

Public Participation  
by Minorities  
Minority Members  
of the National  
Legislatures

Andrew Reynolds

When the first democratic National Assembly convened in Cape Town, South Africa, in 1994 it was the living embodiment of Archbishop Desmond Tutu's dream of a 'rainbow nation': an Assembly that was not merely elected by all but included all. Black sat with white on the government's benches, coloured MPs joined with Afrikaners in opposition. But, beyond that, the Assembly of 1994 contained Ndebele, Pedi, Tswana, Sotho, Venda, Xhosa and Zulu, along with Indian South Africans, Anglo-whites, Afrikaans-speaking Cape coloureds and Afrikaans speakers of Dutch or French Huguenot descent. The descendants of Mohandas Gandhi, Henrik Verwoerd and Govan Mbeki sat together, side by side.

South Africa's ethos of political inclusion has waned a little over the past 12 years, but the over-representation of minority groups still remains the norm. While the inclusion of minorities is less visible in most other parts of the world, there is not a nation-state, rich or poor, democratic or not, where minority groups do not press for their voices to be heard at the highest levels of decision-making. Most countries seek to create at least a small space for minorities in their national parliaments: there are Christians and Samaritans in the Palestinian Authority, Maoris in the New Zealand house, nomadic Kuchi in the Afghan Wolesi Jirga, German-speaking MPs in Poland, and Roma members of the Romania parliament. Whether these representatives are enough, have influence on government policy, or are even *representative* of the minority groups they come from, are crucial questions, but when minority communities have no representatives in national legislatures we can be pretty sure that those minority groups are not being heard in the policy dialogue, their rights are being disregarded and their importance in electoral competition is small.

In many respects, the question of promoting minority representation is akin to the attention increasingly being paid to ensuring the participation of women in politics. There are now more women MPs around the world than ever before and an ever growing number of countries that use special mechanisms to increase their number of women MPs. While the question of how best to promote minority representation has received far less attention, it is an evolving issue for both international organizations and nation-states seeking

to build more stable and inclusive societies. In fragile and divided societies, ensuring that a significant number of minority MPs are elected is a necessary, if not sufficient, condition of short-term conflict prevention and longer-term conflict management. There is not a single case of peaceful democratization where the minority community was excluded from representation.

The full participation of minorities in politics does not necessarily mean veto power, nor does it imply that minority MPs are the only politicians capable of protecting and advancing the dignity and political interests of marginalized groups. But a progressive democracy which values inclusion is characterized by a situation where members of minority groups can run for office, have a fair chance of winning, and then have a voice in national, regional and locally elected government. Having representatives of one's own group in parliament is not the end of political involvement, but it is the beginning.

Perhaps of most importance, the inclusion of both majorities and minorities within national parliaments can reduce group alienation and violence in those divided societies where politics is often viewed as a win-or-lose game. Many peace settlements over the past 25 years have revolved around inclusive electoral systems or reserved seats for communal groups as part of broader power-sharing constructs. There is a debate about how best to include minority MPs. Should systems be designed so that minorities can be elected through 'usual channels' or are special affirmative action measures needed, like quotas or special appointments? Furthermore, is it better when minority MPs represent 'minority parties' that are rooted in an ethnic community, or should they be integrated into the 'mainstream' parties, which may be ideologically driven or dominated by majority communal groups. This analysis refrains from delving too deeply into that debate and focuses on the first part of the question: exactly how many MPs in the parliaments of the world are from minority communities and what explains their election?

### Minority MPs: a league table

The league table shown in Table 2, Reference section (pp. 124–6) is the product of detailed research on the presence of minority MPs in national legislatures around the world. Such comparative data has not been published before and

the 50 cases shown represent approximately a quarter of all countries; we have included both democracies and non-democracies, rich and poor countries, and legislatures from all continents.

Just under half, or 23 of the nation-states, over-represent their minorities when seat share is compared to population share, while the remaining 27 cases, on average, under-represent minority groups. The table details 115 distinct minority groups in the 50 countries: 54 are over-represented in their legislatures while 59 are under-represented. A few minority groups have MPs in legislatures in numbers well above what their population share would suggest. Most notable are Zanzibaris in Tanzania, whites in South Africa, Maronites in Lebanon, Croats in Bosnia and Herzegovina, Walloons in Belgium, Sunnis in Iraq and Herero in Namibia. Sometimes minorities achieve significant representation because their members vote in higher numbers than other groups, but, more often, the 'over-representation' is a product of special mechanisms. In contrast, Russian speakers in Latvia and Estonia, Serbs in Montenegro, Albanians in Macedonia, Bosniaks in Bosnia and Herzegovina, Arabs in Israel and Catalans in Spain are all significantly under-represented.

The top of the league table is something of a surprise. No single type of country consistently over-represents minority populations. The top 10 most 'inclusive' legislatures in the world are found in Africa, Europe, Oceania, North America and the Middle East. Some are peaceful, wealthy, Western democracies, while others are poor, democratically weak, and wrestling with ethnic divisions which still turn violent. The strands that unite the countries that over-represent their minority communities are four-fold: first, there are post-conflict democracies where minority inclusion was a core plank of the power-sharing settlement which brought about an end to civil war and the beginnings of multi-party democracy – e.g. Bosnia and Herzegovina, Lebanon and South Africa. Second, there are nation-states that entrenched power-sharing democracy over a century ago and, while the pressures for minority inclusion may have ebbed over time, the norm of inclusion has remained strong – e.g. Belgium and Switzerland. Third, there are cases which do well on the inclusion of minorities in their parliaments because significant elements of society and party politics are sensitive to minority issues and value minority candidates – e.g. Canada, Finland, the

Netherlands and New Zealand. Last, there are countries where the very geographical concentration of a minority group allows such groups to gain significant representation in their national legislatures – e.g. Kiribati, Sri Lanka and Tanzania.

Interestingly, the three top cases are all in sub-Saharan Africa: Namibia, South Africa and Tanzania. Why should these new and sometimes troubled states produce parliaments that are so inclusive of their many minorities? The South African parliament is the most ethnically representative of any democratic legislature in the world. For the reasons discussed below, the promotion of multi-ethnic parties and the deliberate 'over-representation' of minorities was the watchword of the first decade of democracy in South Africa. The same has been true in Namibia, where the liberation movement, the South West Africa People's Organization (SWAPO), while being rooted in the Ovambo majority, sought to present itself as a catch-all party, similar to the African National Congress (ANC) in South Africa or the Congress Party of India. In the current Namibian National Assembly 10 distinct ethnic groups are represented and the majority Ovambo group (representing 60 per cent of the population) only have 50 per cent of the seats. It is true that the Congress of Democrats, Democratic Turnhalle Alliance of Namibia, Monitor Action Group, National Unity Democratic Organisation, Republican Party and United Democratic Front opposition parties have non-Ovambo (bar one) MPs, but SWAPO has two Baster, four Caprivian, two Damara, four Herero, six Kavango, five Nama, three white, a coloured and a San representative. Tanzania's high spot in the table is a result of the over-representation of the island of Zanzibar in their National Assembly.

