

Concluding reflections

Minorities and minority rights in the work of the Council of Europe: a concluding assessment

The nature of the challenge to the peoples of Europe arising from the minorities issue was discussed in the Introduction. To recapitulate, it essentially resulted from a sea change in awareness of minority questions in theory and practice, resulting from the influence of globalisation, the upsurge in minority-related conflict and the effect of the eastward expansion of European horizons. The present assessment focuses on the response of the Council of Europe in terms of standards, mechanisms and practice in the area of minorities and minority rights.

A set of criteria for gauging the work of the Council appear in the General Course on Human Rights given at the Academy of European Law by T. van Boven, who writes (elaborating on a point by M. Nowak) that:

It may at least be expected that European systems for the promotion and protection of human rights represent an additional value as compared with the global system. In this connection the three criteria mentioned by Nowak provide useful advice and guidance. The first criterion is that through the regional system a pioneering or innovative effort is made. The second criterion relates to the introduction of a higher level of protection. The third criterion corresponds to clearly established needs of a particular region.¹

The author points to possible contradictions between the various elements in that, for example, restrictively interpreting ‘the needs of the region’ might result in a lowering of levels of protection. This takes us back to earlier reflections, and again invites consideration of the broader international and European context in which the developments are set. The criteria of “innovation, protection and needs”² suggest that we should offer a critical account of standards, mechanisms and practice, including consideration of the resources devoted to the issue in question, consistency in the distribution of praise and blame for human rights, the “performance” of states, and the growth of public knowledge and awareness of rights.

On standards and practice

Standard-setting is legitimated and demanded by the Statute of the Council of Europe, which refers to “safeguarding and realising” the ideals and principles which are the common heritage of member states and “the maintenance and further realisation of human rights and fundamental freedoms”.³ In terms of the Nowak/van Boven criteria, it is important to remember that standards continue to develop.

Since the report version of this work in 1994, we have witnessed the emergence of the Framework Convention and its coming into force, and that of Protocol No. 12 of the ECHR, as well as an increased awareness of ethnic issues in the practice of the ECHR capable of further development, but also the “failure” of initiatives, such as the additional protocol to the ECHR on minority rights.⁴ To this must be added an increase in attention to minority protection by the principal organs and the Secretariat of the Council of Europe, and an ever-sharper focus on particularly disadvantaged or “targeted”⁵ groups such as the Roma/Gypsies. In view of the emergence of a number of focal points, the possibility of further standards emerging should not be discounted, even if the “vocation of the age”⁶ is to make existing standards work better in practice.

The European Convention on Human Rights

It is abundantly clear that minority rights are fully integrated into the contemporary canon of human rights at the Council of Europe, as well as in the United Nations, the OSCE, the Central European Initiative and the Council of Baltic Sea States, and in a multitude of bilateral arrangements in Europe. The European Union has proclaimed respect for cultural and linguistic diversity.⁷

In the Council of Europe in particular, the ECHR has been assessed for its strengths and limitations on minority issues. The results are mixed. The “indirect” approach of the ECHR to minority protection has produced an indispensable matrix of rights for the basic freedoms of citizens, and a broad commitment to pluralist democracy essential for minorities to thrive. The contribution of the ECHR to the democratic protection of European citizens is enormous. Although the text is relatively “light” on key questions such as non-discrimination, because of the subsidiary character of that principle in the text of the Convention, possibilities of development are present.⁸

Some early decisions of the organs of the Convention, such as the *Belgian Linguistics* case, have tended to inhibit normative movement. However, the greater sensitivity to minority questions in the Council

of Europe and beyond should gradually produce effects on the interpretation of norms: in particular, the advent of Protocol No. 12 inter-relates the convention system with broader developments in international law and their rich content of minority rights. The influx of judges to the Court from parts of Europe where minority issues are well understood will also have its effects. The emergence of complementary norms such as those in the Framework Convention should not inhibit the development of the Court's jurisprudence: the potential synergy between the two instruments, working within their frames of reference, is capable of having positive systemic effects on the minority question.

The innovative potential of the ECHR is reflected in its global reputation as a major depository of justiciable human rights norms.⁹ While the level of its standards on minority rights could be compared unfavourably with analogous instruments, such as the ICCPR, this stems primarily from textual limitations, strongly suggesting that further possibilities of elaboration of additional protocols in the minority/ethnic/cultural diversity field should not be abandoned.¹⁰

The Framework Convention and a note on “autonomy”

The Framework Convention for the Protection of National Minorities is now the Council of Europe's “flagship” in the sphere of minority rights. Critics, including the Parliamentary Assembly,¹¹ had a field day when the text emerged, comparing it unfavourably with the UN declaration, the OSCE Copenhagen Document, and other documents. The text is marked by a trenchant “individualisation” of norms, and an extreme caution in its language. On the other hand, compared with the ICCPR, it innovates in the field of languages, education, participation, and the “defence” of the integrity of minority areas. It does not approach the uplands of autonomy.

