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Minority Protection in Central Europe and the Enlargement of the EU

It is a euphemism to say that post-communist states of Central and Eastern Europe (CEE) have been less than enthusiastic in promoting a strong, robust policy of the promotion of minority rights. While it has not placed them in stark contrast with many of their West European counterparts – consider the official policy of France or Greece – it has nevertheless been a source of concern for many observers and experts fearing that those new democracies, if they do not establish stable and fair bases for majority-minorities relations, may become vulnerable to disintegrating internal tensions and “export” their problems to the West.

At the same time, there has been a growing perception of the limited and imperfect resources that European institutions – in particular, the EU, but also the Council of Europe (CoE) and OSCE, and their networks – have at their disposal *vis-à-vis* CEE states when it comes to their minority-related policies and legislation. EU “conditionality” has proved to be of very limited effectiveness in this regard, OSCE (in particular, the High Commission on National Minorities, or HCNM) intervened mainly when the ethnic tensions provided threat to international stability, and the CoE instruments (in particular, the Framework Convention on the Protection of National Minorities, or FCNM) provided a very minimal threshold for the protection of minority rights. Such minimal thresholds quickly turned into ceiling limits, thus defying any hopes for them to constitute the starting points for more ambitious and progressive arrangements for majority-minority relations in those countries. As Will Kymlicka recently observed:

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These minimal international standards (as attributable to the FCNM and OSCE recommendations) are not being treated as the preconditions needed to democratically negotiate the forms of power-sharing and self-government appropriate to each country, but rather are viewed as eliminating the need to adopt, or even to debate, forms of power-sharing and self government. When minority organizations raise questions about substantive minority rights, post-communist states respond ‘we meet all international standards’, as if that foreclosed the question of how states should treat their minorities.¹

If Kymlicka is right – and he emphatically is – the problem to address is: what accounts for this reticence on the part of CEE to use the minimal standards of European norms on minority protection as a starting point for a more generous and robust approach to minority rights, in particular in the areas of language rights, territorial autonomy (where appropriate, that is, where the territorially identifiable minorities live) and self-government through, for example, proportional representation of minorities at all levels of government? Two broad answers are available, and this chapter will examine them in turn. First, the Europeanization of political and legal norms, and in particular conditionality related to the process of accession to the EU, was singularly unimpressive in the field of minority rights. The candidate EU states (as they were then), in addition to those who saw themselves as future candidates, had very little reason, incentive and capacity to venture expansively and bravely into the sphere of minority relations: they had very little to emulate, so why bother? Second, their domestic institutional resources, designed and set up to counter the majoritarian, populist and illiberal tendencies of these newly democratized states proved largely unwilling and incapable to act forcefully in this sphere. As a result of these two phenomena, there was no synergy between external and domestic factors which proved reasonably effective in many other areas of democratization and liberalization of post-communist countries, such as the autonomy of central banks, independence of the judiciary, or freedom of media.

1. The impact of EU conditionality on minority protection

In the burgeoning literature on the impact of EU conditionality (and, more generally, on the impact of “Europeanization”, broadly understood, upon the standards and norms adopted in the post-communist states), it became a commonplace view that its effectiveness is a function of, among other things, the

¹ W.Kymlicka, *The Evolving Basis of European Norms of Minority Rights: Rights to Culture, Participation and Autonomy*, paper presented at the conference: “Nations, Minorities, and European Integration” in the European University Institute, Florence, 7-8 May 2004, at 21-22. See also: Will Kymlicka’s chapter in this volume.

degree of resonance between the “European norms” and the preferences, policies and interests in the domestic political life of CEE states, and also of the coherence, clarity and compelling nature of the European norms themselves. In this part of the chapter, I will discuss the effectiveness of the implantation of the European norms within the CEE states, while in the next part I will examine why the CEE states have been relatively reluctant to emulate these norms in their legal and political orders.

If one considers different areas to which the EU political conditionality applied, one realizes that the degree of specificity and concreteness varied from one domain to another, and that it was much more effective where there was a determined set of rules that the candidate states were expected to observe than in cases in which the criteria laid down could at best be characterised as a vague template. For example, Antoaneta Dimitrova found a generally high effect of conditionality on civil service reform;² while, in contrast, Martin Brusis, who has explored the regionalisation reforms in CEE, established that conditionality mattered for rather little in this area: if it were relevant, one would have trouble explaining the significant differences in the regionalisation politics between countries as similar as the Czech Republic and Slovakia.³ In addition, the legitimacy of conditionality demands varied depending upon whether they corresponded to the seriousness and determination with which the EU has held its own Member States to those standards: when the EU set certain political conditions that are not part of the EU legal system, and are not actually shared by the current members states themselves, the credibility, and hence effectiveness, of this area of conditionality must have been suspect. Apart from the legitimacy and “double standards” problem, the candidate states, even when acting in good faith, could not know what exactly was expected of them, because neither the current practice of Member States nor the *acquis* provided any clear guidance.

Minority rights provide a significant example of low-efficiency conditionality areas. “Respect for and protection of minorities” figure prominently among the Copenhagen political criteria,⁴ but it is sadly lacking any basis in EU law and is

² A.L.Dimitrova, *Conditionality meets post communism: Europeanisation and administrative reform in Central and Eastern Europe*, paper presented at the workshop: “The Europeanization of Eastern Europe: Evaluating the Conditionality Model”, The Robert Schuman Centre for Advanced Studies at the European University Institute, 4-5 July 2003, at 33.

³ See: M.Brusis, *Instrumentalized conditionality: regionalization in the Czech Republic and Slovakia*, paper presented at the workshop: “The Europeanization of Eastern Europe: Evaluating the Conditionality Model”, The Robert Schuman Centre for Advanced Studies at the European University Institute, 4-5 July 2003, at 13-14.

⁴ The European Council, held in Copenhagen in 1993, established that in order to be successful in its pursuit of full membership the applicant state must enjoy, *inter alia*, “stability of institutions

not directly translatable into the *acquis communautaire*. It may be hypothesized that the inclusion of this criterion mainly reflected the “widespread Western perceptions and security concerns *vis-à-vis* CEE where the post-communist potential for ethno-regional conflict amidst multi-faceted transition processes appeared to be high”.⁵ Nevertheless, the absence of clear standards, both in EU law and in the practice and law of EU member states yielded not only a strong charge of hypocrisy and double standards,⁶ but also led to difficulties in gauging the real meaning of this criterion. While the Treaty of Maastricht did recognize respect for fundamental rights as one of the underlying values of the EU, and the Treaty of Amsterdam did incorporate almost all of the values set out by the EU in the Copenhagen political criteria, the reference to minority protection is conspicuously absent from both Treaties. Clearly there is no consensus among the older EU member states as to the standards of minority protection: some member states officially recognize the existence of minorities in their population, while others (France, Greece) do not; some (the UK) reserve the term “minority” to describe the immigrant population, and others apply the term to historically-ethnic groups (the Slovenes in Austria; the Slovenes, French and Germans in Italy); some have ratified the 1995 Council of Europe Framework Convention for the Protection of National Minorities (FCNM), while others have not,⁷ and so forth. If one analyzes the annual Regular Reports of the Commission with respect to the standards by which they monitored applicant states’ progress in fulfilling the “minority protection” criterion, one recognizes ambiguities and inconsistencies in scrutinizing the practice of the candidate states. As Gwendolyn Sasse has observed, the Reports consistently emphasised only the plight of two minority groups in the region (the Roma population and the Russian-speaking population in Baltic states) notwithstanding the pervasive nature of the majority-minority problems in CEE. This selectivity suggests that the main concerns which informed the Reports drafters were of an extrinsic nature (a fear of uncontrollable migration to Western countries, in the case of the

guaranteeing democracy, the rule of law, human rights and respect for and protection of minorities...”.

