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"Passed the Point of No Return"
The Need for a Supranational Minority Protection System within the European Union – Examining the Impact of the Latest EU-enlargement Process on the Situation of National and Ethnic Minorities within the European Union, with Special Focus on the New Member States, Exemplifying with a Case Study on Slovakia –

by

Ilona Mikóczy
University of Vienna, Ludwig Boltzmann Institute of Human Rights
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Supervisors: Mag. Marijana Grandits
Ludwig Boltzmann Institute of Human Rights, Vienna

ao. Univ. Prof. Dr. Manfred Nowak

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ABSTRACT

Since the Maastricht Treaty the European Union has been facing towards an ever-closer union, where the integration concerns not just economical cohesion, but political and social as well. The new motto of this ever-closer Union is: United in Diversity!

This paper examines the possibilities of the millions of citizens of the union belonging to national or ethnic minorities in this promoted diversity context. It analyses the current European standards relevant for national minorities and studies the positive impact of the Copenhagen criterion on the protection of minorities during the latest enlargement process within the candidate countries - using the example of Slovakia -, and within the European Union itself. The thesis also points out the deficiencies of the EU-conditionality on minority protection as a consequence of the lack of internal standards.

The paper argues that the need for a supranational minority protection system in the European Union has become very urgent. The latest enlargement process has doubled the number of EU citizens belonging to national or ethnic minority groups; the European integration has become much more than economical cohesion and hence it affects more and more the everyday lives of the citizens of the European Union. The thesis therefore contains a proposal for a supranational minority protection system for the European Union.

The European Union by the latest enlargement process and the commitment for a political union has passed the point of no return. There is no way of avoiding the issue of minority protection at the EU level without risking the security, stability and prosperity of the union.

INTRODUCTION

The enlarged European Union is a cohesion of 25 European states, which has been heading since the Treaty of Maastricht towards a political union besides the economical integration. 25 different member states already create a huge range of diversity, however this diversity cannot be restricted to the number of member states, as in each of them there is an internal diversity as well.

Homogen nation states – despite the several attempts – never existed in history and never will in the future. Drawing state-boundaries hardly result in precise ethnic-boundaries; there are always present groups of people with specific characterizing marks – different from the majority.

There is **no** generally accepted **definition** of minorities at the international level. The most common explanation for the absence of a definition to date is the combination of the subject's complexity with the pressing need to take action. Some scholars have attempted to by-pass the problem by simply saying it is "a question of fact"; others argue for the necessity of the definition.[1] The mostly quoted and widely respected definition had been provided by the UN Special Rapporteur Francesco Capotorti:

„*A group, numerically inferior to the rest of the population of a State, in a non-dominant position, whose members – being nationals of the State – possess ethnic, religious or linguistic characteristics differing from those of the rest of the population and show, if only implicitly, a sense of solidarity, directed towards preserving their culture, traditions, religion or language.*"[2]

The notion "minority" in principle refers to a smaller group than the majority. But who is the majority generally in the European Union? Bigger member states? Is there a dominant „rest of the EU population"? How could we then refer to the principle of equality among the member states? The EU is the cohesion of states, and not sub-national factors. Is it possible to argue –

[1] JOHN PACKER: *On the Definition of Minorities* in John Packer and Kristian Myntti (eds.): The Protection of Ethnic and Linguistic Minorities in Europe; Abo Akademi University 1993; p. 24.-25.
[2] FRANCESCO CAPOTORTI: *Study on the Rights of Persons belonging to Ethnic, Religious and Linguistic Minorities*; UN Document E/CN.4/Sub.2/384/Add. 1-7 (1997)

despite this fact – that the minorities within the member states are the minorities of the European Union as well?

National minorities in the old EU Member States:

The fact that the European Communities did not have any official commitment to minority rights does not provide a comprehensive picture for us concerning its Member States. It would be improper to say that minorities were neglected generally in the old member states, as on one hand some of the most beautiful examples of the current minority protection-systems in the World can be found in EU member states like the Åland Islands and South Tyrol. On the other hand there are states like Greece and France that do not recognize minorities in their territories at all.[3] There are differences in the relation of Member states to Minority Protection Instruments as well. The Council of Europe's Framework Convention on the Protection of National Minorities, which is currently the most important legally binding tool concerning minority protection was not signed by two (France and Belgium) and not ratified by four old Member States, namely: Greece, Portugal, the Netherlands and Luxemburg. The proportion of the ratifications among the "old" 15 EU member states regarding the Council of Europe's Charter of Regional and Minority Languages is even worse.

The European Union – former Community – had been established in principle for economical reasons. It is not a miracle therefore that for many years – with so different member states´ attitude – there was no policy on issues like human rights and minority rights. However the integration process has advanced in such manner that now even for economical reasons, there is no way of avoiding these questions.

The Treaty on the European Union instructs the Community "*to contribute to the flowering of the cultures of the Member States, while respecting their national and regional diversity*". Regional diversity is thus recognized as a Community value. This obviously includes territorially based

[3] BRUNO DE WITTE: *The European Community and its Minorities* in Catherine Brölmann, René Lefeber, Marjoleine Zieck (eds.): Peoples and Minorities in International Law; Kluwer Academic Publishers 1993; p. 174.-176.

cultural and linguistic differences and one can therefore say that there is an incipient recognition of the existence of minorities in a constitutional document of the Community. Respect for minorities however does not mean protection of minorities. Is there a possibility in the future for a distinct role for the EU in protecting subnational groups as well?[4]

National minorities in the new Member States and Candidate Countries

Minority issues have significant resonance in Central- Eastern Europe. The common history of the nations here has still a very important influence on the states´ actual policies. Most of the new states in the region are succeedors of the two Empires, the Ottoman, and the Austro-Hungarian. They have been facing the process and consequences of the awakening of national self-consciousness since the collapse of the former empires. It is a common feature – due to the border drawings after the World Wars – that there are minorities in the States, which were before in dominant position; and that the actual majority is the previous minority. The roles have been changed; and it has been hard to find a balance between the different interests, claims and human feelings. The oppressive totalitarian regime – referring to the common eastern-block past – had also contributed to the postponement of reconciliation with the past and with each other.[5] After the collapse of the socialist regime, it was common that minorities in the new democracies started to demand protection and rights; while majorities feared again loosing control over state-sovereignty areas and so required to prove loyalty by the minority on day-by-day basis. The mutual distrust has been the source of different tensions.

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[4] BRUNO DE WITTE: *The European Community and its Minorities* in Catherine Brölmann, René Lefeber, Marjoleine Zieck (eds.): Peoples and Minorities in International Law; Kluwer Academic Publishers 1993; p. 179.-180.

[5] Even if it was prohibited to talk about dark historical facts that happened during the early years of communism after the World War II; events like the resettlement; the population exchange programs between states; the forced identity-change; the deprivation of citizenship of members of minorities on the basis of „collective guilt"; are hardly forgettable. These kind of policies affected the lives of thousands belonging to different minority groups.

Minorities in the European Union?

The word “minority“ has a completely different meaning in the old states and in the new member states of the Union. Mentioning it in the old-ones, people associate minorities basically to minorities with different sexual orientation; disabled people; women... and perhaps at the end of the list first to immigrants *(“new minorities“)* and finally to traditional national and ethnic minorities *(“old minorities“)*. The situation is different in the new member states, where the historical facts, the common past experiences based traditional old minorities into the centre of the “minority question“.[6]

The European Union took a very cautious approach /and perhaps approach is even a strong expression describing the „bit-more-than-nothing commitment/ towards the minority issue. However the recent developments of the EU-history, the commitment towards the political union; the establishing a human rights clause to the Treaty of the European Union; and the enlargement process created new challenges concerning our issue.

The aim of this paper is to examine the relation between the European Union and minority groups inside its member states. A useful tool in this respect is the classical distinction between *traditional national and ethnic minorities* and *new immigrant minorities*. Though their problems are sometimes very similar, this paper deals restrictively only with traditional national and ethnic minorities. The main research questions concern the influence of the accession period – through the EU’s Copenhagen criterion on minorities – on the situation of minorities in the new member states, and examines whether these kind of external requirements have had an internal impact as well. The thesis describes the actual situation and possibilities of national and ethnic minorities in the EU. It examines the role of the European Court of Justice and the minority friendly attitude of the European Parliament. It analyses the relevant EU legislature, and while dealing with the EU´s strong commitment to non-discrimination the paper contains arguments for affirmative actions in order to ensure de facto equality for the most disadvantaged groups as well.

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[6] PERSONAL INTERVIEW with DUKA ZÓLYOMI ÁRPÁD – Member of the European Parliament, 19. May 2005 - Bratislava

The paper also provides a case study on Slovakia's minority protection system in order to see the influence of the EU-conditionality on a previous candidate state.

Finally the thesis argues for an inevitable development in the EU's stance towards its minorities, presents general recommendations and describes the contours of a special supranational minority protection system.

FRIENDLY APPROACH TOWARDS MINORITIES IN THE EU´S INTERNAL POLICY

At the current stage minorities are not even mentioned in binding EU primary law. Still, the germs of a minority protection system are present at the EU level. The European Parliament is famous for its minority friendly attitude, and has been the initiator of several organs that are relevant of a minority point of you. The European Court of Justice is also an important factor, a reliable point for minorities. Though it has no jurisdiction over minority-issues, the examining of member states´ compliance to the acquis communautaire through the principle of equality, non-discrimination and proportionality has lead to very important court decisions concerning minorities.

Minorities and the European Parliament

The strongest promoter of minority rights has been the European Parliament. This is the only institution where are directly elected representatives of EU citizens, who have the closest link to the people, and despite or rather due to this fact, this is the EU institution with the weakest position.

Since 1981 four resolutions and several reports have dealt with minority issues.

The **Arfé Resolution** - **European Parliament Resolution on a Community Charter of regional languages and cultures and on a charter of rights of ethnic minorities** - of the 16th of October 1981 contested several

recommendations for the institutions of the Member States at national, regional and local level as well; and mainly about the areas of education, mass-media and civil sphere. It also included a provision concerning minority language rights at the Court and Administrative procedures; and it proposed the regional cultures to be supported of the structural funds as well. The Arfé resolution called upon the European Commission to re-examine the Community legislation and practices, which discriminate against minority languages.

Already in the preamble of this resolution *cultural diversity was mentioned in relation with minority issues* and regional languages and cultures as the spring of the richness of European civilisation. It referred to the minority issues in a post-modern way, stating that cultural identity has become one of the most important non-material needs.[7]

It can be attributed to the Arfé resolution, that in 1982 a new paragraph was opened in the Communities budget for the support of the minority and regional languages.[8] At the same year had been established the **European Bureau for Lesser Used Languages** (EBLUL).

In 1983 the Parliament reminded again the issue to the Commission with the **European Parliament Resolution on Measures in Favour of Linguistic and Cultural Minorities.** The document emphasized that there were 30 million citizens of the Communities with minority mother tongue; and considering this fact repeatedly asked the Commission for practical steps; to continue and intensify its efforts in the area.

Regretfully there was nothing relevant to be happened.

In 1987 the **Kuijpers resolution** – **European Parliament Resolution on the languages and cultures of regional and ethnic minorities in the European Community** - called the attention again to the tasks and principles composed by the previous resolutions. It drew up some new recommendations as well concerning the recognition of surnames and geographical signs in minority languages; and the use of minority languages

[7] HEGEDÜS DÁNIEL*: Az Európai Unió nemzeti, etnikai és nyelvi kisebbségeket érintö politikáinak rövid összefoglalása*; EUROPÉER – nemzetözi kapcsolatok; Magyarország egyetlen egyetemisták által szerkesztett külügyi magazinja; p.3-4.

[8] At that time the separated amount was 100 000 ECU, which has increased to the mid 1990s to 4 million ECUs. However this budget paragraph has to be re-negotiated and endorsed annually what is an obstacle to start longer projects.

in the areas as of postal service, names of the goods, consumer-information, street names and road signs and signs of public interest.[9]

The Parliament by Kuijpers Resolution also expressed its support to the Charter of Regional and Minority Languages of the Council of Europe. In addition to this called up the Commission to grant the EBLUL a full status as an official Intergroup of the European Parliament, and ensured budget sources for it as well. As a reaction, the Commission established the **MERCATOR program**, which connects four research institutes that concern researches on the use of minority languages. The MERCATOR network had been coordinated by the EBLUL until 1994; since then, the Commission has been responsible for it.[10]

Further developments led to a report establishing a **Charter of Rights for Ethnic Groups** in 1988. The significance of this **Stauffenberg report** is, that through the use of the term "ethnic groups" it approached the sensitive issue of collective rights, and called for affirmative actions. However, and avoiding the failure by this, the Parliament never took a decision on this report as its term of office was running out. After the elections the Parliament's Law Committee resumed work on a revised version of the Stauffenberg report and count Stauffenberg´s successor, Siegbert Alber presented the **Alber-report** in 1993. This report took a much more cautious and weaker approach than the previous one; but still has not gained more success; as the Parliament wanted to observe which position the developments inside the Council of Europe – regarding the Language Charter – would take; so it did not reach a decision on this revised report either.[11]

The fourth, and until today the last parliamental resolution is the **Killilea Resolution** – European Parliament Resolution on linguistic and cultural minorities in the European Community – from 1994. It referred again to the Arfé resolution, pointed out that Member States should recognise their

[9] Consumer-protection combined with minority language protection. It is interesting to catch the EU´s „economical way of thinking" even in the area of minority protection.
[10] HEGEDÜS DÁNIEL*: Az Európai Unió nemzeti, etnikai és nyelvi kisebbségeket érintö politikáinak rövid összefoglalása*; EUROPÉER – nemzetözi kapcsolatok; Magyarország egyetlen egyetemisták által szerkesztett külügyi magazinja; p. 4-5.
[11] GABRIEL N. TOGGENBURG: *A Rough Orientation Through a Delicate Relationship: The European Union´s Endeavours for (its) Minorities;* European Integration online Papers (EioP) Vol. 4 (2000) N° 16; p. 5.

linguistic minorities and create the basic preconditions for the preservation and development of these languages. The legal acts should "*at least cover the use and encouragement of such languages and cultures in the spheres of education, justice and public administration, the media, toponomics and other sectors of public and cultural life"* (para.4) The Parliament called upon the governments of Member States to sign and ratify the Council of Europe's Charter on Regional and Minority Languages; and recommended further financial support for the EBLUL. It called upon the Commission to take into account the lesser-used languages and their attendant cultures when elaborating various areas of Community policy and to ensure the adequate budgetary provision for a multi-annual action programme in this field. It also addressed the European Regional Development Fund and EC programmes for economic and social reconstruction to allocate financial means also for such purposes. The Parliament specified that all these recommendations should also be applied to non-territorial autochthonous minorities – and expressly mentioned the Roma and Sinti people.[12]

The **Ebner Report** from 4. September 2003 concerns the mother tongue use and the protection of European linguistic diversity. The report refers again to the high numbers of citizens belonging to minorities; and to the fact, that with the eastern enlargement a number of new elements will enrich even more the European linguistic diversity. It contains three key recommendations through which it called upon the Commission for a legislative act

- on establishment of a European Agency on Linguistic Diversity and Language Learning
- on support for a multi-annual programme on linguistic diversity and language studies – minority and regional languages included

[12] GABRIEL N. TOGGENBURG: *A Rough Orientation Through a Delicate Relationship: The European Union´s Endeavours for (its) Minorities;* European Integration online Papers (EioP) Vol. 4 (2000) N° 16; p..6.

- on the European Monitoring Centre for Racism and Xenophobia[13]

The legislative act, which would end up in a directive, for instance, would be a breakthrough in the EU´s minority protection system. Beside the three key recommendations the Report also suggests to involve the already recognized minority languages into the current educational programmes (Socrates[14]), and to the higher education; it encourages capacity building on minority language teachers; and to publish EU documents also in these minority languages. It called upon the Union to put pressure on its Member States and Candidate States to ratify the Council of Europe's minority protection instruments.

The most recent European Parliament development that is related to minority issues is the **Moraes Report.**[15] The report refers to the Article 6 and 7 of the TEU, Article 13[16] and 63[17] of the TEC, to the two anti-discrimination directives of the European Council[18], to the Commission Green Paper on equality and non-discrimination in an enlarged European Union[19], to the Charter of Fundamental Rights and the proposed Treaty establishing a Constitution for Europe.

The Moraes report recalls that there is still no Community *definition* of who can be considered a member of a minority; expresses expectations concerning the future Fundamental Rights Agency's key role in minority

[13] HEGEDÜS DÁNIEL*: Az Európai Unió nemzeti, etnikai és nyelvi kisebbségeket érintö politikáinak rövid összefoglalása*; EUROPÉER – nemzetözi kapcsolatok; Magyarország egyetlen egyetemisták által szerkesztett külügyi magazinja; p. 6.

[14] The objective of the Lingua part of the Socrates program is: *"to promote a quantitative improvement of the knowledge of languages of the European Union, in particular those languages which are less widely thought, so as to lead to greater understanding and solidarity between the peoples of the European Union and promote the intercultural dimension of education."* This statement could give the impression, that minority languages are also included. However the annex of the Socrates decision makes it clear, that only the official languages are involved – also Irish and Letzeburgesch – and in addition Norwegian and Icelandic on the basis of European Economic Area Agreement. It is interesting how the EU is tolerant e.g. towards the recently mentioned 2 not-even-EU-languages; and does not include its own regional and minority languages with such a high relevance as the Catalan, Welsh and Basque.

[15] European Parliament Report on the Protection of Minorities and Anti-discrimination policies in an Enlarged Europe (2005/2008(INI)) A6-0140/2005 final. 10.5.2005

[16] *Combating discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation*

[17] *Establishes the framework of asylum and immigration policy within which the integration of third-country nationals is promoted*.

[18] Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective racial or ethnic origin [2000] OJ L 180/22 and Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation [2000] OJ 303/16

[19] COM(2004)0379

issues and advocates an integrated approach to equality and non-discrimination and mainstreaming of these concepts in relevant EU policies. It explicitly mentions the Roma community who need special protection since it is one of the largest minorities in the enlarged European Union.

Despite the afore-mentioned efforts of the European Parliament it is important to realize and conclude, that practical step forward in the minority issue has not happened for 22 years. The Maastricht treaty, which established the European Union, and was a huge development towards an ever-closer union, has not imposed relevant changes in the area. Oppositely, there have been even backslidings. For instance the budget line (B3-1006) for the EBLUL; which had been continued before year after year as a pilot program; was ended by a **judgment of the European Court of Justice**[20]. The general point made by the Court was, that significant European Community expenditure requires the prior adoption of a basic act by the Community legislative authority. As there was (and is still) no basic act for the budget heading concerning programs for regional and minority languages the EBLUL lost its financial basis.

Following the judgment, the Commission considered the feasibility of proposing a genuine multiannual action program for the benefit of regional and minority languages, which would give funding for this purpose on a firm footing. Although the European Parliament supported the plan, several Member States in the Council working groups did not. Therefore, nothing came out of it.[21] Recently the funding has been going on in a piecemeal and indirect way. In 2001 under the cover of "European Year of Languages" project; currently for the EBLUL and MERCATOR program through the Commission's funding for a miscellaneous group of "institutions of European interest". However these solutions are just constrained supplements; avoiding and delaying the real solution by them.

The ECJ judgment[22] is reasonable, and surely it was not its aim to make the EBLUL work impossible; nonetheless looking at the factual outcome

[20] Case C-106/96, *United Kingdom v. Commission*, (1998) ECR I-2729
[21] BRUNO DE WITTE: *The Constitutional Resources for an EU Minority Protection Policy* in Gabriel N. Toggenburg (ed): Minority Protection and the Enlarged European Union: The Way Forward OSI/LGI 2004, Budapest p. 118-119.
[22] Case C-106/96, *United Kingdom v. Commission*, (1998) ECR I-2729

that the basic act is still missing and that there is no strong initiation towards it, gives a rather sad picture for EU minorities. It would be worth to think about it, that what is the aim of the European Union. Ever-closer union united in diversity? Or is this just lip service, and actually there is no real effort to go beyond the economical cohesion?

The current picture and approach towards minorities within the European Union will not help citizens who belong to minority groups at the same time to maintain their trust in the EU.

The Role of the European Court of Justice in Minority Issues

The European Court has a crucial role concerning the development of the law in the Communities; and especially concerning human rights issues. With its judgments and interpretations it influences the member states, creates precedents and formulates attitudes. There are several decisions, which are relevant from minority protecting perspective without even mentioning this term.

The „Common Market"– referring to the founding aim of the European Community – is not really sensitive towards minority-issues, as the main goal of it is to achieve positive economical results, fruitful integration. Therefore restrictions, protecting mechanisms for minority-protection at national, or even subnational level might limit the four freedoms of the Community and in this way they might violate the primary law.

The **Groener case** from 1985 is a judicial milestone concerning minority rights.[23] Anita Groener, a Dutch citizen, an art teacher, applied for a post in Ireland; and was refused because she could not suit one of the preconditions: Gaelic-language knowledge. (Despite the fact that the specific course was taught in English.) Groener invoked EC law, and argued that such language requirements limit the free movement of workers.