South Africa is an interesting case study of the positive good of including minorities in governance over and above their population size. Post-apartheid South Africa has consistently done well on indicators of minority representation as a result of two pressures towards accommodation. First, the post-apartheid peace settlement of 1994 (and permanent Constitution of 1996) rested upon a universally accepted principle of multi-ethnic inclusion in the new politics of the nation. A principle beyond that of mere equality, which emphasized the very opposite of the former

**Table 1 Cabinet ministers in South Africa**

|            |                        | <b>Black</b> | <b>White</b> | <b>Coloured</b> | <b>Indian</b> |
|------------|------------------------|--------------|--------------|-----------------|---------------|
| 1994       | Ministers              | 52%          | 26%          | 7%              | 15%           |
|            | Ministers and Deputies | 51%          | 28%          | 5%              | 15%           |
| 1999       | Ministers              | 76%          | 7%           | 3%              | 14%           |
|            | Ministers and Deputies | 76%          | 9%           | 2%              | 12%           |
| 2006       | Ministers              | 81%          | 11%          | 4%              | 4%            |
|            | Ministers and Deputies | 68%          | 18%          | 4%              | 8%            |
| Population |                        | 74%          | 14%          | 8%              | 2%            |

apartheid laws, that is, the new South African government would deliberately reach out to minorities to visibly demonstrate their full role in governance. Second, it quickly became apparent that, to be successful, any Xhosa party had to reach out to non-Xhosa, a Zulu party would atrophy if Zulu nationalism remained its *raison d'être*, and white parties could only gain leverage if they became multi-ethnic vehicles. Thus, the ANC under Nelson Mandela deliberately placed coloureds, Indians, whites and Zulus high up on its lists of candidates in 1994 and 1999. This diversity goes beyond the simple black–white divide. As a ‘catch-all’ national movement, the ANC seeks to exist in a universe beyond the Xhosa community which has historically dominated its leadership. It strives to attract the votes of Ndebele, Pedi, Sotho, Tswana, Venda, along with Zulu in KwaZulu, coloureds in the Cape, and English- and Afrikaans-speaking whites throughout the country. These appeals are often based on policy promises, but just as much on having senior ‘ethnic’ politicians high up on the party lists. The same has been true for the opposition – the white-dominated Democratic Alliance places non-white leaders in visible positions – and was even true for the now defunct National Party, which, in its failure to attract sufficient non-white leaders and voters, was ultimately subsumed into the ANC in the most remarkable power-shift between two long opposed movements in the history of modern politics. While

the level of minority over-representation has declined under Thabo Mbeki, it still exists in 2006. Nevertheless, consolidating democracy and stability will rest upon continuing this ethos of minority inclusion and respect.

At the executive level, South Africans have also felt that it is important to visibly include minorities. As Table 1 shows, white and Indian South Africans were dramatically ‘over-represented’ in the first decade of democratic governance under Presidents Nelson Mandela and Thabo Mbeki. The over-representation of whites and Indians was most pronounced in 1994 and 1999, but when ministers and their deputies are taken together it remains to this day.

The deliberate reaching out to smaller minority groups and institutions, designed to ensure the widest inclusion possible, was particularly key in 1994, when South Africa made its first tentative steps towards a multi-party electoral democracy. Two very small parties gained representation in the first National Assembly (the Freedom Front and Pan-Africanist Congress of Azania), facilitating conflict resolution by democratic rather than violent means. Although the Afrikaner Freedom Front only won nine (or 2 per cent) of the seats, the importance of their inclusion in democratic structures was disproportionate to their numbers. General Constand Viljoen’s Freedom Front represented a volatile Afrikaner constituency that could easily have fallen into the hands of white supremacist demagogues such as Eugene

Terre'blanche had its representatives been shut out of the political process. As it was, Viljoen, as former head of the South African Army, became chair of the National Assembly's Defence Select Committee and the paramilitary Afrikaner resistance faded away.

Representing a very different place and time, the inclusion of minority politicians in Canada today is a second positive example of how majority politics can provide a space to hear and reassure minority communities. Electoral system specialists would expect the First Past the Post system of elections in Canada to provide a high hurdle to the election of non-white, non-majority MPs, but Canadian parties and voters have managed to circumvent the majoritarianism of their Anglo election system to produce a parliament which includes, and over-represents, Asians, Canadians of African extraction and Francophone Canadians. Inuits are under-represented in the House of Commons but they have some access to self-governance through the semi-autonomous province of Nunavut.

The inclusion of French-Canadian politicians in large numbers is perhaps unsurprising considering the powerful leverage Quebec has long had over national Canadian politics, but much smaller minorities are also heard in parliament. There are 21 MPs from minority backgrounds in addition to the French-speaking MPs – ten of South Asian extraction, five Chinese, four African or Afro-Caribbean, one Middle Eastern and one Canadian Inuit. Importantly, these minority MPs are not clustered in 'ethnic' political parties. Twelve are in the opposition Liberal Party, six in the governing Conservative party, two in the Bloc Québécois and one in the New Democratic Party. The spread of minority MPs across parties is mirrored in the Netherlands, where the 15 MPs of African, Afro-Caribbean, Iranian, Moroccan or Turkish background are split between Christian Democratic Appeal (4), Democrats 66 (1), Green Left (4), Labour Party (3), List Pym Fortuyn (1) and Peoples Party for Freedom and Democracy (2). While the Netherlands demonstrates the progress that can be made when parties and voters promote multi-ethnicity, the country also illustrates the reality that, even in the most progressive polities, issues of minority rights and respect can still be problematic and vulnerable to anti-immigration elements of society.

The bottom of the league table (pp. 124–6) is also a jumble of very different countries. Half of the bottom 10 are Central European/Baltic states that

democratized in the early 1990s and, in those cases, the under-representation is focused on Albanian, Russian or Serb minority communities. Nevertheless, only in Montenegro is the Serbian community assessed by MRG as being significantly 'under threat'. Outside Central Europe, the most under-represented minorities are found in Brazil, Israel, Spain and the United States. All 10 cases represent very different levels of human development, wealth and democracy.

One of the most important cases that scores poorly on the indicator of minority inclusion in parliament is Afghanistan. On one level we see a high degree of diversity in the new Afghan Wolesi Jirga: there are 30 Hazaras, 53 Tajiks, 20 Uzbeks and 28 others, representing minority communities. There are significant 'minority' leaders in parliament and government. Yunus Qanooni (a Tajik) is Speaker of the Wolesi Jirga, Mohammed Mohaqeq (a Hazara) received the most votes of any candidates in Kabul, and Rashid Dostom (an Uzbek) is Chief of Staff of the Afghan National Army. Ten seats are reserved in the Assembly for the nomadic Kuchi population. President Karzai's cabinet is also diverse, and minority MPs can be found on both the pro-government and opposition benches, but, as the league table (pp. 124–6), each of the four main minority groups is under-represented in the legislature, while the largest group, the Pashtuns, is over-represented. This is a sensitive political issue as Tajiks from the Northern Alliance and Uzbeks from the north feel increasingly marginalized by what they term the 'Pashtun mafia' which surrounds President Karzai.