Besides the important conceptual contribution made by the Congress, in establishing the connection between minority protection and “autonomy” and in developing the substance and practice of territorial autonomy generally,¹² the most explicit employment of “autonomy” in connection with minorities in the corpus of instruments of the Council of Europe appears in Recommendation 1201 (1993) of the Parliamentary Assembly, Article 11 of which provides:

In the regions where they are in a majority the persons belonging to a national minority shall have the right to have at their disposal appropriate local or autonomous authorities or to have a special status, matching the specific historical and territorial situation and in accordance with the domestic legislation of the State.¹³

Recommendation 1201 itself is peculiar, since it is a recommendation for an additional protocol to the European Convention on Human Rights, a protocol which has never emerged.¹⁴ As noted, the recommendation has gained a high political profile by being used as a reference document by the Parliamentary Assembly when it examines applications for membership of the Council of Europe and in its post-accession monitoring procedure.¹⁵

The controversy surrounding the proposed article relates to its qualified endorsement of a right to territorial autonomy for persons belonging to national minorities. The polemics and public expressions of concern surrounding Recommendation 1201 reached such a pitch that the proposed Article 11 became the subject of an opinion by the Venice Commission.¹⁶ The reference to autonomy in the proposed article is tentative and qualified. The “local” is contrasted with the “autonomous” (authority) and there is the additional possibility of a “special status”. Any of the three alternatives must “match” the “specific historical and territorial situation” and be “in accordance with ... domestic legislation” of the state.

The qualifications are such as to make it unlikely that a particular autonomy pattern could be “forced” upon an unwilling state. This reading coheres with the views of the Venice Commission, for whom the proposed Article 11 does not have the mandate for “acceptance of an organised ethnic entity within their territories”,¹⁷ although “being allowed to have local or autonomous authorities represents the most consummate fulfilment of the demands of concentrated minorities within unitary States”.¹⁸

On the phrase “in accordance with the domestic legislation of the State”, the Venice Commission observes that it “is the State that prescribes the legal framework within which the right may be exercised”, while the phrase also “contains a guarantee that a legal framework will exist for the exercise of the right”.¹⁹ It is instructive that the opinion of the Venice Commission on Article 11 comments on the existence of a right to participation rather than autonomy in the Framework Convention, implying that one language can to some extent remedy the lack of another. The Venice Commission observes that “participation in public affairs is above all a question of personal autonomy, not of local autonomy”.²⁰

Instead of the discourse on autonomy, what the Framework Convention reveals – its ruling idea – is the demarcation of local space, analogously to the cultural/spatial/use concepts deployed by the Human Rights Committee in relation to indigenous groups. The minorities do not own the space in public law, but their presence is to be manifested through a series of public permissions and possibilities set out in the convention. The concepts recognise attachment, historical presence, tradition, force of numbers, needs and spatial integrity. The minorities do not have

explicit control, but rights to defend and resist any forced alterations of character, to print their names and make their mark on the territory, along with the names and marks of their non-minority neighbours.²¹

The Framework Convention is an enormously important instrument for the Council of Europe, and deserves a generous appropriation of resources to fulfil its vocation in volatile political spaces. As suggested in Chapter 2, the balance between the political body (the Committee of Ministers) and the expert body (the Advisory Committee), is crucial to success. As far as possible, the Framework Convention should be “managed” by the experts, engaging with governments and civil society in transparent processes of dialogue that give as little space as possible to insinuations of political compromise and fix. Experience from the ECHR and UN expert bodies suggests that the greater the insulation from the vagaries of politics, the greater the prestige of the instrument.

It is instructive that experience with the ECHR moved it towards a rigid (judicial) as opposed to a flexible (political) system. One may hope to see a similar practice for the Framework Convention. The balance achieved between the political and the expert will prove or disprove the theses of the convention’s many critics. On the basis of the evidence in Chapter 2 of the present work, the omens are favourable for the entrenchment of the Framework Convention at the heart of European minority policy.

The Languages Charter

The Languages Charter is an innovative instrument. There are no real equivalents in the canon of international law. The principles it elaborates are synthesised with other texts in the Oslo recommendations regarding the linguistic rights of national minorities, and the guidelines on the use of minority languages in the broadcast media prepared under the auspices of the OSCE High Commissioner on National Minorities, suggesting the emergence of a new canon of human rights in the field of languages. The language question has been of cardinal importance in the development of minority rights in Europe and has frequently been the cause of tension and conflict. As has been observed, the language issue was a staple of the League of Nations system. UN endeavours focused on the question of discrimination in the area of languages, rather than the promotion of positive linguistic rights, although the ICCPR²² and the UN Declaration on Minorities have developed the concept, as has the OSCE. The ECHR has not developed a canon of language rights with any great clarity. Language in the Framework Convention is addressed in key articles.

The difference between the Languages Charter and the other cited instruments is that the charter is about the languages, rather than the

rights of speakers. This “deflection” facilitated the emergence of the text at a time when the Council of Europe arguably represented an unfavourable institutional environment for minority rights. The situation has changed to a considerable extent since minority rights were brought into the mainstream of human rights and into the work of the Organisation as a whole. As an example of innovation, the charter possesses admirable technical qualities, and if its potential is truly unleashed, it can achieve a great deal for the preservation and strengthening of linguistic and cultural diversity in Europe.

