

EU Enlargement and the Protection of National Minorities: Opportunities, Myths, and Prospects

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A united Europe is necessarily a "union of minorities". Indeed, minority protection and participation are inherent in the EU's founding principles, implicitly embedded in the key notion of "subsidiarity". This system allows each of Europe's nations - an assembly of "minority groups" - effective participation in decisions affecting them. Thus on its face, the EU offers a unique example of elaborated and inclusive rules and procedures for its constitutive minorities. Despite this, the Union has little to say to guide states in the protection of their own, national, minorities.

The recent evolution of human rights protection within the European Union has led to a strengthened anti-discrimination framework combined with an "agnostic" attitude towards the rights of national minorities. Through the process of enlargement the EU has recognised the importance of respecting minorities, but as yet, no legal instruments support this aspiration. While equal opportunities for women and men have been addressed in a number of detailed, binding regulations, few documents address ethnocultural diversity, or the rights of ethnic groups. The exceptions are generally non-binding declarations and resolutions. As one expert notes, although "a considerable potential for development" undoubtedly exists, "minority protection *strictu sensu* is limited to the external sphere of the EU". [1]

The key question is whether anti-discrimination provisions are sufficient to ensure respect for minorities? While the two principles are perceived as closely related - and are frequently invoked in combination - at times they appear to be in conflict. This paper argues that prohibitions on discrimination are only a first step, insufficient in themselves to address the spectrum of minority rights enshrined in modern human rights instruments. A more elaborate framework will be required to ensure that the minority problems in Europe's Eastern half don't return to haunt the enlarged Union of the future.

I. Minority Rights - A Troubled History

Today, many conceive of minority rights as a "temporary measure", necessary only to remedy "past injustices" - a mere adjunct to modern human rights treaties, destined to disappear in the long run. This understanding results directly from the beleaguered history of minority rights in Europe.

Minority protection appeared much earlier than the principle of non-discrimination, originally emerging in treaties addressing religious minorities. The first such document dates back to 1606: the Vienna treaty between the King of Hungary and the Prince of Transylvania, which contained a clause allowing Transylvanian Protestants to profess their faith freely.

The principles underpinning this and later bilateral and multilateral treaties on minority protection were clear: minority rights amounted to special privileges granted to particular groups who, for certain historical, religious or political reasons, were particularly dear to contracting parties. There was no claim for the universality of minority rights. The minority issue in the inter-war period was exclusively a foreign policy issue.

The "minority treaties" system established under the League of Nations was the culmination of this trend. Obligations to protect minorities were imposed on three groups of states: those defeated in World War I; those who became independent as a result of post-war treaties; and those who gained territory once Europe's borders were redrawn. The victors did not undertake any obligations in this respect.

The consequences of this exclusively "state-centred" approach to minorities are still with us today. The situation of Roma minorities is a salient example: in the absence of a "kin" state to defend their interests, little has been done to confront widespread discrimination against Roma until very recently.

The "minority treaties" system proved insufficient to prevent the outbreak of a second world war. Moreover, minority concerns were abused and manipulated by Hitler to justify the aggressive expansionism of the Third Reich. As a result, not only was the League of Nations' system discredited, the very notion of minority rights was brought into disrepute. The United Nations subsequently stopped short of including provisions on minority rights in its primary documents, choosing rather to focus on the principle of non-discrimination.

Furthermore, in asserting the universal principle of non-discrimination, "minority rights" (in the League of Nations sense) were perceived as a possible impediment to full equality. A modest clause recognising minorities appeared only in 1966, in Article 27 of the International Covenant on Civil and Political Rights. Otherwise, the UN has been reluctant to place minority rights on the international agenda.

The post-World War II progress of minority rights is well illustrated in the evolution of one of its most sensitive areas - education in minority languages. The 1962 UNESCO Convention Against Discrimination in Education, [2] although not entirely ruling out separate schools for linguistic minorities, clearly treats them as an exception to be tolerated but not promoted. The entire thrust of the Convention is towards unified education and against segregation (a widespread phenomenon at the time of its elaboration).

Three decades later, in 1996, the Organisation for Security and Cooperation in Europe (OSCE) adopted the "Hague Recommendations" regarding the education rights of national minorities, [3] which emphasises the rights of minorities to education in their own languages, if they so wish, extending to the establishment of separate minority schools.