### What explains levels of minority representation?

A number of variables might be expected to influence the level of minority representation in national legislatures (Table 3, Reference section, pp. 128–9).

So what explains minority inclusion in legislative politics: region, electoral system, development or level of democracy? Regionally we see that the six cases from Africa (Malawi, Namibia, South Africa, Tanzania, Zambia and Zimbabwe) on average over-represent their minority groups, but a caution should be noted. First, these results are driven by the impressive minority inclusion of Namibia, South Africa and Tanzania, which may not be replicated in

**Table 2 Minority representation by region**

|           | Africa | Middle East | Western Europe | Oceania | North America | Asia | C-East Europe | Latin America |
|-----------|--------|-------------|----------------|---------|---------------|------|---------------|---------------|
| No. over  | 6      | 2           | 6              | 3       | 1             | 1    | 4             | 0             |
| No. under | 0      | 1           | 6              | 3       | 2             | 4    | 10            | 1             |
| Average   | 1.8    | 0.3         | 0.3            | -0.2    | -0.7          | -1.2 | -1.3          | -3.28         |

**Table 3 Does adequate representation depend on reserved seats for minorities?**

|                         | Reserved seats | No reserved seats |
|-------------------------|----------------|-------------------|
| Cases over-represented  | 6              | 17                |
| Cases under-represented | 6              | 21                |

**Table 4 Minority representation and electoral system**

|           | BV  | MMP | FPTP  | TRS  | List PR | STV  | AV   | PAR  | SNTV |
|-----------|-----|-----|-------|------|---------|------|------|------|------|
| Average   | 0.5 | 0.2 | -0.04 | -0.3 | -0.5    | -0.5 | -0.9 | -1.3 | -3.2 |
| No. cases | 2   | 3   | 11    | 2    | 26      | 1    | 3    | 1    | 1    |

**Table 5 Minority representation by level of democracy**

| Free        | -0.7 |
|-------------|------|
| Partly free | 0.2  |
| Not free    | -0.3 |

other African states, and Malawi, Zambia and Zimbabwe have positive scores because one or two Asians or whites make it into their parliaments. The Middle East scores well because of Lebanon and Iraq, but clearly neither case is a poster child for inter-ethnic harmony. The picture is more mixed in Western Europe, Oceania and North America, and decidedly negative in Asia and Central and Eastern Europe, and Latin America (see Table 2).

Many groups have called for electoral system reforms to ensure and encourage minority access to elected office, but, while such democratic changes

may help, the data suggest that electoral system design only has a limited role in promoting minority representation. Half of the countries that reserve seats for minorities end up over-representing them, while the other half under-represent (see Table 3). Just over half the countries that do not have reserved seats under-represent their minorities, but the other half manage to over-represent despite not having any special mechanisms.

When it comes to electoral system, we can discern patterns in the data but the results are

again surprising in certain respects (see Table 4). The five countries that use the Block Vote and Mixed Member Proportional systems do best at including minorities, but Lebanon and New Zealand drive those high figures. Interestingly, First Past the Post systems, long criticized for providing hurdles to minority representation, do better than List proportional systems. But again the average scores can be misleading as seven of the top ten states in the league table use List PR election systems. Overall, none of the electoral system ‘families’, when combined, produce more minority members than their population share. Majoritarian systems (First Past the Post, the Block Vote, Two-Round Systems, and the Alternative Vote) score -0.1, proportional systems (List PR, Mixed Member Proportional and the Single Transferable Vote) -0.4, and semi-proportional systems (Parallel Systems and the Single Non-transferable Vote) -2.2.

Perhaps most surprising is the finding that the nation-states least able to demonstrate minority inclusion are, on average, the most democratic. The 35 cases ranked as ‘free’ democracies by the Freedom in the World survey produced by Freedom House are the least likely to fully represent their minorities, while the 10 cases ranked as ‘partly free’ on average marginally over-represent minorities in their legislatures (see Table 5).

As noted earlier, the inclusion of some minority MPs within a national legislature is only the first step towards minority protection. One could imagine a situation where a few token minority MPs were elected (or appointed), but minority rights remained severely curtailed. So is there a relationship between the number of minority representatives in parliament and the degree of threat these minority groups live under? Compare the top 20 countries which represent minorities best in their national legislatures (Table 2, Reference Section, pp.124–6) and MRC’s People Under Threat (Table 1, Reference Section, pp.118–123). While overall, the countries which represent minorities best, are generally those where minorities are not most at risk, the appearance of Iraq at No 2 (PUT), Bosnia at No 20 (PUT), and Sri Lanka at No 22 (PUT) illustrates that sometimes minorities can gain significant political representation, but still be marginalized from real decision-making influence, and live under significant challenges to their security.

## How is minority inclusion best achieved?

The findings outlined in this research suggest that political designs matter at the margins but, ultimately, minorities have access to elected office if the society is open to minority inclusion, or power-sharing arrangements dictate ‘fair shares’ in parliament for majority and minority groups. If minority MPs are deemed to be of value to voters or political elites then the barriers of exclusionary election systems, under-development and authoritarianism will be navigated.

Nevertheless, all else being equal, there are some lessons to be noted. First, much of the progress on issues of minority inclusion and representation has occurred not in the established democracies of Europe and North America but in new electoral regimes in Africa, the Middle East and the South Pacific. Second, even when minorities do gain representation in national parliaments they are often discriminated against, face threats to their integrity and are marginalized from real power. Last, the actual method and scope of minority inclusion needs to be crafted to fit the needs of the given country. Some states may do better with reserved seats or autonomous self-governing assemblies, while others will require incentives for minority MPs to be involved in ‘mainstream’ parties and have a guarantee of both legislative and executive representation. The key is to ensure both visibility and voice: to have minorities in parliament and enable them to impact policies that affect not only their communal affairs but the well-being of society as a whole. ■

# Minority Protection in Europe: What about Effective Participation?

Kristin Henrard



Although minority protection has come more to the forefront since the 1990s, both at the international level and at national level, many inadequacies remain, not only regarding the standards or norms themselves, but also and especially concerning their actual implementation and enforcement. Nevertheless, several positive developments also can and should be highlighted.

When discussing minority protection, it is important to realize that this is not confined to rights of 'persons belonging to minorities' (minority-specific rights). Indeed, the central importance of the prohibition of discrimination, in combination with general human rights (the rights of every person), should not be underestimated.

There is an ongoing debate as to whether minority protection necessitates 'special' rights (minority-specific rights) or equal rights, as provided on the basis of the prohibition of discrimination in combination with general human rights. A lot depends on how these rights are interpreted, implemented and supervised.

It may be obvious that it is important for persons belonging to minorities that they should not be unjustly excluded from employment, education, etc. Being treated exactly the same leads to formal equality. However, formal equality does not seem to address all the concerns of minorities because it does not take into account differences in circumstances, like belonging to a minority with a separate identity and having the wish to hold on to this minority identity. The concept of substantive equality can be helpful here, because this understanding of equality accepts that differential treatment (formally unequal treatment) or special rights might be necessary to reach real, genuine equality. To the extent that the interpretation of general human rights is not (sufficiently) suffused by substantive equality considerations and does not provide protection for the right to identity of minorities, the minority-specific standards form a necessary complement.