A number of countries have recognised this in ratifying the charter, and/or building charter prescriptions into other documents – the UK-Ireland Good Friday Agreement, for example.²³ In the EU Charter of Fundamental Freedoms, the recognition of respect for cultural and linguistic diversity has great potential for synergy for European states. Countries that have difficulty with the minority concept may have less trouble with the charter. On the other hand, van Boven’s criterion of adding to international standards requires careful reflection. In particular, it is suggested that the implementing bodies of the Languages Charter and the Framework Convention should keep a “watching brief” on each other’s work. Ideally, the charter can function as a detailed, technically appropriate application of Framework Convention principles within its own sphere. Any effect on rights standards requires careful attention to general principles of non-discrimination and minority rights in the application of the charter. In all this, background “universal” rights standards should not be forgotten.²⁴

The Roma/Gypsies

The situation of the Roma/Gypsies²⁵ represents a kind of testing-ground for international standards and mechanisms, as well as domestic law and practice. The situation of the Roma figures prominently in virtually all reports of states under the Framework Convention, and in the jurisprudence of the ECHR. Landmark documents emanating from the Council of Europe include Recommendation 1203 (1993) of the Parliamentary Assembly and the ECRI General Recommendation No. 3 (1998), on combating racism and intolerance against Roma/Gypsies. This document was drafted in consultation with Roma organisations, representatives of a people who wish to be called by their own name. Many difficulties experienced by Roma can be addressed by conscientious application of equality and non-discrimination principles.

However, the contribution of positive cultural rights should not be underestimated.²⁶ For example, many applications of “development” policy include attempts to eliminate poverty by programmes that neglect the cultural dimension and do not go to the root causes – which may be

precisely those neglected and under-appreciated cultural dimensions. In the case of the Roma, insistence that there is only a “social” issue to be unravelled may be similarly blind. The work of ECRI assists in developing awareness that the practice of “travelling” may have important cultural dimensions; and there are others. The settled state has difficulties with this practice, but the difficulties are not insurmountable with goodwill and effort, including efforts at mutual understanding. As ECRI notes, legal measures will not be enough; education is key. Failure to improve the lot of the Roma will be taken as symptomatic of a wider failure to cope with the reality of diversity, so often celebrated in theory, if not in practice. As the Political Declaration of the European Conference on Racism put it:

Europe is a community of shared values, multicultural in its past, present and future; tolerance guarantees Europe’s pluralist and open society, in which cultural diversity is promoted.

The treatment of Roma through international effort and local practice tests this hypothesis to the full.

On minorities

In the introduction to the present work, A. Eide’s definition of “minority” was offered as a working hypothesis. The practice of the various bodies/institutions of the Council of Europe does not offer much further clarification. Restrictive readings of “national minority” found directly in texts such as Parliamentary Assembly Recommendation 1201 (1993), and indirectly in the Languages Charter, are not followed through with any consistency. By way of example, the Parliamentary Assembly, as observed, has dealt with non-citizens in the course of its work on minorities, and the drafters of the Framework Convention found themselves unable to arrive at a consensus about the meaning of “national minority”: restrictive approaches adopted by some states under the convention are open to challenge by the Advisory Committee and to critical comment by other states.²⁷

In such cases, the background criterion presented by international law in general – recalled in the introduction to the present work – should be borne in mind: the existence of minorities is a question of fact, not of law. The principle of “fact, not law” does not prohibit states from determining how many and which minorities exist on their territory, but indicates that they should “tell it how it is”, and not report to treaty-bodies and others through an ideological fog. The rich variety of European minorities is not suited to the application of reductionist, norm-avoiding characterisations. Definitions, it may be noted, abound at the domestic and community levels. Their absence at the level of international law is

partly accounted for by the nature of the system, which remains essentially dynamic and fluid, allowing for development, change and adaptation. Another reason is the capacity of people to define themselves, to say who they are as persons and collectives.

The legal point is that all definitions are open to international scrutiny, and that the “resolution” of a definition puzzle is ultimately conceived as a dialogic exercise in which individuals, communities and states should play a part, as can international bodies. In this last respect, the bodies of the Council of Europe have adopted a range of stances towards the “existence” of minorities: by defining (above), by encouraging states to keep the questions open (the Advisory Committee), or by applying criteria in a manner approaching the parameters of a definition (the Venice Commission).

On the related question of indigenous peoples, we have not advanced a characterisation of these groups – apart from an initial reference to ILO Convention No. 169 – but have observed their presence through the lenses of undifferentiated human rights and of minority rights: references to the Saami and to the Inuit of Greenland appear in various chapters; the position of the Roma under ILO Convention No. 169 has been the subject of comment by the ILO.²⁸ This omission of a specific account of indigenous rights is not in any way to demean their claim to the status of peoples in international law, but suggests only that at least some of their claims can be advanced through the rights practice and instruments set out in this volume.²⁹ Perhaps it is time that “Europe” elaborated a treaty on indigenous rights: especially in view of the considerable enlargement of the number of indigenous and “tribal” groups in the Council’s sphere as a result of the accession of the Russian Federation and other states of the CIS.

Mainly on mechanisms

Council of Europe summits, the Committee of Ministers and its monitoring procedure

The intergovernmental bodies of the Council of Europe have not always been active pursuers of minority issues. Only when confronted with situations of massive conflict involving the fate of minorities in Europe after the fall of the Berlin Wall did they become actively engaged in finding a role for the Organisation, and then only after initiatives by other organisations, such as the OSCE, were well under way. The minority issue began to be addressed in the context of the process of enlargement towards the east after the end of the cold war. Since 1993, two Council of Europe summits have highlighted this issue as one of the top priorities,

and the Vienna Summit, in particular, devoted a large share of its decisions to concrete steps facilitating minority protection. This has brought the Organisation to the forefront of minority protection in Europe, in both standards and monitoring mechanisms.