The Court explained, that the EEC Treaty does not prohibit the adoption of a policy for the protection and promotion of a language of a

[23] GABRIEL N. TOGGENBURG*: Minority Protection in a Supranational Context: Limits and opportunities*; in Gabriel N. Toggenburg: Minority Protection and the Enlarged European Union: The Way Forward; OSI/LGI 2004 ; p.25

member state, which is both the national language and the **first official language**. The implementation of such a policy must not encroach upon a fundamental freedom, such as the free movement of workers. However, if the policies aim meets the test of proportionality and does not bring about discrimination against citizens of other member states; it might be justifiable.[24] The Court found, that the Irish language requirement for teachers is rightful, as "teachers play an essential role in the framework of a national language policy; not only through teaching, but by their participation in the daily life of the school and the privileged relationship which they have with their pupils."[25]

This decision was about declaring the protection of the first official language of a member state as a legitimate aim. What about other languages with weaker official status, like **minority languages**? Is there a possibility to protect them through similar channels or "second-class languages" are treated in different way?

For this question the answer is in the **Angonese case** from 2000.

Mr. Angonese was denied a position in a bank in South Tyrol because he could not prove his language knowledge by a specific local certificate.[26] In this case access to a working place was made conditional upon the knowledge of a minority language that has official status only in a single region.[27]

Mr. Angonese invoked the EC law only against the highly limited possibility of proving the language knowledge not in order to contest the language duty itself. The Court stuck to this limited radius of examination; and this can be read as a *silent approval* of policies, which foster a regional minority language at the cost of the Common Market.

The **Bickel/Franz case**[28] is again a step forward relevant for *minority protection,* as this is the case, when the Court declares minority protection *as* a *legitimate aim* to make restrictions on Community law. Franz and Bickel – German and Austrian citizens wanted to use German language at the Court in

[24] See Case 378/87, *Groener*, (1989) ECR 3967
[25] See Case 378/87, *Groener*, (1989) ECR 3967, par. 20.
[26] See Case 281/98, *Angonese*, (2000) ECR 4139
[27] GABRIEL N. TOGGENBURG: *Minority Protection in a Supranational Context: Limits and opportunities*; in Gabriel N. Toggenburg: Minority Protection and the Enlarged European Union: The Way Forward*;* OSI/LGI 2004; p. 27.
[28] See Case 274/96, *Criminal proceedings against H. O. Bickel and U. Franz* , (1998) ECRI 7637

South Tyrol – where it is allowed for the national minority on the basis of personal autonomy to do so. The Italian government argued that this is a right specifically for the members of the minority resided in the region. The Court accepted the *legitimate aim to protect the minority language*, but it stated that the fact that other EU-citizens with German mother tongue – exercising the freedom of movement – would also be allowed to use their language at the court does not undermine the aim of the rules. A legitimate aim can justify restrictions as long as it conforms to the principle of *proportionality*.

RELEVANT EU LEGISLATION OF THE MINORITY-PROTECTIVE POINT OF VIEW

The human rights clause and the possible sanctions in case of breaches of human rights according to the Treaty on the European Union

Due to the fact that in 1999 the Treaty of Amsterdam entered into force, the legal background of EU-accession is in Article 49 of TEU, which refers to **Article 6 (1) of TEU**.

„The Union is founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law, principles, which are common to Member States."

The Amsterdam Treaty transposed all the Copenhagen criteria (See below) except the reference on minority protection, into primary law. By doing so, the Treaty gave the criteria a clear legal quality and defined them as founding principles of the EU, which are common to all Member States. Article 6 of the TEU (human rights clause), is now the precondition which are to be respected by any State applying for membership.[29] Although minority rights are not included explicitly in Article 6 of TEU, it should not be interpreted by excluding them. Article 6 refers to human rights and fundamental freedoms,

[29] GABRIEL N. TOGGENBURG: *A Rough Orientation Through a Delicate Relationship: The European Union´s Endeavours for (its) Minorities;* European Integration online Papers (EioP) Vol. 4 (2000) N° 16; p. 17.

without mentioning any kind of special EU-approach concerning the content of "human rights", and neither provides it taxative enumeration of the respected rights. If we take into consideration that the international community expressly recognized the indivisibility, interdependence and universality of human rights in the Vienna Declaration and its Programme of Action[30], and that minority rights are also recognized as human rights, narrow interpretation of Article 6 that would exclude minority rights, cannot be allowed.

The second paragraph of Article 6 TEU, which obliges the Union to respect fundamental rights, and its compliance by EU institutions, was explicitly subjected to the jurisdiction of ECJ by virtue of Art. 46 (d) TEU. In view of these changes it seems more and more difficult to argue that human rights are not an objective of the European Communities.[31]

Concerning the *common legal principles* of the Communities it was the Court, which provided rough control of the respect of these values. However with the protection of fundamental rights (in the "ever closer Union") the Court found itself in a more complicated situation, as touching these issues it would have supposed to deal with issues which concern the sovereignty of the member states. That is why the Court's control remained limited vis-à-vis the Member States on the basis of the principle of subsidiarity.

The evolution of legal standards within the Court was complemented by a revolution in the political control of these standards.[32] In 1997 the Treaty of Amsterdam introduced – with **Article 7 TEU** – a procedure providing political control of the standards laid down in Article 6, and so it became possible for the Council of the European Union to *react on a political level* to the existence of "*serious and persistent breach by a Member State of principles mentioned in Article 6(1)*".

Article 7 provides a high threshold of triggering the sanctioning system. The **procedure** consists of two steps. First, the Council, meeting in the composition of Heads of State or Government and acting by unanimity

[30] MANFRED NOWAK: *Introduction to the International Human Rights Regime*, Koninklijke Brill NV, Leiden, The Netherlands 2003; p. 14.
[31] MANFRED NOWAK: *Human Rights "Conditionality" in Relation to Entry to, and Full Participation in, the European Union* in Philip Alston: The EU and Human Rights, Oxford University Press 1999; p. 694.
[32] GABRIEL N. TOGGENBURG: *The Debate on European Values and the Case of Cultural Diversity*; European Diversity and Autonomy Papers EDAP 1/2004; p. 13.

(without participation of the member state concerned) on a proposal by one third of the member states or by the Commission and after obtaining the assent of the European Parliament (by two thirds majority of the votes cast), may determine the existence of a serious and persistent breach. In a second step the Council, acting by qualified majority as laid down in Article 205 (2) TEC, may decide to suspend certain of the rights deriving from the application of the TEU to the State in question, including the voting rights in the Council, or to impose other appropriate and far-reaching sanctions like withdrawal of structural funds and other financial support; suspension of a member state's participation in different EU-programs.[33]

The procedure ensured by Article 7 is also relevant for our issue, though it depends on the interpretation of Article 6. If we assume that minority rights are also human rights, then a serious and persistent breach of accepted obligations towards minorities would introduce a basis for invoking Article 7. However the interpretation of Article 6 is not clear yet, and the existence of double standards for candidate countries and for those who have already joined the European Union carries the danger that the new member states who accepted the minority conditionality in the accession period, now would rely on the classical "not our business" attitude of the old EU; and would step back of their accepted obligations. What kind of reaction could we in this case expect on behalf of the EU? Hopefully the above described situation will never happen, as the new Member States are enough matured to avoid backsliding; however the question is left opened; and as it is a sensitive issue there is a high possibility that nobody will touch it until it remains just a theoretical presumption. Nevertheless we can attach some hopes to the fact, that it could be argued, that the right of the European Parliament and the European Commission to propose the Council to initiate procedures under Art. 7 (1) or (2) TEU presupposes, that both *institutions keep a vigilant eye on developments in member states*.[34] In practice, since 2000 the European Parliament has been adopting yearly reports on the situation of fundamental

[33] MANFRED NOWAK: *Human Rights "Conditionality" in Relation to Entry to, and Full Participation in, the European Union in:* Philip Alston: The EU and Human Rights, Oxford University Press 1999; p. 695.
[34] FRANK HOFFMEISTER: *Monitoring Minority Rights in the Enlarged Union*; in ; in Gabriel N. Toggenburg: Minority Protection and the Enlarged European Union: The Way Forward*;* OSI/LGI 2004; p. 100.

rights within the European Union, including to some instance minority rights. The *European Commission* has a unit of the Directorate-General for Justice and Home Affairs, which deals on the basis of citizen complaints with the human rights situation in the Member States. On the request of the European Parliament the Commission through the guidance of University Leuven created and finances the *EU Network of Independent Experts*.[35] The Network annually drafts a report on the state of fundamental rights in the EU and in its Member States; provides the Commission with opinions and specific requested information; and assists the Commission and the Parliament in developing a European Union policy on fundamental rights. As – for its reports – it uses the Charter of Fundamental Rights (see below) as reference points to assess the human rights situation within the Member States, it has to take into account the minority relevant provisions Article 21 and 22 of the Charter as well.

HUMAN RIGHTS AND MINORITY RIGHTS IN THE EU´S EXTERNAL RELATIONS

Knowing the reluctance of the Member States of giving competences to the EU over sovereignty issues – like internal politics; human rights – it might be surprising how advanced and consequent requirement system has the EU towards its external partners. Certainly the main reason behind this approach concerns again economics, as it is in the EU´s interest to have secure, reliable and predictable partnerships.

The fourth *Lomé Convention* concluded in 1989 with 69 Asian, Caribbean and Pacific countries was the first to include human rights explicitly in the body of the text.[36] Article 5 expresses the signatories´ commitment to respecting human rights and provides for the allocation of part of the funds made available under the Convention to measures to promote human rights.

[35] The network of fundamental rights experts was created by the European Commission in response to a recommendation in the European Parliament's report on the state of fundamental rights in the European Union (2000) (2000/2231(INI)).
[36] Fourth ACP/EEC Convention, signed on 15. December 1989, O.J. 1991, L 229.

In 1991 the Member States agreed on the insertion of human rights clauses in the texts of development agreements, thus giving tangible and visible form to a binding commitment to shared and universal values.[37]

Minority rights first appeared in the *association and cooperation agreements* between the Community and the countries of South Eastern Europe as suspension clauses; as the conflict in the former Yugoslavia brought them to the forefront. The then twelve member states of the European Community convened a peace conference at The Hague and set up an *Arbitration Committee* (known as the Badinter Committee from the name of its chairman) which has developed, in the course of its opinions, a small body of doctrine on self-determination and minority rights. The Twelve themselves contributed to international state practise by the adoption, within the framework of European Political Cooperation, of a *Declaration on the Guidelines on Recognition of New States in Eastern Europe and the Soviet Union*. Recognition of new states in those areas of the World was made conditional by the Twelve, on a number of commitments from the side of the applicants, including respect for human rights and "guarantees for the rights of the ethnic and national groups and minorities in accordance with the commitments subscribed to in the framework of the CSCE."[38] The question of the credibility of this kind of conditionality by the European Community states raised up already at that time the concerns about the lack of internal minority protection system.

The *Pact of Stability in Europe* of 1995 consists of a declaration and good-neighbourliness and cooperation agreements, supplemented by a list of measures taken or planned by the European Union to contribute to the achievement of the objectives of the Pact. The system of minority protection resulting from it is lack of a general character, as it deals only with specific situations. EU „interested states" (candidates or possible candidate countries); their neighbouring countries and international organizations were invited to the negotiations over different issues. The process of the encouragement of

[37] DANIELA NAPOLI: *The European Union's Foreign Policy and Human Rights*; in Nanette A. Neuwahl & Allan Rosas: The European Union and Human Rights; Kluwer Law International 1995; p. 306.
[38] BRUNO DE WITTE: *The European Community and its Minorities* in Catherine Brölman, René Lefeber and Marjoleine Zieck (eds.): Peoples and Minorities in International Law; Kluwer academic Publishers 1993; p. 172.-173.

good neighbourly relations and transfrontier cooperation has gained the most attention and new frameworks for minority protection – through bilateral treaties have emerged. Finally the OSCE was entrusted to follow the implementation.[39]

The ambiguity of the Copenhagen criteria – double standards?(!)

After the collapse of the communistic regimes in Central – Eastern Europe and after the CEECs applied for EU-membership; the European Union and the European Communities, which before hardly took notice of the minorities living in its territory, suddenly showed keen political interest in the status of minorities living outside of its borders.[40] The specificities of the CEEC applying for EU membership encouraged the Union to deal with new issues – like minority questions. This enlargement process cannot be compared to the previous-ones; first of all because of the then special circumstances and historical background of the countries, and because for the former enlargement procedures not even specific requirements were present. At that time *Article 237 TEC* invited *any European state* to apply for membership, and Article O of the 1992 treaty establishing the European Union, which defined accession and procedures also kept silent on the questions of possible political requirements.[41]

The first time that the Community established criteria for the accession of new Member States by adopting Presidency Conclusions was in 1993, when formulated its *politically binding document – the Copenhagen Criteria*.[42]

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[39] MARÍA AMOR MARTÍN ESTÉBANEZ*: The Protection of National or Ethnic, Religious and Linguistic Minorities* in Nanette A. Neuwahl & Allan Rosas: The European Union and Human Rights; Kluwer Law International 1995; p. 155-156.

[40] GABRIEL N. TOGGENBURG: *Minority Protection in a Supranational Context: Limits and Opportunities* in Gabriel N. Toggenburg: Minority Protection and the Enlarged Union: The Way Forward; OSI/LGI 2004 p.3.

[41] FRANK HOFFMEISTER: *Monitoring Minority Rights in the Enlarged European Union*; in Gabriel N. Toggenburg: Minority Protection and the Enlarged Union: The Way Forward; OSI/LGI 2004; p. 87.

[42] Membership criteria require that the candidate country must have achieved

- stability of institutions guaranteeing democracy, the rule of law, human rights and respect for and protection of minorities;

In general, the regular conditions for accession are found in *primary law* (Article 49, formerly Article O TEU) and in the Accession Treaties, which are to be signed, by the Member States and the acceding State. Furthermore, also the *acquis communautaire* is considered to be a condition for accession, as the candidate states must accept them before joining the EU. The reason for establishing *additional conditions* for accession in the Copenhagen Criteria was probably to give the originally internal obligations a more visible external direction, without limiting the Community organs and Member States too much in their freedom to regulate accession to the Union.[43] *Minority rights were the first time in such an important EU-instrument* – which affects after the accession the Community's internal sphere as well – mentioned. The Copenhagen Criteria are not legally binding, as they were adopted in the conclusions of the European Council, but they have political nature.[44]

Considering the EU´s political power; the dangerous ethnic conflicts in Yugoslavia and generally the minority-situation in CEECs at that time, the Copenhagen criteria is definitely a positive factor for minorities in those countries; but on the other hand, imposing a precondition for candidate countries which has no background within the EU, questions the credibility of the instrument and the EU too. It appears that pursuant to the Copenhagen criteria some of the old member states would not have been eligible, were they to reapply for admission to the EU. Some have never ratified the minimum standards of minority protection, i.e. the Council of Europe's

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- the existence of a functioning market economy as well as the capacity to cope with competitive
  pressure and market forces within the Union;
- the ability to take on the obligations of membership including adherence to the aims of political, economic & monetary union.

http://europa.eu.int/comm/enlargement/intro/criteria.htm

[43] GABRIEL N. TOGGENBURG: *A Rough Orientation Through a Delicate Relationship: The European Union´s Endeavours for (its) Minorities;* European Integration online Papers (EioP) Vol. 4 (2000) N° 16; p. 17.-18.

[44] Nevertheless, if „respect for and protection of minorities" is part of the *acquis*; in an indirect sense the Copenhagen Criteria might be seen as legally binding if we take into consideration that they are reflecting already existing law. / TOGGENBURG: *A Rough Orientation Through a Delicate Relationship: The European Union´s Endeavours for (its) Minorities/*

Framework Convention on the Protection of National Minorities, while nevertheless requesting this ratification from the accession candidates.[45]

During the enlargement process this minority condition faced several problems in the candidate countries. Due to the lack of clear benchmarks and foundation in EU law; that minority rights were not an internal EU policy priority; that there was no generally accepted definition of "national minority"; the EU was not able to provide substantive guidance.[46] Double standards had been developed, which involve in themselves the danger of limited effectiveness. In other words: Can the EU evaluate candidate states´ compliance in the absence of its own documents, procedures and institutions to assess minority protection?[47]

RECENT DEVELOPMENTS IN THE EU-FIELD OF MINORITY PROTECTION

The Case of Cultural Diversity and the European Charter of Fundamental Rights

„At the present stage of development of the European Union, the fundamental rights applicable at Union level should be consolidated in a Charter and thereby made more evident"

This is how EU leaders declared - at their meeting in Cologne in 1999 - the importance of a new statement of rights in the European Charter of Fundamental Rights.

Making EU citizens´ rights more clearly visible is the prime objective underlying the Charter. It does not establish new rights, does not create new responsibilities, does not oblige the Member States to modify their Constitutions; and does not operate in competition with the ECHR. It

[45] ALPHIA ABDIKEEVA: *Meeting EU „Standards" for Accession?* p. 3. www.eumap.org/journal/features/2001/oct/staccess/

[46] GWENDOLYN SASSE: *Minority Rights and EU Enlargement: Normative Overstretch or Effective Conditionality?;* in Gabriel N. Toggenburg: Minority Protection and the Enlarged Union: The Way Forward; OSI/LGI 2004 p. 65.

[47] BORIS TSILEVICH: *EU Enlargement and the Protection of National Minorities: Opportunities, Myths, and Prospects*; p. 6.; www.eumap.org/journal/features/2001/oct/euenlarge/

assembles the existing rights, and *highlights the EU´s respect for the principle of democracy, for human rights and fundamental freedoms*.[48]

Under the III. title of the Charter – *Equality* – are the relevant provisions concerning minority rights. **Article 21** forbids all kind of discrimination based on different grounds and it also adds to the list of grounds "**membership to a national minority**". This is the first time that national minorities are explicitly mentioned within an EU context, as so far there was only reference concerning the enlargement-process. **Article 22** sets out a guarantee of respect by the Union for **cultural diversity**, along with **linguistic and religious diversity**[49]. The fact that both of these Articles are to be found under the title Equality in the Charter, might indicate – despite the very vague wording of Art. 22. – that its drafters saw the respect for diversity as an essential part of equality, which would be very important for a minority protective point of view. Even that the placement of the "cultural diversity"-reference is based after the non-discrimination clause might suggest, that there is a link between the two articles, which could make them to be interpreted in favour of minorities. In fact, during the drafting process of the Charter there have been about a dozen submissions strongly arguing for a separate minority clause to be included in the document. Among the submitting bodies were the European Parliament and the Committee of Regions; the Parliamentary Assembly of the Council of Europe, and several NGOs related to minority protection [50]

Apart from instruments in the field of external relation and enlargement the Charter is the strongest EU document in which a requirement for the respect of cultural diversity is found.[51] But what does this diversity mean in the European Union? **Diversity** itself is included among the values of the European Union. Those elements of EU constitutional law which aim to preserve national identities – national cultures; which foster the polycentric

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[48] EUROPA – Justice and Home Affairs - The Charter of Fundamental Rights: About the Charter; Why does the EU need a Charter of Fundamental Rights?
http://europa.eu.int/comm/justice_home/unit/charte/en/about-need.html

[49] This provision – though it is very vague – is the result of the bargaining process on whether to introduce a minority clause.

[50] GUIDO SCHWELLNUS: *„Much Ado About Nothing?" Minority Protection and the EU Charter of Fundamental Rights*; ConWEB No. 5/2001; p.7.

[51] CHLOE WALLACE*: Education, multiculturalism and the EU Charter of Rights*; Constitutionalism Web-Papers, ConWEW No. 5/2002; p.8

and horizontal characteristics of the Union; the principle of subsidiarity; the actual institutional structure (the strong role of the Council); the treaty revision procedure according to Article 48 TEU (builds on the consensus of all member states)[52] all express the Union's commitment towards the value of diversity *among* the member states. However – as mentioned before – the notion of diversity exists *within* the member states as well; and though the internal diversity strongly contributes to the specifity of the given member state in the EU context; there is no explicit reference in any EU-instruments concerning this intra-state level.

Article 151 par. 4 EC of the Treaty of Maastricht introduced a general, transversal sort of "cultural diversity impact clause".[53] The thoughts above about inter-state or intra-state meaning of diversity express the two possible ways of interpretation of this Article. Exclusive reading of this Janus-headed notion would ignore various forms of ethnic, linguistic, cultural diversity within the single member state – but was this the will of the constructors of the treaty? Is this the way we are building a common Europe; a real political union, which builds on the European traditions, the richness of our cultural heritage? Would not it be controversial with the principle of subsidiarity?

