

Geoff Gilbert\*

## Soft Solutions to a Hard Problem: Justiciable Minority Rights?

“[The] ‘problem’ of minorities [... is not] susceptible of solution as those of physics and mathematics” (de Azcárate, *League of Nations and National Minorities*, 1945, p. vii).

The grass often appears greener alongside the wrongly chosen path. There may well be legitimate criticisms of existing mechanisms for protection, but the so-called solution from another system may not be a wholly suitable transplant: either it cannot be grafted into the present structures or it does not fully respond to the present criticisms. To use a ridiculous analogy to highlight the problem, assuming surgeons could connect the muscles and nerve endings, could a human being ever take full advantage of a prehensile tail? To an extent, it is the contention of this article that a protocol to the European Convention for the Protection of Human Rights and Fundamental Freedoms<sup>1</sup> for the protection of minorities is the equivalent of that prehensile tail—undoubtedly, such a protocol could be grafted on to the ECHR, but it would not be a perfect fit and would not respond to all the needs of minority groups in the Council of Europe region.

It is beyond question that minority rights are not coterminous with international human rights, but international human rights law can definitely protect minorities, or rather, persons belonging to minorities. How far international human rights law, conversely, can provide collective remedies is open for discussion. That does not mean, however, that it is not appropriate to revisit the question

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\* Professor of Law, University of Essex. This article is based on a report provided to the Parliamentary Assembly of the Council of Europe (PACE) that was delivered in Oslo, June 2011. For a fuller idea of the Oslo Meeting, see the parallel report by Krzysztof Drzewicki, *Drafting and Additional Protocol to the ECHR: Basic Standards for National Minorities, Pros and Cons*.

1 ETS, 5 (1950); hereinafter, ECHR.

of a minorities protocol to the ECHR.<sup>2</sup> There are various issues, though, that need to be addressed if a Protocol to the ECHR on the protection of national minorities and persons belonging to a national minority is to be promulgated: first, the definition of rights-holders; next, the content of the rights to be included in the protocol; third, the justiciability of any such rights; and, finally, the sorts of remedies that might be necessary to give full effect to the rights.

Justiciable rights require democratic acceptance in a stable society. Thus, it was hardly surprising that Parliamentary Assembly Recommendation 1201 (1993)<sup>3</sup> was rejected, considering that it sought to establish a broad range of rights for national minorities and their members at a time when so many new members of the Council of Europe were seeking to assert a national identity that had been suppressed for nigh on half a century during the Soviet era. Wars in the former Yugoslavia and between Azerbaijan and Armenia, alongside longer established but less intense minority conflicts in Spain, Turkey and the United Kingdom tolled its death knell.

The proposed Protocol to the ECHR found in Recommendation 1201 also provided for rights for the national minority *qua* group which, even today, runs counter to usual practice in international human rights law instruments.<sup>4</sup>

Article 11:

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

Although set out as a right for persons belonging to a national minority, “autonomous authorities” as a method of implementing their rights would potentially have

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2 See PACE Resolutions 1866 and 1994 (2012) and Document 12879, 23 February 2012.

3 See, at <<http://www.assembly.coe.int/ASP/Doc/XrefViewPDF.asp?FileID=15235&Language=EN>>, Assembly debate on 1 February 1993 (22nd Sitting) (see Doc. 6742, report of the Committee on Legal Affairs and Human Rights, Rapporteur: Mr. Worms; and Doc. 6749, opinion of the Political Affairs Committee, Rapporteur: Mr. de Puig). The proposal was rejected by the Heads of State and Government of the Council of Europe at its Vienna Summit in October 1993 (see Recommendation 1255, 1995; although Parliamentary Assembly Order 484 still required the Legal Affairs Committee of the Council of Europe to have regard to the draft Protocol when assessing new States for admission).

4 Cf. United Nations Declaration on the Rights of Indigenous Peoples, UNGA Res. 61/295, U.N. Doc. A/RES/47/1 (2007).

Article 4:

Indigenous peoples, in exercising their right to self-determination, have the right to autonomy or self-government in matters relating to their internal and local affairs, as well as ways and means for financing their autonomous functions.