

Book Review

Participation, Representation And Identity. The Right Of Persons Belonging To Minorities To Effective Participation In Public Affairs: Content, Justification And Limits, By Annelies Verstichel, Antwerp - Oxford - Portland: Intersentia, 2009, Pp. 735; Isbn 978-90-5095-840-0.

Krzysztof Drzewicki*

DOI: [10.1163/187502310794895443](https://doi.org/10.1163/187502310794895443)

* Krzysztof Drzewicki is an LL.D, Dr. Habil., Professor of Public International Law, University of Gdańsk, Poland. From 2003 to 2010 he was the Senior Legal Adviser to the OSCE High Commissioner on National Minorities in The Hague. Since 2010 he has resumed both his academic and diplomatic work respectively at the University of Gdańsk and the Polish Ministry of Foreign Affairs.

The book under review constitutes one of the best reflections of the actual renaissance in scholarly research on national minority issues which we have witnessed over the last three decades or so. The prior absence of substantial and large-scale research into these issues was a corollary of the post-World War II normative deficit of rules on minority rights in international law. The CSCE Copenhagen Document (1990), the UN General Assembly Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities (1992) and the Council of Europe's (CoE) Framework Convention for the Protection of National Minorities — FCNM (1995) successfully broke this excessively long period of passive and reticent attitudes by the European and other governments in setting key standards for minority rights.

In this context it is not surprising that the reviewed book is one of several studies that have been published in the field of the international protection of rights of persons belonging to national or ethnic minorities.¹ Most notably, the book belongs to a series of scholarly publications which in recent years have focused on the important issue of the participation of minorities in public life. The author has selected for her scholarly analysis the right of persons belonging to national minorities to effective participation in public affairs — a new human right which only emerged in international law in the 1990s. She has thus taken a human and minority rights perspective enhancing three closely intertwined values and normative objectives: participation, representation and identity.

Against this background Verstichel has formulated two departing assumptions (pp. 3-4). One is that 'diversity is a given' and that minorities have always existed and will always exist. So her aim has been to study how to deal with and how to accommodate such diversity and pluralism. She has consistently submitted that since secession as an *ultimum remedium* will almost always create new minorities, it will not solve the whole issue. This is why Verstichel has deliberately decided that secession and the right to external self-determination fall outside the scope of her research. This is a commendable approach since there is still a need to study ways and methods of ensuring the effective participation of minorities in public life within the existing boundaries of states.

The second assumption, or indeed rather a presumption, is the importance of a democratic framework for the implementation of the right of minorities to effective participation in public affairs. However, this is a more complex issue since the cause-effect relationship is not that simple. Ironically, in some parts of Central and Eastern Europe (re-)establishing democratic governance created a more conducive climate than under the former communist autocracy for reinforcing ethnic divisions or even for the eruption of clashes and open conflicts, the Balkans being a prime example. Verstichel's presumption should thus not solely rely on the democratic framework, but rather on its quality, not only on the existence of rules and mechanisms but also on genuine democratic culture. This is what can be read from the conclusions of the Copenhagen Human Dimension Conference which were later endorsed by the Charter of Paris for a New Europe (1990).² Furthermore, her argument on the democratic framework, including respect for human and minority rights, should also be seen from the perspective of the contribution to stability and peace in the light of well-established conclusions of peace research whereby 'democracies do not fight each other' or 'wars [...] are

1 See only by way of illustration the books written in recent years by Marcin Czapliński, Kristin Henrard, Rianne Letschert, Tove Malloy, Maria Amor Martin Estébanez, Anna Meijknecht, Gaetano Pentassuglia, Patrick Thornberry, Marc Weller and Wheatley Steven.

2 The latter concluded in its section on human dimension that '*questions related to national minorities can only be satisfactorily resolved in a democratic political framework*'.