According to Article 52/3 the Charter respects the Council of Europe's European Convention of Human Rights (ECHR) – which was signed and ratified by all the Member States, its protocols, and the case law developed by the European Court of Human Rights. The Rule is in theory simple. The rights and liberties shared by the two documents – even if the wording is different – have the same meaning in both texts. The ECHR is in Europe currently the strongest legally binding human rights protective instrument with the supervision of the European Court of Human Rights. However it also faces some shortcomings. As a document from 1950, does not include any provisions concerning minority rights – due to the fact that after the World War II. States not just Europe-wide but also worldwide showed reluctance towards these issues.[54] In the 1990´s – the era of changing regimes – however several

[52] GABRIEL N. TOGGENBURG: *The Debate on European Values and the Case of Cultural Diversity*; European Diversity and Autonomy Papers EDAP 1/2004; p. 14.-15.
[53] ibid. p. 15.
[54] Article 14 of the ECHR contains a general non-discrimination clause, where „association with a national minority" is also added to the list of grounds of discrimination.

minority related CoE documents had been established. The strongest is the CoE's Framework Convention for the Protection of National Minorities; and the also widely acknowledged Charter for Regional and Minority Languages. So what about these rights, which are not included into the ECHR, but have reference in the EU Charter? The EU Network of Independent Experts in their 2003-year report[55] took an interesting encompassing (and with a high probability – very disputable) view on this question stating, that the ratification of the two mentioned documents "gives a first indication of the willingness of the member states to respect the rights enshrined by Article 22 of the Charter". The experts accordingly this proceeded to examine the signature and ratification practise of the EU member states and they read the Charter in the context of the international human rights instruments acceded to by all Member States and indeed even those "which are not in force as regards all member states but which are widely recognized internationally". According to the Network the CoE instruments might be used as interpretation sources for the Charter and especially to its Article 22.[56] The opinion and initiation of the Network is very nice, however we have to remember, that there is no reference other then to the ECHR in the preamble of the Charter, and the two documents are not being ratified by all the member states. We also have to take into account, that although Article 22 is understood as a minority-protection clause, this view is not shared by all member states. France for instance exclusively understands the value of "cultural diversity" between the national cultures and languages.

The Charter of Fundamental Rights is **not a legally binding** EU-document yet. It has also significant deficiencies, as its provisions are only addressed to the European Union, and thus cannot affect the behaviour of the Member States unless they are implementing provisions of the Union law. It cannot affect the normative framework of laws and legal institutions; although it has been used by the *Advocate General in the Court of Justice*. In technical

[55] http://europa.eu.int/comm/justice_home/cfr_cdf/doc/report_eu_2003_en.pdf
[56] BRUNO DE WITTE: *The Constitutional Resources for an EU Minority Protection Policy*; in Gabriel N. Toggenburg: Minority Protection and the Enlarged European Union: The Way Forward*;* OSI/LGI 2004; p. 114.

legal sense the Charter has very little potential for achieving anything, but still, it provides a useful starting point from which the Union can proceed.

The insecure future of the Constitutional Treaty – minority hopes in danger?

The recent events of the EU history do not seem to be very promising concerning the planned Constitutional Treaty of the European Union. Although the draft version with the support of the governments of all Member States was prepared after long discussions in 2004 autumn; the ratification process does not appear to go without a hitch – as recently two founding EU Member States (France and the Netherlands) rejected the acceptance of the proposed Constitution at a Referendum, causing with this high possibility of the postponement of the planned date of entering into force for it.

Nevertheless the proposed Constitution – even at this draft stage – is relevant concerning our issue.

Although the European constitutionalism dates back to the 1960s, when the ECJ postulated the priority of EC law over national law, its direct effect what is a central sign of supranationalism, and introduced human rights into the EC´s legal order[57]; since that time only recently with the commitment to the political union and with the process of the eastern enlargement has it become faster. The enlargement process strengthened the awareness of the need of institutional reform of the organs; and introduced new challenges like the issue of minority rights to the EU.

Already the old EU – 15 lacked cultural homogeneity, but this diversity has just increased by the accession of the new Member States. In traditional state contexts, constitution making needs people that to have a national consciousness, a certain cultural homogeneity in order to form a nation and to be prepared to build a political unity. Nevertheless it is doubtful whether cultural homogeneity really is necessary in the EU and whether the diversity and variety of national nations of the Member States is a threat to constitutionalisation. Democracy is a concept of organisation that works even

[57] WOLFGANG WEIß: *Eastern Enlargement and European Constitutionalisation*; Queen´s Papers on Europeanisation No 1/2005; p.2.

outside states, it is not reserved for states but can be applied to all kind of societal structures.[58] And real democracy is essential for minority protection.[59]

At the debates about the proposed Constitutional Treaty, minorities were seeking to legitimise their demands in certain areas by lobbying for particular minority clauses. If entering into force – this would be the first time, that minority rights; the *expression: "national minorities" would appear in an EU primary law.* Article 2 in the first part of the Constitution establishes „human rights, including the rights of persons belonging to national minorities" as values which „the Union is based on".

The *EU Charter of Fundamental Rights* has been incorporated in part II. of the Constitution – so Article 21, which prohibits all discrimination also on the ground of „membership to a national minority" would gain by the Constitution heavier weight. Moreover, the Union is held, according to Article 22 of the Charter to „respect cultural, religious and linguistic diversity".[60] Nevertheless the ultimate decision to accept or reject clearly minority demands at the supranational level has been postponed. The current proposed Treaty on a European Constitution *excludes explicit references to either minority rights protections or guarantees*, avoiding the prescriptions structuring supranational-state-minority relations.[61]

The *regional dimension* of the EU might be also relevant concerning minority issues; as some of the minorities constitute relevant weight in a regional entity of a state. These minorities could profit of the fact that the proposed Constitution aims to strengthen further the role of the regions in the Union by expanding the *principle of subsidiarity* to the regional level and by providing it with procedural teeth. However as afore-mentioned; just some of the minorities are represented concentratedly in sufficient number in the regions of Europe; most of them are not! That is why, most of them cannot

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[58] WOLFGANG WEIß: *Eastern Enlargement and European Constitutionalisation*; Queen´s Papers on Europeanisation No 1/2005; p. 4.

[59] Democracy, the will of people does not mean that the majority has the right to outvote and exclude completely minority opinions of the decision making process. It is necessary to take the majority's will as a basis, however in order to constitute justice as well, to take into consideration the will of the minority. This is the "game" for finding the balance, with tools like the test of proportionality.

[60] GABRIEL N. TOGGENBURG: *Minority Protection in a Supranational Context: Limits and opportunities*; in Gabriel N. Toggenburg: Minority Protection and the Enlarged European Union: The Way Forward*;* OSI/LGI 2004; p. 14.

[61] DAVID ADAM LANDAU & LISA VANHALA: *Circumventing the State? The Demands od Stateless Nations, National Minorities, and the Proposed European Constitution*; p.8

gain "results" of the principle of subsidiarity, as the Union's structure offers no constitutional space reserved for European minority groups. Proposals in this direction – like the establishment of a Committee of National and Ethnic Minorities, which would have had the similar consultative status as the Committee of the Regions, have – never gained any sort of sufficient political support. [62]

The "*democratic life of Union*" which is provided an entirely new title in primary law, establishes an EU principle of "participatory democracy" and introduces a new instrument of "*citizens´ initiative*". According to this, no less than one million citizens coming from a significant number of member states may invite the European Commission to submit any appropriate proposal on matters where citizens consider that a legal act of the Union is required.[63] This possibility would be relevant for minorities like the Roma, who are dispersed all over Europe.[64]

Beside the progressive and promising signs concerning the minority issue; it also has to be noted that the proposed Constitution by the fact, that it deals with accession-criteria to the Union and provides the Union's values as the precondition for the accession it does not refer to neither to diversity, nor to minority protection. These accession criteria would again differ from the ones defined through the Copenhagen criteria[65], and concerning for instance the case of Romania or Bulgaria, if the Constitutional Treaty enters into force before their accession will they face different, less strict conditions as before it?

Ever closer integration made the member states to agree on the new motto of the European Union: **United in diversity!** The cultural heritage of the Member States, of our common Europe is gaining more and more importance even in the official communication about the Union. Though there are still huge differences in our „common heritage" which make the discussion more

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[62] GABRIEL N. TOGGENBURG: *A Rough Orientation Through a Delicate Relationship: The European Union´s Endeavours for (its) Minorities;* European Integration online Papers (EioP) Vol. 4 (2000) N°; p. 18.
[63] Article 47, par. 4 of the proposed Treaty Establishing a Constitution for Europe
[64] GABRIEL N. TOGGENBURG: *Minority Protection in a Supranational Context: Limits and Opportunities* in Gabriel N. Toggenburg: Minority Protection and the Enlarged Union: The Way Forward OSI/LGI Budapest 2004; p.20.
[65] WOLFGANG WEIß: *Eastern Enlargement and European Constitutionalisation*; Queen´s Papers on Europeanisation No 1/2005; p. 6.

complicated and which sometimes behave like obstacles, brakes in the progress; the fact, that the governments; the heads of the 25; and the 3 candidate states as well managed to agree on the draft version of the Constitution (which despite the vague provisions, still is a step forward towards minority issues); and that they signed it on 29 October 2004; and that since then there are several states that have already ratified the Treaty finally show a more serious approach towards the political union; and towards minorities of this union as well.

In multinational states constitutions play an important role in defining state-minority relations. The constitution is on the top of the law-hierarchy; all the other laws and provisions have to be in conformity with it; it means a general guidance for the whole state. The possible EU Constitution however is in a more difficult „situation". The EU is still not a state - the Member States are extremely cautious if sovereignty issues are on the table - but as it has already overstepped the mere economical cohesion; and as it affects more and more the daily life of its citizens; there is no way of avoiding „constitutional" issues. If ratified; it could mould the supranational minority relationships in the EU.

MINORITY PROTECTION OR NON-DISCRIMINATION

Two notions with the same aim – gaining equality; but with different approach. Non-Discrimination has the negative aspect of equality, designed to prohibit differentiation on irrelevant, arbitrary or unreasonable grounds; minority protection has classically a positive aspect claiming special measures, affirmative actions in order to achieve the same. Some scholars argue that not to make any difference between people; not to treat anybody differently is the way that leads to equality. However disadvantaged groups – like minority groups sometimes – are originally at a different starting point with lagging behind others. They face much more challenges in daily life as the majority. Example like learning an additional language – and not even on voluntary basis; to comply with a different culture, customs create a type of

burden what the majority would never face. This compliance and efforts are certainly necessary; but demands much more energy and adaptability in the daily life than the members of a majority do need. This kind of launching hardly leads to equality without help to surmount the unequal difficulties. Despite the fact that this is easily understandable, when reaching the concept of minority rights the idea ends up at meeting a wall. The UN Sub-Commission on Prevention of Discrimination and Protection of Minorities offered a distinctive definition between the two notions: non-discrimination and minority protection in 1947. According to this:

"Prevention of discrimination is the prevention of any action which denies to individuals or groups pf people equality of treatment which they may wish. Protection of minorities is the protection of non-dominant groups, which, while wishing in general for equality of treatment with the majority, wish for a measure of differential treatment in order to preserve basic characteristics, which they possess and which distinguish them from the majority of the population. The protection belongs equally to individuals belonging to such groups."[66]

Generally in the World there is a climate of reluctance concerning minority rights; it is highly contested at all forums where a consensus, the political will of the States is necessary to step from one point to the other. While the meaning of the principle of equality and non-discrimination are accepted as a cornerstone of individual human rights; and is also sufficiently defined internationally; minority protection, although generally accepted as desirable after the Cold War, remains deeply contested on the international level.[67]

Institutional possibilities – The European Monitoring Centre on Racism and Xenophobia (EUMC)

Already in 1997, an independent monitoring centre – with headquarter in Vienna – was created by the Council Regulation 1035/97.

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[66] UN Doc. E/CN.4/52 Section V.

[67] ANTJE WIENER AND GUIDO SCHWELLNUS: *Contested Norms in the Process of EU Enlargement: Non-Discriminaion and Minority Rights* in George Bermann and Catharina Pistor: Law and Governance in an Enlarged Union; Oxford: Hart Publishing; 2004; p. 2.

Its tasks are:

- Reviewing the extent and development of racism and xenophobia in the European Union
- Collecting objective, reliable and comparable information
- Analysing reasons
- Establishing best practises
- Proposing measures
- Drafting annual reports
- Cooperating with the Council of Europe (ECRI), the UN and other international organizations
- Setting up RAXEN (European Racism and Xenophobia Information Network) with national focal points in each Member States[68]
- Organizing round table discussions[69]

The EUMC examines discrimination in the fields of legislative initiatives, racist violence and crimes, employment and housing.

The establishment of the Monitoring Centre was a crucial step towards combating racism and xenophobia in EU member states. However its mandate is insufficient to monitor minority rights and does not deal with discrimination on the special ground of belonging to a national or ethnic minority group.

Non-discrimination in the EU legislation

Non-discrimination is a well-established EU norm. It is part of the *acquis communautaire* and in some areas it is deeply rooted to the conscience of the European Community. *Gender equality and the abolition of discrimination on the basis of nationality* between member states have been

[68] The National Focal Points (NFPs) are contracted partners of the EUMC in the national context, and are the coordinators of a national information network which includes cooperation with many actors in the fields of racism, xenophobia and antisemitism. Each year they transmit the information for the Annual Report to EUMC according to specific guidelines /*Racism and Xenophobia in the EU Member States trends, developments and good practise*; EUMC – Annual Report 2003/2004; Part 2. p.9./

[69] MANFRED NOWAK: *Introduction to the International Human Rights Regime*; 2003 Koninklijke Brill NV, Leiden, The Netherlands; p. 242.

highly promoted principles since the beginning.[70] The Treaty of Rome, which established the European Community provided for equal pay for men and women[71] and outlawed discrimination on grounds of nationality between citizens of Member States.[72]

In the field of *racism and xenophobia* however, combating discrimination had a different start. Gender equality has been mainstreamed already through the directive on equal treatment for men and women since 1976; combating discrimination on the ground of race or ethnic origin had to be waited until 1997, when the Treaty of Amsterdam amended the Treaty of Rome; and anti-discrimination on different grounds – also on racial or ethnic origin - was included as a basic founding principle of the Union. What is the reason of this delay? Is there a hierarchy among the grounds of discrimination? Inequality is permissible on some basis while undesirable on others?

Combating discrimination on the grounds of race or ethnic origin is very close to the protection of minorities (as protection of minorities usually refers to autochthonous minorities; and grounds of race or ethnic origin do not only to these minorities of different ethnic origin within the EU; but also e.g: to the "new minorities"). It is broader term than that with strictly individual approach; but still it rings the bell.

The insertion of **Article 13**[73] **in the EC Treaty** in 1999 marked a fundamental turning point in EU law and policy on combating racism. It provides the Union with a legal basis to take action to combat discrimination

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[70] *Racism and Xenophobia in the EU Member States trends, developments and good practise*; EUMC – Annual Report 2003/2004; Part 2. p. 10.

[71] Nevertheless it might be interesting to mention, that the origin of the gender equality mainstreaming is not really based on moral beliefs or social origin. Article 119 of the Treaty of Rome was included due to the pressure provided by France. France insisted on it for quite self-interested economic reasons; as it feared that its worker protection legislation, including its laws on equal pay (which at that time was more advanced than by its partners) would put it at a competitive disadvantage in the common market through additional social protection costs to be borne by French industry. /JAMES A. GOLDSTON: *The European Union Race Directive*; www.justiceinitiative.org/activities/ec/ec_russia/moscow_workshop/goldston_moscow/

[72] *ARTICLE 13 – Proposals from the European Commission for Combating Discrimination*; Published jointly by the CRE and UK Race & Europe Network (UKREN); www.fhit.org; p. 1.

[73] *"Without prejudice to the other provisions of this Treaty, and within the limit of the powers conferred by it upon the Community, the Council, acting unanimously on a proposal from the Commission, and after consulting the European Parliament, may take appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation."*

on grounds of racial or ethnic origin, religion or belief, disability, age or sexual orientation. The general principles of the article are not themselves legally binding, so further legislative act was needed on the basis of Article 13. Relying on the slow routine at the European level; one could have expected long years for the realisation. The Commission between the signature and ratification of the Amsterdam Treaty consulted widely on the most appropriate steps for utilising the new legal competences; and consequently[74] in 1999 produced a package[75] comprising two draft directives proposing a minimum standard of legal protection against discrimination throughout the European Union, and an Action Programme to support practical efforts in the Member States to combat discrimination.[76] An unexpected political event – that Jörg Haider´s Freedom Party; an extreme rights party, got into the Austrian governing coalition; and the Europe-wide reactions on this event – intervened also helpfully. The Portuguese Presidency quickly tracked the proposed Racial Equality Directive as a sign of the EU´s commitment to combating racism; and at the end, under the pressure of the special circumstances, the Council adopted the directive[77], on 29 June 2000; and the Framework Directive[78] on 27 November 2000.

The **Framework Directive** prohibits discrimination primarily in the employment context, but across the categories: disability, age, sexual orientation, religion or belief of Article 13.

The **Racial Equality Directive** goes beyond the sphere of employment; and requires non-discrimination on the ground of racial or ethnic origin in other fields, such as education, access to cultural benefits, and the provision of goods and services as well.

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[74] MARK BELL: *Anti-discrimination Law and the European Union*; Oxford University Press, Oxford 2002; p. 2.

[75] The Article 13 Package:

- A proposal for a directive establishing a general framework for equal treatment in employment and occupation (**the Employment Directive**)
- A proposal for a directive implementing the principle of equal treatment of people irrespective of racial or ethnic origin (**the Race Directive**)
- A proposal for an Action Programme, to run from 2001-2006, to combat discrimination (**the Action Programme**)

[76] MARK BELL: *Anti-discrimination Law and the European Union*; Oxford University Presss, Oxford 2002; p. 2.

[77] Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective racial or ethnic origin [2000] OJ L 180/22

[78] Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation [2000] OJ 303/16

These directives lay down minimum requirements and give Member States the option of introducing or maintaining more favourable provisions. They may not be used to justify any regression in the situation that already prevails in each Member State. The deadline for the implementation concerning the Race Directive was July 2003[79]; concerning the Framework Directive in relation to religion or belief and sexual orientation November 2003; and in relation to age and disability is November 2006.[80] As the directives are part of the acquis communautaire; as such they must also be adequately transposed into domestic law by all candidate states who seek to join the EU.

A Community action programme[81] to combat discrimination – as it was planned – complements the directives. The program covers all the grounds set out in Article 13 with the exception of sex, as there is a separate gender equality programme. Legislation is only one component of action to combat discrimination; and beside that, support for a range of positive measures is also necessary; in order to achieve changes in attitude. The program aims to improve generally knowledge of the phenomenon of discrimination; to develop the capacity to prevent and address discrimination effectively by strengthening organisations and support for the exchange of information, good practise and networking at European level; and to promote and disseminate the values and practises underlying the fight against discrimination, including through the awareness-raising campaigns.[82] The Network of independent legal experts on anti-discrimination was set up by the Commission in July 2004 also under the Action programme to combat

[79] As the transposition of the two key pieces of anti-discrimination legislation into national law should have been completed already, the Commission has begun taking legal measures against those Member States who have failed to do so. Germany, Greece, Austria, Luxembourg and Finland are now facing legal action before the European Court of Justice for their failure to satisfy the requirements of the Directives. /europa.eu.int/comm/employment_social/fundamental_rights/index_en.htm/

[80] CHRISTOPHER MCCRUDDEN: *The New Concept of Equality at the Conference*: "Fight Against Discrimination: The Race and Framework Employment Directives; Trier 2003; p. 6.

[81] Council Decision 2000/750/EC of 27 November 2000 establishing a Community action programme to combat discrimination (2001-2006); OJ L303

[82] Commission of the European Communities: Green Paper on Equality and Non-discrimination in an Enlarged Union; COM(2004) 379 final

discrimination. It provides independent information and analysis on the implementation of anti-discrimination legislation in the Member States.[83]

The Race Equality Directive

Discrimination on the grounds of race, ethnicity or colour is a worldwide phenomenon; and the notion is very close to minorities. It is not rare, that political leaders in order to achieve electoral success espouse the racist tendencies, or they simply do not tackle with the problem, and let exist the continuing systematic discrimination and even racially motivated violence against vulnerable groups.

There are several erroneous myths concerning racism; and there is a widespread tendency of denial. Many do state, that racism is just an isolated phenomenon; or that it exists exceptionally just in post-communist countries. Some believe, that racism means intentional harm – and because of this they do not recognise everyday-discrimination in different treatments, which are absent of objective and reasonable justification; and generally there is an illusion, that by the time progress will be achieved; and we will overcome the racist past.[84]

Provisions of the Race Directive

The Directive forbids four forms of discrimination on grounds of racial or ethnic origin: direct, indirect, harassment and instruction to discriminate.[85]

The Directive (Article 1 and 2) expressly prohibits both **direct** and **indirect** discrimination.[86] To prove indirect discrimination is extremely difficult.