⁵ G.Sasse, *EU Conditionality and Minority Rights in Central and Eastern Europe*, paper presented at the European Forum meeting of the Robert Schuman Centre for Advanced Studies, European University Institute, Florence, 15 April 2004, at 1.

⁶ See: M.Johns, “*Do As I Say, Not As I Do*”: *The European Union, Eastern Europe and Minority Rights*, “East European Politics and Societies”, no. 17/2003, p.682-699.

⁷ Belgium, Greece, Luxembourg and the Netherlands have not ratified the Convention; France has not yet signed it, see:

<http://conventions.coe.int/Treaty/Commun/ChercheSig.asp?NT=157&CM=7&DF=19/05/04&CL=ENG>

Roma, and a concern for Russian political sensibilities, in the case of the Baltic states), rather than intrinsically related to the plights of disadvantaged minorities.

To give one example of a real and dramatic situation of minorities which have remained invisible to the Reports and, largely, to the public opinion in the West,⁸ consider the plight of the Slovenian residents originating from other (ex-)Yugoslav republics (mainly Serbs, Croats and Bosnian Muslims, summarily called the “Yuzhniks”, meaning, “people from the South”) who constitute around 10% of people leaving in Slovenia. Under the 1991 nationality law, passed soon after the declaration of Slovenian independence, all those born outside Slovenia, regardless of how long they had lived in Slovenian territory, were required to apply for citizenship. Due to a very short period given for lodging the application and the very demanding bureaucratic requirements, around 30 000 residents missed out on this opportunity and were crossed off the register of permanent residents in 1992. Since then, some 18 000 of those stateless people who stayed in Slovenia (around 11 000 left the country) have been denied the basic welfare and other entitlements. The successive laws enacted to solve the situation have not resulted in any significant improvements. In 1999, the ruling centre-right coalition passed a law aimed at a conclusive solution to the problem of the stateless, but its many provisions (including a three month deadline for lodging applications and punitive requirements of having to prove a continuous residence in Slovenia over the past 8 years) clearly were aimed at limiting the benefits of the law to as few people as possible.⁹ This is one drastic example of how the device of citizenship has been used to exclude people from their rights essentially for discriminatory reasons.¹⁰ Significantly, this very dramatic situation of Slovenian minorities was never registered in the EU Annual Reports, and the Reports simply kept repeating mantra: “*The overall situation regarding the protection of minorities in Slovenia can be considered to be good*”.¹¹

Generally, the emphasis in the Reports was on formal measures (such as adoption of certain laws, setting up of institutions, and launching of governmental policies) rather than on their implementation; the assessment of the countries’

⁸ The matter only recently came to the public attention when, in the beginning of April 2004, the overwhelming majority of those taking part in the referendum in Slovenia rejected the idea of restoring the citizenship rights to those formerly “erased” from the registers.

⁹ A.Balcer, *Słowenia i mniejszości narodowe*, “Gazeta Wyborcza”, 28.04.2004, (<http://serwisy.gazeta.pl/wyborcza/2029020,34475,2047285.html>), last visited 14 May 2004. Please note that the law was eventually struck down as unconstitutional by the Slovenian Constitutional Court in 2003.

¹⁰ I am grateful to John Packer for this observation.

¹¹ See for example: 2002 Regular Report on Slovenia’s Progress Towards Accession, (http://europa.eu.int/comm/enlargement/report2002/si_en.pdf) at 27.

record had an overall formulaic, schematic character.¹² The real problems are often watered down in bureaucratic language which tends to gloss over difficulties and leaves uncertainties as to what actually happened. Consider this statement: “*The issue of the legal obligation to use the Lithuanian alphabet in spelling the names of persons belonging to national minorities is <being addressed constructively> in particular in the framework of the cooperation between the Lithuanian and Polish authorities*”.¹³ What does “being addressed constructively” actually mean: are the non-Lithuanian citizens still compelled to spell their names in the Lithuanian alphabet, or not, or only sometimes? The reader cannot guess. Most importantly, when it comes to identifying the yardstick of assessment, the reports vaguely refer to international or “European” standards often without specifying what these are.

The question is, of course, *are* there any European standards of minority protection? The only common instrument that can be roughly described as identifying these standards is in the FCNM, but even then doubts of two kinds arise as to how easily it defines identifiable benchmarks of common European minimum. First, it has not been signed, much less ratified, by all European states so it is hard to call the standards included therein “common”. Second, its language is vague, aspirational, and rather minimalistic,¹⁴ and its implementation is not judicial but combined political-expert style.¹⁵ By far the most comprehensive – and broadly adopted – human rights instrument in Europe, the ECHR, does not contain any minority rights, and the closest it comes to referring to minorities is in its prohibition of discrimination (Art. 14) which lists “association with a national minority” as one of the grounds of prohibited discrimination.¹⁶ There is also the Charter for Regional and Minority Languages which evidently concerns an important by a limited aspect of

¹² See: Sasse, *supra* note 5.

¹³ 2002 Regular Report on Lithuania at 29, emphasis added.

¹⁴ Thornberry lists the objections by the critics of the Convention as addressed to “*its loose <framework> structure of <programme type> provisions, its avoidance of the language of collective rights, its textual silence on autonomy, the <softness> of the language, and the ensemble of qualifiers attached to key provisions*”, P.Thornberry, *A Critique of European Standards on Minority Rights*, paper presented at the European Forum meeting of the Robert Schuman Centre for Advanced Studies, European University Institute, Florence, 22 April 2004, at 9.

¹⁵ Monitoring of its implementation is carried out by the Committee of Ministers assisted by an Advisory Committee consisting of “recognized experts in the field of protection of national minorities”.

