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## **HOW RIGHT IS THE RIGHTS OF CHOICE? CONSTITUTIONAL AND OTHER LEGAL REMEDIES IN THE CASE OF THE GREEK MINORITY IN ALBANIA**

*The respect of minorities' rights (and especially national minorities as part of them) has always been a challenge in both international and domestic legislation. One of the most important features of belonging to a national minority is the concept of self-declaration, which is associated with both objective and subjective criteria. Despite being sanctioned inter alia by the Framework Convention for the Protection of National Minorities (FCPNM), both notions, but especially the subjective one, comprise within themselves not well-established social, political, and legal concepts and procedures. In the present article, we shall try to analyze what those criteria are and to what extent the State can interfere with them. We shall also try to see and evaluate the limits of both objectivism and subjectivism together with the advantages and disadvantages of the right of choice as a result thereof, with a special focus on the Greek national minority in Albania and the respective legislation.*

**Keywords:** national minorities, FCPNM, right of choice, objective and subjective criteria, Greek minority, Albania.

### **1. INTRODUCTION**

The study of ethnicity is a difficult exercise that combines both historical, political, social, and, of course, legal elements. In general, ethnicity is part of the collective identity of people created through the centuries by language, religion, traditions, and other elements, unlike nationality, which has on its center the State and its institutions. Ethnicity remains a fluid concept that aligns itself with the path of the society and its changing imperatives. In the case of Albania, the legal aspect of ethnicity has gone through important changes. Initially, it was considered part of the personal data of the citizens defined by the declared ethnicity of the parents and inherited to by the children in a direct and immutable form. With the passage of time and the enrichment of the Albanian legislation with more human rights protection mechanisms, it has become a matter of conscience based on objective

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and subjective criteria which accompany citizens living either inside or outside the historical minority areas. The purpose of this article is to legally evaluate those changes and put those criteria into a more legally oriented framework, having as a point of reference the solidarity of those groups as per their ethnic belonging based on common elements of tradition, religion, language, etc.

## 2. GENERAL CONCEPTS OF ETHNICITY

In the beginning, we should consider a certain difference in the context between “ethnicity” and “nationality”. While nationality is a relatively new phenomenon, connected to the creation of the nation-state and the impact of state related structures in fostering it to the people the national belonging idea, ethnicity and ethnic sentiments are not, since we find primordialist conceptions of groups of people based on ties of kinship, language, religion, race, common experience, and common ground as early as antiquity (Berstein & Milza, 1995). It is because of this approach that the concept has developed from the essentialist or “natural” ethnicity of the nation-building myths. These myths present nations as perennial and “natural” entities, simply waiting for the right political opportunity to “awaken.” The current discussion has also transcended racial and phenotypic (objective biological characteristics that express genetic inheritance, e.g. skin tone, hair colour, eye colour, etc.) definitions of the identity of population groups. On the contrary, ethnicity is currently discussed in conceptual terms. Ethnicity is, therefore, the conscious expression of collective identity, the way in which groups of people consciously decide to manifest their collective identity in relation to other groups of people at various historical junctures. Consciousness contains the basic limitation of self-determination. As Benedict Anderson, among others, has shown, self-identification/self-perception often results from the adoption and acceptance of external hetero-identifications (“ethnic” perception) (Anderson, 2006, p. 40). Jonathan M. Hall, on the other hand, attempts to define ethnicity by devoting a larger part to the phenomenon of ethnicity, the history of its study and the mechanisms of formation and dynamic evolution of ethnic groups (McInerney, 2003). Before proceeding further, it is necessary to say a few words about Fredrik Barth's "instrumentalism". According to Barth (who is considered the father of modern ethnology), ethnic groups are primarily subjects of historical events. Ethnic groups are formed because their constituent populations at a specific moment have an interest in uniting. Ethnogenesis is circumstantial, situational, and often evanescent (Levine, 1999). In order to ensure the coherence of the subject, a strong sense of solidarity is required from its constituent members. Emphasis is placed on the existing similarities of the members (e.g., language, religion, customs, etc.) while existing differences are downgraded (always language, religion, customs, etc.). At the same time, new similarities and new bonds are invented and usually presented as long-standing traditions. The above process is summarised in the saying “imagined communities with invented traditions” which connects the title of Benedict Anderson’s book “Imagined Communities” with Eric Hobsbawm’s principle of “invented traditions” area (Anderson, 2006, p. 36). Often this process is described by the saying that “the past is interpreted differently at different times, so that it remains constantly meaningful.