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[83] *Expert analyis of discrimination law* in EU Programme & Policy Developments; Newsletter 3 ENG 1/13/05; p.5.
[84] JAMES A. GOLDSTON: *Racial Discrimination and the Protection of Minorities: Recommended Government Actions*; European Roma Rights Centre 2003; www.errc.org/cikk.php?=1198
[85] The provisions apply also to third-country nationals until they face discrimination on grounds of their racial or ethnic origins, however it does not cover differences of treatment based on **nationality**; and does not apply to the field of **immigration** – to "provisions and conditions relating to the entry into and residence of third country nationals and stateless persons to the territory of Member States" either.
[86] Direct discrimination occurs *"where one person is treated less favourably than another is, has been or would be treated in a comparable situation on grounds of racial or ethnic origin."*

Statistics, data might be helpful, but as it confronts in some countries with data-protection provisions; and generally in many countries, data is not typically kept broken down by race or ethnicity; in most of the cases no such evidence is available. That is why the directive requires not to show that a practise affects a significantly higher proportion of persons of a particular racial or ethnic origin, but it is sufficient to demonstrate that "an apparently neutral provision, criterion or practice *would* put persons of a racial or ethnic origin at a particular disadvantage compared with other persons"; and it states, that indirect discrimination may be established "by any means, *including* on the basis of statistical evidence".

Indirect discrimination has already appeared in the field of gender discrimination[87] at European level, but it is significant, that the Race directive goes beyond the prior gender directives by requiring somewhat less demonstration of comparative disparity than for gender. Thus it is not necessary for a claimant to show that a rule at issue ***does*** put members of particular ethnic group at a disadvantage compared to others, but only that the rule ***would*** put them at a disadvantage.

It is similar with the direct discrimination as well. It is not necessary to show, that a provision ***does*** have a discriminatory impact on members of a particular ethnic group, but only that it is ***liable*** or ***likely*** to have such an effect.[88]

These tiny little differences in the text make enormous differences in the practise, as it definitely facilitates the proof for the complainant.

Harassment is defined broadly[89]; so it should cover a range of actors, and a range of actions in all kind of different fields. The Directive gives wide discretion to national authorities in order to make their own decisions on the

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Indirect discrimination occurs "*where an apparently neutral provision, criterion or practise would put persons of a racial or ethnic origin at a particular disadvantage compared with other persons, unless that provision, criterion or practise is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary."*

[87] The comparison with the achieved results in the field of gender discrimination is very useful in order to see to which direction are we facing now concerning non-discrimination in the ever-closer more and more integrated Union.

[88] MARK BELL: *Anti-discrimination Law and the European Union*; Oxford University Presss, Oxford 2002; p.3.

[89] "*any unwanted conduct related to racial or ethnic origin takes place with the purpose or effect of violating the dignity of a person and of creating an intimidating, hostile, degrading, humiliating or offensive environment*"

full scope of the ban on harassment; as it states, that the "*concept of harassment may be defined in accordance with the national laws and practises of the Member States*."[90] It is important to note however, that national discretion cannot undermine the substance of the right altogether.

Burden of proof – As it has already been concluded before, discrimination is not that easy to prove. In criminal procedures the burden of proof is beared by the state prosecutor, however in civil cases, where the complainant should bear it, he or she could face enormous difficulties to prove his/her right. Often the alleged discriminator is in exclusive possession of all the relevant information needed to be showed, so the plaintiff could find his/herself in a deeply disadvantaged position. That is why the Race Directive (following the good example again from the field of gender-equality) shifts the burden of proof in civil cases involving allegations of racial discrimination. The shift is not automatic. The directive states, "*once a prima facie case of discrimination has been established* (once the facts have been established from which it may be presumed that discrimination occurred), *it shall be for the alleged discriminator to prove that there has been no breach of the principle of equal treatment*."[91]

Positive Action[92] - The directive – with very cautious wording – leaves the possibility opened for the Member States, to take positive actions in order to ensure the principle of equality. This provision is extremely important concerning our minority issue; it gives a quick glance at the general picture of non-discrimination and minority rights. This is the Achilles heel of the system; this is where the political consensus has never achieved so far. It should be possible and desirable for states to adopt measures which give preference to members of minority groups which have historically been the victims of discrimination if such measures have the legitimate aim of reducing de facto inequalities which stem from the past discriminatory practises, and the nature and extent of the present inequalities make the preferential measure

[90] MARK BELL: *Anti-discrimination Law and the European Union*; Oxford University Press, Oxford 2002; p. 3.
[91] Ibid; p. 3-4.
[92] Article 5 – "*With a view to ensuring full equality in practise, the principle of equal treatment shall not prevent any Member State from maintaining or adopting specific measures to prevent or compensate for disadvantages linked to racial or ethnic origin*."

proportionate.[93] Such affirmative actions (already approved by the ECJ) would be completely in harmony with other EU principles; and would be essential in order to combat discrimination on the grounds of race or ethnicity practically; and ensure de facto equality.

Non-discrimination and minority protection are not controversial notions at all, rather comprehensive. Combining them could lead to achieve the common aim: *de facto equality*. And achieve de facto equality cannot be successful, if we strictly stick to non-discrimination, not taking into account, that there are inequalities already at the starting point. Treating unequals equally can be as detrimental as treating equals unequally. Recognising differences could be the first step on the road towards equality; after which should come the wise consideration what are the tools by them we could attain from the unequal starting the equal ending, how could we give equal opportunities.

It is widely accepted that not all distinctions are necessarily discriminatory. Equality and the right to non-discrimination require that individuals be protected against unreasonable or unacceptable different treatment. How it is nevertheless possible to decide whether a particular distinction is acceptable or not certainly is a difficult task.[94] However there are notions like “balancing between interests”; the “test of proportionality”; the “legitimate aim” which might be helpful at a decision making process.

Do the non-discrimination provisions of the Race Directive lead to an internal EU minority protection system?

The recent developments in the anti-discrimination legislature area are really of crucial importance. The EU´s actual strong commitment leads us to have confidence in an even stronger future-system.

[93] MARK BELL: *Anti-discrimination Law and the European Union*; Oxford University Press, Oxford 2002; p. 4.
[94] NOELLE HIGGINS: *The Right to Equality and Non-Discrimination with Regard to Language*; E LAW – Murdoch University Electronic Journal of Law; Volume 10, Number 1 2003; p.3. www.murdoch.edu.au/elaw/issues/v10n1/higgins101_text.html

Realising the danger of the spreading tendencies of racism and xenophobia was already unavoidable. These are somehow the cores of the tensions in EU power relations.

However, I would found the statement that the extension of anti-discrimination legislation within the EU was the internal result of the external minority protection criterion from Copenhagen, precipitate.[95] Certainly there was an influence by the enlargement conditions, but the actual non-discrimination system faces basic shortcomings concerning minority issues. The race directive provisions do not mean more than minimal requirements; which without a political goodwill might rise against their basic aim – ensuring equality. The protection offered by the anti-discrimination provisions is to be enjoyed by persons and not groups. The broad term "ethnic origin" means that there is some scope for minority protection even if the directive was not conceived for this purpose; and only if so interpreted by the judges of the European Court of Justice.[96] The EU, as a supranational organisation should engage itself in a proper manner - in compliance to its growing size and responsibility – to such issues which effect so many of its citizens.

THE IMPACT OF THE EU ENLARGEMENT PROCESS ON THE SITUATION OF MINORITIES IN EU CANDIDATE STATES

Although the EU´s internal non-discrimination rules seem to take a rather thin approach to classical minority protection, in its external relations and particularly in the latest enlargement process (due to security reasons and doubts about the stability of the CEECs) it took a different approach.

[95] GABRIEL N. TOGGENBURG: *Minority Protection in a Supranational Context: Limits and Opportunities* in Gabriel N. Toggenburg: Minority Protection and the Enlarged Union: The Way Forward OSI/LGI Budapest 2004; p. 8.
[96] JAMES HUGHES & GWENDOLYN SASSE: *Monitoring the Monitors: EU Enlargement Conditionality and Minority Protection in the CEECs*; London School of Economics and Political Science, UK; Issue 1/2003; p. 11.

The ambiguity of the Copenhagen Criteria, the specific circumstances concerning minorities in CEECs[97] were already mentioned before. The EU, as it could not totally rely on its internal experiences regarding minority protection and in such a short period could not invent a consistent conditionality system; in a certain way had to take the achievements of the other regional international organisations, such the Council of Europe, and the OSCE.

The engagement of the CEECs with the *Council of Europe* became an institutional stepping stone towards the EU. Democracy and human rights had always been at the core of the Council of Europe's self-definition and membership criteria. At this moment still, the Council of Europe has also the most relevant and effective minority protective instruments – the *Framework Convention for the Protection of National Minorities* and the *European Charter of Regional and Minority Languages*. When the European Commission officials were asked to explain how the monitoring process actually embodies the Copenhagen Criteria with respect to minority protection, they always emphasized the ratification of the FCNM as the main instrument for putting the criteria into practise.[98]

The *OSCE* General Recommendations issued in the 1990s, were also crucial. The establishment of the office of the *High Commissioner on National Minorities* in 1992; and the quiet diplomacy of its then head Max van der Stoel helped a lot to all actors at the European stage to stabilise the region and to smoother the democratisation process of the candidate countries.

The mentioned two important CoE-instruments (FCNM, Language Charter), the monitoring system, data-basis and the specific institution of the OSCE – the High Commissioner on National Minorities – were helpful tools for the EU to support its Copenhagen criterion with.

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[97] CEESs after the collapse of the Eastern block in 1989-1990 – began the process of "transition to democracy". This period is not easy even with less difficult circumstances as the CEESs have. When transitology does address the issue of minorities, their presence in a transition state is viewed as a major obstacle to democratisation. It used to be argued, that minorities represent a challenge to democratising nation states that has serious potential for political instability and, consequently, are best managed by centralization and assimilatory policies. The potential for destabilization is even bigger – they state - if there is a territorialized minority group in the State. /See: JAMES HUGHES & GWENDOLYN SASSE: *Monitoring the Monitors: EU Enlargement Conditionality and Minority Protection in the CEECs/*

[98] GWENDOLYN SASSE: *Minority Rights and EU Enlargement: Normative Overstretch or Effective Conditionality* in Gabriel N. Toggenburg: Minority Protection and the Enlarged Union: The Way Forward OSI/LGI Budapest 2004; p. 68.

Beside the Framework Convention and the Language Charter it is also important to mention the *recommendation 2001* adopted by the Parliamentary Assembly of the Council of Europe in 1993. Although – because of its commitment to collective rights – it has been rejected as an additional protocol to ECHR, as a political document it played a role in the 1990s Europe. The post-communist countries of Europe at their acceptations to the Council of Europe met this recommendation, and some of them – like Slovakia – even agreed on implementing it into its politics on minority rights. It is legally not binding, but still it shows some kind of approach towards the minority issue in the state's policy.

It would be desirable to say, that we could have witnessed a fruitful and united *cooperation among the different international actors* at Europe's stage on the improvement of the situation of their minorities; however this is regretfully not the case. The cooperation was instead *ad hoc,* without any conscious planning, and mostly concerning just data usage.

As enlargement was a policy task that was allocated to the Commission by the Copenhagen Council of 1993; the *European Commission's annual Regular Reports*, following the Opinions of 1997 and the Accession Partnerships, have been the EU´s key instrument to monitor and evaluate the candidate's progress towards accession. These reports indicate the main trends and results in the field of minority protection within the candidate countries.[99]

There are some interesting features of this monitoring beside ad hocism. Although the candidate states (10 of them already New Member States) have significant minority populations, the EU addressed primarily only two – the *Russophone* and the *Roma* minority groups. This *hierarchy of minority issues* first of all reflects the EU´s great interest in good relations with its powerful neighbour Russia, and its own security concerns regarding migrating Roma; secondly again questions the EU´s real commitment towards minority protection. It is also interesting to mention, that dealing with Roma issues is politically less sensitive to focus on, compared with territorialized and

[99] GWENDOLYN SASSE: *Minority Rights and EU Enlargement: Normative Overstretch or Effective Conditionality?* in Gabriel N. Toggenburg (ed): Minority Protection and the Enlarged European Union: The Way Forward; OSI/LGI 2004 Budapest, p. 65.

politically mobilized minorities; as the major problems the Roma are facing are first of all of social concerns like segregation, poverty and social exclusion.[100] The Roma issue is a complex issue of contributing social, economic and human rights problems.

SLOVAKIA'S ROAD TO THE EUROPEAN UNION

- A CASE STUDY WITH THE PURPUSE TO SHOW THE IMPACT OF THE EU´S ENLARGEMENT PROCESS MORE SPECIFICALLY AND IN DETAILS ON A CONCRETE EXAMPLE -

On the 1st of May, 2004 Slovakia together with 9 other European countries joined the European Union. It was a perfect day for celebration after long years of struggle for this aim; however it is worth to examine how the path of Slovakia was in order to achieve this goal.

It was a long way from the *1989´s velvet revolution* when thousands of people of Czechoslovakia both in Prague and Bratislava; protested peacefully – symbolically clattering their keys[101] – for a democratic country; for freedom and human rights; for a world without a totalitarian regime controlling the everyday of them.

The possibilities given by the change of regime lead directly to the *renegotiations of* the existence *of the "Czechoslovak" nation* and to the legal status of the common state. Minorities living in the territory of the state also built hopes towards the new political regime, however after a short period it became clear that the hopes were just illusions. There was only one proposal brought about a failure at the formation of the new government on 8 December 1989; and that was about establishing a Ministry of Nationalities in the Federal Cabinet, which would have had the task to deal with the injustices of the communistic regime concerning minorities and put the failures of this period right.

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[100] GWENDOLYN SASSE: *Minority Rights and EU Enlargement: Normative Overstretch or Effective Conditionality?* in Gabriel N. Toggenburg (ed): Minority Protecction and the Enlarged European Union: The Way Forward; OSI/LGI 2004 Budapest, p.66-67.
[101] Bratislava, 17 November 1989

The period between 1990 and 1992 could be characterised by the attempts of the democratisation of the Federation. The major disputes were first about the *name of the Republic*[102] in which the main point was finding a solution through what it would have been obvious the equality of the two nations – the Czech and the Slovak. Secondly the needs for a new *constitution* also lead to a huge debate. The only federal constitution was not acceptable for the Slovaks, so at the end there were three constitutions created: one Federal, one for the Slovaks, and one for the Czechs. The long and over-politicised debates, the question of the competencies finally ended up at the *collapse of the Republic*.[103]

Interesting is concerning this break off that the decision-makers were the political leaders of the two states. In such important questions it would be appropriate to hold a referendum, but the politicians at that time could not risk their "Success" through such a democratic solution, so they decided instead of the two nations without consulting or let them express their will through a referendum[104]

Slovakia and its minorities

General overview

After Slovakia has gained independence in 1993[105]; the building of a monoethnic state on the territory of a multiethnic country has begun.[106] Officially the proportion of the minorities in the State is 14%; however this number is much higher according to the estimations.

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[102] Václav Havel with his innocent proposal to delete the "socialist" attribute of the name of the Federation started the "Hyphen War". The "Czechoslovak" name was not sufficient anymore; the Slovak politicians wanted to make Slovakia visible on the international level; however the Czechs felt that the hyphen would separate of rather than link together the two nations.
[103] HAMBERGER JUDIT: *Föderációk bomlása*; Politikatudományi Szemle, 2000/1-2; p. 63.
[104] All the surveys showed clearly at that time, that the clear majority of the population would prefer the Federation rather than the separate states.
[105] Constitutional Statute No. 542/1992 Coll. on the Dissolution of the Czech and Slovak Federal Republic of 31 December 1992
[106] MIROSLAV KUSY: *A magyarkérdés Szlovákiában*; Kalligram, Bratislava; 2002

Numerically the most significant minority is the **Hungarian**, of about 10% of the population. For a long time, after the political changes in 1989 until 1998, when the Hungarian Coalition Party has become coalition partner in the Slovak Government, it has been stated that the minority issue in Slovakia is de facto the same with the Hungarian issue. The Slovaks have been afraid of the Hungarian irredental movement; and of the annexion of the southern regions; on the other hand, the Hungarians have felt a stronger danger of the assimilation and of loosing their national identity.[107]

The **Roma** question – has come to the front during the period of EU accession. In the years of communism they were not even recognised as a national minority group, just merely an ethnic group; and on the basis of this categorisation all kind of minority rights were denied of them. This situation has changed, today, they are also a recognised minority group however still do face specific problems. The Roma community is not homogeneous; it is divided into several different subgroups, which have their own specific ethnic and cultural patterns. The majority of them live in very poor conditions, is excluded from the society, face segregation and are subject to discrimination. Their number according to the latest census is around 90 000; however the de facto number is around 400 000, four times of the official count.[108] Many Roma deny their ethnicity to avoid the stigma of being attached to the bottom rung of the social hierarchy.[109]

The **Czech** minority, because of the common past – with the exception of a short period at the time of the collapse of Czechoslovakia, when they have found themselves in the focus of enemy-productive attacks – do not face special problems as a minority group. Apart from some administrative constraints regarding the matters of citizenship they do not have any conflict

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[107] FARIMAH DAFTARY & KINGA GÁL*: The New Slovak Language Law: Internal or External Politics?;* ECMI Working Paper #8, 2000; p. 4.

[108] As according to the data protection provision everybody can choose freely his or her identity; there is now no possible way to get an official and relevant number. However, an indicator could be for instance the "roma-district" Luník IX. in Kosice. It used to be referred to as the "largest ghetto of Central Europe". According to the census statistics, the proportionate of the Roma there was just 3%. /Based on the INTERVIEW WITH CSÁKY PÁL vicepresident of the Slovak Government responsible for regional integration and human and minority rights; Bratislava; 24 May 2005./

[109] *National Democratic Institute Assesses Roma Political Participation in Future EU Members: Bulgaria, Romania and Slovakia* in ROMA RIGHTS Quarterly Journal of the European Roma Rights Center; Number 4, 2003; p.8.

with the majority of the population, nor have they identity problems. Their number is according to the estimations between 60-120 000.[110]

Besides the above-mentioned three biggest minority groups in Slovakia, there are **minorities that constitute smaller percentage of the population**, like the *Rutens*[111], the *Ukrainians*, the *Germans*[112], the *Poles*[113], the *Gorals*[114], the *Croats* and the *Jews*.[115]

Slovakia and EU conditionality – general review

As with all EU accession countries, the formal negotiations[116] with Slovakia were initiated on the basis of a Europe Agreement. This was signed in 1994, after the dissolution of Czechoslovakia, and a parallel process of regular Association Council meetings was initiated already six month later.[117]

The 1990 – 1997 period was quite hectic concerning democratic issues in Slovakia. As Slovaks have gained greater control over their region, the nationalist sentiment had been growing. During this transitional period the Movement for a Democratic Slovakia (HZDS) lead by Vladimir Mečiar was the cabinet-founding party that governed the country with the support of the Slovak National Party (SNP).[118]

At the beginning, the EU had serious problems with its own requirement. It had stressed the importance of intra-regional cooperation – as a mean of "fostering stability and good neighbourly relations"[119], democracy

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[110] MIROSLAV KUSY; *Co s nasimi madarmi?;* Kalligram, Bratislava 1998; p. 53.
[111] The Rutens have also special status, as they are do not have either any kin-state relationship.
[112] Because of the resettlements after the World War II. only a few of them – around 8000 people – have stayed in the country, living in diaspore.
[113] The Poles have been living in the territory in Slovakia for centuries however only 2600 people declared themselves of this origin.
[114] The Goral is a very specific minority group – linguistically closer to the Polish; emotionally closer to the Slovak identity.
[115] LANSTYÁK ISTVÁN: *A magyar nyelv Szlovákiában*; Osiris-Kalligram, MTA Kisebbségkutató Mühely; Budapest – Bratislava; 2002; p. 43.
[116] After the end of the communist regime, the way to the European Union became a clear desire for all CEECs.
[117] KYRIAKI TOPIDI: *The Limits of EU Conditionality: Minority Rights in Slovakia*; European Centre for Minority Issues (ECMI): JEMIE - Journal on Ethnopolitics and Minority Issues in Europe; Issue 1/2003; p.3.
[118] http://www.slovakia.org/society-hungary2.htm
[119] *Fifth meeting of the EU – Slovak Republic Association Council*, Joint Press Release, 27/4/1999, EU-SK, 2007/99; press 125, point 4 paragraph 2

and rule of law and tried to avoid the explicit mention and discussion of ethnic minorities. It has to be noted that Slovakia requested the EU to consider a preparation of a White Paper on the rights of national minorities, however the lack of response alone points to the unease created within the EU regarding its lack of standards and policy on minority rights.[120]

EU requirements on Slovakia started taking more specific shape with the introduction of the law on the use of the state language that was passed in November 1995, in conjunction with a law on the use of minority languages that was declared unnecessary by Mečiar´s government in November 1997. The series of alarming political events and legal moves towards institutionalizing ethnic dominance[121] triggered the reaction of the European Parliament in 1995, which accepted a resolution on the need to respect human and democratic rights in the Slovak Republic.[122] The European Parliament threatened Slovakia with reconsidering its assistance programmes if Slovakia "*continues to follow policies which show insufficient respect for democracy, human and minority rights and the rule of law*."[123]

The events developed in such way, that Slovakia became **the only candidate country of CEE, which have been explicitly excluded in 1997 from accession negotiations on the basis of its non-fulfilment of the Copenhagen criteria**.