¹⁶ The results of litigation under this article have been meager, and consequently the ECHR has been a limited instrument as far as minority protection is concerned, see: Thornberry, *supra* note 14 at 7. See generally: G.Gilbert, *The Burgeoning Minority Rights Jurisprudence of the European Court of Human Rights*, “Human Rights Quarterly”, no. 24/2002, p.736-780.

minority rights,¹⁷ and the list of countries that have ratified it is less than comprehensive;¹⁸ the CSCE so-called Copenhagen Document of 1990 which served as an early “code” of the CSCE/OSCE in this area; the set of EC anti-discrimination directives, in particular, the 2000 Race Discrimination Directive of 2000,¹⁹ and – last and not least – a pious expression of concern for cultural, religious and linguistic diversity in the EU Charter of Fundamental Rights (Art. 22).

The overall picture is, therefore, of a patchwork of norms of largely programmatic and non-specific character, few of which enjoy the comprehensive, consensual support in Western Europe. No wonder that, with the best of will, the CEE states would be in trouble if they wanted to determine what specific blueprint they were supposed to comply with. However, “the best of will” was unlikely to emerge if the Western attitude smacked of hypocrisy and double standards, and these factors undermined the seriousness with which the minority-prong of Copenhagen criteria were made. As none of the EU candidate states was a site of the sort of ethnic tension which would be a direct and severe threat to regional stability, they realised that whatever they did in this domain, however perfunctory and ritualistic gestures they made, would be considered a “plus” and would not be subjected to an overly severe scrutiny. The only two persistent themes in the annual reports of the Commission – the Roma situation and the Russian-speaking minority in Baltic states – never led to any serious questioning of the candidate states’ credentials as *bona fide* democratic and rights-respecting states eligible for membership in the EU. When it comes to the situation of the Roma population, the EU member states do not exactly have a perfect record and so their credibility in depicting the faults of candidate states is somewhat questionable;²⁰ as far as the Russian speaking population in the Baltic states is concerned, the worst aspects of discrimination have been properly remedied in time – thanks to the persistence of the High Commissioner for National Minorities of the OSCE. The other problem areas in the field of minority protection have occasionally raised gentle castigation on the part of the EU, but nothing more serious than this.²¹ The general feeling that one has is that

¹⁷ An important limitation of the Charter is that it explicitly refuses to apply to “the languages of migrants”, and it does not indicate when a language ceases to be regarded as a language of migrants, see Thornberry, *supra* note 14 at 7.

¹⁸ Belgium, Greece, Ireland and Portugal have not signed it; Italy and France have not ratified it, see: <http://conventions.coe.int/Treaty/EN/CadreListeTraites.htm>

¹⁹ Council Dir. 2000/43 (2000), O.J. L180/22.

²⁰ On discrimination against Roma in Spain and Germany, see: OSI/EUMAP, *Monitoring the EU Accession Process: Minority Protection*, vol. 1/2002, p.37-49.

²¹ These include: failure by local authorities in Slovakia to set up a faculty for Hungarian teachers, 2002 Report on Slovakia at 30; Latvian Parliament refusal to ratify the Framework

none of the parties – neither Western scrutinizers nor the candidate states – took this part of political conditionality particularly seriously; a mutual, if unspoken, understanding has developed such that the scrutinizers would not be too harsh and the scrutinized ones would not openly question the scrutinizers' credentials.

2. Domestic constitutional resources for minority protection in CEE

The weakness of external factors is not sufficient in explaining the (non-) adoption of a “European norm” by a state willing to be accepted into the European club. The opacity and thinness of European norms would not be fatal if there were strong institutional resources in CEE states displaying a firm commitment to counter societal preferences and political pressures. In some cases, “Europe” was successful in having its norms emulated in CEE, not merely because the meaning of the European norms was clear and forceful, but also because there have been local, political and legal resources which favoured their adoption. Economic liberalization and accompanying rule-of-law reforms (including judicial independence), as well as the autonomy of the central bank have been successful to the degree to which they were perceived as beneficial to the emerging business community. These reforms were supported by the institutional design which strengthened the implementation of the relevant norms and which rendered the reforms almost irreversible. Has there been a similar normative resonance and favourable institutional design in the case of minority rights?

In this part of the chapter, I will attempt to show that, notwithstanding a by-and-large minorities-friendly constitutional design (section 1), the central institutions set up to articulate and interpret the meaning of constitutional provisions, namely constitutional courts, have been reluctant to use those provisions in an expansive way (section 2). This indicates that the anxieties which accompanied the process of state formation and state consolidation in the wake of the fall of communism had a centralizing effect upon the behaviour of all institutions, including constitutional courts (section 3).

2.1. Constitutional design of minority rights

The only constitution in the region that fails to mention minority rights is the Constitution of Bulgaria. All of the others list various catalogues, with special prominence given to language and educational rights, the right to preserve one's cultural and religious identity, among others. Minority language is clearly the main protected interest among minority rights (and will be discussed, in more

Convention for the *Protection of National Minorities*, 2002 Report on Latvia, at 30; and some mild misgivings about the Hungarian status law, see *e.g.* 2002 Report on Hungary, at 30.

detail, below). For example, the Constitution of Latvia provides that: “*Persons belonging to ethnic minorities have the right to preserve and develop their language and their ethnic and cultural identity*”. (Art. 114). The catalogues of minority rights are often more elaborate, as in this provision of Romanian constitution: “*The state recognises and guarantees the right of persons belonging to national minorities, to the preservation, development, and expression of their ethnic, cultural, linguistic, and religious identity*”.²²

In some cases, certain minority rights, in particular the right to education in one’s own language, are framed as expressly positive rights imposing certain active duties upon the state. For example, in Hungary the Constitution states that “*The Republic of Hungary shall provide for the protection of national and ethnic minorities... [and] education in their native languages*”.²³ Positive state duties are sometimes restricted to particular obligations, especially in the sphere of official communications and the interaction of citizens with governmental bodies. For example, in Estonia, there is a very specific regulation concerning the official use of language, which provides: “*In localities where at least half of the permanent residents belong to an ethnic minority, everyone shall have the right to receive answers from state and local government authorities in the language of the ethnic minority*”.²⁴ Finally, some constitutions provide for the rights of minorities to participate in public affairs *qua* minorities. The Hungarian constitution proclaims that “*national and ethnic minorities will be assured collective participation in public affairs*” and that “*the laws of the Republic of Hungary shall ensure representation for the national and ethnic minorities living within the country*”.²⁵

The constitutions do not, on the whole, attempt a definition of the term “minority”, nor refer to a definition enshrined in any other international document (which is not surprising, given the lack of any such precise definitions in the major international agreements on this subject).²⁶ The Constitution of Slovenia, for one, distinguishes between different types of minority groups in its provisions on the protection of minorities. For example, it states, in Article 61, that “*each person shall be entitled to freely identify with his national grouping or autochthonous ethnic community, to foster and give expression to his culture and to use his own language and script*”. However, in addition to this, there are

²² Art. 6.