These two - hardly compatible in spirit - documents demonstrate a general trend in post-war treaties. The absolute dominance of the non-discrimination principle in the fifties and sixties, sometimes to the detriment of minority identity safeguards, gradually shifted, in the late Twentieth Century, towards increasing recognition of the right to identity and the preservation of diversity. The appearance of numerous violent ethnic conflicts after the collapse of the Communist system required clear rules for effective treatment of minority problems. In the nineties, a number of politically and legally binding instruments on minority rights were adopted by the UN, the OSCE and the Council of Europe.

Nevertheless, the UNESCO Convention is sometimes invoked even today, to justify the refusal of minority

demands for their own schools, on the purported basis that education solely in the official language is the only way to ensure real equality and non-discrimination. Other states (notably, France) deny the very existence of national minorities on the basis of the constitutional principle of equality of all citizens and the prohibition of discrimination.

The European Union appears to be undergoing a parallel evolution: after much debate, strong anti-discrimination legislation has finally been adopted. The June 2000 "Race Directive" [4] marks an important improvement, particularly in its introduction of, and prohibition on, "indirect discrimination" and "harassment". The Directive also increases the scope of anti-discrimination legislation well beyond employment, the traditional EU sphere of protection. However, the Directive has been criticised on a number of counts, in particular the omission of references to religious discrimination - often closely related to discrimination on a racial or ethnic basis. Public services and institutions are not covered; nor is incitement to racial hatred and violence. These omissions are "substantial problem[s]", especially in the light of enlargement and the situation of certain minority groups in applicant countries." [5]

Legislation specifically intended to safeguard minority identity, languages and education, has yet to be enacted. In this respect, the EU, like the UN before it, appears reluctant to transform policies of multiculturalism and ethnic diversity into legal remit.

II. Non-Discrimination and Minority Rights: Conflicting or Complementary Approaches?

Is this reluctance justified?

Hardly. Non-discrimination, on the one hand, and minority protection on the other, can be regarded rather as complementary. The principle of non-discrimination aims at ensuring equality. Minority rights are aimed at preservation of diversity. While the former ensures the right to equality, the latter safeguards the preservation of identity, or, in other words, the right to diversity.

In this context, the text of the International Convention on the Elimination of All Forms of Racial Discrimination is instructive:

1. In this Convention, the term "racial discrimination" shall mean any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life.

The principle of non-discrimination is limited to the demand for equal treatment, without reference to specific circumstances. It is not self-evident, however, that formal equal treatment, under uniform conditions, is sufficient to guarantee full and effective equality in practice.

For example, picture a multilingual society comprising sizeable linguistic minorities, where only one language is legally recognised as the official, or state, language. Claims of discrimination against those who do not speak the official language are difficult to sustain. Formally, all are treated equally, but this formal equality effectively disadvantages those members of society whose mother tongue differs from the state language (i.e. linguistic minorities). In extreme cases, persons belonging to linguistic minorities may not have any command of the official language, and may thus confront grave difficulties accessing even basic social services, where no stipulations allow for the use of other languages. Their basic constitutional rights may be effectively denied to these persons. Even where persons belonging to linguistic minorities command the official language, they may still find themselves vulnerable in competitive situations, such as in court proceedings, job interviews, or university entrance exams. Strict adherence to the principle of non-discrimination may obscure the absence of equal treatment at play here.

A similar situation arises with official holidays. Let's assume the presence of an Orthodox Christian minority in a country where the majority adheres to the Catholic faith. It is likely, as is the case in some such countries, that only the Catholic Christmas will be recognised as an official holiday, with Orthodox believers thus facing potential difficulties securing the freedom to celebrate their main religious holiday. This problem can be (and has been in some countries) addressed by obliging employers to provide a certain number of free days at the employee's discretion. But it should be noted that this solution goes beyond the standard application of non-discrimination.

One more example concerns mandatory uniforms in certain job activities (e.g. railway transport). Such restrictions, while applied equally to all, effectively exclude certain individuals from certain jobs for reasons solely related to their identity - for example, Sikhs, who are obliged to wear turbans at all times, cannot wear uniform caps.

Thus, in many cases, formal equal treatment may run contrary to the principles of full and effective equality.

Beyond this, the fundamental right to identity looms. If a state refuses to recognise the languages, religions or customs of its minorities - all essential aspects of their identity - how can the state claim truly to represent all citizens, and not merely those belonging to the majority group?