non-existent (or very rare) among democracies'.³

Both the triangle of values/goals and two departing assumptions have naturally determined the structure of the book and reflect the methodological approach of the author. This voluminous book is divided into merely five chapters, although they are very broad. The first chapter is devoted to the theoretical framework. Although it extends to over 80 pages, its content is indispensable not only for characterizing certain basic notions and definitions but also for making preliminary submissions which are verified in subsequent parts of the book. An additional asset of the chapter is that Verstichel, while writing a legal dissertation, has not overlooked a broader set of social science aspects of theories of and approaches to participation and representation. Chapter 2 is on the protection of minority participatory rights through general human rights instruments with an international law character. This extensive chapter provides an impression of all specific standards and arrangements for minority participation in international law. It convincingly demonstrates that in spite of their development, general human rights instruments are an insufficient tool for ensuring the effective protection of minority participation in public life. Consequently, this brings us to chapter 3 in which the international right of minorities to effective participation is examined in detail throughout the numerous frameworks of the United Nations, the OSCE and its High Commissioner on National Minorities (HCNM), the Council of Europe and bilateral treaties. Perhaps the book could also have examined the European Union which, although not directly involved in minority issues, has initiated some programmes within the Union (e.g. for Roma and Sinti) and in its external relations it is very actively and regularly involved in election observation.

The further examination of minority participation has shifted from international law to constitutional legal frameworks. Chapter 4 deals with domestic mechanisms to implement the right of minorities to effective participation in public affairs in a comparative perspective. Finally, before the final conclusions, chapter 5 contains three case studies: Belgium, Italy and Hungary.

The end result shows that Verstichel has written an excellent study in the field of participation by persons belonging to national minorities in public life. Her study is laborious, diligent and meticulous. Concerning its aims, content and performance the book is a successful outcome of her research project which has lasted for many years. Verstichel also merits a great deal of appreciation for her methodological approach. She has actually submitted a study of comparative constitutional law, notably an investigation into the modalities of electoral law and comparing their arrangements with a variety of international law frameworks. Her decision to examine country case studies was perhaps a risky venture, including that of the selection of three specific states, but the final outcomes appear to be both methodologically and substantively valid.

The book reflects a modern methodology bridging the demands of theory and practice, an approach that should be strongly commended. Having said that, the book is too voluminous (735 pages). It is understandable that Verstichel wished to demonstrate her research diligence and to investigate all the major problems on her way to her conclusions, but her book could have been substantially shorter if she had referred to some of her detailed publications (articles) and merely summarized them in the book. Her research nonetheless invites a few polemical or concurring comments on certain controversial issues and positions contained in the book.

The first is the interpretation of Article 27 of the International Covenant on Civil and Political Rights as to

³ For more on those conclusions see N.P. Gleditsch, 'Democracy and Peace: Good News for Human Rights Advocates', in D. Gomien (ed.) *Broadening the Frontiers of Human Rights: Essays in Honor of Asbjørn Eide*, Oslo: Scandinavian University Press, 1993, pp. 290–291.

its scope. In a climate of the normative deficit of international legal rules the emergence of Article 27 raised controversy as to whether it entails the right to participation in public affairs. Instead of admitting that the original formulation of Article 27 is very narrow and ignores participatory aspects, Verstichel follows the majority of commentators by stating that the Human Rights Committee (HRC) extended this provision so as to also entail effective participation for the enjoyment of cultural rights. While correctly submitting that not only cultural matters can be at stake as far as participation is concerned, she attempts to strengthen this broad interpretation by expecting the formation of a customary rule if nations do not object to requests for information on participation (pp. 167-169). It seems, however, that the interpretation by the HRC in its general comments has more authority than a possible but unrealistic formation of a customary rule on the broader meaning of participation.

The second point which invites some arguments concerns some quite surprising remarks about monitoring the right to effective participation in public affairs. Of the three international frameworks which Verstichel has examined 'only the FCNM is foreseen with a proper monitoring mechanism' (p. 369). This 'allegedly' proper mechanism is made up of five-year reporting cycles and report assessments by the CoE's Committee of Ministers and its Advisory Committee under the Framework Convention. In a number of cases governments prefer to report in the spirit of wishful thinking about work which has been undertaken on, for instance, a relevant draft law and they conclude in the next cycle about its expected adoption in the near future. This tactic does actually work and pays off. What Verstichel calls a 'proper mechanism' thus amounts to a lengthy process with a reduced impact. Furthermore, she has not devoted sufficient attention to the experience of other treaty-based bodies with one-dimensional monitoring (e.g. reporting) which have been improved and enriched by other means for supervising compliance, notably by complaints mechanisms.