²³ Art. 68(2). See also the constitutions of Albania (Art. 20), Belarus (Art. 50), Czech Charter (Art. 25), Hungary (Art. 68), Macedonia (Art. 48(4)), Slovakia (Art. 34), Romania (Art. 32(3)), the Ukraine (Art. 53), Serbia and Montenegro Charter (Art. 52), Montenegro (Art. 68) and Serbia (Art. 32).

²⁴ Art. 51(2).

²⁵ Art. 68(2) and (3).

²⁶ See: Gilbert, *supra* note 16 at 738.

specific rights subsumed under the heading “*Special Rights of the Italian and Hungarian Ethnic Communities in Slovenia*”.²⁷ Here, these groups are given additional rights such as (entitlements) “*to establish organizations, to foster economic, social, scientific and research activities... to plan and develop their own curricula (for education)... In those areas where the Italian and Hungarian ethnic communities live, their members shall be entitled to establish autonomous organizations in order to give effect to their rights...*”.²⁸ As mentioned earlier in this chapter, while Italians and Hungarians may be seen as “indigenous” groups in Slovenia because they have inhabited that area for centuries, they are not the most numerous ethnic minorities: Croats, Serbs and Muslims constitute proportionately larger minorities in Slovenia than do the Italians and Hungarians.²⁹ The only explanation for this apparent abnormality is that the issue of the relationship between ethnic Slovenians and ethnic Italians and Hungarians in Slovenia is less politically explosive than the relationship between the members of the ethnic groups that made up ex-Yugoslavia. Hence, it was safer to accord a special, elaborate and advantageous minority status to Italians and Hungarians than to Serbs and Croats. Different treatment is also accorded to the Roma people. Article 65 of the Slovenian Constitution states that “*the status and rights of Gypsy communities living in Slovenia shall be such as are determined by statute*”. This suggests that they do not fall within the general provisions on minorities and are not considered to be a minority group.

Most of the constitutions of the region phrase minority rights in the language of individual rights, as held by “*persons belonging to national minorities...*”.³⁰ In some cases, however, the language of group rights is used. For example, the Hungarian Constitution states: “*National and ethnic minorities shall have the right to form local and national bodies for self-government*”.³¹ Slovenia also takes this approach, albeit in relation to the rights of Hungarian and Italian

²⁷ Heading at Art. 64.

²⁸ Art. 64.

²⁹ See: A.L.Pap, *Representation or Ethnic Balance: Ethnic Minorities in Parliaments*, “Journal of East European Law”, no. 7/2000, p.261-339 at 289.

³⁰ This particular quote is taken from article 6 of the Romanian constitution. The following constitutions have similar provisions: Albania (art 20); Croatia (art 15); Czech Charter (art. 25); Georgia (art 38); Latvia (art 114); Lithuania (art 37); Macedonia (art 48); Poland (art 35 (1) – although section 2 of the same article uses the language of group rights); Romania (art 6); Slovakia (art 34); Slovenia (art 61 – although note the exception relating to Hungarian and Italian minorities); Ukraine (art 53) and Serbia (art 32).

³¹ Article 68(4). But note that the statute on the rights of national and ethnic minorities adopted on 7 July 1993 uses both the language of collective and individual rights, see: P.Paczolay, *Human Rights and Minorities in Hungary*, “Journal of Constitutional Law in Eastern and Central Europe”, no. 3/1996, p.111-26 at 123.

minorities only (the others are treated as individual rights).³² Thus, these states create constitutionally-guaranteed group rights. Several constitutions use the languages of both group and individual rights in terms of minorities, depending on the nature of the right proclaimed. For example, the Polish constitution uses group-rights language with regard to the establishment of educational and cultural institutions for national minorities,³³ and individual-rights language when dealing with the freedom to maintain one's customs, tradition and culture.³⁴ What difference does this make? A brief *excursus* on group versus individual rights for minorities is in order.

The main constitutional dilemma with regard to the protection of minorities is whether the best way of protecting members of (national, ethnic, religious *etc.*) minorities is simply through strong protection of individual rights backed up by a robust non-discrimination principle, or whether there should be a special constitutional principle (or set of principles) that confers special rights upon minority members. The former (liberal-individualistic) approach dominates thinking on the protection of minorities in the United States: the idea is that if every citizen, regardless of their (*inter alia*) national or ethnic group membership benefits from the same strong civil and political rights, then any special group-based protection is redundant, and avoiding potential danger.³⁵ This may be called a "liberal-neutralist" (or individualistic) approach. In the continental European setting, however, this approach has been seen as largely ineffective and insufficient. In continental Europe there has been much less faith in the beneficial effects of the extension of individualistic liberal principles to a situation in which anti-minority prejudices and hostility are deeply engrained,

³² Thus, article 64 states that: "*The autochthonous Italian and Hungarian ethnic communities and their members shall be granted the right to...*".

³³ Art. 35(2).

³⁴ Art. 35(1). For other examples of the mixed use of both group- and individual rights language, see: Estonia Art. p.49-51.

³⁵ As an account of the actual, authoritative legal situation of the United States this is certainly an oversimplification: the rejection of group rights is not absolute in United States law. For example, when the U.S. Supreme Court allowed Amish families to keep their children out of school up to a certain age (see: *Wisconsin v. Yoder*, 406 U.S. 205 (1994)), or when it upheld Native American tribal law that imposed patrilineal kinship rules that limited women's marital choices (see: *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978)), it clearly recognised the legal weight of group-based claims for treatment different to that accorded by universally-binding legal rules. Similar group-based thinking is visible in the enhanced legal protection of those who are victims of crimes motivated by hatred of a group (in the form of enhanced punishment for hate crimes, see: *Wisconsin v. Mitchell*, 508 U.S. 476 (1993)). On the qualified nature of the group/individual rights distinction in U.S. law, see: J.Greenberg, *Affirmative Action in Higher Education: Confronting the Condition and Theory*, "Boston College Law Review", no. 43/2002, p.521-621 at 580-581.

and are also displayed by those who are entrusted with the enforcement of general rules. In principle, the liberal-individual approach is considered well-suited to the particular situation of immigrant societies, where the dominant concern of new minorities is to enjoy the same rights as the older population and to integrate themselves into a larger society governed by neutral rules. In contrast, when the claims for protection come from groups that have been present in a given territory for a long time, or that find themselves sharing the same nation-state due to changing borders or forced movements of population (hence, forced rather than voluntary migration) *etc.*, the purely individualistic method appears much less capable of providing real and effective protection to minorities.³⁶

Probably the main reason why the individualist-liberal approach to minority protection is more entrenched in Anglo-American constitutional systems (in particular, in the United States, and to a lesser degree in countries such as Canada, Australia and New Zealand) than in Europe is that in the former settings there is a problem that has traditionally given liberal theorists a headache: how to reconcile a universal commitment to individual human rights (including the right to autonomy) with a proper respect for the traditions of minorities that often do not practice autonomy in their internal life and are (by liberal standards) quite oppressive towards their members. This may be seen as the fundamental liberal dilemma when it comes to minority rights. On the one hand, a liberal is committed to extending some fundamental dignity-based rights to everyone. On the other hand, those minorities – often indigenous ones – that do not respect fundamental equality between men and women, that practice corporeal punishment, and that do not respect the individual's right to control his or her life to the degree deemed necessary by liberals, pose a threat to these fundamental values. Hence, the liberal theorist is concerned about the position of the most vulnerable members of those minorities – often women and children – who are threatened with deprivation of all those individual rights that non-minority citizens take for granted. Group rights aimed at the protection of the identity of the group as a whole give to that group a degree of immunity from interference by the wider community into its “internal affairs”. As noted by Brian Barry.