It should be noted, however, that the procedure to monitor the implementation of commitments by the member states, recently established at the level of the Committee of Ministers (CoM), has not paid specific attention to the minority question. The principle of “non-discrimination” among states characteristic of thematic monitoring – along which lines this monitoring mechanism has been mainly developed, implying that a specific issue of concern under the procedure should be approached in all member states simultaneously – may have contributed to the minority issue not being firmly brought under the monitoring agenda.

The high level of sensitivity of the minority question for interstate relations seems to favour a CoM preference for leaving the minority question to the separate, voluntarily undertaken monitoring machinery, endowed with legal parameters and expert filters, provided under the Framework Convention. As a result, a substantial number of states, especially those which have not signed or ratified the Framework Convention, may remain shielded against addressing the minority questions within their borders. Whether the political consensus will be reached to overcome this fencing-off of minority issues – by means of the CoM monitoring mechanism – remains an open question.

The CoM’s thematic monitoring procedure will most probably continue to address topics that are relevant to minority protection, even without dealing with that issue expressly, but in its own slow-moving, isolationist and formalised ways. Whether the minority question is ever brought under the CoM’s monitoring procedure will probably depend on the assessment of its performance in addressing connected topics. Results under thematic monitoring so far seem to have reflected underachievement rather than success, especially in tackling issues concerning West European states.

Urgent human rights situations in specific states need prompt and high-profile political action. The failure to incorporate that kind of flexibility into the mainstream of thematic monitoring possibly resulted from fears by Western states that any new tools could be used against them in the future, but that inflexibility has been the cause of lost opportunities to address specific country situations under the CoM’s monitoring mechanism.

That difficulty of adapting has also determined the need to develop parallel, country-specific procedures whereby the non-discriminatory

criterion is abandoned. These alternative, more intrusive country-specific forms of monitoring under the CoM's monitoring mechanism, developed since 2000, have been instrumental in dealing with outstanding aspects of human rights protection and democratic performance in some states, selected on the basis of realpolitik considerations. Aspects of minority protection have been touched upon as a result.

However, the non-discriminatory spirit of the CoM monitoring mechanism overall may, ironically, act as a deterrent to prevent this country-specific monitoring being applied to an ever growing number of states, due to fears – by western European states, in particular – that assessment of their own performance could be next in line. This fear may spread to the “new democracies”, which, in the aftermath of membership of western organisations may no longer feel compelled to show a higher level of performance, especially in the field of minority protection. They may also lose the incentive to engage in monitoring exercises that go beyond the light, non-intrusive kind which thematic monitoring provides, and which still allows wide scope for selective consideration..

It will be up to the CoM to opt for continued low, slow performance in isolation – keeping its monitoring mechanism fenced off even from interaction with other institutions (originally perceived as useful) and from any direct input from civil society – or to make a choice for progress and the benefits derived from external contribution instead. The latter would seem to serve better the “spirit of our time”, which perceives such interaction as an essential element of international co-operation, especially in view of the growing weight of the non-governmental sector and societal dialogue. From this perspective it would seem that a substantial effort lies ahead and challenges the CoM and its present approaches.

It remains to be seen whether the high level of concern for minority protection that the Council of Europe has declared in recent times will endure, once conflicts involving minorities – conflicts that have devastated Europe – have reduced in intensity. There may now be an emerging interest, for an ever-growing majority of Council of Europe member states, in sweeping the minority issue under the carpet once again.

On the basis of non-discriminatory treatment among states, there will be no reason to continue to address the minority question in central and eastern European member states of the Organisation and not to do so in the western ones. Therefore, much will depend on the level of political support that the Committee of Ministers is ready to give to the standards and mechanisms recently set up at its own initiative. If minority protection really becomes a shared concern for European states in practice and if the will to engage in active co-operation in order to address it is finally proved, it will show that the lessons from the past have finally been learnt.

Intergovernmental co-operation activities

Several intergovernmental committees operating under the authority of the Committee of Ministers are responsible for developing co-operation between member states in areas relevant to minority protection. An important aspect of the work of these committees, in which they have achieved varying success, has been their promotion of international instruments relevant to minority protection. This has concerned not only their conceptual work of standard-setting but also their work to promote accession by states to existing international instruments. Insufficient attention and follow-up seems to be frequently given to the policy recommendations resulting from the – often very thorough – analysis in which these committees engage, analysis which occasionally involves consultation processes that extend into civil society. As illustrated by the recent suspension of the very valuable work so far of DH-MIN in particular, progress achieved in the framework of these committees may be easily jeopardised by changing priorities.

In spite of the general lack of transparency and public information about the concrete activities of these committees, the information available indicates that DH-MIN in particular had become an important instrument of interstate dialogue and exchange of experience among states on minority questions, undertaking activities highly relevant for the definition of minority protection. It had undertaken important initiatives concerning minority groups that are in an especially vulnerable position, possibly falling beyond the scope of current minority protection regimes, and it increasingly engaged in dialogue with civil society on minority questions. In the absence of the DH-MIN however, expert committees, such as the Advisory Committee of the Framework Convention, have taken up part of this activity. In considering the restoration of the DH-MIN, it would be important to guarantee that its activities do not overlap or interfere with existing expert work, but serve to support and complement it, by reaching out to aspects of minority protection which are not covered by existing international instruments and expert bodies.

