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# Introduction: The Outlook for the Protection of Minorities in the Wider Europe

*Marc Weller*

Europe often considers itself the global champion of the legal provision for minorities. After all, the Council of Europe has generated the world's only legally binding treaties on minority rights in general and on language rights in particular. Compliance with minority rights has been imposed as one of the conditions for entry into the EU of the states of Central and Eastern Europe. Furthermore the Organization for Security and Cooperation in Europe (OSCE) has even created an institution to address issues concerning minorities, the High Commissioner on National Minorities (HCNM). Moreover, the EU seeks to promote the position of minorities in its external relations, especially in its near abroad, in states adjoining the newly expanded EU boundaries.

While this may strike one as an impressive balance sheet relating to EU involvement in minority issues, the reality of the situation is very different. Thus far, no coherent policy on minorities has developed within the EU. Minority issues remain intensely controversial. Four out of the present EU members have not ratified the Council of Europe Framework Convention for the Protection of National Minorities (FCNM), with no less than thirteen remaining outside the ambit of the European Charter for Regional and Minority Languages.<sup>1</sup> This is due to the fact that a small number of states either deny the relevance of the issue or adopt a very restrictive approach to it. France, for instance, has long maintained that it is a state of equal citizens, thereby rendering minority provisions superfluous. Greece has limited the application of minority rights to a distant historical context. Even states that have signed and ratified the Convention have, at times, attempted to limit artificially its scope of application to certain minority groups designated by them. Hence, there was a significant dispute involving the Council of Europe FCNM Advisory Committee and Denmark relating to the possible application of the Convention to members of the Sinti and Roma communities. Other states, in particular in Central and Eastern Europe, tend simply to deny the existence of certain groups for complex historical and political reasons. Hence, no minority protection can be accorded to them. Germany and a number of other states are keen to ensure that the legal framework applicable to minorities

is applied to only 'autochthonous' or indigenous groups. This would exclude more recently arrived, often sizeable migrant communities who have settled permanently in EU states.

Some of the more recent EU members are plagued by other concerns. In addition to wishing to exclude the one or other specific group from the definition of minorities, there is the question of substantive entitlements. There is a fear that minority representative groups might deploy the rights granted to them in order to mount a destabilizing political campaign against the central state. This might lead to demands for territorial autonomy, or perhaps even secession, it is sometimes feared.

The EU is a creature of consensus politics. Hence, the position of the Union as an institution on certain issues is disproportionately affected by the concerns of the one or the other of its member states. Given the variety of issues that trouble individual states, this means that the EU indeed may not be best placed to address the issue. Thus far, minority issues have had to be tackled in a fractionated way, almost by stealth. Hence, while the Union has addressed discrimination and social inclusion, cultural diversity, 'lesser-used languages', Roma issues, and several other issues of relevance to minorities, it has been unable to commit itself to initiatives on minorities as such.

This situation did not change with the debate about the Treaty establishing a Constitution for Europe. The drafters managed to include – after much discussion and at the last moment – only a vague reference to minorities among its guiding values. The Charter of Fundamental Rights, which survived the renegotiation process following the failure of the Constitution, does not add anything new. Membership of a national minority is mentioned only as a ground for prohibited discrimination. In this way, the Charter does not really progress beyond the provision for minorities attained at the universal level already in 1966 in the International Covenant on Civil and Political Rights (ICCPR), namely Article 27. That venerable provision originally reflected a very conservative, negative perception of non-discrimination – a view that has long since been overcome in the implementation practice of the ICCPR Human Rights Committee. Modern practice focuses not only on anti-discrimination but also on the obligation of states to create conditions whereby members of minorities can exercise full and effective equality both in law and in fact.

Hesitation in relation to minority issues is of course not only the preserve of the EU. The Council of Europe Framework Convention was drafted as exactly that: a framework. While the provisions of the Convention are legally binding, the states party to it are given a wide margin of appreciation in implementing the commitments that are, in themselves, rather general. With respect to the Language Charter, states have even greater freedom to pick and choose which of the obligations they wish to accept. This approach reflects very much the sense of uncertainty and danger that appears to grip some European governments when engaging with minorities in terms of

legal provision. Accordingly, neither of the two treaties was included within the jurisdiction of the European Court of Human Rights. The provisions contained in the Conventions therefore are not directly justiciable at the European level. Thus, the powerful European Court of Human Rights has only been able to address minority issues in an incidental way. Instead of opting for access to a human rights court, each convention was equipped with its own Advisory or Expert Committee to engage states party in a softer form of implementation dialogue.

There is little else to make up for this gap. The innovative Office of the OSCE High Commissioner on National Minorities is restricted in its mandate. Rather than watching over rule-of-law-based implementation, the High Commissioner's mandate is focused on quiet diplomacy as a means of conflict prevention.