Of course, it is impossible to avoid problems of this kind entirely. Nevertheless, it is possible to ensure reasonable and just grounds for regulations which may result in the exclusion or disadvantaging of certain groups. There is a fundamental difference, for example, between a railway worker's cap, and a fireman's helmet: strict regulations in the latter case are demonstrably indispensable to the work.

III. The European Union and minority protection

It may surprise the casual observer to discover that EU member states have proven generally more reluctant than non-EU members to undertake legal obligations and commitments in the field of minority rights. For example, as of July 2001, only four of the Council of Europe's 43 members have not signed its strongest instrument in this area, the Framework Convention for the Protection of National Minorities (FCNM). Two of these, Belgium and France, are EU member states, only one is a candidate (Turkey). Of seven signatories who have not yet ratified the Convention, four are EU members (Greece, Portugal, the Netherlands and Luxembourg). Latvia is the sole candidate state to have signed but not ratified the FCNM.

On 23 January 2001, the Parliamentary Assembly of the Council of Europe called on all these states specifically to sign and/or ratify the FCNM, amending domestic legislation if necessary, as otherwise "it cannot take full effect across the continent." The Assembly noted that "the price to be paid for failing to respond positively to the needs of national minorities may be an escalation in social tension, an increase in the numbers of asylum seekers, reluctance to reinforce unity between the member states of the Council of Europe, and a climate of insecurity." [6] To date this call has not been heeded.

Extensive discussion of the EU Charter of Fundamental Rights afforded another opportunity to incorporate minority protection explicitly into EU legislation. However, in the Charter adopted at Nice in December 2000, relevant provisions were limited to a prohibition of discrimination (Article 21) and to the following brief provision:

"The Union shall respect cultural, religious and linguistic diversity" (Art.22). [7] Once again, no explicit mention of "minorities".

The European Court of Justice has ruled on several human rights-related cases, but none dealing with the rights of minorities.

It is particularly notable that the no specialised institution within the EU's extensive bureaucracy deals specifically with the minority rights.

Does this mean national minorities do not enjoy effective protection in the European Union? Not necessarily.

Arrangements to protect minorities have developed in the legal traditions of some member countries over time. Devolved regional powers and decentralisation have made special procedures for minority rights unnecessary in some states - although these have no application to "non-territorial" minorities. In others, well-rooted democratic institutions allow for the resolution of minority-related disputes in the absence of special instruments. Moreover, the EU as a whole is not dominated by any one "majority".

These varied approaches, however, although functional, hardly suffice to address the very different circumstances, both historical and social, faced by minorities in the candidate states.

IV. Respect of minority rights as a precondition for EU accession

The "agnostic" approach to minority rights outlined above is far less in evidence when it comes to EU policy towards the candidate states. Indeed respect for human rights generally, and minorities in particular, are explicitly included in the Copenhagen criteria for accession, the requirements a candidate state must meet in order to become an EU member state.

In the words of Giuliano Amato and Judy Batt, "Minority rights have become an important item on the EU's external policy agenda in its relations with the new democracies of Central and Eastern Europe, but have not hitherto featured in internal policy. This has led to the charge of 'double standards' on minority rights, which has weakened the credibility of the EU's position. The question is how far the EU can insist on minority rights for others without first putting its own house in order, especially in the light of eastward enlargement." [8] How, in other words, can the EU evaluate candidate states' compliance, in the absence of its own documents, procedures and institutions to assess minority protection?

Two possibilities are apparent. First, the EU may make use of other European organisations, for their monitoring procedures and mechanisms. The Council of Europe and the OSCE, and its office of the High Commissioner on National Minorities in particular, are natural candidates. Second, the EU can reach its own conclusions simply through political bargaining with the governments of the candidate states.

In practice, it seems a combination is applied. The European Commission consults, in particular, with the OSCE High Commissioner on National Minorities. Co-ordination with the OSCE and the Council of Europe is often conducted behind the scenes, rarely if ever disclosed to the general public.

As to negotiations, a first question concerns the extent of participation of all concerned parties - minority representatives, in particular. The primary negotiating partner is the government. Candidate states' national parliaments are involved in accession negotiations to a limited degree - so minority MPs, if there are any, may gain a hearing with the European Parliament's representatives. Should a minority party form part of a governing coalition, substantial negotiating power would result.

Otherwise, candidate governments can hardly be expected to offer broad opportunities for the inclusion of minority representatives or NGOs in accession negotiations. In the meantime, no institutionalised mechanisms for participation are envisaged for minority and human rights NGOs. In other words, contrary to basic EU principles, no participation opportunities for minorities are stipulated.