The focus of this annual report, and of this article, is on the participation of minorities. The concept 'participation' needs clarification. It seems obvious that it can be interpreted broadly. In this article, the central importance of participation is underlined, and a generous approach is adopted as to the potential reach of the concept.

The other central concept in this article, namely 'minority', also does not have a generally agreed

upon definition. One particularly controversial question is whether or not persons belonging to minorities are required to have the nationality of the country of residence before being able to avail themselves of that nation's minority protection. A closely related question is whether (and to what extent) immigrants could qualify as minorities.

In the first section, the two central concepts of this article are discussed; this is followed by a presentation of the most relevant developments in the Council of Europe, the Organization for Security and Cooperation in Europe (OSCE) and the European Union (EU). An overview is then given of recurring problems in several European states, after which some concluding observations are made about the actual and potential protection of minorities in Europe.

### What do we mean by 'minority' and 'participation'?

Although there is no set legal definition of the term 'minority', there is broad agreement about certain requirements: that minorities should have stable ethnic, religious or linguistic characteristics that are different from those of the rest of the population, a numerical minority position, non-dominance and the wish to preserve their own, separate cultural identity.

However, it is important to note that, under international legal norms, states do not explicitly have the right to decide which groups count as minorities. This point was underlined by the United Nations (UN) Human Rights Committee, the body tasked with monitoring the International Covenant on Civil and Political Rights (ICCPR). In its General Comment on Article 27, the Human Rights Committee stated that individuals need not be citizens of the state to have minority rights protection. Although not legally binding, the Committee's Comments are widely seen as authoritative statements on the scope of ICCPR.

The Human Rights Committee position, however, is in conflict with the position traditionally adopted by states, which have often been adamant about the need for persons belonging to minorities to have the nationality of the country of residence. This requirement is increasingly criticized for the following reasons. Nationality legislation can all too easily be manipulated by the public authorities. Especially in cases of state succession and change of

frontiers, such a requirement seems problematic, as is clearly apparent in the Baltic states. Nationality is also difficult to satisfy for nomadic groups. Finally, and especially in countries where it is difficult to acquire nationality, it may seem inappropriate to exclude certain groups that have lived in the country for decades or even generations. Where to draw the line will ultimately be an arbitrary decision. Hence it seems more appropriate not to focus on nationality or immigrant status as such, but rather to adopt a more pragmatic attitude, taking into account all the relevant circumstances and deciding on a case-by-case basis whether a particular group can enjoy minority rights.

Slowly but surely, the tide seems to be turning as states increasingly, if only *de facto*, treat immigrant groups as minorities. It is striking that a nationality requirement does not feature in the majority of the declarations of contracting states to the 1995 Framework Convention for the Protection of National Minorities (FCNM), the only legally binding document that is exclusively devoted to the protection of minorities. Furthermore, the Advisory Committee supervising the implementation of the FCNM clearly adopted an inclusive approach, urging states to consider whether they cannot expand the reach of the Convention on an article-by-article basis with respect to immigrant groups as well.

Most minority rights provisions contain escape clauses or conditional clauses, like 'where appropriate', 'when necessary', etc., which could easily be used by contracting states to avoid their obligations. However, the positive side to such standards is their inherent flexibility, which allows them to cater for the tremendous diversity of minority situations. Indeed, not all groups qualifying as minorities should necessarily have equally strong rights. In this respect, some have advocated a 'sliding-scale' approach, especially in relation to rights that would impose financial burdens on the public authorities. Following this approach, the state would have more far-reaching obligations towards minority groups of a greater size (and a higher level of territorial concentration). Likewise, states would have less far-reaching obligations in relation to newly immigrated groups (often called 'new' minorities, as opposed to the traditional, autochthonous minorities). At the same time, clearly it is essential that the exercise of this

state discretion should be suitably monitored so as to ensure that states do not abuse it.

International human rights law provides for the right to participation – for example Article 25 of ICCPR holds that: 'every citizen shall have the right and the opportunity ... without unreasonable restrictions to ... take part in the conduct of public affairs'. This has subsequently been taken up in minority-specific instruments: Article 2, paragraphs 2 and 3 of the UN Declaration on the Rights of Persons belonging to National or Ethnic, Religious and Linguistic Minorities (UNDM; stipulating respectively the right to participation in the cultural, religious, social, economic and public spheres of life and the right to participate in decisions concerning the minority to which they belong), and Article 15 of the FCNM (enshrining the right to effective participation in cultural, social and economic life, and in public affairs, in particular those affecting them). But the difficulty is that there is no legal definition of what the concept of 'participation' entails.

It is generally agreed that, potentially, the concept has a very broad reach. The High Commissioner on National Minorities (HCNM) has instigated and endorsed in 1999 the Lund Recommendations on the Effective Participation of National Minorities in Public Life. These Recommendations are made by independent experts and hence are not legally binding. Nevertheless, as they are rooted in minority rights and other standards generally applicable in the situations in which the HCNM is involved, they cannot be ignored. Two major dimensions of participation are distinguished in the Recommendations, namely 'participation in decision-making' and 'self-governance'. The former is actually mostly concerned with issues of 'representation' in the broad sense, as it addresses not only representation in parliament (e.g. reserved seats for minority groups) and government/executive bodies, but also members of minorities in the civil service, the police and the judiciary, and even deals with the establishment of advisory bodies and other consultation mechanisms. It also deals with election systems (including references to forms of preference voting and lower numerical thresholds for representation in the legislature for minority political parties).

It should be emphasized, though, that while the political dimension of participation traditionally

attracts most attention, there are also important economic, social and cultural dimensions to participation. In regard to economic participation, there is the issue of access to employment. Unemployment is a serious problem for many persons belonging to minorities, especially the 'new' minorities and the Roma.

In this regard, but also more generally, it is important to underline the inherent link between adequate participation and the prohibition of discrimination. It can indeed be argued that full participation of minorities would only be possible when there is no discrimination against persons belonging to minorities. There is a growing acknowledgement of the phenomenon of indirect discrimination, the prohibition of which targets rules that are apparently neutral but which have a disproportionate negative impact on particular groups (without justification). A good example would be the competence in language required in relation to standing for elections or for access to jobs, as is the case in Latvia and Estonia. Requirements in terms of the official language of the state are inherently more difficult to fulfil for foreigners. Insofar as these requirements would not be proportionate in relation to the position concerned, they would be indirectly discriminatory (and thus prohibited).

Indirect discrimination is closely related to the understanding that the prohibition of discrimination also requires differential treatment of substantively different situations. This, in turn, appears inherently linked to a duty to reasonably accommodate different identities and lifestyles, which is slowly gaining ground. Arguably this *could* have repercussions for regulations on the wearing of the headscarf in education and employment, special food, special rules in relation to festive days of minority religions, special attention to the lifestyle of nomadic groups and the like (see, for example, the Recommendations on Policing in Multi-Ethnic Societies endorsed by the HCNM).