Similarly, the activities of the European Committee on Migration (CDMG) seem to have contributed to the development of new conceptual approaches to integration policies, applicable in many cases to all types of minorities, including the new minorities resulting from migration flows. In recent times, the CDMG has increasingly focused its activities in identifying concrete problems that make the integration of these minorities especially difficult and finding the avenues to overcome them.

While some of the achievements of the work done under the aegis of the Council for Cultural Co-operation (CDCC) were of high relevance for minority protection, they were not followed up by the CDCC itself as a

result of lack of political support. On the other hand, some of its activities, which have been continued under the GR-C, such as the cultural policy reviews, have shown increasing awareness of minority protection aspects. However, a much higher degree of awareness of and attention to these aspects, as well as the provision of practical guidelines for their effective redress at the domestic level, still need to be provided, if the protection of cultural diversity is to acquire any real meaning.

Cultural protection is an area where much still needs to be achieved; and this applies also at the level of the Organisation generally, as recent regulatory attempts illustrate. Progress in this field could provide a very useful channel by which to address minority concerns in the future, so practical work in this area by the Organisation remains of the utmost importance, and the standard-setting objective, especially under the ECHR, should remain a priority.

The European Population Committee (CDPO/CAHP) has made a very important contribution in carrying out an assessment of the objective conditions of minorities in the member states. This will be highly relevant in the approaches to be taken by the international community towards the development of concrete policies in the area of minority protection in the member states, and in determining the adequate content such policies should have. It is to be hoped that the committee's findings will be taken into consideration.

Finally, the CDLR's work has started to take an interesting path, given its recent engagement in direct dialogue with territorial authorities in states on practical aspects of territorial self-government. This can contribute to facilitate improvements in state practice in areas of particular relevance for minorities, such as transfrontier co-operation. With the support of the Congress of Local and Regional Authorities of Europe a debate has been opened on the establishment of the legal and other mechanisms needed to allow territorial self-government to develop in practice, both within individual states and in the framework of the Organisation overall. However, in view of the follow-up provided to the activities of the intergovernmental committees generally the existence of a real and continuing commitment of Council of Europe governmental structures to co-operative and effective action in the field of minority protection remains in the balance.

Activities of the secretariat

The former Council of Europe Secretariat activities concerning minority protection, under the ADACS programme, were mostly limited to those carried out under the joint programmes on minorities with the EU Commission. The joint programme on minorities constituted the first

thorough attempt to promote effective co-operation between representatives of government offices responsible for minority questions. The programme lacked a built-in system for continuity, and was discontinued despite its very positive results and the positive assessments received by the governments voluntarily involved, with an increasing number of western European states participating.

Coincidentally, the joint programme was discontinued when the initiative for the expansion of the programme to states in western Europe generally and the more active involvement of civil society were both gaining momentum. The groundwork and achievements of the joint programme on minorities should not be abandoned and allowed to decay, but should be built on and developed instead. This is especially so since it proved suited to assisting states to address practical aspects of minority protection and existing gaps in it under international instruments, including the Framework Convention. The continuation of the programme, or the start of a similar one, allowing for interstate dialogue on practical concerns and an adequate degree of NGO input, could strongly contribute to the positive redress of minority questions by Council of Europe states.

Other important activities of the Secretariat have concerned the provision of legal assistance in addressing minority questions, and the promotion of recently adopted legal instruments relevant to minority protection. The work presently carried out by the departments dealing with implementation of the Languages Charter and the Framework Convention require especial consideration. It is in the context of their activity – in support of the work of their corresponding expert bodies – that some of the most interesting Council of Europe initiatives involving dialogue between governments and civil society on minority issues within states are currently being developed. Similarly, Secretariat activities in the cultural policy field remain highly important, and support for cultural policy reform recently under way in several Council of Europe states should pay a higher degree of attention to minority concerns.

Finally, under the confidence-building measures in civil society programme, a rapidly increasing number of projects aimed at grass-roots level have been supported. There has also been a simultaneous increase in the level of direct governmental control over the programme. It would benefit from a higher level of transparency, especially as regards the acceptance or refusal of specific projects and their output, which could set an example for better practice at the domestic level. The role of the Secretariat in ensuring that its activities concerning minority questions are promoted also in western Europe, rather than simply concentrating on central and eastern European states as has been the case so far, will help to maintain the Organisation as a relevant actor in connection with this aspect of human rights protection.

The Parliamentary Assembly and its monitoring procedures

The Parliamentary Assembly is the Council of Europe organ with the longest and most active record in dealing with minorities in Europe and in searching for avenues of improvement. Often, the Assembly's prioritisation of specific minority questions has responded mainly to political concerns and its approaches have been affected by a geo-political bias. However, the Assembly has also increasingly paid attention to minority situations which do not attract political attention or which are of little relevance to the friction between geo-political blocs.

Human rights considerations in a more strict sense seem to be progressively gaining ground over political ones. This is a line of thinking and action which should be pursued in the future; it is important also from the perspective of long-term conflict prevention. The Assembly has played an essential role in developing a conceptual framework for minority protection, singling out aspects of political and social life which deserve consideration in relation to this protection, and promoting the adoption of international standards applicable to minorities. The role of the Assembly will remain of paramount importance in keeping the minority question on the agenda of the Council of Europe's inter-governmental bodies in the future, particularly in view of the possible trends towards dilution and decay identified above.