It seems overwhelmingly plausible that some groups will operate in ways that are severely inimical to the interests of at any rate some of their members.

³⁶ See: D.Petrova, *Racial Discrimination and the Rights of Minority Cultures* in: *Discrimination and Human Rights: The Case of Racism*, ed. Sandra Fredman, Oxford University Press, Oxford 2001 at 65; M.J.Aukerman, *Definitions and Justifications: Minority and Indigenous Rights in a Central/East European Context*, “Human Rights Quarterly”, no. 22/2000, p.1011-1050 at 1029-1030.

To the extent that they do, cultural diversity cannot be an unqualified good. In fact, once we follow the path opened up by that thought, we shall soon arrive at the conclusion that diversity is desirable to the degree, and only to the degree, that each of the diverse groups functions in a way that is well adapted to advance the welfare and secure the rights of its members.³⁷

The *prima facie* hostility of Anglo-American legal systems to minority rights can be seen as resulting largely from this dilemma. However, in continental European setting, and in particular in CEE, this dilemma is much less acute; the problem just identified simply does not ring true in the context of CEE societies to the same degree as in the United States, Canada or Australia. The pattern of relations between an ethnic majority and minority (or minorities) does not easily³⁸ fit the description of “liberal majority versus oppressive minority”; as Nenad Dimitrijević noted: “*All post-communist states of the region claim adherence to liberal constitutionalism, and no national minority (...) would question main liberal tenets*”.³⁹ Therefore, the fundamental philosophical reason for distrusting the very idea of minority rights does not apply (or applies to a much lesser degree) to the CEE (and more broadly: European) situation. Obviously this does not negate the fact that a “multicultural” solution, with an explicit recognition of separate minority rights, is often seen as a threat to the culture of the majority, and to state sovereignty. The problem, then, is not whether a liberal-neutralist model or a diversity-accommodating model (that is, a pluralist model) should be adopted; this dilemma seems to have been answered overwhelmingly in favour of the latter. As one Serbian legal scholar concludes: “*Experience in (CEE) countries has shown that ethnocultural neutrality and group-neutral regulation cannot accommodate cultural pluralism, and cannot guarantee stability and peace between ethnic majorities and minorities. Traditional liberal attitudes lack empathy towards maintaining diversity, and cannot provide solutions in traditionally multicultural environments where equality presumes an equal right to maintain one’s distinct identity*”.⁴⁰ It is significant that virtually the same argument has been officially endorsed in Hungarian law, namely in the 1993 Act on the Rights of Ethnic and National Minorities, which proclaims in its introduction that “minority rights cannot be

³⁷ B. Barry, *Culture and Equality*, Cambridge 2001 at 134.

³⁸ There are some exceptions, of course, such as that of Roma population in Europe.

³⁹ N.Dimitrijević, *Ethno-Nationalized States of Eastern Europe: Is there a Constitutional Alternative?*, “*Studies in East European Thought*”, no. 54/2002, p.246-269 at 247, emphasis added.

⁴⁰ T.Várady, *On the Chances of Ethnocultural Justice in East Central Europe* in: *Can Liberal Pluralism be Exported? Western Political Theory and Ethnic Relations in Eastern Europe*, eds. W.Kymlicka and M.Opalski, Oxford University Press 2001, p.135-149 at 147-148.

fully guaranteed within the bounds of individual civil rights; thus, they are also to be formulated as rights of particular groups in society”⁴¹

2.2. Institutional Articulation of Minority Rights

As noted above, the specific design of minority rights in CEE varies from one country to another, but overall the constitutional texts provide a reasonably promising starting point for progressive policies and laws towards the minorities. Yet, the actual implementation has been directed towards confining rather than expanding these broad constitutional declarations, and the institutions that are otherwise hailed as courageous and imaginative devices for protection of constitutional rights – constitutional courts – have often been providing a restrictive interpretation of those rights.

The question of language rights is perhaps the most instructive because, as is known, they are quite directly related to a number of other rights, including the rights of participation in a democratic process. The well-known case of Russian-speaking minorities in the Baltic states provides an example of the constitutional courts’ very weak role (if any) in protecting language and other rights of minority. Estonia’s saga with its own Language Law is worth looking at because it illustrates the point made here well. The Constitutional Review Chamber (CRC) in Estonia was twice asked to decide on the constitutionality of imposing Estonian language requirements on electoral candidates running in national and local elections. The 1997 amendments to the Language Act provided for language requirements of electoral candidates (as well as the tightening of the Estonian language proficiency requirements for non-Estonian employees in the public and private sectors). As one commentator notes, the law had been “*motivated by nationalist desires to make sure that no non-Estonian-speaking person could be elected to parliament or a local council*”⁴². The challenge to the law by the President was not based on minority-rights grounds, but rather on technicalities (the vagueness of language requirements and the delegation of the task to control the language proficiency to the executive branch thus breaching the separation of powers). The court followed this narrow line of reasoning, adding an argument from the constitutional preamble that one of the duties of the state is to preserve the Estonian nation and culture, as evidenced by the constitution’s preamble and state language provisions. On the basis of these provisions, and additionally of the provision that everyone has the right to

⁴¹ Quoted in: S.Deets, *Reconsidering East European Minority Policy: Liberal Theory and European Norms*, “East European Politics & Societies”, no. 16/2002, p.30-53 at 49.

⁴² V.Pettai, *Democratic Norm Building and Constitutional Discourse Formation*, paper presented at the workshop: “Rethinking the Rule of Law in Post-Communist Europe”, European University Institute, Florence, 22-23 February 2002 (text on file with the author), at 26.

address the authorities in Estonian and to receive answers in Estonian (Art. 51(2)), the court inferred that the challenged requirement of proficiency in the Estonian language for the candidates to parliament and councils was not unreasonable. As a matter of fact, the court did conduct an “activist” or an “expansive” interpretation, but in the direction of undermining any possible claims for minority language rights! On the basis of the constitution’s preamble (incidentally, a non-typical basis for a constitutional court’s reasoning), which declares that the state will guarantee “*the preservation of the Estonian nation and culture through the ages*” (note there is no mention of the language!), and on the further basis of the principle that Estonia is a democratic republic (Art. 1), the chamber concluded that language requirements for electoral candidates could be justified. It was, therefore, on narrow technical grounds that the chamber eventually struck down the controversial provisions. It agreed with the challenger that the law was impermissibly vague insofar as the requirements for employment were concerned, and also that, by delegating the power to regulate the language requirements for election candidates to the government, it was contrary to the separation of powers: decisions connected with electoral rights should be made by the legislature and not the executive.