What instrumentalism also emphasises is the flexibility and adaptability of ethnicity. When the subject we call an ethnic group finds itself in new circumstances, then it can change the existing tradition, for example, to integrate new populations or to exclude old members, or finally, to secure rights in a region.

### 3. CONSTITUTIONAL AND LEGAL CHANGES AND THE RIGHTS OF CHOICE

The concept of nationalism and ethnicity became the subject of public debate and legal or social evaluation in Albania right after the fall of the communist regime (1991) as part of the more general context of the rights of conscience and speech. In the initial stages of the democratisation process in Albania and the legal reforms that followed the fall of the communist regime, the country was mainly oriented towards a broad protection of human rights and minority rights for two reasons:

1. The first reason is the very fact that during communism, the Albanian legislation on human rights protection was simply an empty page, so almost everything had to be rewritten as a domestic obligation to have that kind of legislation.
2. The second reason combines both political and legal needs in showing mainly to the international community the goodwill and responsibility of Albania in respecting the generally accepted norms in the aforementioned area (Ziogas, 1995).

Based on this reasoning, the Albanian Parliament in 1993 for the first time in Albanian history passed the law nr. 7692, date 31. 3. 1993 on “Basic human rights and freedoms”<sup>1</sup> and made it an integral part of the Law nr. 7491, date 29. 4. 1991, “On the main constitutional disposition”<sup>2</sup>, which was serving at the time as an interim Constitution of the State (Parliament of Albania, 2010).

As it is specifically mentioned in the preamble of the “Constitutional Dispositions” the country recognises the immediate need of such legal settlement mainly due to: “*Considering that during the savage 46 years of a communist dictatorship of the Party-State, in Albania have been violated and denied through State terror all civil, political, economical, social, cultural and human rights ... decided the inclusion of this law on human rights as a separate chapter of the law on the main constitutional provisions*”(Parliament of Albania, 2010).

This change in the legislation included a very important provision mentioned under article 26, specifically sanctioning in its paragraph 2 that: “*Ethnicity is decided based on the accepted international norms*”<sup>3</sup>. During the discussion of the aforementioned provision, a strong issue was raised between the MPs representing the Greek minority into the Albanian Parliament and another group of the so-called “nationalistic hard core” of the Democratic Party representatives. The minority MPs stressed this article must specifically refer to the freedom of choice as for nationality(ethnicity)<sup>4</sup>, in a clear and

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<sup>1</sup> Law nr. 7692, date 31.3.1993 on “Basic human rights and freedoms”.

<sup>2</sup> Law nr. 7491, date 29.4.1991, “On the main constitutional disposition”.

<sup>3</sup> Law nr. 7692, date 31.3.1993 on “Basic human rights and freedoms”.

<sup>4</sup> In this case as in general in the present research with the term nationality/ethnicity means the national belonging of the people in clearly differentiating it from the citizenship.

open form, with the other side not accepting the very existence of the second paragraph (Parliament of Albania, 2010).