After the elections in 1998 a decisive change has come in domestic politics of Slovakia. Mečiar could not form a government, so Slovakia got a new cabinet of the coalition of the previous opposition parties. The broad left-right coalition with prime minister Mikuláš Dzurinda showed eagerness to integrate Slovakia into European structures.[124] The Hungarian Coalition

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[120] KYRIAKI TOPIDI: *The Limits of EU Conditionality: Minority Rights in Slovakia*; European Centre for Minority Issues (ECMI): JEMIE - Journal on Ethnopolitics and Minority Issues in Europe; Issue 1/2003; p. 4.
[121] http://www.slovakia.org/society-hungary2.htm
[122] KYRIAKI TOPIDI: *The Limits of EU Conditionality: Minority Rights in Slovakia*; European Centre for Minority Issues (ECMI): JEMIE - Journal on Ethnopolitics and Minority Issues in Europe; Issue 1/2003; p. 4-5.
[123] *European Parliament Resolution on the need to respect human and democratic rights in the Slovak Republic*, O.J. C 323, 04/12/1995
[124] FARIMAH DAFTARY & KINGA GÁL*: The New Slovak Language Law: Internal or External Politics?;* ECMI Working Paper #8, 2000; p. 5.

Party[125] has also become a coalition partner, and this was a clear sign of that the EU accession, and the fulfilment of the Copenhagen Criteria became the priority for the new cabinet. The European Parliament in its resolution[126] also begun to encourage a change of regime, requesting Slovakia to give absolute priority to human rights and the rights of minorities, democracy, and the rule of law. The Parliament pushed at the same time for a "fundamental reassessment of EU´s position towards Slovakia".

The 1998 Accession Partnership identified the need for the adoption of minority language-use legislation and implementation measures as a short-term priority and set the development of policies and institutions protecting the rights of minorities. At this time the Council identified the treatment of the Hungarian and the Roma minority as being the two urgent issues that required the most attention.[127] In 1999 the treatment of the Hungarians – due to their political representation in the Government found to be solved, so it was removed as a matter of concern from the Commission's evaluation list.

Assessing the EU´s development concerning its own Criterion for accession, there was a progress during the accession years. Although the approach towards minority issues remained very cautious until the end; and there were several contradictorial elements[128] in it, an improvement certainly has to be seen – even in the wording of the documents; and even in the stronger action made through the exclusion decision.

In two years, Slovakia has experienced substantial changes and it has re-gained its position in the first round of EU enlargement. Though the situation of the Roma remained (and is still) critical; Slovakia – in a short period of 22 years – complied with the EU´s Copenhagen Criteria, showing

[125] Coalition of three Hungarian political parties: Coexistence, Hungarian Christian Democratic Movement and the Hungarian Civic Party

[126] *European Parliament Resolution on the Slovak Republic*, O. J. C 328, 26/10/1998, p. 190.

[127] KYRIAKI TOPIDI: *The Limits of EU Conditionality: Minority Rights in Slovakia*; European Centre for Minority Issues (ECMI): JEMIE - Journal on Ethnopolitics and Minority Issues in Europe; Issue 1/2003; p. 6-7.

[128] For instance in *Council Decision 1999/853EC of 6 December 1999 on the principles, priorities, intermediate objectives and conditions contained in the Accession Partnership with the Slovak Republic* it was noted that adoption of the relevant legislation was so far insufficient and further implementation was required to reach "**the same standards as those which apply within the Union**". But are there any standards within the EU?

with such kind of development a huge progress, and very strong will for joining the European Union.[129]

Examining the development of the Slovak Legislation Concerning Minority Rights, and the Impact of the EU´s and other international actors´ pressure on this development

The Constitution of the Slovak Republic

The surest protections for minorities are not those written into constitutions. The Belgian Constitution has no clause guaranteeing minority rights; nevertheless this has not prevented Belgium from working out a system of perfect equality between the French and the Flemish languages. The study of constitutional provisions is nevertheless interesting because they reveal, not the actual relations between minority and dominant groups, but the constitutional techniques of protection of, or discrimination against minority groups.[130]

Constitutions structure the most basic relationship a state has with resident minority groups by defining the character of the state such that minorities may or may not be incorporated in the basic concept of the nation-state. They define the territorial organisation of a state, which further structures state-minority relations and prescribe the institutional mechanisms through which state-minority debates can be discussed and provide basic guidelines for addressing minority demands.[131] As the political philosopher, Will Kymlicka argues: "the state unavoidably promotes certain cultural identities and thereby disadvantages others."[132]

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[129] Personal interview with CSÁKY PÁL; 24 May 2005, Bratislava

[130] J. A. LAPONCE: *The Protection of Minorities*; University of California Press Berkeley and Los Angeles 1960; p. 43.

[131] DAVID ADAM LANDAU and LISA VANHALA: *Circumventing the State? The Demands od Stateless Natons, National Minorities, and the Proposed European Constitution,* p. 2.; Redefining Europe: Federalism & the Union of European Democracies; 1st Global Conference, 26th March - 30th March 2004, Prague, Czech Republic http://www.inter-disciplinary.net/AUD/s6.htm

[132] WILL KYMLICKA: *Multicultural Citizenship*: A Liberal Theory of Minority Rights; Clarendon Press Oxford, England 1995; p. 108

The Slovak Constitution, adopted on the 3rd of September 1992, was a key step in Slovak nation building. It marked the final stage in move towards independence. Although Hungarians, Roma, Czech and all the other ethnicities together with the Slovaks became citizens of the new Slovakia with the 1st of January 1993, the Constitution established the pre-eminence of the Slovak nation. The Constitution states, that the Slovak Republic is the state of the Slovak nation, and not of the Slovak citizens. In the Preamble it already distinguishes different categories of citizens with the composition:

"*We the Slovak nation, mindful of the political and cultural heritage of our forebears, and of the centuries of experience from the struggle for national existence and our own statehood, in the sense of the spiritual heritage of Cyril and Methodius and the historical legacy of the Great Moravian Empire, proceeding from the natural right of nations to self-determination, together with members of national minorities and ethnic groups living in the Slovak Republic*…"

With this patriotic tone of the preamble, it assumes a hierarchy of ethnic groups between the Slovak nation and other groups.

Article 33 and 34 declares the rights of the persons belonging to minorities, but in a very general manner; and with referring to laws later to be adopted. Article 33 recognizes the *right of membership to any national minority or ethnic group as an element that cannot be utilized to one's detriment*, while Article 34 establishes the *right for the general development to one's culture*, to *receive and disseminate information in one's mother-tongue*, the *right to education in the minority language,* the *right to use the minority language in official communications* the *right of association*, the *right to establish and maintain educational and cultural institutions* within a set legal framework[133]. The Constitution confirms *Slovak* as the *official language* – as already established before in the 1990 law on the official language, and guarantees minorities the "*right to learn the official language*" [134]

Scholars also used to have concerns about the fact, that the rights guaranteed by the Constitution can easily be taken away, through a simple

[133] www.slovensko.com/docs/const.
[134] FARIMAH DAFTARY & KINGA GÁL*: The New Slovak Language Law: Internal or External Politics?;* ECMI Working Paper #8, 2000; p. 22.

parliamentary majority, rather than a constitutional amendment that requires 60 % approval.

The *latest revision* of the Constitution was in 1999. Compared to the previous form of the Constitution, the revised one meant serious steps towards democracy and Slovakia's EU accession. The amended Article 7 refers to the international norms of the European Community and the EU, that they have priority before the domestic legislation. The competences of the Constitutional Court and the National Audit Office have also been expanded.

Although not specifically responsible about national minorities, the revised constitution established the institution of the ombudsman and set up the office of the public defender of rights[135]. Doc. Judr. Pavel Kandrác was elected by the Parliament on the 19th of May 2002.

The Constitution *became EU-conform*, however the reference to the State of the Slovak nation has not been changed. It is also worth noting that *Article 12* (2) of the Constitution henceforward *prohibits positive discrimination* or any kind of affirmative action, which theoretically blocks the way to any special measures in favour of ethnic minorities.

Other legal acts related to minority issues

As the constitution concerning the way of exercising the rights of minorities points to separate laws – in order to get a proper picture of the content of these rights – we have to look into the respective laws. The mistrust towards minorities, the concerns about the infringement of state-sovereignty had been characterising the development of the minority protection system of the country.[136] This kind of cautious approach has been visible in the legislative acts as well.

[135] http://www.vop.gov.sk/en/index.html
[136] *Magyarok és nyelvtörvények*; Teleki László Alapítvány; Budapest, 2002; p. 25-26.

Language rights for minorities

The most significant question for minority groups is usually that to what extent can they use their language beyond the private life communications. In states with national minorities, the question inevitably arises how to find the balance between the right of a state to ensure that the position of the state language is safeguarded and the need to ensure that the languages of the national minorities are protected in accordance with international standards.[137]

Since the change of the regime in 1989 there have been adopted three legal acts in Slovakia, which concerns the language rights of the citizens. The first one was in 1990 about the official language of the Slovak Republic, the second one in 1995 about the state language, and the third one in 1999 about the minority languages.

The domestic and the international reactions related to these laws significantly determinated Slovakia's political position during the accession negotiations.

Hereinafter I will describe 3 periods characterised by the development of the language-usage in Slovakia.

First period: the way towards the nationalist Slovakia

The **428/1990 Act** declared the Slovak language to be the official language of the Slovak Republic. The preparatory period of the law was full of serious disputes. The "Coexistence"[138] fought for the free language usage, the "Matica Slovenská"[139] for the monolingual Slovakia. At the end, the Act – with the exception of the Czech language[140]- declared that the "other languages" might be used *in the official contact*, if the percentage of the minority in the concerned settlement reaches the 20% and there is no party in the process

[137] Recommendations of the OSCE High Commissioner on National Minorities, sent to Slovak Foreign Minister Juraj Schenk on 24 August 1995 http://www.osce.org/documents/hcnm/1995/12/2750_en.pdf
[138] Hungarian Party at that time, now present in the Hungarian Coalition Party
[139] Significant Slovak cultural organisation, which has a leading role in maintaining Slovak nationalist trends.
[140] The usage of the Czech language was declared to be free without any restrictions.

who does not belong to the minority group. The employees of the state and local administration however are not obliged to know and use the minority language in any case and all the public documents were to be issued in the official language only.[141]

Clarifying the official language of the state was the legitimate aim of the act, however the adoption resulted in confusion and inter-ethnic antagonism. Neither the nationalists were satisfied by it, nor the minorities.[142] After the adoption of the law the fight for the bilingual geographic signs begun between the community of ethnic Hungarians and the then Slovak Government nationalist-populist parties. The Slovak Ministry of Internal Affairs ordered also to reduce the usage of minority first and last names. At this period of Slovakia, nationalist political forces were in power, which first of all identified the nation in opposition to the minority, and mainly in opposition to the Hungarians.

The Slovak Parliament accepted the *law on family and first names* on the 24th of September 1993. However it did not comply with the duties Slovakia took at its accession to the Council of Europe. Although it allowed giving first names in minority languages, it still obliged women from minority groups to use their family name with the "-ova" affix according to the Slovak grammar.

For a short period between March – October 1994 the rule of the Mečiar government was interrupted following a vote of no-confidence. During this period two important laws fulfilling the Council of Europe requirements were passed.[143] This *1994/154 law on parish registers* abolished the afore-mentioned obligation concerning the use of names by persons belonging to minority groups.

On the 7th of July 1994 the Slovakia accepted the *law on geographic signs also in minority languages*. Accordingly it has become to be allowed to sign the beginning and the end of the settlement also in minority language, where a particular minority's proportion reached the 20% threshold.[144]

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[141] Magyarok és nyelvtörvények, Teleki László Alapítvány, Budapest, 2002; p. 33.
[142] FARIMAH DAFTARY & KINGA GÁL*: The New Slovak Language Law: Internal or External Politics?;* ECMI Working Paper #8, 2000; p. 21.
[143] Ibid, p. 23.
[144] LANSTYÁK ISTVÁN: *A magyar nyelv Szlovákiában*; Osiris-Kalligram, MTA Kisebbségkutató Mühely; Budapest – Bratislava; 2002; p. 96-98.

Second stage: The one state – one language model

The Constitution of the Slovak Republic declares Slovak to be the state language. Concerning the official usage of languages differing from the state language, the Constitution refers to an other disciple.

The *law on the State language of the Slovak Republic* was accepted in 1995[145]; and overruled the language law from 1990[146]. Despite the shortcomings of the previous law, it had some provisions related to the usage of minority languages. The 1995 Act explicitly nailed down, that it does not rule the minority language usage; creating by this a *legal vacuum*. The political powers relying on this law, systematically tried to supplant the minority language usage from all kind of different areas. They even threatened with imposing high fines for aggrievements of the Act. In order to have successful implementation of the Law, the *Central Language Council* was set up in 1996 to provide supervision by its language consultants over it; and make recommendations for the effective protection of the Slovak language.[147]

The law was sent by the opposition – the Hungarians and the Slovak Christian-democrats to the Constitutional Court in September 1997. Nevertheless it did not cause any changes, that the Court found contravention with the Slovak Constitution.

The politicians successfully played the "minority card"; diverting thereby the attention of the people from other issues like economics; privatisation, social affairs. Even the then government programme openly said, that the Slovak State would be built on the national principle.[148]

Language related issues in general, and minority education in particular, have been one area of dissatisfaction and friction between the

[145] The same year in which Slovakia signed the Council of Europe's Framework Convention.
[146] Characterising event of the political life of Slovakia at this time is that before the voting, the deputies of the Slovak Parliament were told by a HZDS representative that: "*Anyone who votes against the bill is against the fulfilment of the Slovak's desires and deserves public contempt*." Only the Hungarian deputies alone voted against the law, and only the Christian-democrats (KDH) abstained.
[147] FARIMAH DAFTARY & KINGA GÁL*: The New Slovak Language Law: Internal or External Politics?;* ECMI Working Paper #8, 2000; p. 27.
[148] ibid. p. 24.

Slovak government and the Hungarian minority.[149] The *case of alternative education* and the *case of the bilingual school certificates* received the greatest response both at the domestic and international level. Though other minorities were also affected by the state's discriminatory policy; most of the damaging factors concerned the Hungarian community. There are many primary and secondary schools in Slovakia with Hungarian as the main education language. The state in this period tried to assert greater control over these schools; and tried to outrule the dominance of the Hungarian language of them. The aim of the "Education Conception for Regions Inhabited by an Ethnically Mixed Population" – better known as the "*alternative education*" – was to introduce more courses in Slovak to the Hungarian Schools; to strengthen the feeling of loyalty towards Slovakia among the pupils and to ensure the correct supervision of the teaching and protection of the Slovak language. Eva Slavkovská, the former minister of education worked on the government program. She had even proposed to give higher salary for those Slovak teachers who work under special disadvantaged circumstances in mixed population areas. Parents took to the streets when directors of Hungarian schools were dismissed over this plan in 1995.[150]

Concerning the *bilingual school certificates,* the Mečiar cabinet referred again to the accepted Act on the official language of the state. As the school documentation is an official issue, it has to be in accordance with the Law in Slovak. The Hungarians in Slovakia have had bilingual school documentation. The principle of acquired rights means that without the consent of the subject of certain right, infringement to the enjoyment of this right might only be possible in very special circumstances.[151]

The legal vacuum created by the 1995/181 Act had been present until 1999.

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[149] ibid; p. 13.
[150] FARIMAH DAFTARY & KINGA GÁL*: The New Slovak Language Law: Internal or External Politics?;* ECMI Working Paper #8, 2000; p. 13.
[151] In the case of *Cyprus v. Turkey, Judgement of 10 May 2001, Grand Chamber* the European Court of Human Rights declared in relation to the first sentence of Article 2 Protocol 1 that a discontinuance of provision might constitute violation of the right. This means that there may be even a positive obligation to continue the bilingual administration once that has been provided, even if there is no obligation to provide it.

Third stage: reaching minimum standards

After the 1998 elections, the new coalition's main goal was to regain Slovakia's position among the first round EU accession countries. First of all, they had to show that the new government was determined to break with the previous nationalist populist attitude what was the main reason for outruling Slovakia of the first round of EU accession. Even a new position in the government was created, the *Deputy Premier for Human Rights and Minority Issues,* which has been held by Csáky Pál. The OSCE High Commissioner on National Minorities, Max van der Stoel in his letter to the new prime minister again stressed the importance of the adoption of a law on minority languages.

One of the basic conditions for the EU as well was the creation of *the Act on the Use of Languages of National Minorities and Ethnic Groups,* so the acceptance of the 1999/184 law was crucial for satisfying both the external and internal demands. The main motivation for the government was to draft a law as soon as possible, before the summer to be in time for a key meeting of the EU.

The 1999 Law faces several *shortcomings.*

It regulates the language usage of minorities only in the official contacts – and even this is interpreted very narrowly, as it refers only to the state administration and deals not with other spheres of public administration (like post; social security, labour office), education, commerce, public transport, etc.

Although the Law guarantees language rights for minorities in contacts with the local administration; but beside the restrictive 20% threshold, there are other imperfections too.

The law guarantees the right

- to *submit written requests* to the local and state administration and to *get an answer* next to the state language also in minority language, with the *exception of public documents*;
- to distribute *official forms* of the local administrative bodies in a minority language *upon request*; as well as to provide on

request information about general legal regulations in a minority language;

- to conduct *meetings of the local administrative bodies* in minority language, if all present at the meeting agree;
- to *keep records*/chronicles of the municipality also in a minority language
- to *display important information in public areas* also in minority languages[152]

The provisions raise up several questions. First of all, the 20% threshold imposes real barriers for the enjoyment of these rights. Concerning for instance the official documents; only at the local level is it possible to "use" these documents. If the procedure goes beyond the borders of the municipality[153], the document might be used, if the minority also at the county level reaches the 20% threshold. For minorities, which are present in the country with lower percentage – like the Rutens – the 20% constitutes even at the local level too high threshold. At the regional level – this possibility does not even come to consideration. There is no minority in Slovakia, which could reach 20% within a region under the actual administrative construction.[154]

The public meetings of the local administrative body conducted in minority language, might be easily hindered by a single occasional visitor.

The law uses insecure vocabulary several times ("*may use also minority language"*) – which makes any kind of enforcement of the rights almost impossible.

The Act at some points while establishing certain rights, in the next paragraph it immediately restricts these rights by creating exceptions that are not defined in a proper way.

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[152] FARIMAH DAFTARY & KINGA GÁL*: The New Slovak Language Law: Internal or External Politics?;* ECMI Working Paper #8, 2000; p. 42.

[153] The law contains a list of those municipalities where according to the official statistics, the proportion of the minority reaches the 20% threshold. According to the European Commission's Regular Report 2000, the contradictory and not clear provisions particularly affected the Roma minority; as they do not exercise their right in any of the 57 villages where they officially constitute more then 20% of the population. / KYRIAKI TOPIDI: *The Limits of EU Conditionality: Minority Rights in Slovakia*; European Centre for Minority Issues (ECMI): JEMIE - Journal on Ethnopolitics and Minority Issues in Europe; Issue 1/2003; p. 18./

[154] Personal INTERVIEW with DURAY MIKLÓS and KVARDA JÓZSEF; Bratislava, May 2005

There are several contradictions in the text as well. Paragraph two of Article 7 for instance states, that the local administrative bodies are obliged to create conditions for the use of minority languages according to the terms of this law and separate regulations. At the same time the first paragraph declares that the local administrative bodies and their employees are obliged to use in official contacts the state language and may use a minority language if it complies with the set by law.[155] The law does not create any kind of obligation for the employees of the local administration bodies to know the minority language. There is no right to be understood by the officials included in the Law. It becomes this way quite contingent, that the member of a minority group can enjoy his/her right in reality.

In fact, the 1999 Law is a step forward, as it dissolved the legal vacuum; and created freer atmosphere concerning language usage; at the same time it does not change the fact, that the Law on the State Language is still operative and its discriminative provisions are still valid. There is only one paragraph – concerning the fines in case of violation of the provisions in the 1995 Law –, which was overruled.[156]

Nevertheless the law was welcomed by all the international organisations. Based on the 1999 Regular Report, the European Commission started accession negotiations with Slovakia in February 2000, after the favourable decision taken by the European Council in Helsinki in December 1999.[157]

Media, Education, Participation in public life

In relation to the *media*, the 255/1991 Law on Slovak Radio and the 254/1991 Law on the Slovak Television, the Slovak national radio and television are under the obligation to contribute to the promotion of national culture and the cultures of minorities living in the Slovak Republic. They are

[155] FARIMAH DAFTARY & KINGA GÁL*: The New Slovak Language Law: Internal or External Politics?;* ECMI Working Paper #8, 2000; p. 44.
[156] LANSTYÁK ISTVÁN: *A magyar nyelv Szlovákiában*; Osiris-Kalligram, MTA Kisebbségkutató Mühely; Budapest – Bratislava; 2002; p. 104 – 109.
[157] FARIMAH DAFTARY & KINGA GÁL*: The New Slovak Language Law: Internal or External Politics?;* ECMI Working Paper #8, 2000; p. 40

also obliged to broadcast programmes promoting minority cultures in their mother tongues. In practise, the circumstances are far from the best. Particularly the Roma rights are again cut down, and other minorities like the Czech, the Rutens, the Ukrainians have received no coverage at all.[158]

It is also worth to consider that what kind of negative majority opinion what has been concerning mainly the Roma people is consistently present in the programs of the TV and Radio.