Of course, the word 'reasonably' clearly indicates that this duty to accommodate would not be an absolute, unlimited duty. This is reflected in the practice of the Commission on Equal Treatment of the Netherlands. While that Commission tends to qualify prohibitions to wear the headscarf in employment and education as violations of the General Equal Treatment Act, because they would

amount to indirect discrimination on the basis of religion, it often allows prohibitions on the *nikaab* and the *burka*, because, in the Commission's view, there would be reasonable justifications for these prohibitions.

The concept 'participation' has a very broad reach indeed. It would be difficult to deny that the absence of reasonable accommodation of differences would not hamper the full and genuine participation of the persons concerned. Furthermore, full participation would also send important symbolic messages about inclusion, essential for an optimal integration. In the words of the previous HCNM, Max van der Stoep: 'participation has a broader connotation, namely that minorities feel that they are active and equal members of the state' (Speech by the OSCE High Commissioner on National Minorities at a conference in Slovenia, February 2001).

### Minority protection in Europe Council of Europe

It has often been pointed out that, while effective protection against discrimination and of general human rights is very important for minorities, the case law of the European Court of Human Rights, supervising the European Convention on Human Rights (ECHR) is in many respects inadequate.

The Court has often been criticized for its apparent reluctance to conclude that violations of the prohibition against discrimination have occurred. While this is still a problematic area, there have been some important developments. The cases of *Nachova v. Bulgaria* (26 February 2004, partially confirmed by the Grand Chamber of the Court on 6 July 2005, concerning the killings of two Roma by military police) and *Timishev v. Russia* (13 December 2005, concerning the refusal to allow a Chechen person to enter another republic of Russia) clearly indicate that the Court is becoming more vigilant in relation to alleged racial discrimination. In the latter case, the Court explicitly held that 'no difference in treatment which is based exclusively or to a decisive extent on a person's ethnic origin is capable of being objectively justified in a contemporary democratic society built on the principles of pluralism and respect for different cultures' (para. 58). As both cases concern minorities, they confirm the special importance of

the prohibition of discrimination for minorities.

In *Thlimmenos v. Greece* (6 April 2000) the Court had made a very important pronouncement on the prohibition of discrimination, which implied a crucial opening towards substantive equality. The Court underlined in its judgment that the prohibition of discrimination can also be violated when states fail to treat differently persons in substantively different situations (without justification). In other words, the prohibition of discrimination gives rise to a duty to adopt differential measures in certain circumstances. This clearly holds the promise of a duty to adopt minority-specific measures in order to reasonably accommodate their different identities and lifestyles. This could possibly concern regulations to reasonably accommodate persons belonging to minority religions and their specific needs as to timing of work, dress code and the like. The link between these measures and full and effective participation has already been made. However, the subsequent case law has been rather modest and has not (yet) ventured along this path.

The case law of the Court so far has revealed that it struggles with the concept of indirect discrimination. The latest case in which this was particularly visible and detrimental for minorities was *D.H. et al. v. Czech Republic* (7 February 2006). Despite the convincing statistical evidence that Roma children were disproportionately sidelined to schools for mentally retarded children, the Court failed to find a violation of the prohibition of discrimination.

The ECHR is not explicitly geared towards the protection and promotion of minority identity. However, a lot depends on the interpretation of concepts that are in themselves vague and open-ended. A good example is *Chapman v. UK* (18 January 2001), where the Court for the first time acknowledged that the right to respect for private life, family life and home actually enshrines a right to a traditional way of life, and that states have positive obligations to facilitate the minority way of life. However, states have broad margins of discretion in this respect and *de facto* protection still remains low.

An interesting case in relation to political participation, of special relevance for linguistic minorities, is *Podkolzina v. Latvia* (9 April 2002). This concerned a person of Russian ethnicity who

was ultimately barred from standing for election because she did not have the required language proficiency in Latvian. The Court found it legitimate for a state to set linguistic requirements for candidates for parliament. It concluded that there was a violation of the Podkolzina's 'election right', not because the content of the measure – the linguistic requirement itself – was disproportionate, but because of the way it was administered *in casu*. Even though it would have been welcome if the Court had explicitly indicated that there are also limits on what exactly can be required (content of the measure) in this respect, this judgment in any event sends a signal to states that they do not have unlimited discretion in the way in which they impose linguistic requirements for certain functions. This could be an indication that the Court, in future, might be more attentive to protecting linguistic minorities more generally.

Since the 1990s there has been long line of case law in which the Court emphasizes that states are not allowed to limit the freedom of association of members of minorities merely because the association would aim to promote the culture of a minority. However, the judgment in *Gorzelik and others v. Poland* (20 December 2001, confirmed by the Grand Chamber of the Court on 17 February 2004; on the refusal to register an association under the name 'Union of People of Silesian Nationality') seems to deviate from this case law. While there are no clear context-specific variables that explain the atypical outcome in *Gorzelik*, the combination of two areas in which states are accorded a broad margin of appreciation, namely the identification of minorities and electoral matters, could explain this particular outcome. It should in any event be underlined that, in subsequent case law, the Court has returned to its protective stance.

The Court traditionally has provided ample protection to religious minorities in terms of freedom of religion, inter alia by underscoring states' duty to protect and promote religious tolerance and pluralism. However, in a country like Turkey, where the great majority of people are Muslim, where there is a history of a sensitive, fragile relation between religions and state, and a perceived danger of religiously inspired movements/political parties taking over, the supervisory organs of the ECHR seem willing to accept considerable limitations to the freedom to manifest one's religion (by wearing

the headscarf). The case that received most critical attention in this respect was *Leyla Sabih v. Turkey*. According to the Court (10 November 2005, confirmed by the Grand Chamber on 29 June 2004), the prohibition on wearing the veil in a state university in Turkey did not amount to a violation of the freedom to manifest one's religion (under Article 9 of the ECHR). It is to be hoped that the Court will be equally context sensitive if a case comes before it from a Muslim girl faced with a similar prohibition in a country without this specific historical background, where Muslims are not in the majority and where the danger of pressurizing others would not be present.

The preceding overview arguably hints at a rather ambivalent picture with regard to the contribution of individual human rights to minority protection. Remarkable advances at the theoretical level in relation to embracing both substantive equality considerations and the right to identity of minorities, are not always matched by equally progressive, minority-sensitive applications in concrete cases. Furthermore, in certain areas where the Court has traditionally realized a meaningful level of minority protection, decisions in a few recent cases have gone against this trend and hence threaten to question this traditionally minority-sensitive case law.

Nevertheless, it should be emphasized, the case law clearly reveals tremendous *potential* to provide enhanced levels of minority protection on the basis of general human rights and the prohibition of discrimination. It is to be hoped that the Court will, in the future, actually realize this potential. Since the judgments of the Court are legally binding for the states against which they are pronounced, they do tend to lead to changes in the law and practice of these states (and also of other states).