The conclusion was a middle political ground, mainly trying to bring the two parties as close as possible to a political consensus, which had to be then reflected into the law (Parliament of Albania, 2010). It is evident that such provision is mainly inspired by the Document of Copenhagen, article 26/1,<sup>5</sup> and the right of choice. The most important aspect, in fact, was the shifting of such a problem from the domestic into the international legal framework, giving major importance to the latter. Such legal settlement can be considered as an important step forward in protecting minority rights but still remains a vague article and with a lot of discretion as to its implementation and/or interpretation (Dule, 2010). The new Albanian Constitution of 1998 and its amendments thereafter do not refer anymore to this kind of settlement,<sup>6</sup> pursuing the path of neither positive nor negative discrimination. The first law, “On the civil status”<sup>7</sup> of the democratic Albanian State in force from 2002 to 2009, has no reference to ethnicity as part of the main generalities of a person, making the issue of ethnicity thereof not a mandatory element. Such absence made ethnicity a pure case of self-declaration, such as religion, which also is not to be found in any legal and personal document of the Albanian citizens.

The Albanian legislation on this subject initially changed from an internationally oriented legal doctrine, as mentioned above, into a strictly domestic one, settled by article 58, paragraphs 1, 2 and 7, of the Law Nr. 10129, date 11. 5. 2009, “On the civil status”, which abrogated and replaced the previous law. The article specifically states that the child takes the ethnicity of the parents, or in case parents have different ethnicities, that of the father, with the right to change it at the age of 18, as long as a special note has been placed on the register.<sup>8</sup> So, we have witnessed the passage from a general, vague norm of international law, into a rigid and genuine *ius sanguine* norm of the domestic legal system (Spahiu, 2011).

By sticking so strictly into the sanguine origins of the ethnicity, which are the fruits of a purely administrative act created from the moment a child is born, having consequences for the rest of his/her life, the right of ethnicity declaration as a product of conscience and freedom of choice becomes really limited (Dule, 2010). Considering that people living outside the acknowledged minority areas were always registered as Albanian nationals during communism (Ziogas, 1995) and enjoyed neither the right of choice, nor the right of being recognised as part of the minority, the problem shall still exist; “*parents’ heredity*” will follow them all the time (Idrizi, 2025). Of course, the entire legal settlements, as evident from the above analysis and the aforementioned theory on minorities’ rights, are based on personal rights and not group or community rights. In fact, this legal reform and the actual status of the Albanian legislation are genuine evidence of the personal rights theory (Lerner, 1995).

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<sup>5</sup> CSCE/OSCE. 1990. Document of the Copenhagen Meeting of the Conference for Security and Co-operation in Europe (CSCE).

<sup>6</sup> The Constitution of the Republic of Albania of 1998.

<sup>7</sup> Law nr. 8950, date 10.10.2002, “On the civil status”.

<sup>8</sup> Law nr. 10129, date 11.5.2009, “On the civil status”.

In order to meet the high standards of human rights as those sources from articles 25 and 35 of the Albanian Constitution, the Constitutional Court of Albania on its decision Nr: 52, Date: 01.12.2011 decided that the term: “ethnicity based on the ethnicity of the parents” as foreseen by the Law on Civil Status art. 42/2 and 58, jeopardise the juridical security of the citizens as enshrined in the aforementioned articles of the Constitution.<sup>9</sup>

Therefore, when it comes to the right of choice according to the actual legislation, such has become strictly a matter of conscience and as such cannot be subject to official declaration and personal data of the citizens.

#### 4. GREEK MINORITY OUTSIDE ‘MINORITY AREAS’ AND PROBLEMS OF COMMON CONSCIENCE

In treating the issue of the minorities outside the historically considered “minority areas” composes a hard task, mainly as it regards the legal support of this principle *per se*. Almost all the international agreements, treaties, or declarations refer to the minorities only to that territorial extent already recognised by the States in terms of exercising their collective rights (Ermaçora, 1983).

Article 27 of the International Covenant on Civil and Political Rights (1966) refers to minorities where they exist. Taking this as the initial spot, Roukounas argues that, starting here, governments have considered the interpretation of this article only in the already accepted and recognised minority areas within their states (Roukounas, 1995). An obvious example is the recognition of the Austrian minority in Alto Adige (Italy) based on the treaty between Italy and Austria in 1947 (Tomuschat, 1984).