Even if various important Assembly proposals in the field of standard-setting and the establishment of monitoring mechanisms in relation to minorities have been neglected by member states, the Assembly's constant and persistent work in examining and determining relevant aspects, and appropriate levels of protection and commitment to, minority questions has had an important impact. The search for effective solutions to minority questions within the Organisation has largely been due to the Assembly's initiative. The Assembly has shown the flexibility necessary to adapt its approaches to developments resulting from inter-governmental initiatives and activities, or the lack of them, and persevered in advancing its own projects dealing with either standard-setting or implementation.

At the same time the Assembly has followed rather consistent approaches, without losing sight of the need to achieve recognition of appropriate minority rights matched with optimal guarantees for their implementation. The Assembly has placed emphasis on the justiciability of the rights of minorities. This explains the insistence of the Assembly in bringing the question of minority protection under the aegis of the ECHR, via the adoption of an additional protocol to the Convention, dealing specifically with minority concerns.

As to the assessment of state performance, the Assembly's approaches have also been generally consistent, but often undermined by geopolitical considerations. Probably the greatest missed opportunity of the Assembly in recent years regarding minorities was its role in the Council of Europe enlargement process. The possibility of obtaining adequate guarantees for the implementation of minority rights, in connection with the requirements for membership, was not sufficiently used by the Assembly.

The Assembly's part in the assessment of state compliance with accession requirements has undoubtedly contributed to the prominent place occupied by minority protection in the process. Nevertheless, the Assembly's endeavours in this regard have been overshadowed by political imperatives for rapid enlargement. Hence, the Assembly has needed to keep adapting its own monitoring procedures, and creating new ones after closing previous ones, in order to keep responding to situations of inadequate state performance, particularly in relation to minority protection. So from this perspective a "flexibility excess" has been the rule.

On the positive side, this continued process of adaptation has been instrumental in opening new doors for engagement of the "old" or Western democracies in the implementation of minority rights. Whether these states will agree to enter these doors, so that they also actively engage in minority protection, remains an open question. The reputation – and subsequently the acceptability – of the Assembly's procedures will remain in the balance until they do. It is to be hoped that the Parliamentary Assembly will continue to play its important role in keeping the minority question on the agenda of the political bodies of the Council of Europe. Given the possibility that it may now be in the interest of the majority of member states to de-emphasise the minority issue, the activity of the Assembly to prevent such a development will be of paramount importance.

It is likely that specific minority situations, and questions of minority protection, will continue to attract the attention of the members of the Assembly. This may remain true even if the impetus which the minority question has received in recent years – and which has resulted in the mobilisation of the intergovernmental organs of the Council of Europe and the increasing activities of the Secretariat – were to recede in the medium or the long term, especially in the absence of interethnic conflicts. Similarly, it is likely, and to be hoped for, that the Assembly will remain as a source of developments in standard-setting, and will continue to bring the lack of adequate implementation and justiciability of minority rights to the attention of the political bodies.

The Congress of Local and Regional Authorities of Europe and its monitoring procedures

In spite of the consolidation of the Congress as a fully fledged Council of Europe organ only recently, and the parallel development of its monitoring capabilities, the Congress has been responsible, in recent years, for a large share of the most relevant initiatives for the protection of minorities adopted within the framework of the Organisation. The Congress is also primed to become a major focus of daily activity in minority protection within the Organisation. The basic aims of the Congress, such as the achievement of local and regional self-government, are fundamental for minorities.

The Congress quickly grasped the relevance of its activities for minority protection, and has been able to conceptualise this relation, bringing it into the mainstream of its work. The Congress repeatedly succeeds in bringing and incorporating into Council of Europe discourse such concepts as territorial autonomy, which had previously been the source of considerable controversy when raised by the Parliamentary Assembly, and was considered taboo by intergovernmental bodies of the Organisation.

The Congress's monitoring of local and regional democracy in member states has centred mainly on the implementation of the European Charter of Local Self-Government. This has highlighted a series of long-standing issues concerning minorities in various member states. Nevertheless, other instruments of great importance for minority protection, such as the European Outline Convention on Transfrontier Co-operation between Territorial Communities or Authorities, together with its additional protocols, and the Convention on the Participation of Foreigners in Public Life at Local Level, have started to attract the Congress's attention.

The adoption of these instruments by an increasing number of states and their appropriate implementation will be an important pointer for minority protection in the future. The last-named instrument in particular relates to the development of democratic practices within the territorial (particularly local) authorities and communities themselves, and is an aspect of minority protection which will need a higher degree of attention by the Congress. Only through the assurance of minority protection at the local level will it be possible to ensure that genuine democracy becomes a reality at all levels of government.

In the same light, the international initiatives undertaken by the Congress in connection with its Local Democracy Agencies need to be praised. It seems, however, that they have not been receiving enough intergovernmental financial and other support, in spite of the validity of

the local authorities' aims and efforts. The will to remedy this situation seems to be increasingly present, especially through the medium of EU finance.