Third, proportional to Verstichel's overestimation of the FCNM as a monitoring mechanism, she has definitely underestimated the importance of the HCNM who is regularly involved in a variety of participation issues, including cooperation with the ODIHR in election observation. The HCNM promotes his fairly advanced concepts in the field of participation.⁵ Verstichel admits that the HCNM potentially has a big impact through his political and legal recommendations but it is difficult to assess his approach to participation as his work is confidential and only general lines emerge from his speeches and the publications of his staff (p. 369). The HCNM was the first to endorse a list of possible dimensions and forms of promoting effective participation by minorities in public life (the Lund Recommendations on the Effective Participation of National Minorities, 1999). Verstichel thus offers a distorted view because what the HCNM has actually influenced is largely accessible also through the ODIHR election observation reports, the dissemination of cases of good practice, the improvements discussed and introduced in specific states with regard to their electoral laws and regulations concerning consultative and advisory bodies, in public statements by national politicians and by other publicly accessible means.

The fourth comment concerns a stand-still clause and retrogressive measures in the field of minority standards. This is indeed a problem which becomes one of the most serious threats to effective minority protection. The problem is that in the course of time some states try to introduce legislation to reduce the achieved level of the protection of the right of minorities to participate in public life (e.g. the withdrawal of electoral privileges or reducing membership in minority councils). Such steps or even plans are criticized by the FCNM and other minority bodies. This practice leads Verstichel to an apt submission on the existence of an 'implicit stand-still clause' (pp. 309-311). One must observe, however, that the resistance against retrogressive measures cannot be unlimited. One can easily envisage a situation where substantial demographic changes

may justify the withdrawal or reduction of some privileges or other arrangements for the protection of minority participation or other interests. In such cases certain modifications could be introduced, but only after a careful consideration of the situation and their consequences for minority rights. This flexible understanding has permitted Verstichel to correctly conclude that ‘the stand-still clause is applied *rebus sic stantibus*’ (p. 332). In order to boldly strengthen this position one could directly refer to the demands of Article 62 of the 1969 Vienna Convention on the Law of Treaties which strongly protects contracted obligations against terminating or withdrawing from the treaty under the so-called ‘fundamental change of circumstances’. This approach allows the validity of treaty obligations to be modified in only exceptional and strictly specified situations. Verstichel’s submission is timely and topical for the ACFC and other minority bodies to counteract any attempts at unjustified challenges to valid and legitimate minority rights.

Fifthly, while joining other critics of the *Gorzelik* judgment of the European Court of Human Rights for its allegedly restrictive interpretations, Verstichel *inter alia* points out that the Court is not yet ready to allow ‘unilaterally and automatically [...] to claim minority rights, without approval of all political actors involved’ (p. 123). While it is true that this was the case as far as Article 11 ECHR was concerned, the Court relied on the assessment of domestic courts as to whether Silesians are a national minority or not. Verstichel’s interpretation is so liberal as to the recognition of Silesians as a minority that she becomes blind to the potential consequences of her option – the electoral system would convert the Parliament to an assembly of delegates of regional groups and not of political parties. As a reaction the Parliament would have to abrogate any electoral privileges for actual and alleged national minority groups. It is a good lesson for those who promote the better representation of minorities in a way that leads to harmful effects. Another lesson is an excessive belief in the subjective criterion for the recognition of minorities, while ignoring the objective factors. Such asymmetry easily leads to a possible recognition of REAL-ians (see their website) who claim to have arrived from space but by way of a subjective criterion might seriously claim their minority status. Remarkably, in the same book Verstichel provides a more balanced view on the relationships between the objective and subjective criteria (p. 11).

A few of the above polemical points cannot undermine the value, the usefulness, the high professional quality and the successful end results of this book. On the whole, the book is a success story. It provides not only some answers to crucial questions but, above all, shows what has already been achieved in promoting the right to minority participation and what still remains to be done.



This article was first published with Brill | Nijhoff publishers, and was featured on the Security and Human Rights Monitor (SHRM) website.

Security and Human Rights (formerly Helsinki Monitor) is a journal devoted to issues inspired by the work and principles of the Organization for Security and Cooperation in Europe (OSCE). It looks at the challenge of building security through cooperation across the northern hemisphere, from Vancouver to Vladivostok, as well as how this experience can be applied to other parts of the world. It aims to stimulate thinking on the question of protecting and promoting human rights in a world faced with serious threats to security.

Netherlands Helsinki Committee
Het Nutshuis
Riviermarkt 4
2513 AM The Hague
The Netherlands

© Netherlands Helsinki Committee. All rights reserved.

www.nhc.nl