Not surprisingly, the parliament properly saw the Constitutional Review Chamber’s decision (and an analogous decision handed down a few months later)⁴³ as a “*green light (...) to legislate language requirements for electoral candidates*”,⁴⁴ which it did in November 1998 by passing amendments to the electoral law, and which the President soon promulgated despite protests from Russian community leaders. These language requirements were eventually repealed in November 2001 under direct pressure from the OSCE and not as a result of a constitutional challenge.

In other post-communist countries, very few ethnicity-related decisions have been made by constitutional courts, and where they have, they would hardly support the thesis that those courts play a central role in shaping the regime of toleration. For instance, in Romania in 1995, UDMR (the Hungarian minority party), along with some other opposition parties, attempted to introduce a provision granting a right of the Hungarian minority to have a state Hungarian-language university into the draft law on education. They did not succeed in the legislative process, and challenged the bill before the constitutional court in an *ex-ante*

⁴³ In November 1998 the Constitutional Review Chamber considered a challenge, which reached it *via* a lower court, to the original Language Act (not the 1997 amendments) requirements for local deputies; see: *ibidem*, at 28-29.

⁴⁴ *Ibidem*, at 29.

review procedure, but the challenge failed.⁴⁵ As another example, taken from beyond the pool of candidate states, one could mention a decision of the Ukrainian Constitutional Court of December 1999, in which the court strengthened the constitutional place of the Ukrainian language in Ukraine, and established an affirmative duty on all public bodies to use only Ukrainian throughout the country (even though in Eastern and Southern regions the Russian language is widely used both in private and public contexts).

One may say at this point, in defence of constitutional courts, that they have a very narrow margin of manoeuvre because they are bound by constitutional provisions which set up the “official language.” To some extent it is true; indeed, in almost all candidate states (with the exception of Czech Republic and Hungary) there are constitutional provisions stipulating the official language of the State. On the other hand, the contours of the rights and duties entailed by the “official language” rule are not self-evident and need to be articulated by those who apply those rules; in addition, all these constitutions contain provisions stating that minorities are allowed to use their own language. It is therefore the task of constitutional courts, when faced with the relevant demand, to negotiate the borderlines between the official-language rule and the linguistic rights of the minorities. In those few cases in which the language rule was litigated before the courts, the results were not particularly helpful to minorities.

Consider the example of Polish Constitutional Tribunal and its only encounter, so far, with the official-language rule. Poland provides an unwholesome example of a rigid, homogenising constitutional attitude towards the official state language. The constitutional provision that declares that “*Polish is the official language*”⁴⁶ leaves no room for the introduction of any minority languages into official fora, even in a restricted manner. While there is an additional sentence in this article, to the effect that that the official-language rule “*shall not infringe upon national minority rights resulting from ratified international agreements*”, at least one prominent critic of this constitutional provision has argued that it does not add anything to the first sentence, and does not open up the possibility of introducing official minority languages.⁴⁷ It is therefore not an exception to the rigid rule: “*National minorities have not acquired in this Constitution a right to depart from a general rule that Polish is*

⁴⁵ Of course one may suggest that it was due to the general weakness of the Romanian Constitutional Court, and that a stronger constitutional court would have taken on the legislature more aggressively, but it is an unverifiable speculation.

⁴⁶ Art. 27.

⁴⁷ J.Trzeciński, *Remarks about Article 27 in: Konstytucja Rzeczypospolitej Polskiej: Komentarz (Constitution of the Republic of Poland: Commentary)*, ed. L.Garlicki, Warszawa 1999 (loose leaf).

the official language".⁴⁸ The above-quoted critic has reviewed all of the international treaties between Poland and its neighbouring states, and has concluded that none contains a rule permitting a minority to have its language officially recognised in Poland. If the constitution-makers had wanted to allow for such a possibility, they would have said so explicitly in the official-language provision.⁴⁹

The only occasion when the Tribunal has been asked to consider the meaning of the "official language" provisions was in its "interpretive decision" of 14 May 1997.⁵⁰ The Tribunal was asked by the President of the Supreme Audit Chamber to provide an interpretation of the official language provisions by saying to whom exactly they apply, and also to which types of official actions they apply. The direct trigger for the decision was unrelated to minority languages, however. Nonetheless, at the end of its lengthy decision (which confirmed that the requirement to use the official language applies to all state institutions, and to all of their official actions) the Tribunal dropped a hint that, as far as citizens were concerned, the official-language rules were applicable only "indirectly" (when they communicated with state bodies), and that constitutional rights and freedoms defined the limits of the duty of state bodies to communicate in the official language. As the Tribunal stated in the very last sentence of its decision: "*A citizen, whenever he wants to exercise his fundamental freedoms and rights, cannot be forced to comply with the provisions establishing the official language*".⁵¹ Unfortunately, this pronouncement was left in a vacuum: no specific criteria regarding how to reconcile the official-language provisions with the rights of members of minority groups have been identified.⁵² However, the limits on these rights seem to be very strong and rigid: as the above-quoted authoritative commentator notes, under the present Constitution the right to use a minority language in public "*does not imply that state organs have a duty to issue official certificates (e.g., birth certificates) or conduct court proceedings in the language of ethnic minority*".⁵³ In other words, no duties upon state bodies are implied by the "fundamental freedoms and rights" to

⁴⁸ Ibidem at 4 (quoting J.Boć with approval).

⁴⁹ Ibidem at 4.

⁵⁰ The decision was handed down before the new Constitution entered into force, which declared in its article 27 that "Polish is the official language. The subject-matter of the Tribunal's interpretation was a 1945 decree on the official language (previous Polish Constitutions had not dealt with the issue at all); however, according to the authoritative commentators, this decision also applies to the new Constitution, and can thus be seen as a statement of the current official position of the Constitutional Tribunal on the issue of the "official language".

⁵¹ Ibidem at 796.

⁵² To be fair, the Tribunal was not asked to do so in this particular interpretative decision.

⁵³ Trzeciński, *supra* note 47 at 4-5.

which the Constitutional Tribunal referred and which, allegedly, establish the limits of the official-language provisions.

