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Contested Norms in the Process of EU Enlargement: Non-Discrimination and Minority Rights¹

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Abstract

This paper analyses the adoption of EU conditions regarding non-discrimination and minority protection in three applicant countries: Romania, Hungary and Poland. While non-discrimination is a well established EU norm, minority rights are a contested norm and not enshrined in the *acquis communautaire*. It is argued that contestation over norm meaning highlights the importance of norm resonance and domestic norm construction in processes of norm diffusion, and that the conceptual tension between the internal and external EU policy towards minorities implies the possibility of unintended long-term effects in the applicant countries, as well as potential backlash against the EU after accession.

KEYWORDS: minorities; non-discrimination; enlargement; Romania; Hungary; Poland

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Introduction

European accession negotiations and compliance with the accession criteria² proceed in accordance with the ‘treaty language.’³ While the candidates’ interest in EU membership counts as a strong motivation for compliance, to be sure, ultimately, compliance performance depends on the perception of a legitimate procedure, that is, on the principle of ‘right process.’⁴ How to comply thus takes precedence over what substantive conditions to impose. The actual substance of European Union law, including the *acquis communautaire* as the institutional framework, the political objectives, the administrative procedures and the entire body of law which form the EU’s formal and informal institutional properties, is therefore not the yardstick.⁵ Yet, it is this body of law which the candidate countries have to respect upon accession as full members in 2004. The entire *acquis communautaire* must be accepted ‘as binding’ by all members.⁶ For candidates, this is a ‘compulsory and demanding reference framework.’⁷ Enlargement thus entails a twofold adaptation to externally defined rules and norms for the candidate countries. First, they are expected to adopt a modicum of new legal, political, economic and administrative standards – the accession criteria – in their respective domestic polities. This process involves mainly formal institutional adaptation, thus establishing the legal validity of the accession conditions in the domestic contexts of each candidate country. Such adaptation has been

² Dubbed ‘Copenhagen criteria’ with reference to the place where they had been agreed in 1993. For details of the accession criteria which were defined at the 1993 Copenhagen conference, see the Commission website at <http://europa.eu.int/scadplus/leg/en/lvb/e40001.htm>.

³ Chayes and Chayes 1995.

⁴ Franck 1995, 24.

⁵ The *acquis communautaire*, or short ‘the *acquis*’ is a contested concept albeit the frequent references in different contexts. It has become a standard reference, a kind of compliance yardstick for candidate countries. According to the TEU, Article 2(1) the Union is ‘to maintain in full the *acquis communautaire* and to build on it.’ For a detailed discussion about the concept’s application and use in the literature, see Delcourt 2001.

⁶ Case C-259/95 *Parliament v. Council* [1997] ECR I-5313, para 17, cf. Delcourt 2001, 830.

⁷ Delcourt 2001, 831; Gialdino 1995; Michalski and Wallace 1992.

monitored by the European Commission and documented in accession reports.⁸ The second type of adaptation arises more clearly after accession. It involves implementing the new rules, norms and principles in political and legal performances. At this point, the interpretation of norms, principles and procedures as it has evolved over five decades of constitutionalisation within the EU becomes vital for the member states.⁹ This second period is distinctive for its constitutional quality, for it includes transposing the EU's *acquis* into domestic contexts, which in turn sheds light on the political and cultural validity of such basic European norms as supremacy, direct effect and subsidiarity in the respective domestic contexts of the new member states.

The present inquiry raises questions about the legitimate underpinning of the EU enlargement process. To that end, it highlights the policy and politics of enlargement with reference to the development of two norms included in the accession criteria of the European Union: non-discrimination and special minority rights. Both norms pertain to the protection of minorities, which acquired an immensely important role in the Union's external relations after the end of the Cold War and was reflected in the political accession criteria spelled out at the Copenhagen European Council in 1993. However, while the meaning of the principle of equality and non-discrimination as a cornerstone of individual human rights is sufficiently defined internationally and institutionalised on the EU level, minority protection, although generally accepted as desirable after the Cold War, remains deeply contested in its meaning on the international level and has been largely absent from the EU's *acquis communautaire*. Among the political accession criteria, 'the insistence on genuine minority protection is clearly the odd one out. Respect for democracy, the rule of law and human rights have been recognised as fundamental

⁸ Grabbe and Hughes 1998; Grabbe 2001.