But, what’s the level of treatment for the persons if taken for granted they belong to a certain minority, but they do not live within the prescribed minority areas? In order to analyse this, first we need to decide on the way how such individuals can be considered as part of the minority to their personal level and bounded only by their feelings, conscience, or belief.

When it comes to specifically the Greek minority in Albania, perhaps it is worth to describe in brief those main common elements that created the Greek nation and see how they apply either historically or today into that part of the population living in the areas of Himara in South Albania, which is not officially considered a “minority area” (Veremis, 1995).

Historically, the main characteristics of the forming of the Greek nations were starting from the most important one: religion, language, common traditions, and historical conscience (Dimaras, 1995). By religion, it is meant the Orthodox Christian faith of the Eastern Church and language, the Greek one having its roots in antiquity and coming into our era in its modern form, but always as a natural development of the same language (Dimaras, 1995). The people living in the described area of Southern Albania seem to have in common at least the first two key elements. The mother tongue spoken in part of that region, mainly in the city of Himara itself and the other two villages Dhermi and Palasa is Greek, in a form of a certain dialect (Georgoulis, 1995). In this respect, we should consider that in almost all minority areas, the Greek element is not the only one living in the specific lands, but it is mixed with other Albanian populations. On the other side, religion

<sup>9</sup> Constitutional Court of Albania, decision nr. 52, dt. 01/12/2011.

is entirely Orthodox (Georgoulis, 1995) by tradition in the aforementioned cities and/or villages. According to Leonodas Kalibratakis: “*the regions where the Greek minority comprises the majority are not exclusively fully concentrated as a whole, but they are interrupted by overlapping Albanian communities. The case of Himara is the par excellence example, but the same can be said about other regions also...*” (Kalibratakis, 1995).

According to the Municipality of Himara’s webpage, only in the village of Dhermi (Drymadhes) there are at least 35 Orthodox churches and a strong feeling of orthodoxy is evident if someone travels into the area: “...*An interesting fact here is that Drimadhes has numerous churches, about 35, one in about 20 families...*” (Himara, 2025).

If we try to link the aforementioned reasons and criteria to the article 32, paragraph 1, of the Document of Copenhagen as per the right of choice then the matter becomes really realistic: Individuals having the right of choice within a very specific framework of circumstances which connect them to a specific nation, which are not in a dominant position and furthermore exploiting the definition of Prof. Capotorti: “*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*” (Capotorti, 1995).

The problem arising with the Document of Copenhagen remains in the fact that it does not constitute a *jus cogens* norm. The Document is a clear political act with no explicit binding force, barely falling under the soft-law category and making only general observations and engagements (Heraclides, 1997, p. 40). But on the other hand, states are bound to act positively as for the treatment and their relations to persons belonging to all kinds of minorities, as agreed upon by the Framework Convention for the Protection of National Minorities (1995). The combination of political engagement for the settlement of disputes or the achievement of standards must be the main driving force of any legal act that can spring from such political will. Therefore, laws either national or international should be restricted or widened, respectively, to the case; as a result, not only of international legal acts *per se* but also from the “political” legislator giving source and birth to those acts (Balkanweb, 2025).

So, the right of every individual concerning their ethnicity or minority belonging has its own dimension in its personal rights and is strictly accompanied by the exercising of such rights in the community, at least according to the current general theory of international law.

## **5. THE CONTINUATION OF LEGAL ACTS AND THEIR BINDING FORCE IN THE CASE OF HIMARA**

The continuity of the obligations by the Albanian state is strongly connected to two main elements such as:

The continuity of the Albanian State *per se*, which is already extensively elaborated in the respective chapter above.

The continuity of the legal obligations of the State as for the status and rights of its minorities.

After the Albanian independence and its Declaration in front of the LoN of the year 1921, minority schools continued to exist along with the other recognised schools in even today's areas, like in the region of Himara (Georgoulis, 1995), as well as in other regions inhabited by Greeks or Grecophones (Glenny, 2000, p. 414) and they were also subject to the results of the PCIJ advisory opinion on the Greek Minority schools' case.