As was pointed out above, the FCNM has an explicit minority focus. Considering the central importance of substantive equality and the right to a minority identity for mechanisms of minority protection, it should not come as a surprise that this Convention has these as guiding principles. Article 15 explicitly addresses the effective participation of persons belonging to national minorities in cultural, social and economic life, and in public affairs.

It is the practice of the supervisory mechanism in terms of Article 15 that will be focused upon here. However, it should be acknowledged that some

issues of relevance to full participation are focused upon in other articles of the FCNM and hence no longer attract attention in terms of Article 15. This does not mean, though, that these issues would not be considered as important or relevant for participation purposes. A good example here would be rules on the use of a minority language in communication with public authorities, and rules on language in education. Similarly, the practice of some states of assigning Roma children to special schools for mentally retarded children is problematic in view of the requirement of equal access to education (Article 12(3) and Article 4 on equal treatment).

Linguistic requirements to stand for elections are addressed in terms of Article 15, and the same can be said about such requirements in relation to access to employment. Such requirements should not be too rigid or demanding, so as to prevent a negative impact on effective participation of minorities.

Issues pertaining to religious accommodation do not attract much attention, either in the text of the FCNM or in the supervisory practice. Participation of religious groups is definitely considered but not (so far) in terms of duties to reasonably accommodate the specific needs of religious minorities.

Notwithstanding the fact that the FCNM stipulates that the Committee of Ministers of the Council of Europe has the final responsibility for the supervision of the Convention, the importance of the opinions of the independent expert body, the Advisory Committee (AC) is now undisputed. Indeed, the Committee of Ministers has begun to follow the opinions of the AC, and even refers back to them for further detail in its Resolutions. Hence, the focus of this analysis will be on the opinions of the AC. One general remark that needs to be made is that the supervision by the AC has revealed that the discretion of contracting states to the FCNM is not as boundless as it may seem at first sight.

The AC has recently added another tool to its supervisory practice: the adoption of thematic reports reflecting and synthesizing its experience and views on specific thematic issues. The first report was adopted in March 2006 and is entitled *Commentary on Education under the Framework Convention for the Protection of National Minorities*. A wealth of issues is addressed in this report, as is evidenced by the following description:

*the Commentary recognizes that the Framework Convention is of relevance not only in guaranteeing the rights of persons belonging to minorities to good quality, free primary education as well as general and equal access to secondary education (right to education) but also in setting standards on how such education should be shaped in terms of content as well as form (rights in education) in order to facilitate the development of the abilities and personality of the child, guarantee child safety and accommodate the linguistic, religious, philosophical aspirations of pupils and their parents'. (Commentary on Education under the FCNM, p. 4)*

It should be highlighted that the AC is currently working on a Commentary on political participation.

When reading through the opinions of the AC, its emphasis on the need to consult and to maintain a dialogue with minorities on all the issues addressed in the FCNM is hard to miss. The central importance of consultation and even involvement of minorities in relation to policies of (direct or indirect) relevance to them, can be explained by its double effect of enhancing integration (inclusion) of minorities while strengthening their identity. It seems obvious that when minority groups are allowed a say in the construction and implementation of policies and programmes concerning them, this is bound to improve the quality, efficiency and overall impact of the latter.

The AC encourages states not only to go beyond mere *ad hoc* consultation and to make dialogue a regular, preferably institutionalized feature, but also makes suggestions on how this participation can be more 'effective'. The AC shows itself to be increasingly demanding about the effectiveness of participation, in the sense that it should be meaningful, which implies that the ideas of minorities are to be taken seriously. The AC appears to consider consultation as the bare minimum and often goes beyond mere consultation, urging states to coordinate and cooperate on minority policies with the minorities concerned. 'Cooperation' seems to indicate that the minorities' opinions should be reflected in the actual outcome.

While this consultation theme is omni-present, it should be highlighted that the AC clearly focuses on the public affairs component in Article 15. Participation in cultural, social and economic life is

given significantly less attention. The AC is nevertheless particularly attentive towards the problems of economic exclusion of the Roma in virtually all contracting states, while also urging some states to address shortcomings in the participation of other minorities in economic life. Increasingly, the AC seems to address the social situation of Roma as well, looking at their problems with regard to access to housing and health care, as well as the resulting shortcomings in their living conditions.

It has already been emphasized that the AC is critical about language requirements that do not seem necessary in order to work in particular functions or deliver certain services. Nevertheless, it seems that the AC could expand its review in terms of the effective participation of minorities in economic, social and cultural life.

With regard to the public affairs component, it is noteworthy that the AC regularly starts by noting that minorities are not, or not sufficiently, present in parliament (or other elected bodies), and encourages authorities to examine thoroughly all the barriers that might hinder minority representation in political life and to develop mechanisms to redress this situation, particularly in relation to small and scattered minorities. More recently, the AC has expressed concern about insufficient representation of minorities' interests in the decision-making process. The AC, furthermore, does not limit its review to elected and executive bodies, but also often speaks out against low levels of minority members in the judiciary, the civil service, the police, the army and the prison service. In relation to employment in the civil service, the AC expresses (again) concern about too-demanding linguistic requirements.

Finally, the AC addresses an area that is closely connected to the sovereignty of states and for which states have generally not been willing to accept far-reaching international commitments, namely citizenship legislation. It is obvious that citizenship is still a requirement for the exercise of (most) electoral rights and hence is essential for political participation. The central importance of the prohibition of discrimination makes it possible for the AC to point out that governments should make sure that legislation on citizenship is applied fairly and in a non-discriminatory fashion. According to the AC, the presence of large numbers of non-

citizens would cast doubts in this respect, particularly in cases of the break-up of states and state succession.

It may be obvious that, in terms of the FCNM, the contracting parties are continuously invited and even urged to improve the full and effective participation of persons belonging to national minorities. Even though the outcome of this supervisory process is not legally binding, the second round of monitoring has clearly revealed high levels of compliance with the Recommendations. It is to be welcomed that the contracting states recognize its authority as in fact coming from the bodies that are responsible for the supervision of its implementation by the states.

## OSCE

The activities of the OSCE in relation to minorities are not limited to those of the High Commissioner on National Minorities, as can be witnessed, inter alia, from the existence of the Roma Contact Point. Within the OSCE more generally there has been heightened attention to the plight of the Roma across the participating states. This led in 2003 to the adoption of the *Action Plan on Improving the Situation of Roma and Sinti in the OSCE Area*. However, in view of space limitations, it seems appropriate to focus on the HCNM because of its explicit focus on national minorities (in general).

It would be difficult to capture comprehensively the multiple activities of the HCNM in relation to national minorities. The country-specific work of the HCNM continues to underline the importance of comprehensive integration strategies, entailing special attention to the effective participation of persons belonging to national minorities, and especially the Roma. Themes that are taken up and criticized are the under-representation of Roma in the legislative bodies, and the lack of consultation of Roma when policies on Roma are being developed.