⁹ Regardless of the type of constitutional text that stands to be agreed as the result of the 2003-04 constitutional process, the EU's treaties are the result of five decades of constitutionalisation.

values of the European Union's internal development and for the purpose of its enlargement, whereas minority protection is only mentioned in the latter context.¹⁰

By scrutinising minority protection as a contested norm in the EU enlargement process, this paper means to contribute to research on the development of international norms. It contests the assumption that international norms have to be 'robust' in order to have impact and therefore can be treated as stable structural factors with fixed and clear meaning. To that extent, it problematises the meaning of particular norm types. To demonstrate the variation of meanings of specific norms types, we first trace different interpretations and path dependent developments based on the reconstruction of meaning of regional and global norms. Secondly, we seek to identify the role of different domestic meanings of norms in the course of rule-adoption by applicant states. We argue that although EU conditionality may induce compliance, the contestability of minority rights implies the possibility of unintended long-term effects in the applicant countries, as well as potential backlash against the EU after accession.

The remainder of the paper proceeds in four parts. In the first part, we situate the subject within the recent international relations literature on norms, developing the theoretical argument of path dependent norm construction and norm resonance. In the second part, we establish the content of the norms of non-discrimination and special minority rights in the international and European context, and elaborate on their internal institutionalisation and external promotion by the EU, with a special focus on the conceptual tensions between the articulation of minority protection norms in these different contexts. In part three, we offer a comparative account of the norm diffusion and domestic norm construction in the case of three applicant countries: Romania, Hungary and Poland. Finally, the conclusion reflects on long-term feedback effects of the

¹⁰ De Witte 2000, 4 [emphasis in original].

tension between the EU's internal non-discrimination position with regard to minority protection and the domestic norm construction in applicant countries, which follows from the EU's external policy of conditionality in combination with domestic factors and norm resonance, and tries to envisage possible backlashes on the EU.

Case and Argument

So far, research on norms in international relations has mainly focused on 'robust,' ie strong and stable, norms in order to account for the diffusion of and compliance with international norms.¹¹ Work inspired by sociological institutionalism, with its stress on institutional isomorphism, deep internalisation and habitualisation, has specifically sought to make the case for a rule-following 'logic of appropriateness,'¹² which relies on stable norms to explain behaviour.¹³ More recent constructivist approaches, which claim to 'bring agency back in' against the overly structuralist sociological institutionalist account, have done so mostly by studying agency in reaction to well established norms.¹⁴ While others do acknowledge contestation as a central feature of norms, they stress the contestation between norm types (rather than norm meanings), treating them as basic, atomistic and unproblematic units of analysis. Research has thus focused on the question of 'which norms matter?'¹⁵ with a view to understanding the power of particular norm types, thereby leaving to one side the contested meaning of norms. Such a structural analytic perspective on norms neglects the role of practices within particular normative contexts. The variation in normative context and hence the increasing probability of norm contestation does,

¹¹ Legro 1997; Chayes and Chayes 1993; 1995; Jacobson 1996; Jepperson et al. 1996; Koh 1997; Sikkink 1993.

¹² March and Olsen 1989; 1998.

¹³ DiMaggio and Powell 1991; Finnemore 1996b; Kyvelidis 2000; Meyer et al. 1997; Berkovitch 1999.

¹⁴ Checkel 1998.

¹⁵ See Legro 1997.

however, require particular attention in transnational orders such as the EU, all the more so under conditions of enlargement. Before we turn to three case studies on contested meanings, the following section offers a theoretic discussion of neo-institutional and constructivist perspective on the construction, evolution and impact of norms.