Concerning *education,* the Constitution recognizes the right for national minorities to be educated in their mother-tongue. However, this right neither has developed in a natural way. The 1984 School Act for instance limits the right to certain specific minorities (Czech, Hungarian, German, Polish and Ukrainian), excluding with this the Roma, whose language is not recognised as one that is suitable for being used in primary and secondary education.[159].

According to Slovakia's international obligations – especially what concerns the Language Charter – the question of minority language university became also a hot issue during this transitional period. In order to maintain the subsistence of a minority group, in order to tackle the grounds of inequality and reach development in this area it is extremely important to have, and to support well educated professionals of a minority group. The best way for achieving this aim leads through education.

The Selye János University in Komárno that was founded in 2004, exists and provides education in Hungarian at three faculties: Economy, Pedagogics and Reformed Theology[160] in order to train well educated professionals.

The *Roma* however face serious problems in this sector as well. In practise, Roma children are increasingly excluded of the Slovak education system. Not only is it the fact, that Roma children are often sent just because of their ethnic background to segregated classes or even to special schools

[158] KYRIAKI TOPIDI: *The Limits of EU Conditionality: Minority Rights in Slovakia*; European Centre for Minority Issues (ECMI): JEMIE - Journal on Ethnopolitics and Minority Issues in Europe; Issue 1/2003; p. 18.
[159] KYRIAKI TOPIDI: *The Limits of EU Conditionality: Minority Rights in Slovakia*; European Centre for Minority Issues (ECMI): JEMIE - Journal on Ethnopolitics and Minority Issues in Europe; Issue 1/2003; p. 18-19.
[160] http://www.selyeuni.sk

designed for mentally retarded children[161]; they even face difficulties in the "normal" schools. Romani language is not recognised as a language suitable for providing education at all. In the best cases it is used as supplementary language in the schools. In fact, there is only one secondary School of Art in Kosice, where Romani is the teaching language. Having such problems already at the primary and secondary level deeply influences the situation of the Roma in the society as well. Without education and with such kind of policy practise the stigmatisation is increasing, it is always hard to get on to the labour market, the segregation becomes ever and ever visible,; and creates a devil's circle, of which Roma people cannot get out. There has been increasing pressure on Slovakia from different international sides, and theoretically the government is trying to do its best in order to tackle the issue.

The *Office of the Roma Plenipotentiary* had been established by the Government resolution 1196/2003 from 17 December 2003 as an advisory organ by the government, whose aim is to work on the integration of Roma people to the society.[162]

The "*Governmental Strategy for Addressing Problems of the Romani Minority*" acknowledges the need to "establish stricter criteria" in order "not to allow institutional segregation via the placement of children into special schools", but in reality no action has been taken to address the issue.[163]

The government's "Action Plan for the Prevention of Discrimination" from 2001 suggests alternative solutions like "zero classes" which could function as special preparatory classes for Roma children. In practise, these kinds of solutions if combined with real goodwill, and the careful evaluation of the special classes might operate to consolidate the trend towards segregating Roma schoolchildren.[164]

At the university level a department of Romani Culture has been in operation in Nitra University since 1992, with a specialization in teaching

[161] The European Commission also expressed its concerns about this issue in tis Regular Report 2000.
[162] http://www.vlada.gov.sk/romovia/twinning/index_en.php3
[163] *Monitoring the EU Accession Process: Minority Protection in Slovakia*; Open Society Institute 2001; p. 446. http://www.eumap.org/reports/2001/minority/sections/slovakia/minority_slovakia.pdf
[164] Ibid; p. 447.

Roma children since 1999.[165] However, only a very few number of students with Roma background are able to reach this level of the education system.

Concerning the *participation in public and political life*, the Slovak Constitution provides a rather blurred provision. It states, that national minorities and ethnic minorities *in a certain way* have the right to participate in decision-making process with regard to concerned matters. In practise it means, that there is no substantial right for having a minority member of the parliament, so minority groups get into the highest decision-making institution, to the parliament by establishing their own political parties. This fact does not cause problems for territorialized and institutionalized minorities like the Hungarians[166], however it affects the smaller minority groups – as they cannot reach the 5 % threshold for a party to accede to the Parliament, and the Roma especially due to their dispersion and disorganisedment. Their oldest political party with approximately 30 000 members is the Romany Civic Initiative. It has never been represented in Parliament as it failed the 5% threshold.[167]

Slovakia's administration law and its impact on the minorities

The administrative reform in Slovakia was also one of the main EU requirements during the accession period.

The 20 percent threshold for the allocation of language rights – as we could see before – does not satisfy the demands of the minorities generally; however, in conjunction with the administrative law for the Hungarians it has become even more restrictive.

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[165] FARIMAH DAFTARY & KINGA GÁL*: The New Slovak Language Law: Internal or External Politics?;* ECMI Working Paper #8, 2000; p.. 19.

[166] The Hungarian Coalition Party has been originally established by three Hungarian parties in 1994: the *Coexistence* (chairman. Duray Miklós), the *Hungarian Christian Democratic Movement* (chairman: Bugár Béla); and the *Hungarian Civic Party* (chairman: A. Nagy László) in order to represent stronger poltical power together.

[167] KYRIAKI TOPIDI: *The Limits of EU Conditionality: Minority Rights in Slovakia*; European Centre for Minority Issues (ECMI): JEMIE - Journal on Ethnopolitics and Minority Issues in Europe; Issue 1/2003; p. 17-18.

Already in the Mečiar-era the administrative boundaries had been redrawn in the country.[168] in a way, which broke the linguistic territorial unity of the Hungarians in the southern part of the country. Nevertheless the new democratic coalition voted also against the interests of their own coalition partner, and in accordance with the plans of the previous Meciar government, accepted the new Administration Law on the basis of the opposition's proposal. With this step, they basically affirmed the previous system and not even gaining real decentralization, as the central control remained in every important question. The hidden aim of this Law was to minimize the political strength of the Hungarian minority in the areas where it constituted a numerical majority.[169] Due to the North-South division, there is no region, where the Hungarians would reach the 20% threshold for the enjoyment of the language rights.

Slovakia's commitment to the international minority protection system – satisfying the surface or real progress?

Slovakia was among the first countries to sign and ratify the most important minority protective instruments. It has been the member of the Council of Europe since 1993, signed and ratified the *Framework Convention*, which is the most significant binding document on the protection of minorities; and also the *Language Charter*.

Beside the multilateral treaties, the bilateral *Slovak – Hungarian basic treaty* is also relevant of a minority protective point of view. Good neighbourly relations with Hungary, the neighbouring kin state of the ethnic Hungarians in Slovakia, have been always crucial. Hungary feels responsible for ensuring the rights of ethnic Hungarians; on the other hand, the Slovaks have fear that this responsibility once turns into territorial demands. The stability of the region however has been for the EU important, that is why it urged and supported the idea of the bilateral treaties.

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[168] *1996 – Act on the redrawing of the territorial-administrative boundaries*

[169] GWENDOLYN SASSE: *Minority Rights and EU Enlargement: Normative Overstretch or Effective Conditionality?* in Gabriel N. Toggenburg: Minority Protection and the Enlarged Union: The Way Forward; OSI/LGI 2004 p.76.

The aim of the EU´s initiative, named *Pact on Stability* was to improve neighbourly relations by avoiding the issue of borders and by establishing minority rights on the basis of existing international standards, with the prospect of accession to the EU as an incentive.[170]

The Slovak – Hungarian basic treaty was signed in the Mečiar era, in 1995. The Hungarians insisted to the stronger minority protection provisions, while the Slovak partner to the inviolability of the state-borders.[171] The basic treaty cites the Framework Conventional provisions; and as it is a bilateral treaty, which does so with a multilateral one – it would be logical to expect, that the parties aim to go beyond the interpretation of the previous one in order to add something to their content. The Mečiar cabinet at that time included the Slovak National Party, which saw a capital treason in signing the basic treaty. The discussions around the Council of Europe's recommendation 2001 – whether to refer to it or not were at the centre of the political debates. The Slovak government could not reconcile with the idea of any kind of collective rights.

All these international instruments despite their indispensable role, still have a very *limited impact on the de facto situation of the minorities*; if they are adopted just in order to achieve other goals – like EU-membership for the country.

First of all, the legal value of international treaties in domestic law is determined in the Constitution. According to Article 11 of the Slovak Constitution, international treaties on human rights and basic liberties that were ratified by the Slovak Republic and promulgated in a manner determined by law, take precedence over domestic laws, provided that they secure a greater extent of constitutional rights and liberties. In other words, the afore-mentioned international agreements on human rights have a legal force that is lower than the Constitution but higher than law.[172] As a result, positive discrimination, which is explicitly, included to the Framework Convention –

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[170] KINGA GÁL: *Bilateral Agreements in Central and Eastern Europe: A New Inter-State Framework for Minority Protection?* ECMI Working Paper #; May 1999; p. 4.
[171] KOVÁCS PÉTER: *Nemzetközi Jog és Kisebbségvédelem*; Pro Minoritate könyvek – Osiris, Budapest 1996; p. 158.
[172] KYRIAKI TOPIDI: *The Limits of EU Conditionality: Minority Rights in Slovakia*; European Centre for Minority Issues (ECMI): JEMIE - Journal on Ethnopolitics and Minority Issues in Europe; Issue 1/2003; p. 20.

Article 4 (2) and 3 – is not guaranteed in Slovakia, as the Constitution expressly prohibits positive discrimination.[173]

The aim of the international instruments cannot be achieved without domestic political goodwill. As their construction required also wide-range consensus they represent "shy minority protection"[174]. Without exigent implementation for instance in Slovakia they do not change the situation respectively. Purposeless is the 20% threshold for the use of minority language, if the administrative-boundaries are drawn with the aim to prevent numerical majority of the minority in any region.

It is also common to happen with international instruments, that in most cases, the interested groups – the minority communities themselves – are not involved to the negotiations and adoption of them. This practise is a bit controversial: an international document in the interest of, but without the participation of national minorities?[175]

The EU`s Non-discrimination Requirements in Slovakia

As the EU Race Directive 2000/43 forms part of the *acquis communautaire*, Slovakia had to modify its legal system to the EU´s non-discrimination requirements. However there was a debate among the political parties, whether a single act, or the amendments of different laws would be the most appropriate to meet the EU requirement. The last would have meant an amendment of about 80 laws to secure non-discrimination in Slovakia. The Justice Minister and the Slovak Christian-Democrats argued only for 14 laws[176]. The European Union also preferred a single act, and the Commission urged Slovakia to implement it. Finally, a proposal had been prepared by Csáky Pál, the Deputy Prime Minister of the Slovak Republic for Human

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[173] Article 12(2) *Basic rights and liberties on the territory of the Slovak Republic are guaranteed to everyone regardless of sex, race, color of skin, language, creed and religion, political or other beliefs, national or social origin, affiliation to a nation or ethnic group, property, descent, or another status. No one must be harmed, preferred, or discriminated against on these grounds*.

[174] KINGA GÁL: *Bilateral Agreements in Central and Eastern Europe: A New Inter-State Framework for Minority Protection?* ECMI Working Paper #; May 1999; p. 13.

[175] KINGA GÁL: *Bilateral Agreements in Central and Eastern Europe: A New Inter-State Framework for Minority Protection?* ECMI Working Paper #; May 1999; p. 5.

[176] http://lists.delfi.lv/pipermail/minelres/2004-January/003147.html

Rights, Minorities and Regional Developmet. Mr. Csáky has told within an interview, that the Anti-discrimination Act, has been passed by on the 20th of May 2004, with a strong majority of 107 coalition and opposition MPs backing the bill; a high-quality law Europe-wide that met all the EU-standards and provided a wide-scale protection against discrimination. Nevertheless right after that the Parliament so successfully accepted the Act, the Justice Minister Daniel Lipsic immediately proposed a constitutional review over it, as it contained a provision about certain positive discrimination contravening with the Constitution.

The concerned measure provided legal platform for temporary positive discrimination, allowing certain measures to serve as a tool to help the most afflicted groups of society get in step with the rest of the population. The Roma in Slovakia are the most disadvantaged group of the society. This ethnic group suffers above-average unemployment, worse-than-average health and lower education levels than most Slovaks. The Roma also endure social and economic deprivation.[177] Without helping them to get on equal starting point, they will continuously face extreme difficulties while trying to surmount their drawback.

Final remarks on Slovakia's commitment to minority protection

After examining Slovakia's minority protection system, while seeing its shortcomings it still has to be admitted, that complying to international standards, the country has a sufficient and good de jure situation concerning minority rights.

The EU accession period was crucial for the democratic transition of the country. Although there are significant deficiencies – mostly in the field of implementation, the country has showed development during the short period of the transitional years since1989.

Nevertheless there is no time for satisfaction and illusions; as there is still a lot to do. The Roma question is still an urgent issue; and the legal

[177] MARTINA JURINOVÁ: *Court delays ruling on anti-discrimination law* in the Slovak Spectatos, Vol. 11 Number 13; http://www.slovakspectator.sk

provisions – even if they are according to the international standards – do not solve discriminatory issues for the thousands of people suffering of the majority attitude.

Hopefully after the accession to the European Union the development will continue.

THE IMPACT OF THE EU-ENLARGEMENT PROCESS ON THE EU´S INTERNAL MINORITY PROTECTION SYSTEM

The EU´s human rights commitment in its external relations is widely well known. However this commitment; for instance the Lomé Convention's human rights clause serves mainly economic purposes – as having predictable partners at the same time reduces the risk factor of the business. Nevertheless within the enlargement process the interests are different. Although the EU is dealing with third countries again, the aim of the whole process is to get these third countries into the EU. Here besides economical factors a wide range of others gains importance. It has to be remembered that the actual candidate countries ones are going to become member states; and such they are already having impact on the EU´s internal relations.

Minority issues came up as an EU priority in the latest enlargement process. The Central and Eastern European countries have significant minorities, and the EU recognised the weight of this question, when it has explicitly included the protection of minorities into its Copenhagen Criteria. And recognition is the first step before protection.

The end of the communism in Central and Eastern Europe was a catalyst for the processes of the deepening of the EU as a political union based on common values beyond the regulation of an internal market, and its eastern enlargement.[178]

Although – according to the human rights principles: universality, indivisibility and interdependence[179] – *minority rights* had been *implicitly*

[178] JAMES HUGHES & GWENDOLYN SASSE: *Monitoring the Monitors: EU Enlargement Conditionality and Minority Protection in the CEECs*; London School of Economics and Political Science, UK; Issue 1/2003; p. 7.
[179] MANFRED NOWAK: *Introduction to the International Human Rights Regime*, Koninklijke Brill NV, Leiden, The Netherlands 2003; p. 14.

incorporated to the EU primary law *to Article 6 TEU*; the internal sphere of the issue in the old EU remained rather uncharted. There had also been progress achieved with the implementation of Article 21 to the EU Charter of Fundamental Rights; the stronger reference to cultural diversity; and the weak indication in the proposed Constitution. Probably the greatest result of the enlargement process is still that the minority issue became an EU interest. The old EU member states have discovered that not only the accession countries have Roma communities; but they do so as well. The fact, that the 10 new member states accession had duplicated the number of EU citizens belonging to national minorities creates a case that cannot stay anymore within the policy preferences of a single member state. This is the interest of the minorities, but the member states and the EU as well. There has to be developed a supranational EU minority protection system.

The EU has passed the point of no return; there is no way of avoiding to deal with the issue any more.

The way forward…

General recommendations

The Maastricht Treaty opened a new era of the European integration, whereby the European Union became one of the key international actors that influence the every-day lives of its citizens by its regulations, requirements and policies.

Such a serious influence draws serious responsibility as well, to ensure that while meeting the demands, the fundamental rights of the persons affected will be respected. The EU became a supranational organization over differing nations, differing cultures, and different minorities. In order to ensure its continuity and development, the main challenge is to find the balance between these differing interests. This challenge had been faced through the anti discrimination legislation developed by the ever-closer integration;

however as the size of the EU is growing, the diversity is increasing as well. It is visible, that the anti-discrimination legislation has become insufficient to face this kind of diversity, which on one hand makes relations to become more complicated, and requires much more attention and adequate policy to deal with the upcoming issues; on the other hand comprises enormous richness of possibilities to make the EU more compatible, more effective and successful actor at the international field, and at the same time a comfortable place of living for its citizens.

It has been already discussed before, that *de facto equality* is different of *de jure equality;* that different starting points make it difficult to reach equal ending points; and that affirmative actions might be the tool to tackle this problem. Such kind of affirmative actions could be helpful to face the problems of national minorities as well.

The role of minorities in the EU – Burden or Resource of Possibilities

The European integration certainly infers the harmonization of existing structures. It has to be emphasized, that the aim is to *harmonise*, *not to abolish the unique structures*. It used to be said, that the strength and uniqueness of Europe is in its cultural diversity. Is this just propaganda to moderate the possible rivalisation, or is it based on reality? Why is it worth to maintain so many different languages and habits?

It should not be forgotten that the primary aim of the establishing the European Community was strictly economical. Do minorities contribute to economical prosperity?

First of all I would like to argue with a very simple example. The golden rule in business is having satisfied costumers, as a satisfied client comes back and leaves his/her money again at that particular shop or service. Beside the quality of the product there are a number of other factors that influence the costumers. In an area of mixed population it is certainly not the most appropriate policy to reject speaking the language of the other group, or even being impolite or rude to one just because of his/her ethnic origin. The

devil's advocate could argue now that the whole issue – or possible tensions would disappear if the minority group would be assimilated to the majority.

Taking into account that our Europe is so beautiful and full of places worth to see, certainly mixed population areas are targets of tourism as well. Visiting historical places is also a good reason for choosing destinations. The golden rule, having satisfied costumers, applies again. People' belonging to minority groups and because of this special background speaking additional languages to the official one certainly is a tool of what business can draw advantages.

Solving ethnic tensions is necessary; however drawing new borders is not the solution. The aim is to make European nations feel comfortable in Europe, wherever one is going. Gaining prosperity, economic development is in the interest of everybody. It is therefore a very bad policy to loose clients because of their ethnic origin.

Good neighbourhood relations are also extremely necessary for economic development, and ethnic tensions do not support these kinds of relations at all. For instance the Mária Valéria bridge on the Danube between Štúrovo (Slovakia) and Esztergom (Hungary) had been missing for long years since 1944, when the retreating German troops blew it up. The question (rebuilding it or not) was nevertheless over politicised and just after long discussions could the Hungarian and Slovak Government agree on the reestablishment of the bridge. The project was financed by the EU Phare Program, which assisted applicant countries of Central Europe in their preparations for joining the European Union.[180] Since 2001 both countries have been benefiting of the bridge, it facilitates the commerce and the circulation of commodities. At the same time it has a moral value and symbolises the good relations between the two nations.

The aim of the economic prosperity is our common interest in Europe. There is a huge international competition for gaining profit, and if the EU continually wants to face this competition there is no time for sinking into the moor of ethnic tensions. Several political parties misuse ethnic differences, for

[180] http://www.europarl.eu.int/enlargement/briefings/pdf/2a1_en.pdf; p.12.

gaining political success, while at the same time diverting the attention of serious issues like economics.

Multicultural societies used to be even more productive according to the historical and current experiences, and multiculturalism is widely accepted as a tool for economic prosperity. Huge business enterprises, companies have been recognizing the benefits and are drawing profit of the cultural diversity while relying on the different language and cultural skills needed to compete successfully in international markets. Our Europe has to do the same.

The need for recognising minorities at the European level

The fact that there is no definition officially accepted at any international level of minorities makes the issue of minority protection even more complicated. Even if it is recognised that minority protection is necessary it is hard to define which groups should fall under the scope of this protection.

Traditional minority protection refers to the so-called "old minorities" – national and ethnic minorities. However because of the worldwide phenomenon of migration there are more and more people belonging to "new minority" groups. The main difference usually quoted is that these new minority groups decided by their own to leave their country of origin mainly due to economical reasons[181]; while the old minorities have been living at the particular territory, however the state-borders had moved around them.

This division is just referring to the first major distinction. The question of old minorities can neither be simplified. The actual state borders in Europe do not comply necessary with the ethnic boundaries. There are several minorities, which maintain special relations to a different state than their country of origin.[182] These special connections are based on common culture, language, and traditions. The "kin states" also express a kind of responsibility

[181] This free decision might be sometimes disputable to what extend was it really free, but the most important characterising of these groups is that they are not rooted to the territory.
[182] Examples: the German speaking minority in Italy; the Danish minority in Germany and the German minority in Denmark; the Hungarian minority in Slovakia and Romania; the Greek minority in Albania and the Albanian minority in Greece etc.

towards the “ethnic fellows” outside of their borders and sometimes this leads to tensions between the neighbouring states. Beside these groups there are however other minorities, like the Roma, Rutens, Basks, Catalans – who maintain common features but do not belong to any kin states.