Another important aspect of the promotion of the place of minorities in the political system of a country is by making special arrangements for facilitating or assuring its representation in the political branches of the government, and in particular in self-government and representative institutions.⁵⁴ Mild forms of such facilitation include certain preferences in the form of a more lenient election “threshold”, as in Poland⁵⁵ or in Lithuania.⁵⁶ Romania goes a step further: its Constitution reserves one seat in the parliament for each ethnic minority organisation that fails to obtain a sufficient number of votes to get elected in the normal manner though the electoral law clarifies that this is subject to obtaining at least five percent of votes.⁵⁷ In Slovenia, the Hungarian and Italian minorities can elect at least one candidate each to the National Assembly.⁵⁸

In Hungary, apart from the constitutional right to be represented in national and local bodies, national and ethnic minorities have a constitutional right to form their own minority self-governments. By mid-1990s it had been reported that over 800 such minority self-government units existed in Hungary,⁵⁹ although it must be added that serious doubts have been expressed as to the resources available to, and powers and effects of, these bodies.⁶⁰ However, when it comes to formal parliamentary representation of ethnic minorities, despite an impressive number of assorted legislative proposals aimed at designing an acceptable system,⁶¹ no political consensus has emerged as yet to allow the adoption of a statute to regulate this issue – even though the Hungarian Constitutional Court declared that the absence of mechanisms to implement the constitutional requirement for parliamentary representation of minorities was unconstitutional.⁶²

⁵⁴ For a very good survey and discussion see: Pap, *supra* note 29.

⁵⁵ Electoral committees representing ethnic minorities do not have to pass the five percent threshold to achieve parliamentary representation.

⁵⁶ The organisations representing ethnic minority parties were exempt (until the 1996 amendment to the 1992 election law) from the four percent threshold needed to elect candidates under the proportional rules (which apply to one-half of the MPs, the remaining half being elected through a majoritarian system).

⁵⁷ See: Pap, *supra* note 29 at 286-88.

⁵⁸ Art. 80 (3).

⁵⁹ Paczolay, *supra* note 31 at 125.

⁶⁰ Deets, *supra* note 41 at 49-51.

⁶¹ See: Pap, *supra* note 29 at 320-24.

⁶² See: *2002 Regular Report on Hungary's Progress Towards Accession*, Commission of the European Communities, Brussels 9 October 2002, SEC(2002) 1404, available at: http://europa.eu.in/comm/enlargement/report2002/hu_en.pdf at 20

One example of an intervention by a constitutional court actually preventing a system of ethnic representation is provided by the Slovakian Constitutional Court.⁶³ In that country, where the Constitution is silent on the question of political representation of minorities, there was an attempt to introduce by legislation a rule of proportional representation of ethnic groups (an admittedly controversial idea which I do not mean to endorse here). A local self-government electoral law of 1998 stipulated that, in towns and villages where national minorities or ethnic groups lived, the total number of deputies in local elections must be divided proportionately, resulting in a faithful reflection of the ratio between Slovaks and individual minorities. The law was challenged before the Constitutional Court which eventually found that a quota system was contrary to the constitutional rule of equal access to public offices, to the principle of equal dignity, and to the constitutional provision that states that the regulation of political rights must facilitate political competition in a democratic society. In effect, the Court rejected any idea of “preferential quotas” in order to improve the status of a national minority or ethnic group, and opted instead for the individual-civic principle: all citizens are equal in exercising their political rights, regardless of group membership.

Overall, one must conclude that the record of constitutional courts in the sphere of promotion and protection of minority rights have been a mixed bag in CEE. There have been, no doubt, some important and positive (though rather limited) contributions by constitutional courts in this regard, such as those decisions by the Slovenian court, mentioned above, on the restrictive nationality law or by the Hungarian court on the constitutional failure to enact the statute implementing the constitutional rule of representation of minorities at a national level. There has been also an extremely important and courageous decision by the Bulgarian Constitutional Court which saved the Turkish party (MRF) from delegalisation.⁶⁴ On the other hand, however, there have been decisions, as described above, which displayed failure to grasp the opportunity to provide an expansive, pro-minority interpretation of constitutional rules. This suggests that the contribution of the constitutional courts in this area have been much less impressive than the high hopes related to these new bodies set up in post-communist states might have promised. The barriers against an expansive approach to minority rights remained quite powerful despite the fact that the

⁶³ Decision 19/98 of 15 October 1998, summarised in: “Bull. Constitution. Case Law”, vol. 3/1998, p.460-462, SVK-1998-3-010.

⁶⁴ The decision of the Bulgarian Constitutional Court of 22 April 1992 on the status of the Movement of Rights and Freedom. For a discussion of the decision, see: E.Konstantinov, *Turkish Party in Bulgaria Allowed to Continue*, “East Europ. Constit. Rev.”, no. 1-2/1992, p.11-12.

constitutional design provided for the counter-majoritarian mechanisms which worked reasonably well in many other areas of constitutional interpretation.

2.3. Ideological predispositions and commitments

The explanation for this reluctance of major institutional actors in the CEE to adopt an expansive approach to minority rights must be found in the role that nationalism and an appeal to the dominant ethnic idea within state-building and state consolidation efforts in CEE states. After the fall of Communism, national identity (often perceived in an ethnic rather than civic fashion) has been probably the most powerful social factor, other than those identified with the social foundations of the *ancien régime*, capable of injecting a necessary degree of coherence into society and of countervailing the *anomie* of a disintegrated, decentralised, and demoralized society. An expectation, expressed especially in the 1970s and 1980s by democratic oppositions in some of these countries that “civil society”, constructed on the basis of spontaneous social solidarity, responsibility and strong informal networks constituting the intermediate structures between the state and the family, would play the role of such unifying forces, turned out to be a little more than wishful thinking. In some of these societies (in particular, in Poland), the dominant religion played this role to a limited degree and for a limited period of time, but faced its own problems given the need to reconstitute its social role in a situation in which it no longer constituted the only free political space in an otherwise oppressed society. Hence, virtually the sole common force capable of supporting the social coherence required for state building after the fall of communism was a national idea related in these countries to the ideal of sovereignty of the nation-state.⁶⁵ As Claus Offe has noted: “*The sheer absence of imagined as well as institutionalized collectivities such as classes, status groups, professional or sectorial associations, constituted religious groups, etc. moves the ethnic code into a prominent position*”.⁶⁶

One can deplore this fact, but nationalism turned out to be an indispensable factor in providing the basis for societal mobilization without which the processes of state-building and state transformation would not have occurred, or would have been even less successful than they were in CEE. This confirms the analysis that John Breuilly developed in his study of the relationship between

⁶⁵ Of course, the link between nationalism and celebration of sovereignty is contingent; the national idea (even in its strong forms) can thrive without, or even against, the context of a sovereign state. But in countries such as Poland or the Baltic States where the memories of the loss of sovereignty are strong, the two happen to come in a package. I will return to this point below.