In addition to the country-specific work and ensuing recommendations, the HCNM has been involved (since 1995) in the elaboration of more thematic recommendations, concerning issues that recur in virtually all minority situations. The HCNM does not have a mandate of standard-setting, but has adopted a practice of bringing together international experts to draw up Recommendation on such themes, which he

subsequently endorses. These Recommendations are based on the existing standards but are more detailed, and hence provide important additional guidance. In relation to participation, the Lund Recommendations on the Effective Participation of National Minorities (1999) should of course be highlighted. Nevertheless, the earlier Recommendations on Education Rights (1996) and Language Rights (1998) also concern issues with important repercussions for the full participation of minorities. Similarly, it can be remarked that the *Guidelines on the Use of Minority Languages in the Broadcast Media* (2003), and their goal of equal access to mainstream public media, are essential for optimal integration and adequate participation of minorities.

The year 2006 witnessed the adoption of a new set of recommendations, namely on Policing in Multi-ethnic Societies. Various themes addressed in these Recommendations are very important for a full participation of minorities in society. The need for an equitable representation of minorities within the police force, at all levels in the hierarchy, is obviously relevant. It is not difficult to see that minorities will feel more 'included' when members of their group are part of the police force. Other themes that are important in this respect concern the way in which the police engage with ethnic communities and, more generally, the way in which they exercise their functions, including questions of use of force and the need to avoid even the impression of 'ethnic profiling'. The importance of a neutral working environment should not be underestimated either; or, better, a working environment that adequately accommodates the population diversity present in the force. The policing recommendations are particularly innovative because they not only look at linguistic diversity but also at religious diversity. The 'Explanatory Note to the Recommendations' explicitly points out that the working environment should be sensitive to diversity in the needs, customs and religions of different groups (e.g. with regard to matters of dress, diet and religious observances such as prayer and holy days).

In view of these characteristics of the policing recommendations, it is particularly noteworthy that they have been very well received by the OSCE states. While the OSCE may not have the power to adopt legally binding decisions, the documents

produced by its institutions and bodies, including the work of the HCNM, do possess considerable *de facto* political authority.

## European Union

In relation to the European Union and minority protection, it should first of all be emphasized that the original, and still the main focus of that organization, namely economic integration, lends itself less evidently to the adoption of minority policies. Furthermore, the EU only has those competences that are explicitly attributed to it in the founding treaties and there is no explicit competence concerning minority protection attributed to the EU. This explains why there are no explicit EU standards in relation to minority protection and no explicit demands on the member states to respect minority rights.

Nevertheless, this has not prevented the EU from demanding that third states comply with minority rights standards, which has led to the well-known complaint about double standards. The best-known example is in relation to countries wanting to accede to the EU. The reference to the need to respect and protect minorities in the political Copenhagen Criteria (the requirements that have to be satisfied by candidate countries in order to accede to the EU) has drawn the European Commission into monitoring and evaluating the candidates' progress in relation to minority protection. Since there were no internal EU benchmarks, the annual reports used the standards adopted in the Council of Europe and the OSCE. Arguably, this synergy in the use of standards adds to their strength. Furthermore, the European Commission relied heavily on the information coming from the opinions of the Advisory Committee of the FCNM and the HCNM. Since these sources of information concern independent expert bodies, this reduces (at least to some extent) the danger of politicization of the supervision.

Nevertheless, it cannot be denied that the monitoring exercise revealed a clear hierarchy of minority issues. In the 10 recently acceded countries, two minority groups were consistently stressed, specifically the Russophone minority in Estonia and Latvia and, more generally, the Roma minority. Nevertheless, most of the countries concerned have several other minority groups. In relation to Bulgaria and Romania, this virtually

exclusive focus on the Roma was apparent. While the Roma are undoubtedly the most excluded and disadvantaged minority group in these countries, this hierarchy can (also) be translated in terms of political sensitivities: on the one hand, it is important for the EU to maintain good relations with its most powerful energy supplier, Russia (hence the attention paid to the Russian minority in candidate countries); and, on the other hand, the Roma as a minority group are considerably less politically sensitive in comparison with well organized, politically mobilized and territorially concentrated groups like the Hungarians in Slovakia and Romania. In other words, it is harder for states to comply with political demands for autonomy (or other issues) because of political sensitivities, than it is for them to improve the situation (living conditions, employment, education, etc.) of the Roma.

This political dimension is also visible in the way in which the political criteria are used in the accession monitoring. In relation to the 10 recently acceded countries, there was a clear political determination to proceed with enlargement, which translated itself into the absence of harsh criticisms. Even if some shortcomings were highlighted, the end conclusion remained that the political criteria had been fulfilled.

When reviewing the European Commission reports in relation to the current three candidate countries, Croatia, Macedonia and Turkey, a different overall picture emerges, which can still – to some extent at least – be explained in terms of political considerations. Arguably, the practice in relation to Macedonia is closest to that for the 10 recently acceded countries: the evaluation is quite easy-going and not very detailed. While there are several references to ongoing ethnic tensions, the most sensitive minority, the Albanians, is never mentioned by name.

The 2005 report on Croatia is definitely different in tone; it goes into much more detail and is more critical. The extensive attention paid to issues of political participation of 'minorities' is striking in this report. There is again a focus on the Roma minority but now also on the Serb minority. Apparently, in this case, the EU has less difficulty in addressing 'sensitive' minorities; though it is difficult to deny that the situation in Macedonia is potentially much more explosive



than it is in Croatia.

Be that as it may, the accession monitoring in relation to Turkey clearly stands out as being very elaborate, and critical, which is arguably in line with the lack of clear political determination to proceed with the accession of this country. The European Commission is very critical of the Turkish position that the only minorities in Turkey would be non-Muslim minorities. The Commission focuses on several non-religious themes, such as language rights and language in education, and is particularly critical of the treatment of the Kurdish minority. The Roma minority in Turkey is also paid special attention – as are the Muslim minorities, particularly the Alevis.

Notwithstanding the legitimacy problem facing the EU when it is accused of double standards, it should not be forgotten that all member states, old and new, are member states of the OSCE and contracting parties to the ECHR, and that most of the old member states have also ratified the FCNM. The impact of the related supervisory mechanisms should not be underestimated and is conducted by independent bodies.

It is not surprising that it has been remarked that it is difficult to pin down the exact relationship between domestic incentives and EU conditionality, and the conditions and recommendations of the EU, the OSCE and the Council of Europe overlap, making it impossible to separate their respective effects. Furthermore, an empirical study of what happened in relation to minority protection in a selection of recently acceded Central and Eastern Europe countries has revealed that international pressures were important to set the process in motion, but the precise content of the legislative and policy changes was mainly determined by domestic factors.

Going back to the problem of 'double standards' and, especially, the lack of an internal minority policy, the following comment can be made in regard to the alleged problem of lack of EU competence concerning minority protection. An analogy with human rights seems in order. The EU does not have an explicit competence in relation to human rights. Nevertheless, the European Court of Justice (ECJ) has identified a duty to respect human rights for the institutions and the member states when they are operating in the field of EU law. It can be argued that, in order to respect human

rights, some kind of regulation/legislation on fundamental rights is needed in relation to the existing explicit competencies of the EU. This mainstreaming of human rights in the EU has ultimately resulted in the adoption of the EU Charter on Fundamental Rights.