In such circumstances at the European level it is not easy to define who should fall under European protection. This kind of diversity goes beyond the diversity created by the states themselves.

If we take into consideration that for instance France refers to a nation, that bases its existence on a contractual and universal concept and as such does not recognise nations within the nation or special rights for certain ethnic groups[183], it presupposes very difficult moments when trying to create a European definition of minorities. Nevertheless the sober sense says that the process of integration – which cannot be imagined in a Europe loud of ethnic tensions – should not be stopped.

Taking into consideration the reluctance of defining the term minority at the international level and the different approaches of member states on the issue presupposes difficulties with finding the definition at the EU level as well. Even if the issue of new minorities will be left for general anti-discrimination regulation, there will be problems with the definition of traditional minorities either. Nevertheless recognition is essential to secure the rights of minority groups, as lack of recognition could lead to instability and conflict. The legal recognition of minorities and the subsequent respect of their rights contributes to peaceful coexistence.[184] The EU as a supranational organisation should establish its *own criteria-system for recognition of its minorities*. This system has to be uniform, taking into account European history and in a certain way flexible for occasional future amendments. The Hungarian minority protection system has developed a progressive recognition system, which could serve as an example for the European level. There are now 13 minority groups being recognised in Hungary; however this list could be amended for request, if a certain group suits the requirements of the law (*numerical minority*; own *language, culture, tradition that distinguishes*

[183] MICHEL WINOCK: *Nationalisme, antisémitisme et fascisme en France*, Paris, Editions de Seuil, 1982 p. 188.
[184] PANAYOTE ELIAS DIMITRAS: *Recognition of Minorities in Europe*: Protecting Rights and Dignity; Minority Rights Group International 2004; p.1.

the minority group form the majority; *sense of solidarity* to preserve the commom features; and *at least for 100 years having been living in the territory* of Hungary). In such way the system is not hardened into stone, and by the time with a simple procedure can be amended for instance for „new minorities".[185]

Institutional possibilities – actualities and proposals

The EU Fundamental Rights Agency

In line with the commitment of the European Union to respect and promote fundamental rights, the representatives of the Member States meeting in Brussels within the European Council on 12 and 13 December 2003, decided to extend the remit of the European Monitoring Centre on Racism and Xenophobia and convert it into a *Fundamental Rights Agency.*[186] This decision was already essential, considering the fact that with the Maastricht Treaty the European integration has made a major step towards a supranational political union. The European Commission has launched its communication on the public consultation document regarding the Fundamental Rights Agency on 25 October 2004[187]. The public consultation process attracted a high number of responses from a wide range of stakeholders. To the date of the 19th of January 2005, 94 contributions have been received and reviewed, what is a clear signal of the importance of the Agency.[188] The European Parliament accepted its final report on the 11th of

[185] HAJAS BARNABÁS: *A nemzeti és etnikai kisebbségek jogai* in KILÉNYI GÉZA: Fejezetek az Alkotmányjog köréből; Szent István Társulat, Budapest 2002; p. 207-208.
[186]http://europa.eu.int/comm/justice_home/news/consulting_public/fundamental_rights_agency/communication_com2004_693_en.pdf
[187] Commission of the European Communities: Communication from the Commission: The Fundamental Rights Agency Public Consultation Document; COM(2004)693 final; Brussels, 25. 10.2004
[188] European Policy Evaluation Consortium (EPEC): Preparatory Study for Impact Assessment and Ex-ante Evaluation of Fundamental Rights Agency – Analysis of Responses to Public Consultation; www.epec.info

May 2005,[189] by which the realisation of the Fundamental Agency is coming closer.

The development is crucial regarding the human rights situation in the European Union. Since the 1st of May 1999 fundamental rights have been the "foundation" of the European Union, according to Article 6 of the Treaty on the European Union. The existing treaties lack a clear description of these rights as they only refer to the European Charter of Human Rights and Fundamental Freedoms (ECHR) and to the common constitutional traditions of the Member States. An increase of the visibility of these rights have appeared through the EU Charter of Fundamental Rights, which by its incorporation into the Constitutional Treaty will in fact create a legal obligation for the Union to ensure that fundamental rights are actively promoted across all policy areas.[190]

As fundamental rights need a holistic approach, an Agency that would empower and integrate the existing national human rights institutions into a "*network of networks*" is certainly an important and relevant aim. Such an initiation needs to face several challenges and organisational questions, such as the future remit of the Agency, the areas of operation, geographical scope, the tasks of the Agency, the dialogue with the civil society and the cooperation with other international actors, and the structure of the Agency.[191] It should be a "crossroads", facilitating contacts between the different players in the field of fundamental rights; allowing synergies and increased dialogue between all the stakeholders concerned; and satisfying the needs of, respectively, the EU institutions, the member states and civil society. However, the Commission communication[192] also makes it clear that the Agency will have neither judicial nor decision-making powers. In addition, it emphasises that the tasks of the Agency, which will be set up by an instrument of secondary legislation

[189] European Parliament Report on Promotion and Protection of Fundamental Rights: the Role of National and European Institutions, Including the Fundamental Rights Agency; Committee on Civil Liberties, Justice and Home Affairs; A6-0144/2005; 11.5.2005 final
[190] European Parliament Working Document on Promotion and Protection of Fundamental Rights: the Role of National and European Institutions, Including the Fundamental Rights Agency, Committee on Civil Liberties, Justice and Home Affairs; Rapporteur: Kinga Gál, 31.1.2005; p.2-3.
[191] European Policy Evaluation Consortium (EPEC): Preparatory Study for Impact Assessment and Ex-ante Evaluation of Fundamental Rights Agency – Analysis of Responses to Public Consultation
[192] Commission of the European Communities: Communication from the Commission: The Fundamental Rights Agency Public Consultation Document; COM(2004)693 final; Brussels, 25. 10.2004

(regulation), should not encroach on the powers conferred on the EU institutions by the Treaties, and more particularly on the supervisory role of the European Commission as regards the application of the community law.[193]

According to the European Parliament's final report[194] the dilemma of *which rights need to be protected*, it is of utmost importance that all rights in the Charter of Fundamental Rights and relevant provisions of the first part of the Constitutional Treaty are covered, but *priorities* should also be established among them. It is important to allow for some *flexibility in setting the priorities* both in terms of thematic focus and geographical scope.

Already during the public consultation several responses arrived and claimed *minority rights* to fall under the scope of the future Agency.[195] The European Monitoring Centre on Racism and Xenophobia does an important role in the European Union combating racism, xenophobia; dealing with non-discrimination issues. However this scope of action is insufficient to face the problems of vulnerable groups like the Roma and other national minorities. According to *ERIO – European Roma Information Office* particular care should be given to the situation of Roma as one of the groups, which are the most affected by discrimination and Human Rights violations. Their expectations concerns clear *monitoring of anti-gypsyism* as one of the most pervasive forms of European racism both at horizontal and vertical level; and *reliable, comparable data collection*. The ERIO believes that the definition of anti-discrimination needs to be extended and that the Human Rights Agency should aim to *include ignored aspects of discrimination*. Not only the persistence or absence of discrimination should be evaluated, but also the extent to which equality is given. This means not only evaluate whether equal access to employment is formally guaranteed, but also view in how far disadvantaged groups as Roma are actually represented within the labour force as well as the terms of their employment.[196]

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[193] *MICHAEL BEIS:* Establishment of a European Agency on Fundamental Rights: Opportunities and Challenges*; www.eumap.org*

[194] European Parliament Report on Promotion and Protection of Fundamental Rights: the Role of National and European Institutions, Including the Fundamental Rights Agency; Committee on Civil Liberties, Justice and Home Affairs; A6-0144/2005; 11.5.2005; final par. 17.

[195] European Policy Evaluation Consortium (EPEC): Preparatory Study for Impact Assessment and Ex-ante Evaluation of Fundamental Rights Agency – Analysis of Responses to Public Consultation

[196] VALERIU NICOLAE: *Contribution of European Roma Information Office on the Consultation*; 16 December, 2004

The European Parliament also expressed its standpoint that the protection of national minorities upon EU enlargement will constitute a significant issue, and their promotion cannot be assured exclusively through the fight against xenophobia. This complex problem has to be addressed from different angles as well – therefore a *separate sector of the Agency* should deal with the question, based on the experience of existing European and national institutions and networks in this field.[197]

The remit of the Agency whether it should be limited to the observation and analysis of the areas covered by the Community or Union law only or should be given *competence under Article 7* of the Treaty on the European Union as well attracted several different opinions during the public consultation. The majority of the member states argued only for the areas covered by the Community or Union law; only the Netherlands and a number of NGOs supported the idea of giving competence under Article 7; however some member states (Austria, UK, Germany), and the EUMC stated that upon request, the Agency could provide the Union institutions with independent information to objectify the Article 7 procedure. Such an Agency competence would save the EU institutions from having to establish an ad hoc independent forum.[198]

The European Parliament in its final report[199] states that the Agency might be given competence in raising awareness on situations evoking Article 7 of TEU, since the relevant expertise will already be located there.

The establishment of the Fundamental Rights Agency would put minority rights under a much safer protection umbrella. The independent, objective institution would for the first time explicitly address minority issues within the European Union at both horizontal and vertical level by a separate unit of it. Its aim would be to promote, protect fundamental rights and raise

[197] European Parliament Report on Promotion and Protection of Fundamental Rights: the Role of National and European Institutions, Including the Fundamental Rights Agency; Committee on Civil Liberties, Justice and Home Affairs; A6-0144/2005; 11.5.2005; final par. 19.
[198] http://europa.eu.int/comm/justice_home/news/consulting_public/fundamental_rights_agency/news_contributions_fund_rights_agency_en.htm
[199] European Parliament Report on Promotion and Protection of Fundamental Rights: the Role of National and European Institutions, Including the Fundamental Rights Agency; Committee on Civil Liberties, Justice and Home Affairs; A6-0144/2005; 11.5.2005; final. Par. 17.

awareness and create a culture of fundamental rights[200] what means a very important step forward for the European Union.

The Fundamental Rights Agency is the first possible internal EU actor, which could be part of an EU minority protection system. However after the public consultation and the European Parliament final report, there is very little chance for minorities for being established an individual complaints procedure by the European Commission regulation.

Participation and representation of minorities in the decision making processes

In an ever-closer Union which is united in diversity[201], and which is based on fundamental principles like liberty, democracy, respect for human rights and fundamental freedoms and the rule of law, and states that these principles are common to its Member States[202], a supranational monitoring and protection system is insufficient if it does not *involve into the decision making processes the concerned ones.* Institutional equality could never be achieved if members of the minority group cannot effectively participate in the decision-making processes over issues which are relevant for their „minority-being". The problem cannot be solved as long as it is always the majority which defines what is in the interest of the minority and thereby treating others or other interests from the point of view of a pater familias[203].

Considering the fact that with the 1st of May 2004 the number of persons belonging to different national minority groups has become double as it was before[204], it would be appropriate to establish a system where their voice could be heard as well. That is why direct participation has to be guaranteed in decision-making procedures for the citizens of the European Union belonging to minority groups. The direct participation – generally for the

[200] European Parliament Working Document on Promotion and Protection of Fundamental Rights: the Role of National and European Institutions, Including the Fundamental Rights Agency, Committee on Civil Liberties, Justice and Home Affairs; Rapporteur: Kinga Gál, 31.1.2005; p. 3.
[201] Motto of the Treaty establishing a Constitution for Europe
[202] Article 6 (1) of the Treaty on the European Union
[203] JOSEPH MARKO: *On the Representation and Participation of National Minorities in Decision-making Processes*; EUR.AC Research 2000; p.3. http://www.eurac.edu
[204] http://www.eurac.edu/Org/Minorities/Eld/Projects/Pecede/Policy_Recommendations.htm

citizens - appears at the European Parliament elections.[205] However a system has to be developed for the EU´s minority protection system. The majority principle, applied as a legal technique to legitimize the democratic decision-making process, is often accused of leading to the „*tyranny of the majority"* instead of the democratic rule.[206] Democracy means much more than the will of the majority, it should be at the same time the balance of powers, where explicitly the rights for groups in minority position are guaranteed.

Minority issues are often solved through territorial regulations – like federal system or territorial autonomies – in the states. As we are talking about an EU minority protection system one based on territorial structures is not a solution. There is a huge diversity among the different minorities in Europe and while some of them are concentrated into certain areas others are not. However the *representation and participation* of minority groups should be the corner stone of the EU system.

The *constitutional traditions* of some member states contain guarantees to ensure participation for minorities at different levels. Generally there are two methods for this purpose. The states either guarantee *reserved seats* at the local and national governments for the representatives of the minority, or do *lower the threshold* for these special groups and as so make it easier for them to gain representatives at certain decision making level.

In Slovenia for instance the constitution[207] guarantees to the Italian and Hungarian minority the direct representation both at the local and the national level. At least one seat for each of them is provided in the Slovene Parliament. The respective electoral laws create specific electoral districts where members of the Italian and Hungarian community cast their votes for candidates according to the „first past the post" system. The candidate who gained the most votes is proclaimed to be elected.[208]

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[205] The Decision and Act on European elections by direct universal suffrage were signed in Brussels on 20 September 1976. After ratification by all the Member States, the text came into force on 1 July 1978. The first elections took place on 7 and 10 June 1979

[206] JOSEPH MARKO: *On the Representation and Participation of National Minorities in Decision-making Processes*; EUR.AC Research 2000; p.2.

[207] Article 80 of the Slovene Constitution

[208] JOSEPH MARKO: *On the Representation and Participation of National Minorities in Decision-making Processes*; EUR.AC Research 2000; p. 6.

The 5% threshold required to achieve at parliamental or local elections is a common phenomenon Europe-wide. However this threshold for minority rights is in most of the cases inaccessible. The „exemptions from threshold" is also not a unique solution in Europe. The example of Schleswig-Holstein shows a well developed system in favour of the Danish minority in Germany. According to the German Constitutional Court, which decided about the exceptional thresholds, such exemptions are not exemptions but a necessary conditions to meet the demands of equal protection.[209]

The Hungarian minority protection system also provides comprehensive solution to ensure minority representation. It combines the local self government system with the diasporic settlement of the minorities in the states. The minorities can found *directly* „*minority local governments*" if more than half of the elected representatives are representatives of a national minority group. If the elected minority representatives of a certain group reach 30% of the total number of representatives they can in such way *indirectly* found a „*local minority government*". The voters can however elect *directly* their „*local minority governments"*, if 5% of the voters or minimum 100 people have voted validly for minority representatives. In such case those candidates became to be elected who gained the most votes. *Minority mediator* represents the particular minority if no local minority government had been elected.[210]

Concerning *participation* of national minorities in relevant state institutions there are also salutary methods in some member states´ experience. One can arrange the instruments on a normative scale which is formed by two poles that of *consultation mechanism with advisory effects* on the one hand and *absolute veto power* on the other.[211]

Article 54 of the Belgian Constitution provides a so-called alarm-bell procedure, a suspensive veto. If ¾ of the members of the parliament of one of the language groups in Parliament declare that a bill might seriously threaten the relationship between the communities, the parliamentary procedure has to be suspended. The Slovene Constitution in its Article 64 guarantees an

[209] Ibid p. 5.
[210] Hungarian Act on the Rights of National and Ethnic Minorities 1993/77; par. 22.
[211] JOSEPH MARKO: *On the Representation and Participation of National Minorities in Decision-making Processes*; EUR.AC Research 2000; p. 6.

absolute veto. Laws, regulations and other legal acts, which concern the realization of rights, defined in the constitution or the situation of the national communities must not be adopted without the consent of the representatives of these communities.[212]

Without these afore-mentioned member states´ methods for ensuring representation and participation for minority groups, the danger of squeezing out certain groups of the decision making might easily occur.

As the European Union more and more affects the daily life of its citizens – in order to preserve its democratic commitment – a comprehensive structure of minority representation and protection should be implemented to its institutional framework. As an optimal solution, an *advisory committee should be established beside the European Parliament* (which itself is going to gain more power in the EU institutional structure). The advisory committee should be allowed to contribute to the EU legislation preparation, to consult the different stakeholders and to make proposals if an issue concerning minorities comes up. The committee should provide representation for all autochthonous minorities in the European Union – either territorially concentrated or living in diaspora, either maintaining special relations to a kin state or not – and ensure that the diversity among the minorities will be respected by proportionality and a special system of rotational presidency, which would allow to mainstream the different interests of the different groups. The advisory committee in crucial questions regarding European minorities should have a veto power.

The idea of such an advisory committee is not new. Already in 2003 the European Convention received a contribution of Mr. József Szájer, member of the Convention. The Contribution had proposed the establishment of a Committee of National and Ethnic Minorities (CONEM)[213], which would have been set up from the representatives of national, ethnic minorities and indigenous peoples living in the member states. The status of the proposed Committee would have been similar to the one that the Committee of the Regions have and even a close cooperation between the two committees was

[212] KILÉNYI GÉZA: *Alkotmányjogi szakvélemény a nemzeti és etnikai kisebbségek parlamenti képviseletéröl*, Budapest 1999; p. 7.
[213] CONV 580/03 1 THE EUROPEAN CONV TS BRUSSELS, 26 FEBRUARY 2003

wanted. The contribution provided a plan for the institutional structure and the proportional representation system for the minorities[214]. Notwithstanding the proposal never gained sufficient support.

Need for a supranational minority protection system

The source of minority protection can be found in national or international law. However the recent developments in the stage of Europe show that a third legal layer, a supranational minority law is opening a new chapter of the history of minority protection[215].

The principle of sovereignty is the main argument against any supranational minority protection system. Most of the states argue that minority protection should remain in the state's constitutional competences. The European Union is based on the voluntary decisions of the states for a closer European integration and cooperation with the aim of achieving competitiveness in the world market and economic prosperity for the people of its member states. In order to reach this goal the member states of the European Communities assigned some of their competencies for the Communities.

Through the ever-deeper integration and the increasing diversity the EU reached the point when the situation of minorities cannot remain anymore in the competences exclusively of the member states. The supranational EU-minority protection system thereby has to be developed.

The national governments and state centred regime will neither be able to solve the challenges of self-identification and self-determination, for example as caused by the Basque or the Scottish nationalist movements. Neither will it be able to solve the rising problems through migration, such as the Kurdish movement, or giving adequate recognition to the cross border political movements such as of the Roma.[216]

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[214] http://www.htmh.hu/background/jozsef%20szajer.pdf

[215] GABRIEL N. TOGGENBURG: *Minority Protection in a Supranational Context: Limits and Opportunities* in Gabriel N. Toggenburg: Minority Protection and the Enlarged Union: The Way Forward OSI/LGI Budapest 2004; p.3.

[216] ANJA MIHR: *Minority Rights and Political Movements*; POLIS 2005 Conference Paris 17-18 June 2005; p.1.

The European Union itself is an entity that oscillates between a state and an international organisation. The *lack of competence* in the area of minority rights is *not an eternal and unalterable situation*, just the legal result of the *lack of political consensus* among the member states. The "subsidiarity argument" that the minority issues should and can be solved at the level of the state is also weak. First of all it just regulates the execution of competencies and therefore leaves the location of such competencies to the respective treaty provisions and, thereby, to the discretions of the politicians.[217] Secondly the minority issues have already overgrown the state-boundaries and have much wider effects even on the economical future of the European Union.

PROPOSED MODEL OF THE EU SUPRANATIONAL MINORITY PROTECTION SYSTEM

When developing its own supranational minority protection system the EU can rely on **three pillars**. These are the *good practises of its member states*; its *own "vocabulary"* like the principle of subsidiarity, the role of the regions, the promotion of equality, the supported trans-border cooperation's and the recognised value of cultural diversity; and on an *effective cooperation with the other international actors* - like the Council of Europe and the OSCE - in the field. Over these pillars could the EU build effectively its own system through the above mentioned *Committee of National and Ethnic Minorities* as a **strong advisory and co-decisional body**, and through the future *EU Fundamental Rights Agency*, which could **supervise the implementation**, and through the *European Court of Justice* which would be responsible for the **realisation and enforcement** of EU minority rights.

First Pillar – The good practises of the member states

[217] GABRIEL N. TOGGENBURG: *Minority Protection in a Supranational Context: Limits and Opportunities* in Gabriel N. Toggenburg: Minority Protection and the Enlarged Union: The Way Forward OSI/LGI Budapest 2004; p.10

There are several cases even within the European Union when states within their borders or even among each other develop a very far-reaching, comprehensive and well functioning systems to satisfy the demands of their minorities and provide them comfortable conditions and position in the majority society. Some of the good examples are already mentioned above in the "participation and representation" paragraph.

Bilateral agreements can also provide suitable solutions, especially for those states, which are linked together by mutually having fellow minorities connected to the culture of a state in the other state.