That said, EU intervention has undoubtedly led to substantial changes for the better. One observer highlights "significant direct and indirect effects on the protection of minority rights in both the Czech Republic and Romania" [9]. This is particularly true for Central Europe's Roma, perhaps the most vulnerable minority in Europe. Even here, however, solutions have been ad hoc in nature, rather than on the systematic application of clearly formulated legal standards.

Ultimately, however, the evaluation of John Packer, Legal Adviser to the OSCE High Commissioner on National Minorities, remains valid: "We have serious concerns that if there is not an EU internal (human rights) assessment process and if there is not a continual annual reporting, new states which become EU members might feel less pressure to meet those (human rights) standards." [10]

Two important aspects of this problem can be singled out.

First, pre-accession monitoring is predicated on the presumption that the situation in the candidate states will improve in the course of negotiations; that a candidate state's legislation and practices will eventually comply with the Copenhagen criteria. The pressure for progress may raise justifiable concerns about the accuracy of conclusions. Simply put, candidate states may eventually "import" minority-related problems into the Union, after which time treating them will be complicated by the weakness or absence of a specialised EU framework for minority rights.

Second, enlargement will inevitably alter the minority landscape within existing member states substantially. This eventuality is discussed by Andre Liebich:

One may suppose that the minority factor will become far more important to EU politics than it is at present. This will occur because trends and realities from both parts of the Union will converge in a highly dynamic combination. On the one hand, the Union will contain a significant number of new members with important but marginalized minorities. On the other hand, it will be made up of old members where minorities are more integrated and less numerous but where a culture of minority promotion and of minority rights has been developing (often in terms of regionalization). West European minorities will find themselves reinforced, perhaps reinvigorated, and will intensify their strategies aiming at European-wide recognition. At the same time, in the new members of the Union minorities will invoke West European precedents and norms to pursue their case in favour of an improved status, including greater cultural autonomy and, in some cases, territorial autonomy. [11]

Thus, compliance with the political (but not legal) Copenhagen criteria may, given the vague assessment procedures and limited consultation mechanisms, lead to post-accession effects which the existing legislative and bureaucratic framework of the Community are ill equipped to treat.

To quote Amato and Batt again, "the EU will find it hard to maintain its agnostic stance on minority rights vis-a-vis

its members". [12] Sooner or later two factors - growing migration and diversity within the EU, and enlargement to the East - will render inevitable the elaboration of a more concrete Union framework on minority rights.

Footnotes

[1] Gabriel Toggenburg. A Rough Orientation Through a Delicate Relationship: The European Union's Endeavours for (its) Minorities, 5.12.2000. Online at: <http://eiop.or.at/eiop/texte/2000-016.htm>

[2] Online at: <http://www.uel.ac.uk/law/mr/MRun6.html>

[3] Online at: <http://www.riga.lv/minelres/osce/hagrec.htm>

[4] Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin. Online at:

http://europa.eu.int/eur-lex/en/lif/dat/2000/en_300L0043.html

[5] Report from the EU Human Rights Discussion Forum, 30 Nov. - 1 Dec. 1999.

[6] Parliamentary Assembly of the Council of Europe, Recommendation 1492 (2000), The Rights of National Minorities, adopted 23 January 2001, paras 5-6. Online at: <http://stars.coe.fr/ta/TA01/EREC1492.htm>

[7] Online at: <http://db.consilium.eu.int/df/default.asp?lang=en>

[8] Giuliano Amato and Judy Batt. Minority Rights and EU Enlargement to the East. Report of the First Meeting of the Reflection Group on the Long-Term Implications of EU Enlargement: the Nature of the New Border. September 1998. Online at: <http://www.iue.it/RSC/Amato98-PP.htm>

[9] Melanie H. Ram. European Union Aspirations and Obligations: The EU Influence on Minority Rights in Candidate States. Presented at Humboldt University Berlin, June 14-16, 2001. Online at: <http://www.demographie.de/minorities/papers/Ram.pdf>

[10] Report from the EU Human Rights Discussion Forum, 30 Nov. - 1 Dec. 1999

[11] Andre Liebich. Ethnic Minorities and Long-Term Implications of EU Enlargement. 1998. Online at: http://www.iue.it/RSC/WP-Texts/98_49t.html

[12] Giuliano Amato and Judy Batt, 1998.

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