The Commissioner for Human Rights

The recently-established Commissioner for Human Rights is consolidating a role as a flexible mechanism for the protection of human rights. In spite of the lack of specific references to minority protection in his mandate, minority issues have become one of the main targets of the Commissioner's activities. His attention initially focused on the situation of states undergoing conflict or post-conflict situations involving secessionist regions. Initial invitations for the Commissioner to visit states enmeshed in this type of conflict, following the Commissioner's visit to Russia in relation to the situation in the Chechen Republic, may have raised doubts about the perception by Council of Europe states of the Commissioner's role.

However, the Commissioner has progressively reaffirmed his standing as a monitor of states' general performance in the area of human rights, and especially minority protection, rather than as an instrument to advance the state's position in connection with a particular conflict. Further, the Commissioner has taken the important step of starting to monitor the human rights situation in the states of western Europe, occasionally without mediating a formal invitation of the authorities concerned, adopting a non-discriminatory approach to the implementation of his mandate.

The performance of the Commissioner has been marked by a high level of transparency, openness towards the media and direct contact with civil society. He has established broad channels of communication with Council of Europe organs, as well as dialogue with other international organisations. In contrast to the approach of the High Commissioner on National Minorities of the OSCE, the Commissioner has not seen his role as one of quiet diplomacy.

Although his formal mediation attempts have obtained mixed results, by increasingly relying on information from NGOs and civil society and forwarding their assessment on the human rights situation in the states to the Council of Europe political organs, the Commissioner is contributing to open lines of contact between civil society and governmental authorities under international and public scrutiny. The Commissioner has contributed to highlighting aspects of state performance of which little general knowledge existed, raising international awareness.

The Commissioner's activities concerning specific member states have mainly centred on pointing to existing problems, although the

Commissioner has also made some recommendations as to their solution, and this latter aspect has acquired a growing importance in the development of his activities. It should be highlighted in this connection that the large gap between the extent of the duties given to the Commissioner and the highly questionable level of resources presently at his disposal remains a source of concern. It does not contribute to the making of targeted recommendations, and especially to pursuing and following up their implementation, in spite of the Commissioner's efforts, which are increasingly reflected in the results of his monitoring work. Finally, reference should be made to the conceptual development and standard-definition activity with regard to aspects of human rights in which the Commissioner has engaged. This work has concerned issues that the Commissioner has perceived as being of particular importance to the implementation of his mandate, and related to the fate of minorities in particular.

Governments, citizens and the ownership of human rights

To outsiders, the Council of Europe may appear highly intergovernmental in its approach to human rights, including minority rights. However, the position varies, and the input of NGOs is significant in some areas of activity: for example, the alternative reports under the Framework Convention are capable of having significant influence in practice. The point of all human rights instruments is that they are not in the possession or ownership of governments or the intergovernmental bodies which produced them. In the drafting of the Universal Declaration of Human Rights, attention was switched from the authors of the declaration to the readers by changing the title from the "International Declaration" to the "Universal Declaration", a move designed to shift attention away from the authors of texts to their readers or addressees: all human beings.³⁰

Too much intergovernmentalism is bad for human rights and does not reflect their essence. Thus, the growth of expert committees in the service of human rights in the Council of Europe is to be welcomed. Leading on from the example of the organs of the ECHR, the development of bodies such as the Advisory Committee under the Framework Convention and ECRI is an important pointer to a methodological balance between the demands of governments and the demands of the instruments in question. It is important in practice that expert committees are not regarded as secondary to government imperatives.

In the slow development of human rights since the Charter of the United Nations, the notion that human rights were a deviation from principles

of classical international law has lost ground, to be replaced by the perception that human rights are a new note in the system, with their own validity and independent grounding. It follows that they are not at the mercy of states. They belong to the peoples of Europe and elsewhere. This cardinal principle should and must inform the efforts of inter-governmental organisations, and all those dedicated to the service of human rights.

Coda: on the importance of minority rights

Many practical problems of minority rights can be “solved” (in a technical sense) by the application of principles of non-discrimination. But there are cases where groups ask for explicit “recognition” in law and practice, for increased sensitivity to their voices, and for opportunities to promote their character and culture – not merely tolerance by others.³¹ These demands and desiderata are the stuff of minority rights, symbols of that recognition and care.

While minorities may need more of the Council of Europe’s attention than those who are comfortable, oppression is not unique to minorities. Derrida paints a dramatic picture:

Never have violence, inequality, exclusion, famine, and ... economic oppression affected as many human beings in the history of the earth and humanity ... let us never neglect this macroscopic fact, made up of innumerable singular sites of suffering: no degree of progress allows one to ignore that never before, in absolute figures, have so many men, women and children been subjugated, starved or exterminated.³²

In this theatre of cruelty, the provision of minority rights instruments can appear “light”, frothy, superficial, dealing with superstructural questions of culture and language. Derrida’s macroscopic drama can be set alongside Eagleton who writes that

Culture is not only what we live by. It is also, in great measure, what we live for. Affection, relationship, memory, kinship, place, community, emotional fulfilment, intellectual enjoyment, a sense of ultimate meaning.³³

There is also the point that ethnicity may not be a “light” matter to others. Ethnicity and the perception of “otherness” are distinctive bases of oppression and under-privilege. Poverty results from cultural disintegration. Cultural assertion and self-determination, in negotiation with the norms of the broader community, form a mode of resistance to the narratives and stereotyping of others.