Norm Resonance

This paper conceptualises norm development in terms of historical institutionalism, which stresses that different historical and cultural developments lead to cross-national variation and unintended consequences of institution building, due to path dependencies and the resulting fact that ‘[t]he common imposition of a set of rules will lead to widely divergent outcomes in societies with different institutional arrangements.’¹⁶ This insight becomes even more relevant, once we acknowledge that norm development takes place not only in different national settings, but also on the regional and global level, thus creating multiple path-dependencies and a need for the translation or mediation of meaning when norms are transferred from one level to another. This brings the issue of norm resonance to the fore: new norms have to be modelled so as to ‘resonate with pre-existing collective identities embedded in political institutions and cultures in order to constitute a legitimate political discourse.’¹⁷ As a starting point, this is mostly presented as an argument about ‘cultural match’ and institutional ‘goodness of fit,’ on the one hand,¹⁸ and the social embeddedness of formal institutions, on the other.¹⁹

¹⁶ North 1990, 101; Pierson 1996; Thelen and Steinmo 1992.

¹⁷ Marcussen et al. 1999, 615; Finnemore and Sikkink 1998, 908.

¹⁸ Bulmer and Burch 2001.

¹⁹ Wiener 1998.

Contrary to the rationalist point of view, where a ‘misfit’ between domestic and international norms creates the adaptational pressure necessary to provoke domestic change,²⁰ historical institutionalists and social constructivists maintain that only when new norms can be related to established institutions, traditions and beliefs, does norm transfer become possible. In this view, resonance is a structural precondition for enabling effective norm diffusion, which delineates the extent to which a norm may be accommodated within the new context. However, since complex normative structures consist of sometimes competing or even contradictory norms and broad principles in need of interpretation, they cannot determine a unique outcome in a structuralist fashion but merely provide ‘resonance points’ to which a new norm can be related,²¹ so that ‘norms create permissive conditions for action but do not determine action.’²²

Although an institutional analysis looking for ‘resonance points’ within the constitutive normative framework into which a norm is to be introduced is a starting point for assessing the range of possible resonant norms or norm interpretations, resonance is not simply ‘out there’ as a structural property of the norms themselves and therefore as an independent measure of norm robustness. It also includes an agency-oriented, dynamic and interactive element, insofar as ‘the meanings of any particular norm and the linkages between existing norms and emergent norms are often not obvious and must be actively constructed by proponents of new norms.’²³ Resonance therefore also entails an ability to create compelling and coherent arguments within a social context with regard to the norm and to relate the norm positively to institutions, traditions, and ideas that are prevalent to that context. In other words, one important question regarding

²⁰ Börzel and Risse 2000.

²¹ Schwellnus 2001.

²² Finnemore 1996a, 158.

²³ Finnemore and Sikkink 1998, 908.

norm transfer from the international to the national level is how international norms are introduced into the process of domestic norm construction.

To explain the emergence of new norms as well as the transposition of international norms into domestic contexts, scholars have begun to study the actions of ‘norm entrepreneurs,’ ie agents actively promoting the norm. First, international organisations themselves can act as ‘teachers of norms.’²⁴ To account for the role of international organisations in persuading national élites, some scholars are studying meetings between representatives of both sides. Once persuaded, the national representatives then become norm entrepreneurs in the domestic arena, assuming they are not themselves in a position to implement the norms directly. Second, following a ‘bottom-up’ process of societal pressure and mobilisation, norm entrepreneurs can act as ‘advocacy coalition networks’ within the applicant states, mobilising public support against a reluctant government either out of principled commitment or for instrumental reasons.²⁵

A third possible factor is the involvement of domestic or transnational experts acting as ‘epistemic communities’²⁶ which promote EU rules internally as a model for domestic legislation. While work on epistemic communities has so far focused mainly on scientific expertise in highly technical policy areas, the concept has recently also been extended to lawyer communities.²⁷ Rather than mobilising against norm-breaching governments, political élites voluntarily include specialists in the domestic process of norm construction, since they can provide expertise and consensual interpretations sufficient to overcome the uncertainty that inheres in the absence of clear obligations and models. The influence of epistemic communities thus depends on favourable domestic conditions: a demand by political élites for expertise is a

²⁴ Sikkink 1993.