One of the most impressive examples is based on the *German-Danish agreement*, where special quality is afforded relations through the German minority in North Schleswig and the Danish minority in South Schleswig. The successful minority policies on both sides of the German-Danish border are founded on the Bonn-Copenhagen Declarations on minority rights from 29 March 1955.[218] The *principles are flexible*. Therefore, the specific minority policy in the two countries has been dynamic and it has developed over the years. New elements and new practice have gradually been developed in a pragmatic process.[219]

By such kind of agreements the states can easily *find the balance of the different interests*, can avoid ethnic tensions within the country and between the neighbouring countries as well, and are able to build on a stable society where minorities are integral and contributing part of it. That is why the *EU should promote such kind of agreements* for member states - as it did with the Stability Pact for South-Eastern European Countries.

Second Pillar - "EU-vocabulary" as a useful tool for the supranational minority protection system

[218] http://www.auswaertiges-amt.de/www/en/laenderinfos/laender/laender_ausgabe_html?type_id=14&land_id=35
[219] JØRGEN KÜHL: *The Copenhagen-Bonn Declarations;* http://www.kbh-bonn.um.dk/da/menu/Erklaeringerne/InEnglish/

The European Union offers an interdependent structure, therefore, the regional dimension is increasingly heard in a "*Europe with regions*".[220] EU member states depend on the Union just as they depend on their regions, and the Union in turn is not only in need of member states´ policy-consensus but also of the efficient transposition of EU law at the regional level and legitimizing approval by powerful regions. Therefore *regional policy* is one of the core activities of the EU and is shaped by the legal requirement according to Article 2 of the TEU to *strengthen economic and social cohesion*.[221] The regional dimension is sufficient only for those minority groups, where they can constitute significant percentage of the population in that particular territorial item. Nevertheless at least these minority groups could directly benefit of the principle of subsidiarity and of the recent trend of further strengthening the regions, which trend could be overtaken also in the proposed Constitutional Treaty.[222]

Compared to national and international law, *EU law offers new instruments that are highly relevant for minorities*, as many of the rights and tools granted to all EU citizens are of special relevance to minorities. For instance all minorities whose language is at the same time the *official language of the EU* may use this language when corresponding with the EU independent from their country of residence. The *common market freedoms* may have a useful function for minorities as well, particularly for those that have close links with the population of another EU country. The free movement of goods and services means that they have free access to cultural goods (books, periodicals) and services (television) from across the border.[223] *Mobility* is also a crucial and determinative factor for minorities especially who settle on two sides of state-borders, who are maintaining special relations to a neighbouring country's majority population being connected both identically

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[220] GABRIEL N. TOGGENBURG: *Minority Protection in a Supranational Context: Limits and Opportunities* in Gabriel N. Toggenburg: Minority Protection and the Enlarged Union: The Way Forward OSI/LGI Budapest 2004; p.17.
[221] JAMES HUGHES, GWENDOLYN SASSE and CLAIRE GORDON: *EU Enlargement and Power Assymetries: Conditionality and the Commission's Role in Regionalisation in Central and Eastern Europe*; ESRC Working Paper 49/03; Sussex European Institute 2004; p. 4.
[222] http://europa.eu.int/scadplus/constitution/subsidiarity_en.htm
[223] BRUNO DE WITTE: *The European Community and its Minorities* in Catherine Brölmann, René Lefeber and Marjoleine Zieck (eds.): Peoples and Minorities in International Law; Kluwer Academic Publishers 1993; p. 175.

and economically. *Financial programming* of the EU which provides resources to a vast variety of policy fields such as cultural policy, regional policy, language policy or social policy can mainstream its activities according to minority needs or even dedicate special funds to minorities.[224] The EU initiative concerning *cross-border cooperation* accord priority to proposals, which include the establishment or development of shared institutional and administrative structures intended to widen and deepen cross-border cooperation between public agencies, private organisations and voluntary bodies. Measures assisted under this initiative should be designed to have their main development impact on the population of the border areas eligible for participation. The support for structures of transfrontier cooperation not only offers an economic boost for minorities whose population is divided by borders, but also allows for the development of common institutional structures, which help to maintain the existence and development of those communities.[225]

All these EU-instruments in combination with the *principle of proportionality* provide solutions for some of the aspects of the complex minority issue in the European Union. If it consciously undertakes to use these possibilities in a "minority-friendly" way, it is already a step forward to a comprehensive EU-structure.

Third Pillar – Cooperation with the International Actors committed for human rights and minority rights

Organisations such as the Council of Europe (CoE) and the Organisation for Security and Cooperation in Europe (OSCE) do an important job of monitoring their own member states, which include EU member states as well, but cannot be relied upon to produce regular reports on the situation of human rights within the EU.

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[224] GABRIEL N. TOGGENBURG: *Minority Protection in a Supranational Context: Limits and Opportunities* in Gabriel N. Toggenburg: Minority Protection and the Enlarged Union: The Way Forward OSI/LGI Budapest 2004; p. 18-19.

[225] MARIA AMOR MARTIN ESTEBANEZ: *The Protection of National or Ethnic, Religious and Linguistic Minorities*; in Nanette A. Neuwahl and Allan Rosas (eds.): The European Union and Human Rights; Kluwer Law International 1995; p.153.

In the European context minority rights are mostly safeguarded by the Council of Europe's instruments.[226] It is the only pan-European intergovernmental organisation that offers legally based instruments and mechanisms on minority protection across the wider Europe by its Framework Convention for the Protection of National Minorities and the European Charter of Regional and Minority Languages. The OSCE´s most important instrument concerning the protection of minorities is of political nature, the institution of the High Commissioner on National Minorities. The Commissioner's mandate is to provide early action and early warning on issues related to tensions involving minorities.[227]

Despite their important roles of these organisations, they do not address the issue of EU accountability for the respect of human rights within the Union and are not sufficient to absolve the EU of its own requirement originating from Article 7 of the TEU.[228]

A closer cooperation among the three organisations has happened already during the latest enlargement process, however this cooperation was rather contingent. The EU has involved the protection of minorities into its accession criteria, but had lack of own standards in minority protection. That is why it has relied on the standards developed by the Council of Europe and the OSCE. The European Commission's annual Regular Reports suggest that the EU took a flexible approach to the adoption of the Framework Convention and the OSCE Recommendations and foster a perception that the EU seeks to shift responsibility from its own monitoring process by internationalizing the benchmarking of the CEECs with respect to minority protection. This is most clearly evident in the explicit encouragement to sign up to documents such as the Framework Convention for the Protection of National Minorities.[229]

A more structured and conscious cooperation is needed after the enlargement process, of which cooperation minorities within the Union and in

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[226] PANAYOTE ELIAS DIMITRAS: *Recognition of Minorities in Europe: Protecting Rights and Dignity*; Minority Rights Group International 2004; p. 3.
[227] MAX VAN DER STOEL: *Preventing Ethnic Conflicts: Lessons and Prospects; International Conference on "Preventing Ethnic Conflicts in Central-Eastern Europe"* 6 November 2000; p. 2.
[228] A Visit for Human Rights in the European Union, Amnesty International Observation on an EU Human Rights Agency, April 2004; www.amnesty-eu.org
[229] JAMES HUGHES and GWENDOLYN SASSE: *Monitoring the Monitors: EU Enlargement Conditionality and Minority Protection in the CEECs*; JEMIE – Journal on Ethnopolitics and Minority Issue in Europe Issue 1/2003; ECMI; p. 18.

the wider Europe could benefit. Avoiding duplicity is required, however the cooperation should not lead to just relying on the instruments provided by the Council of Europe and the OSCE. The power of both organizations to ensure compliance to their norms is relatively weak. Just in very exceptional circumstances can the Committee of Ministers of the Council of Europe in consultation with the Parliamentary Assembly suspend member states for infringements of its statute.[230]

The European Union through its own minority protection system should go beyond the internationally accepted standards. It should learn from the lessons experienced by the Council of Europe and the OSCE, refer to their standards, but developing a more comprehensive system that is suitable for an economically and politically integrated union.

How could the EU practically benefit from the achievements of its partner organisations? The accession to the relevant Council of Europe instruments could be the first step to make. The EU itself can ratify CoE conventions, as it has done that in 8 cases, including treaties on issues such as medical standards and wildlife protection.[231] All the EU member states are members of the Council of Europe, and all of them have ratified the CoE´s most important human rights instrument, the *European Convention for the Protection of Human Rights and Fundamental Freedoms* (ECHR). The ECHR is a legally binding instrument, which is supervised by the European Court of Human Rights in Strasbourg, however it does not contain any minority protective provision. It provides nevertheless an article for non-discrimination, which can be invoked in the conjunction with an other article of the convention.[232] The Strasbourg Court has also taken a minority friendly jurisprudence, when referring to an "emerging international consensus" within the CoE "recognising the special needs of minorities and an obligation to protect their security, identity and lifestyle"[233] The positive reading of the ECHR non-discrimination jurisprudence could point to the achievement of substantive equality, when according to the Court the right not to be

[230] Ibid, p. 6.
[231] RAINER HOFMANN and ERIK FRIBERG: *The Enlarged EU and the Council of Europe: Transfer of Standards and the Quest for Future Cooperation in Minority Protection* in Gabriel N. Toggenburg: Minority Protection and the Enlarged Union: The Way Forward OSI/LGI Budapest 2004; p. 137.
[232] Article 14 of the ECHR
[233] See case *Chapman v. United Kingdom* (ECHR judgment of January 18, 2001)

discriminated against in the enjoyment of the rights guaranteed under the ECHR is also violated when states without an objective and reasonable justification fail to treat differently persons whose situations are significantly different. The Court has been indicating the requirement that "equal situations are treated equally and unequal situations differently".[234] Accession of the EU to the ECHR is predicted in the proposed Constitutional treaty, already Article 6 (2) of the TEU and the European Charter of Fundamental Rights are referring to it as a basis for interpretation.

After the adoption of the ECHR by the EU a future interplay between the Strasbourg Court (European Court of Human Rights) and the Luxembourg Court (European Court of Justice) would potentially consequence an increasingly minority-friendly jurisprudence.[235]

Whether the EU should also accede to the Framework Convention is probably less advisable, as it is likely to raise more questions as it resolves. The European Court of Justice would certainly see in such accession a violation of the Union's autonomy. It has to be recognised as well, that various FCNM provisions are not applicable at all in the EU context. (like minority language usage with the administrative bodies)[236]

However a more formalized character of inter-institutional relations, including regular dialogues would facilitate joint planning and programming of activities. The cooperation among the EU, the CoE and the OSCE is relevant from the EU´s perspective, as it concerns security issues and stability of Europe within the borders of the union and beyond the EU borders, with the neighbouring countries as well.

Committee on National and Ethnic Minorities

In my general recommendations concerning the EU minority protection system I have already argued for the importance of minority *representation*

[234] See case *Thlimennos v. Greece* (ECHR judgment of April 6, 2000)
[235] RAINER HOFMANN and ERIK FRIBERG: *The Enlarged EU and the Council of Europe: Transfer of Standards and the Quest for Future Cooperation in Minority Protection* in Gabriel N. Toggenburg: Minority Protection and the Enlarged Union: The Way Forward OSI/LGI Budapest 2004; p. 134.
[236] GABRIEL N. TOGGENBURG: *Minority Protection in a Supranational Context: Limits and Opportunities* in Gabriel N. Toggenburg: Minority Protection and the Enlarged Union: The Way Forward OSI/LGI Budapest 2004; p. 15.

and participation in the decision-making process with regard to concerned matters of minorities. This role should be held by the Committee of National and Ethnic Minorities, which could forward its opinions to the larger institutions - the Council, the Commission and the European Parliament; and so participate in the decision-making process. Because of the important role of the regions for some minorities, there should be a close cooperation between the Committee of the Regions and the Committee of National and Ethnic Minorities. The organisational structure of the Committee and its code of conduct should be developed in that manner what would ensure its advisory and co-decisional mandate.

The Role of the Future Fundamental Rights Agency

An effective minority protection system requires not just good standards, policies, minority representation and participation; but also an effective monitoring system. This should be the role of the EU Fundamental Rights Agency by its special unit dealing explicitly with minority rights. The Agency should focus both on the *de jure* and the *de facto situation* in the member states; on the implementation mechanisms and on the member states´ compliance to the future EU standards. As the Agency is going to have the mandate of a "network of networks" effective cooperation is required during its work with national institutions, the minority communities and the civil society.

The Jurisprudence of the European Court of Justice

The founding treaties of the European Communities initially contained no specific provisions on human rights, however the European Court of Justice has developed through its jurisdiction a case law of human rights.

A supranational minority system even if it is relying on the above mentioned three pillars, on minority representation and participation and on effective monitoring system; cannot be complete without enforcement power.

Until so far I have not argued for the creation of an EU Charter for Minority Rights, as I do not find it necessary for the developing of a well functioning system. The Constitutional Treaty after entering into force, and Article 6 of the TEU are the legal basis for the supranational minority protection. Later on some specific areas of the minority protection could be regulated by secondary legislation. In the future, after recognising the existence of this system, the ECJ could rely on these legal instruments and so ensure the realisation of the obligations.

The development of such supranational EU minority system would be definitely a unique structure. According to the proposed model it would be comprehensive and predictably effective. Nevertheless large scale of *flexibility* is needed in order to ensure its effectiveness as the different minority groups in the European Union have different demands; and even among these groups there is wide range of diversity.

CONCLUSIONS

The European Community has overgrown its initial borders in lots of sense. The stage of integration of the currant 25 member states, the commitment to a political union and the ever deeper effect on the EU-citizen's everyday life, have brought new challenges for the Communities. Not just the territory of the Community has been enlarged, but the cohesion of more and more states brings more tasks to solve at the community level as well. The European Union has to face these new circumstances in order to be successful in the world economical competition and in order to satisfy the expectations of its member states and citizens.

Europe has been living for centuries in a wide range of diversity of nations. As the idea of the homogenous nation state is utopistic, the European nations have been facing the challenge of co-existence not just at the Euopean stage but also within their borders.

This paper has argued for the importance of dealing with minority issues at the European level. There is no internationally accepted definition of

minorities, so I have used the term for autochthonous minorities; for traditional national or ethnic minorities like groups, numerically inferior to the rest of the population of a State, in a non-dominant position, whose members – being citizens of the State – possess ethnic, religious or linguistic characteristics differing from those of the rest of the population and show, if only implicitly, a sense of solidarity, directed towards preserving their culture, traditions, religion or language."[237]

The latest EU-enlargement duplicated the number of EU citizens belonging to different national or ethnic minorities. The EU has expressed its commitment for cultural diversity already in Article 151 of the Treaty of Maastricht, and refers to it as a founding value of the European Union in Article 33 of the European Charter of Fundamental Rights.

However it is disputed whether this diversity refers to the interstate diversity of the Union only, or to the diversity produced by the minorities living within the member states as well. The EU member states have different policies towards their minorities. There are present the best examples like South Tyrol and the Åland islands but at the same time there is France for instance, that does not recognise any minorities in its territory at all.

Currently there is no provision in the EU primary law that would explicitly refer to the "minorities" of the Union. Nevertheless the Union have had indirect effect on the situation of the minorities for a long time. The germs of a union minority protection system are in the jurisprudence of the European Court of Justice and in the resolutions and reports of the European Parliament. The jurisprudence of the European Court of Justice recognised minority protection as a legitimate aim to make restrictions on Community law as long as these restrictions meet the principle of proportionality. (Groener case, Angonese case, Bickel-Franz case). The European Parliament has had four resolutions and several reports dealing with minority issues since 1981. These resolutions underlined the importance of protecting minority languages; have called up the member states to ratify the relevant Council of Europe minority protection instruments, the European Commission to examine the community legislation and practises that discriminate against minority

[237] FRANCESCO CAPOTORTI: *Study on the Rights of Persons belonging to Ethnic, Religious and Linguistic Minorities*; UN Document E/CN.4/Sub.2/384/Add. 1-7 (1997)

languages, had direct impact on the establishment of the European Bureau for Lesser Used Languages[238], and on the foundation of the MERCATOR program that provides a network of research institutes that concern researches on the use of minority languages.[239]

The recent developments in EU legislation – like inserting a human rights clause to the primary EU legislation (Article 6 of TEU) and establishing a procedure of political control of these standards of the human rights clause (Article 7 of TEU) are certainly important steps forward to an ever-closer union. The explicit reference to minorities in the European Charter of Fundamental Rights and the proposed Constitutional Treaty of the European Union are also gates towards an EU minority protection system.

During the latest EU-enlargement minority rights have got into the focus of the accession procedure. The Copenhagen criteria – despite the ad hoc and inconsistent policy of the union have had relevant impact on the situation of minorities in the candidate states. The thesis consists a case study on Slovakia – as a previous candidate country and current member state of the EU. The example of Slovakia provides a clear picture about the achieved results through the Copenhagen criteria and while describing the events of the accession period also points out the shortcomings of the EU-conditionality. The lack of an internal minority protection system first of all has introduced double standards for old EU member states and for the future member states, while imposing requirements on candidate states that do not have adequate background within the Union itself. These double standards question the credibility of the European Union and on the other hand they have caused difficulties even concerning the implementation of the requirements without the stable internal theory and practise.

The EU has a well-developed legislature regarding non-discrimination. Non-discrimination is part of the acquis communautaire and there are several directives specialised on combating discrimination on the different grounds. The recent directives (the race directive and the framework directive) are crucial concerning the European integration. The spreading tendencies of racism and xenophobia have been endangering the ever-closer union, the

[238] Arfé Resolution of 16 October, 1981
[239] Kuijpers Resolution of 1987

effective cohesion of the member states. Nevertheless non-discrimination does not provide sufficient protection for groups like minorities that are originally at a disadvantaged starting point, and have been being the victims of discrimination for long time and it would be needed to take positive actions in order to ensure de facto equality for these groups. This is the Achilles heel of the non-discrimination system, where usually the political will is lacking. For instance the new Slovak anti-discrimination law is facing at this time constitutional review by the Slovak Constitutional Court as it contains provisions that would allow temporary positive actions for the most disadvantaged groups. Affirmative actions are urgently needed for achieving the aim of de facto equality. Besides, such kind of actions could contribute to the preservation of Europe's cultural diversity. The price for equality should not lead to the loss of identity. Assimilation should not be the outcome of the non-discrimination policy.

That is an illusion that the minority problems we face in Europe today are only pains of newly emerging democracies of Central East Europe as a consequence of the renaissance of ethno-nationalism after the break down of communism. However minority issues have been receiving more attention since the issue of eastern enlargement. Factually the number of EU citizens belonging to national minority groups has been doubled since the 1st of May 2004. This percentage is not negligible any more. Besides the arguments of the numbers, the development of the ever-closer political union is the other reason why I believe that the EU has to develop its own supranational minority protection system.

The thesis provides a model system for the supranational minority protection system based on three pillars (good practise of the member states, special EU developments and cooperation among the different international organisations); ensured representation and participation of minorities in the decision- making process, effective monitoring system and enforcement power.

Despite the fact that recently some positive signs have been shown acknowledging the importance of the minority issue (like the Copenhagen Criterion on minority protection, the insertion of the term "minority" into the European Charter of Fundamental Rights and to the proposed Constitutional

Treaty); the actual perspectives are not really promising. The reason behind this pessimism is the lack of political will that is common widely in Europe. That is why initiatives – like for the establishment of the Committee on National and Ethnic Minorities – do fail; that is why the practise of taking affirmative actions is not promoted, just allowed in some cases.

It is also worth to think about the fact that the financial support for the European Bureau for Lesser Used Languages has been just recently withdrawn. The proposed constitutional treaty that would for the first time introduce the term "minority" to an EU primary law, has just been rejected by two member states. Not just the recommended steps forwards have not been being taken, but even the already achieved results are being restricted.

There are no incentives for optimism until politicians do not acknowledge minorities as a source of richness, until rivalisation and not cooperation is their leading aim, and until in order to gain political election success they mislead the majority populations of the member states by false and populist arguments that awaken or strengthen the discriminatory tendencies and anti-minority attitudes. It seems so, that at the European stage the lack of political will to act is not due to any uncertainty as to what must or should be done but to a deliberate decision not to take action. Paradoxically, then, a political will does exist, but it is a will to refrain from action.[240]

Nevertheless the EU – especially after the latest enlargement – has passed the point of no return. There is no way of avoiding to deal with minority issues at the supranational level, unless the politicians risk the security, stability and prosperity of the Union. There are millions of people concerned and the future accession of Bulgaria, Romania and Turkey, will just increase the numbers. The Union has to provide a system, where its citizens belonging to minority groups feel comfortable, where they are protected from extremist racism and discriminatory attitudes and where the most disadvantaged groups are helped to make up their leeway. If motto of the European Union: "United in diversity!" serves as a guidance; it has to be remembered that diversity requires an environment that gives space and expression to multiple interests.

[240] FRANÇOIS BORELLA: *The Weakening of the Political Will of the Central State* in Europe in Science and Technique of Democracy No. 22: The Transformation of the Nation-state in Europe at the Dawn of the 21st Century, Nancy, 6-8 November 1997, Council of Europe Publishing; p. 132.

Such circumstances would contribute to the development of the ever-closer Union in economical, political and social way.

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