It was, of course, the security dimension that led to the development of standards and mechanisms on minorities in Europe in the first instance. While the ethnopolitical conflicts of the immediate post-Cold War years in Europe triggered a strong interest in this area, and a comparatively rapid reaction, this background also created some of the problems we are facing now. Considering minority issues as security problems stigmatizes minorities or states facing difficult ethnic issues. Minorities are seen as the 'problem' that needs addressing if threats to the stability of existing states or their boundaries are to be avoided. Moreover, this approach has led to a claim of double standards. As a price for admittance to the European Club, the states of Central and Eastern Europe claim that they had to accept solutions that would have been unacceptable for many Western European states.

The question is, what happens now, after the initial process of accession is almost complete? Already, several of the newly admitted states are requesting the Union to direct its attention to minority issues. To them, minority issues are not an alien problem affecting states external to the Union. These are internal issues and problems that need to be engaged within the Union. Consider the dispute between Hungary and neighbouring states about the treatment of ethnic Hungarians living abroad. This problem was addressed through the OSCE HCNM. Now, with all the parties to that dispute having joined the EU, the underlying problems brought out into the open in this instance will need to be addressed as a matter of EU internal policy.

In this environment, it will not remain possible for long to pretend that minority issues cannot, or should not, be addressed as minority issues. Consequently, this book seeks to investigate the prospects for the further development of standards, policies and mechanisms that will address minority issues in the future, now that a very major step in the process of EU enlargement has been completed. This question is relevant, as it is undeniable that the Union will now need to address the minority dimension head-on. However, the institutional set-up for this purpose remains haphazard. As the Union has not been able to include minority issues in its foundational

instruments in a sufficiently broad way, there is no firm legal basis for engaging with this problem, either now or in the future. Instead, it is likely that the Union will continue to address minority problems indirectly, through its policies on social exclusion, employment, culture, and so on. Over time, this may consolidate into a minority policy in its own right. The newly established EU Fundamental Rights Agency is likely to help consolidate this trend.

In the meantime, however, the Council of Europe will retain its pre-eminence in relation to minority issues within the wider Europe, including the EU area. While the European Court on Human Rights will most likely make some inroads into this area, much of this development will continue to be driven by the Expert or Advisory Committees attached to the two Council of Europe conventions on minorities and by the Council's political bodies. The Parliamentary Assembly, where minorities have gained direct representation in some instances, will continue to press for such action.

When considering the institutional furniture on minority issues in the enlarged EU area, a further question arises. What will be the role of the HCNM? In the past, this institution mainly has addressed minority issues outside the EU, in the East or Centre of Europe. But now, much of that area is part of the EU. The HCNM will need therefore to intrude into the EU area, if it wishes to continue tackling many of the unresolved problems there. Moreover, there will be pressure on the HCNM to address its geographic imbalance by also addressing minority issues and problems in Western Europe.

In addition to these institutional questions, there remains the question of legal standards. The FCNM and the Language Charter are seen by many as somewhat imperfect documents that ought to be reviewed and enhanced. In this way, one might overcome the 'framework' character of the legal commitments made, and the dining *à la carte* approach of the Language Charter. However, at present, there seems little appetite for a major revision of the legal framework among the governments of Europe, including the EU members. There certainly seems little prospect for a EU legal instrument on minorities at present. Nevertheless, there has emerged at least a discussion about having the EU join the relevant Council of Europe legal standards, which might in turn have a bearing on minority issues.

Overall, therefore, there is a whole host of issues that now arise in relation to minority issues in the wider Europe. In order to help address these, this book is organized into three main sections. First, we consider some conceptual aspects of the development of minority rights discourse in Europe. Second, we examine the institutional arrangements covering minority issues in Europe. Finally, we consider aspects of the implementation practice of this institutional design and architecture.

In the first section, Will Kymlicka asks whether there ever existed a consensus in Europe on standards relating to minorities. While he finds that autonomy solutions have often been adopted in Western Europe, the

granting of cultural rights appears to have been emphasized in the East. However, many minority groups did not see the latter approach as sufficient. Instead of granting autonomy, recent emphasis has been placed on political participation mechanisms. However, the author considers it unlikely that these will provide a minimum standard of provision for minorities in the future.

Hans-Joachim Heintze addresses a further important conceptual issue in framing provision for minorities for the future. This concerns the long-running debate relating to individual and collective rights. Generally speaking, states have been quite hesitant in relation to the latter, and, as a consequence, most international instruments speak of 'persons belonging to minorities' instead of 'minorities'.

Tove Malloy considers a different kind of collective dimension when she broaches the need to address the ever-increasing diversity of identities in the post-accessions environment. She considers it necessary to enhance the policies directed at sub-national, regional entities seeking to express their cultural identity. This includes even possible integration among them, by way of 'fourth level politics'.