⁶⁶ C.Offe, *Ethnic Politics in European Transitions*, working paper of Zentrum für Europäische Rechtspolitik an der Universität Bremen, Bremen: February 1993, at 26, footnote omitted.

nationalism and the modern state.⁶⁷ Breuille identifies three main functions of nationalist ideologies *vis-à-vis* the state which render nationalism a particularly effective component of political action: those of coordination, mobilization and legitimacy.⁶⁸ The mobilization function is of particular relevance in our context: While Breuille carefully emphasizes that the general process of mobilization in the modern state does not necessarily give rise to nationalistic politics, especially when different social groups find effective ways of expressing their interests to government, nevertheless in circumstances where civil society actors poorly articulate their interests and where the representation of social interests by parties based on class or special interest is either blocked or underdeveloped, nationalism becomes a convenient device of political mobilization. This – we may observe – is precisely the case in post-communist societies, and the words written by Breuille about colonial situations apply equally well to post-communist CEE: “*In such cases the appeal to cultural identity is often a substitute for the failure to connect politics with significant social interests...*”⁶⁹ Furthermore, it needs to be remembered that a significant number of the accession states are, literally speaking, “new” states (all three Baltic states, Czech Republic, Slovakia and Slovenia). It is natural and understandable (even if deplorable) that “new states” make a strong appeal to national identity, both as a way of asserting their legitimacy in the international order and to match a new territorial polity to an ideology which provides the necessary degree of coherence and mobilization to make a new political elite sufficiently legitimized. It is also in the new states that nationalist movements – often in opposition to a dominant elite – have a particularly fertile ground for development (as there is always a degree of territorial-ethnic mismatch inherited from the older state), and they push the dominant elite towards a more nationalistic policy.

This, I believe, is the main explanation for the chronic resistance of the institutions in the post-communist states to a more expansive interpretation of minority rights. In particular, when combined with the anxieties related to the perceived “loss of sovereignty” related to the accession to the EU, the patterns of incentives among the political actors in CEE has not favoured more pro-minority policies. This often combined with more specific, contingent factors (such as resentment of Russian-speaking minorities in Baltic states related to the forced Russification of these countries in the immediate past) and, as a result, created a situation in which the opportunities for a pro-minorities approaches were meagre. Whenever they occurred, they were grasped – as in Hungary which had its own reasons to “lead by example” in providing its minorities with a thick

⁶⁷ J.Breuille, *Nationalism and the State*, New York 1982 at 349.

⁶⁸ *Ibidem* at 365-373.

⁶⁹ *Ibidem* at 371.

structure of local representation – though even in these circumstances, the policy was often tainted by less benign, more nationalistic motives, as reflected in the Hungarian Status law, at least as originally conceived.

3. Conclusion

The impact of Europeanisation, and more specifically of conditionality, upon the positive changes in the law and politics of CEE states has been the most impressive whenever there was a synergy between the external factors (clear, coherent and credible norms supported by the established practices of the Western states in a given domain) with the internal ones (the institutional support and proper incentives to act towards the adoption and implementation of the norms). In the case of minority protection such a synergy has occurred only to a very low degree. As the first part of this chapter has shown, the minority protection norms that the Western states expected CEE states to follow were opaque and rarely implemented in a coherent way throughout Western Europe, and as the second part has shown, the institutions charged with the development and articulation of constitutional norms in CEE had no incentives or ideological predisposition to push the articulation of minority rights in an expansive direction.

Where does this leave the EU conditionality with regard to protection of minority rights? There are two schools of thought.⁷⁰ The first suggests that the standards of minority protection will decrease with the formal end to conditionality⁷¹ now that the “candidate states” here turned into “new member states”. As minority protection is not part of the EU competence and the new member states (just as all other member states) will be free of any special scrutiny in this regard, they will be free to revert to bad old ways – unless properly checked by other European institutions (but then it has been the case quite regardless of EU conditionality). The second suggests a phenomenon of a “reverse conditionality” or of a “boomerang effect”: the standards articulated in the conditionality instruments (and in particular, despite all their weaknesses, in the Commission’s regular reports on progress of candidate states towards the accession) will inform the thinking about the minority rights and minority protection across the board in the newly enlarged EU. As the OSCE High Commissioner on National Minorities Rolf Ekeus proclaimed in 2002 (as a

⁷⁰ See for example: B.de Witte, *The Impact of Enlargement on the Constitution of the European Union* in: *The Enlargement of the European Union*, ed. M.Cremona, Oxford 2003, p.209-252 at 240; Sasse, supra note 5 at 32.

⁷¹ Of course conditionality will continue *vis-à-vis* Bulgaria, Romania, Turkey and other future potential member states.

normative ideal rather than a prediction): “*the standards on which the Copenhagen criteria are based should be universally applicable within and throughout the EU, in which case they should be equally – and consistently – applied to all Member States*”.⁷²

It is very hard today to speculate about which of these two scenarios will prevail but it is not unlikely that future developments will strike a middle way between the both extremes. On the one hand, it is unlikely that the EU will take “minority protection” on board: with the enlargement of the EU (and therefore with a larger overlap between the EU and CoE membership base) the voices urging a clear delineation of tasks between both structures will intensify, and the case for the EU to sideline those goals that the CoE or OSCE are (reasonably) good at achieving will become even stronger. It is therefore likely that the moderate voices of scholars like Bruno de Witte who say that the EU should not take a “holistic” approach of a detailed standard-setting as regards minority protection will prevail, but rather that the EU should confine itself to a piecemeal approach, by incorporating the concern for minorities in the EU cultural and educational policies (including promoting minority languages), through cultural diversity policy, *etc.*⁷³

On the other hand, however, it is unreasonable to expect, and it would certainly be regrettable, if the standards and experience written into the institutional memory relating to political conditionality were to be erased altogether with the date of the accession. While no clear and thick norms can be attributed to the standards used in conditionality, there are a number of problem-areas, information, suggestions and complaints deposited in this institutional memory, and more specifically, in the Commission’s annual Reports on candidate states’ progress towards accession. They still may haunt those misbehaving – and this would be a good thing, too. Under the general rules for monitoring the rights developments within the member states, and in particular, under the Article 7 of the TEU on the sanctions against a member state found to be in a serious and persistent breach of democracy, human rights and the rule of law, one may anticipate a higher degree of sensitivity towards the new entrants than towards the older member states. This is because some of these solutions have been registered in European public opinion, and in the EU conditionality context more specifically, as being vulnerable to serious objections regarding their treatment of minorities. However, this is only a very minimal threshold for international scrutiny.

⁷² Speech in Copenhagen on 5 November 2002, quoted in: Johns, *supra* note 6 at 699.

⁷³ B.de Witte, *The Constitutional Resources for an EU Minority Protection Policy* in: *Minority Protection and the Enlarged European Union: The Way Forward*, ed. G.N.Toggenburg, (forthcoming).