It may be that in time the intense contemporary focus on minorities and their rights will diminish. If the forces of “one state: one nation” and other totalising ideologies become weaker, then oppressed cultures will

flourish again. If threats to minorities emanate from the state, then minority groups and a supportive civil society will appeal and resist. If threats emanate from transnational corporations, the continuing support of the state is vital. In the working through of international standards on minority rights, governments have modified their behaviour, if somewhat unevenly: the glass is half-empty and half-full.

The same could be said of the work of the Council of Europe in this field. On our three criteria, outlined in the Introduction, the work of the Council (in various degrees, depending on its organs) has certainly been pioneering and innovative, exploring areas of minority rights where others feared to tread. A higher level of protection than the global norm has not always resulted from such endeavours, though often it has. With serious if not always flawless strategies, the Council of Europe has attended to the needs of the region and bestowed an example to the world at large.

Notes

1. T. van Boven, "General course on human rights" in *IV: Collected Courses of the Academy of European Law*, Book 2 (1995), pp. 1-106, at p. 18. The citation of M. Nowak is from "The contribution of intergovernmental organisations to an all-European system of human rights protection" in *All-European Rights Yearbook* (1991), pp. 211-20.
2. Present author's emphasis.
3. Article 1 (present author's emphasis).
4. Discussed in detail in Chapter 8.
5. The term is prominent in *the General Conclusions of the European Conference Against Racism*, EUROCONF (2000) 7 Final, 16 October 2000, p. 4 – the category includes persons identified – "targeted" – on grounds of language, religion, national or ethnic origin, migrants, refugees and asylum-seekers, non-nationals, indigenous peoples, etc.
6. Cf. F.K. von Savigny, *On the Vocation of Our Age for Legislation and Jurisprudence* (1831).
7. Charter of Fundamental Rights of the European Union, especially Article 22: "The Union shall respect cultural, religious and linguistic diversity".
8. See references in Chapter 1 to *Thlimennos v. Greece*.
9. See works cited in Chapter 1, and J.G. Merrills and A.H. Robertson, *Human Rights in Europe: A Study of the European Convention on Human Rights* (Manchester University Press, 4th edition 2001).
10. Hence the disappointment expressed in Chapter 1 on the outcome of the UK cases of *Chapman et al.*
11. Notably in Recommendation 1255 (1995).
12. See Chapter 10.
13. Compare Congress Recommendation 43 (1998) on territorial autonomy and national minorities, adopted on 27 May 1998; and the Congress Declaration on federalism, local autonomy and minorities, 26 October 1997. The recommendation links subsidiarity and autonomy, and the preamble affirms that "the use of the subsidiarity principle to assist in solving the problem of national minorities is not detrimental to the unity of the State, but should be an opportunity to strengthen that State's cohesion and solidarity". See the comment below on the legitimisation of the autonomy discourse by the Congress.
14. See Chapter 8.
15. See Chapter 9.
16. Doc. CDL-INF (96) 4, 22 March 1996.
17. *Ibid.*, p. 5.
18. *Ibid.*, p. 7.
19. *Ibid.*, p. 9.
20. *Ibid.*, p. 4.
21. P. Thornberry, "Images of autonomy and collective rights in international instruments on the rights of minorities" in M. Suksi (ed.), *Autonomy: Applications and Implications* (The Hague: Kluwer Law International, 1998), pp. 97-124.
22. Notably in *Ballantyne, Davidson and McIntyre v. Canada*.
23. The Belfast Agreement: Agreement reached in the multi-party negotiations in Northern Ireland, Cm. 3883 (1998).

24. Various remarks in *From Theory to Practice: The European Charter for Regional or Minority Languages* (Strasbourg: Council of Europe, 2002). See also contributions in *International Journal of Minority and Group Rights*, Vol. 6, No. 3 (1999), passim.
25. See Chapter 4 in particular.
26. The strategies of some Roma organisations are moving in the direction of claims to peoples' rights, including self-determination, and the proclamation of a Roma nation: a nation without territory. We may also bear in mind the "Halonen initiative" – a Roma representative body at the pan-European level. For a summary of the original initiative and animated discussion on proposals, see *Roma and the Question of Self-Determination: Fiction and Reality* (Project on Ethnic Relations (PER): Princeton, 2003); and *Leadership, Representation and the Status of the Roma* (Project on Ethnic Relations: Princeton, 2001). For an update of the current state of the initiative, see "Joint French and Finnish contribution on the European Forum of Roma and Travellers, GT-ROMS (2003) 6, 3 July 2003.
27. Discussed in Chapter 2.
28. Introduction.
29. The strategic possibilities for indigenous peoples of various human rights "pathways" are elaborated at length in P. Thornberry, *Indigenous Peoples and Human Rights*, op. cit.
30. J. Morsink, *The Universal Declaration of Human Rights: Origins, Drafting and Intent* (Philadelphia: University of Pennsylvania Press, 1999), p. 33.
31. Hence the recent initiative by some Roma groups declaring themselves a nation, rather than simply relying on rules against discrimination by others against them.
32. J. Derrida (trans. P. Kamuf), *Spectres of Marx* (1994), p. 85, cited in S. Marks, "The end of history? Reflections on some international legal theses", *European Journal of International Law*, Vol. 3 (1997), pp. 449-77, at p. 457.
33. T. Eagleton, *The Idea of Culture* (Oxford: Blackwell Publishers, 2000), p. 131.