It is generally accepted that minority rights are part and parcel of human rights. Hence the duty to respect human rights entails an obligation to respect minority rights, as has been confirmed by the European Commission and as is explicitly confirmed in Article I, 2 of the draft Constitutional Treaty. In other words, there would already be, under current EU law, a duty on all member states to respect minority rights (when operating in the field of EU law).

Some experts have pointed to the following existing EU competences where this minority protection mainstreaming could be very meaningful. Article 151(4) of the EC Treaty (1957) has been qualified as a basis for mainstreaming regional cultural diversity, which could indirectly benefit territorially concentrated cultural and linguistic minorities. Similarly, Article 13 of the EC Treaty, and the expanded prohibition of discrimination in EC law, have a great deal of potential, since it is now no longer limited to gender and EU nationality but also encompasses religion, and racial and ethnic origin as prohibited grounds of discrimination. The Racial Equality Directive (2000/43/EC), which has been adopted on the basis of Article 13, is generally considered to have (at the moment) most potential for internal minority protection. This Directive not only tackles differentiation on the basis of racial or ethnic origin, but can also – through the concept of indirect discrimination – address certain differentiations on the basis of language or religion. As pointed out above, this prohibition of indirect discrimination *if interpreted progressively* can be understood as imposing on the member states a duty to reasonably accommodate differences, also differences in identities and lifestyles. It is to be hoped that this potential development will actually take place.

The Directive has a very broad material and personal scope of application. The material scope is not limited to the employment sphere but also targets education, health care and social security. The degree to which the dimension of political participation is covered will have to be clarified by the jurisprudence

of the ECJ. Finally, the Directive also sets out to address the traditional problems of actual enforcement of the prohibition of discrimination.

It should be underlined that third-country nationals (immigrants or 'new' minorities) can benefit from this Directive. While Article 3(2) excludes differentiations on the basis of nationality as such, it has been justly claimed that when a differentiation on the basis of nationality could be qualified as indirect racial discrimination, it would be covered nevertheless. Clarification of case law of the ECJ on this (and other aspects) of the Racial Equality Directive is eagerly awaited, but so far no cases are pending.

While it is still true that there is no coherent internal minority policy in the EU, there does seem to be an emerging awareness that the EU cannot remain indifferent towards the faith of minorities. While the overarching value of cultural diversity seems a likely avenue for minority-friendly internal measures, references in the founding treaties to cultural diversity arguably focus on diversity between states rather than diversity within states. However, there are a few exceptions, like Article 151(4) and the duty to respect cultural diversity expressed in Article 22 of the Charter of Fundamental Rights. Article 22 has been construed as a 'minority' provision by the EU Network of Independent Experts on Fundamental Rights, but this body has no legislative or judicial power.

Be that as it may, there are increasing references to 'ethnic minorities' (often side by side with 'immigrants') in the social inclusion programme. While this is focused on the employment sector, it is interesting that the 2006 report on social exclusion of the European Commission and the Council of Ministers states that 'the exclusion of people and groups, such as immigrants and ethnic minorities, from participation in work *and society* [should be addressed] for economic as well as social justice reasons'. Furthermore, one of the key priorities is to 'improve access to quality services and to overcome discrimination and increase integration of ... ethnic minorities and immigrants' (8–10). Admittedly, little attention is paid to identity issues, but, as was already pointed out, it is *possible* that identity themes will also be addressed (in terms of the prohibition of indirect racial discrimination). The main focus, however, is on employment, as was also visible in the name of the Advisory Group

established by the Commission in January 2006, namely the 'high-level advisory group on social integration of ethnic minorities and their full *participation in the labour market*'. Hopefully, this attention to minorities and their fate in official policies and documents will translate into a more positive reality for these groups.

In view of the ongoing resistance of certain states in relation to minorities (e.g. Belgium, France and Greece), it is unlikely that the founding treaties will ever contain an explicit competence in relation to minorities. This was also noticeable in the elaboration of the Draft Constitutional Treaty. The protection of minorities is marked as a foundation value of the EU. Although this was a big step forward for minorities, there are still no explicit competences assigned to the EU to make this more concrete.

It remains to be seen how the 'mainstreaming' of attention for minorities will develop, and whether the ECJ, in its jurisprudence on human rights as a general principle of EC law, will take up the position of the Commission that minority rights are a component part of human rights, and hence that the actions of states in the field of EC law have to comply with minority rights. If anything, it will be a very incremental process.

### Minority issues in the European states: recurring problems

The regional report on Europe (pp. 89–102) provides an excellent overview of the recurring problems in relation to minority protection in the European states. Hence it suffices here to highlight those themes that are particularly problematic in terms of participation (in the broad sense).

The systemic discrimination against the Roma is not confined to Eastern European states but can also be witnessed in Western European states. Similar problems of exclusion from economic, social and political life have also been remarked in relation to the North African communities (new minorities) in several states. Nevertheless, it should be acknowledged that in the wake of the (duty to) grant EU citizens electoral rights in local elections, Denmark, the Netherlands and Sweden also grant electoral rights to non-EU nationals after 3–5 years of residence. So far this does not seem to have had a significant impact on the overall level of economic (or social) participation of the population groups

concerned. More seems to be needed to counter prejudice against immigrant groups.

The practice of several countries of introducing advisory bodies for immigrants or minorities is to be welcomed as an important mechanism for representation and participation. However, there is scope for such bodies to be better institutionalized.

Since 11 September 2001, anti-Muslim sentiment has been gaining ground in several, if not most, European states. Governments should pay special attention to the danger that the application of anti-terrorist measures does not disproportionately target Muslims. This unjustifiable disparate impact would amount to a violation of the prohibition of indirect discrimination.

Finally, it should be underlined that unreasonable linguistic requirements in relation to access to jobs, to nationality or to the passive right to vote, similarly could amount to indirect racial discrimination. While the problems of the Russophone minority in Estonia and Latvia in this respect are well known, other governments should also take care to avoid such requirements, in view of the resulting serious impairments of various dimensions of participation.

### **Trends, prospects and suggestions**

The above overview has revealed a complex patchwork of outright positive developments, developments with potential to improve minority protection but also negative developments that need to be addressed urgently.

At the level of the states themselves, the question of political will is very important, not least because the minority rights standards themselves leave states a considerable amount of discretion. Political will on the part of states matters not only at the level of implementation but also at the level of the adoption of (new) standards. In this respect, the call to adopt an additional directive to tackle the particular integration problems of Roma can be highlighted.

The discretion left to states concerning implementation also underscores the importance of adequate monitoring systems. It is striking that the lack of judicial supervision of the FCNM has not prevented the contracting parties from taking up the suggestions of the AC by way of an incremental process. The jurisprudence of the ECHR reveals that there is a great deal of potential but that the Court so far has not made full use of

it, often because of the margin of appreciation it allows states.

It remains to be seen to what extent the process of internalization of minority protection in the EU will proceed. In this respect, the case law of the ECJ, *inter alia* in relation to the Racial Equality Directive, and the possible place of minority rights within human rights as general principle of EC law, is eagerly awaited. ■