²⁵ Finnemore and Sikkink 1998; Keck and Sikkink 1998; Klotz 1995.

²⁶ Adler and Haas 1992.

²⁷ Van Waarden and Drahos 2002.

precondition for inclusion of experts in the process. Still, from the perspective of norm resonance, transnational communities of legal specialists are in a position, given their knowledge of both international and domestic norms, to perform an important function as catalysts or *mediators of meaning*.²⁸

Non-discrimination and minority rights: EU rules and conditionality

For purposes of this paper, non-discrimination and special minority rights shall be treated as two distinct norms used to achieve the protection of minorities.²⁹ While the norms not necessarily contradict each other and can be combined in a comprehensive approach to minority protection,³⁰ they can still be distinguished and follow different rationales: First, non-discrimination is a general human rights principle (so that “belonging to a national minority” is only one among many reasons for discrimination to be eliminated), whereas special minority rights are group-specific, ie targeted at particular persons or groups. A related issue is that non-discrimination as a general human right is applicable to all persons, while special minority rights can be restricted to citizens. Although the definition of minorities is in fact highly contested,³¹ they are predominantly meant to protect long-term resident ‘old’ or ‘national’ minorities rather than the ‘new’ minorities created by migration and therefore restricted to citizens.³²

²⁸ Kieser 1999; Wiener 2001. See also Elgstrøm 2001; Ratner 2000, 581 ff.

²⁹ The difference between the norms can be seen in the definition offered by the UN Sub-Commission on Prevention of Discrimination and Protection of Minorities in 1947: ‘1. Prevention of discrimination is the prevention of any action which denies to individuals or groups of people equality of treatment which they may wish. 2. 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’. UN Doc. E/CN.4/52 Section V.

³⁰ Open Society Institute 2001a, 16.

³¹ Hofmann 1992.

³² This applies specifically to the context of European minority norms (Thiele 1999). The UN, on the other hand, has come to include non-citizens in their minority-definition (Eide 1999).

Secondly, while non-discrimination aims at the removal of all obstacles to the enjoyment of equal rights and full integration of persons belonging to minorities into society, special minority protection requires permanent positive state action in support of the minority group, in order to preserve its identity and prevent assimilation.³³ Minority protection is therefore a positive, non-discrimination predominantly a negative right, although it can be interpreted in a way that allows at least temporarily for positive measures to counter *de facto* inequalities.³⁴ Thirdly, non-discrimination is mostly viewed as an individual human right. By contrast, the question whether special minority rights should be conceptualised as individual or collective rights, ie as rights granted to persons belonging to minorities or rights granted to the groups as such in the form of self-government, autonomy or self-determination, remains highly contested. Hence, while the interpretation of the non-discrimination principle may vary between a formal and a substantive reading, depending on whether ‘affirmative action’ is allowed or not, special minority rights can conceptually be subdivided in individual and collective minority protection concepts.³⁵

³³ Niewerth 1996.

³⁴ Thornberry 1991, 126. Still, the aims of non-discrimination and minority protection remain different: positive measures under non-discrimination are by definition only to be employed temporarily and are put into place to remove the underlying distinction, while special minority rights are essentially permanent and aim at the preservation of the distinctive character of the minority group.

³⁵ For an overview on collective minority protection cf. Brunner 1999; Niewerth 1996. For a liberal-individualist critique cf. Barry 2001; Donnelly 2003. For a recent German individual vs. collective minority rights debate cf. Brunner 2002; Heintze, 2002; Riedel 2001; Salzborn 2002.