After the principal conceptual debates relating to minority provision in Europe, the book then turns to the newly emerging institutional architecture. First, Gabriel von Toggenburg offers a very comprehensive assessment of the prospects for action within the framework of the EU. While the now defunct Constitution, which may in this respect be carried over into the more modest Reform Treaty, has been much criticized, he notes that one could not realistically have expected much more on minority issues than it delivered. Instead, he emphasizes the need to develop a cooperative relationship with the Council of Europe in relation to the development of new initiatives in this area.

Nevertheless, the EU has already managed to offer some significant innovations, in particular with respect to recent and current attempts to help manage or transform inter-ethnic conflicts in its external policy. This aspect is examined by Stefan Wolff and Annemarie Peen Rodt, in their chapter on the EU and its burgeoning policy of conflict prevention. After the initial disaster of the EU's early involvement in Bosnia and Herzegovina, significant credibility was gained when the Union addressed, jointly with the US, the situation in Macedonia, and then re-engaged in a more impressive way with Bosnia and Herzegovina. At present, however, EU unity is once again strained in relation to the status of Kosovo, though greater EU involvement in the area is likely in the end to lead to its assumption of a the lead role foreseen for it there.

Krzysztof Drzewicki considers EU enlargement in relation to the mandate and functions of the OSCE High Commissioner on National Minorities. The High Commissioner's Office has not only been serving within the OSCE context, but it has also performed important functions for the EU, for instance,

the evaluation of accession states' compliance with the Copenhagen criterion relating to minorities. Moreover, the Office played a significant role in helping to stabilize relations among the states of Central and Eastern Europe during the pre-accession period. The author assesses how this role will continue with respect to both the external and internal policies of the Union.

Traditionally, the Council of Europe has played the lead role in relation to minority issues in Europe. The Council has generated the two legally binding instruments in this area. Moreover, it has developed these significantly through the work of the treaty monitoring bodies attached to them. In addition to standards and their implementation, the Council has also generated a significant number of projects and activities on diversity in the wider Europe. Nevertheless, the debate over the Constitution, and the accession of a large number of states to the EU, has given rise to questions about the future role of the Council of Europe. Accordingly, some have argued, the EU should start to cover minority issues. As already noted above, however, this is not realistic. Moreover, the Council of Europe, with its powerful Court of Human Rights, enjoys decades of experience and credibility on human rights issues. Accordingly, Rainer Hofmann, in his chapter on the future role of the Council, rightly foresees that it will remain the principal point of reference on minority issues. If anything, it would be necessary to strengthen the Council in this respect, for instance by transforming the Framework Convention into a Protocol to the European Convention on Human Rights in order to make it justiciable before the Court.

Having considered the principal institutional mechanisms covering minority issues, the book then turns in its final section to the accession process itself and its impact on the minority policies of the relevant states. Wojciech Sadurski asks why it is that most accession states were so reluctant to engage with minority issues, doing so only at the prodding of international agencies, and often at the minimum level required. He considers the constitutional design in Central and Eastern Europe, the different articulations of minority rights in the respective states and the role performed by their constitutional courts in pronouncing upon them. The author questions whether the effects of conditionality can be preserved far into the post-accession period, especially if the Union does not genuinely universalize minority rights among its entire membership.

Martin Brusis picks up this theme, considering political power-sharing mechanisms that have emerged in several Central or Eastern European states, in his view, as a consequence of the need to meet EU accession criteria. In these instances, the emphasis on conflict prevention in the OSCE and EU approach resulted in consociationalist power-sharing solutions that might not otherwise have proven attractive to the majority parties.

Finally, the section concludes with a special study of the interrelationship between minority issues as they concern Greece, Cyprus and Turkey. Greece

may count itself as an established member of the EU, Cyprus is a recent, and still problematic, accession state, and Turkey hopes to consolidate its candidacy.

Based on this review, what prediction may one offer when considering minority provisions in the wider Europe? It is certainly clear that minority issues will play an ever-greater role, even within the EU context, given that the Union is increasingly addressing diversity issues such as language policy and exclusion of certain groups from economic and social opportunities. There are also opportunities to coordinate to even greater effect the efforts of existing institutions, including the European Commission, the Council of Europe and the Office of the OSCE High Commissioner. This relates both to EU internal issues, and to the work relating to the remaining accession states and those just outside of the membership region. Whether there will be major reforms and advances on standards remains to be seen in the mid-term. There certainly would be room for an advanced minority rights treaty that is justiciable before the European Court of Human Rights. Finally, minority issues will retain their relevance fully, or even gain in relevance, with respect to the remaining candidates, and the longer-term aspirants. For the latter group, human and minority rights considerations will be equally as decisive as the *aquis* proper when their capacity for membership is at issue.

## Note

1. In the case of the FCNM, of the current 27 member states of the European Union, Belgium, France, Greece and Luxembourg have failed to ratify; in the case of the ECRML, those outside its remit are Belgium, Bulgaria, Estonia, France, Greece, Ireland, Italy, Latvia, Lithuania, Malta, Poland, Portugal and Romania.

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