In supporting such an argument, the Albanian government included the reopening of the schools of this region on its tasks as resulting from the aforementioned opinion (Georgoulis, 1995).

Greek language schools in the region continued to function up to the first years of the communist regime, and they were finally closed in the year 1946 (Georgoulis, 1995). The closing of those schools did not refer to any international treaty or even standard, but they simply fell into the general disrespect and lack of legitimacy in human rights issues, which was a characteristic of the communist regime and its dictatorial nature (Annual Register of Elementary education).

Therefore, if taken into account the two initial issues of continuity (both of the Albanian State and its international obligations), it results that the area was already part of the minority area, regardless of the fact that it was detached geographically from the rest of the historical minority area; nevertheless, it formed a quite concentrated region mainly based on the two villages (Dhermi and Palasa) and the city of Himara.

If the case of the Albanian Declaration in front of the LoN (1921) direct applicability can be found under the famous article 26 of The Vienna Convention on the Law of Treaties, "*pacta sunt servanda*".<sup>10</sup>

So, we have at least two elements in considering this part of the country as a minority area, and most importantly, the people living there as belonging to a certain minority. The first is a kind of emotional and a matter of conscience by their use of Greek as mother tongue and the strong belonging to the Orthodox tradition which combined thereof create a first common characteristics of that specific nation<sup>11</sup>.

It must be noted than when referring to the mother tongue we have present as for the definition of this concept the recommendation of the European Parliament (EP): "*Communication in the mother tongue: Communication in the mother tongue is the ability to express and interpret concepts, thoughts, feelings, facts and opinions in both oral and written form (listening, speaking, reading and writing), and to interact linguistically in an appropriate and creative way in a full range of societal and cultural contexts; in education and training, work, home and leisure...*"<sup>12</sup>.

The second is more legal or legalistic by the continuity of the international obligations of Albania. This second element must also be connected to a third fact of the same nature: almost all the aforementioned international treaties and/or agreements convey one point: the situation of minorities has to be improved by the passing of time and not deteriorating (Roukounas, 1995, p. 300). This has a logical conclusion the effective protection of human

<sup>10</sup> The Vienna Convention of the law of Treaties of 1969.

<sup>11</sup> The Vienna Convention of the law of Treaties of 1969.

<sup>12</sup> Recommendation of the European Parliament and of the Council of 18 December 2006 on key competences for lifelong learning (2006/962/EC)", *Official Journal L 394,30/12/2006 P.0010 -0018*.

rights and minority rights which comes, among others, from the preamble of the FCPNM specifically mentioning that: "...Being resolved to define the principles to be respected and the obligations which flow from them, in order to ensure, in the member States and such other States as may become Parties to the present instrument, the effective protection of national minorities and of the rights and freedoms of persons belonging to those minorities, within the rule of law, respecting the territorial integrity and national sovereignty of states"...<sup>13</sup>

As far as all precaution measures are already taken by the member States, and to the extent that such rights either do not pose a threat to the territorial integrity or sovereignty of the State, or do fully respect the rule of law within the State, there is no legal barrier to their implementation.

## 6. CONCLUSION

In conclusion, it can be stressed that the concepts of nationality and ethnicity have gone through important changes in the path of history. Despite being State fostered of developed under traditional forms, these concepts create today important legal consequences and as such they should be legally treated and protected. The Albanian post-communist legislation has undergone the same process of adoption, focusing on minority people who have lived within the historical minority areas and those outside such areas. The concept of self-declaration has made belonging to a national minority either inside or outside traditional minority areas a pure matter of conscience in combining both objective and subjective elements of that concept. As all matters of conscience, it remains a strictly personal issue, protected by both international and domestic legislation and no discrimination can be applied in law and practise.

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<sup>13</sup> "Framework Convention for the Protection of National Minorities", in *European Treaty Series - No. 157*, 1995.

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