study has argued that, as the Framework Convention proves, it seems almost impossible to ignore the collective aspects of minority rights and refrain from arranging them, to a certain extent, with a group-based approach. In addition, the article underlined that the nature of the nation-state and its founding principles of citizenship appear to be sources of tension for minority issues. This can be, to a certain extent, overcome, or, at least, mitigated by minority rights which in themselves constitute collectivistic aspects.

As mentioned above, the long history of the classical nation-state has demonstrated that the assimilation attempts of the nation-states and the purely individualistic approach to minority rights overlap. However, in last two decades what we have been witnessing is a relative shift away from the traditional approach to a mixture of individualistic and collectivistic approaches.

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