Table 1: Concepts of Non-Discrimination and Special Minority Rights

Non-Discrimination		Special Minority Rights	
Formal Non-Discrimination	Substantive Non-Discrimination	Individual Minority Rights	Collective Minority Rights
- general	- predominantly general, group-specific measures allowed to achieve <i>de facto</i> equality	- group-specific	- group-specific
- negative	- predominantly negative, positive measures temporarily allowed to reverse past discrimination and achieve <i>de facto</i> equality	- permanent positive measures required	- permanent positive measures required
- individual	- individual	- individual	- collective

EU rules and conditionality in the field of non-discrimination

Non-discrimination has been a fundamental principle within the European Community from the beginning, in the form of gender equality and the abolition of discrimination on the basis of nationality between member states.³⁶ Furthermore, although the original treaties did not contain human rights provisions, the European Court of Justice exercised a competence for human rights issues within its case law,³⁷ at least within the scope of community law, which was later codified in the Maastricht Treaty, with the introduction of Article 6(2) of the Treaty of the European

³⁶ The latter was codified in art 6 (now art 12) TEC, the former was established first in art 119 (now art 141) TEC regarding 'equal pay' and later specified and extended in the Council Directive 76/207/EEC of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions [1976] OJ L039/40.

³⁷ For the establishment of Human Rights as general principles of Community law see Case 29/69 *Stauder* [1969] ECR 419; Case 11/70 *Internationale Handelsgesellschaft* [1970] ECR 1125 and Case 4/73 *Nold* [1974] ECR 491. Subsequently, the ECJ regularly referred to the ECHR as the basic European human rights document (see eg Case 36/75 *Rutili* [1975] ECR 1219). Betten and Grief 1998, 56-59.

Union (TEU).³⁸ Since the Amsterdam Treaty, the non-discrimination framework has been expanded to include ethnic and racial discrimination: Article 13 TEC enables the Community to ‘take appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation’,³⁹ again within the scope of the Treaty. This furnished a basis for the adoption of a Framework Directive on equal treatment in employment and occupation,⁴⁰ and, more significantly, a Directive on the prohibition of discrimination on the basis of racial or ethnic origin (the so-called ‘Race Equality Directive’).⁴¹ Building on ECJ rulings on ‘affirmative action’ in the field of gender discrimination,⁴² the directives contain a provision allowing for ‘measures intended to prevent or compensate for disadvantages suffered by a group of persons of a particular racial or ethnic origin’.⁴³ This is also reflected in ECJ rulings acknowledging that the ‘the protection of (...) a minority may constitute a legitimate aim’⁴⁴ of national policy and therefore does not in itself run afoul of the non-discrimination principle. As the most recent EU development, the Charter of Fundamental Rights includes ‘belonging to a national minority’ in the non-discrimination list.⁴⁵

³⁸ Art 6(2) TEU: ‘The Union shall respect fundamental rights, as guaranteed by the European Convention on Human Rights and Fundamental Freedoms (...) and as they result from the constitutional traditions common to the Member States, as general principles of Community law’.

³⁹ Art 13 TEC. Cf. Toggenburg 2000, 20 ff.

⁴⁰ Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation [2000] OJ L303/16-22.

⁴¹ Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin [2000] OJ L180/22-26.

⁴² ECJ Case C-450/93 *Kalanke* [1995] ECR I-3051 and Case C-409/95 *Marschall* [1997] ECR I-6363. For a thorough discussion of both cases and the shift they imply see Charpentier 1998.

⁴³ Council Directive 2000/43/EC, para. 17.

⁴⁴ Case C-274/96 *Bickel/Franz* [1998] ECR I-7637: §12. Other minority related cases include Case C-379/87 *Groener* [1989] ECR 3967 and Case C-281/98 *Angonese* [2000] ECR I-4139. Cf also De Witte 1999.

⁴⁵ Art 21: ‘Any discrimination based on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation shall be prohibited.’ Charter of Fundamental Rights of the European Union [2000] OJ C364/13 http://www.europarl.eu.int/charter/pdf/text_en.pdf.

It follows that non-discrimination can be regarded as a reasonably clear and well-established norm at the EU level.⁴⁶ It is also largely congruent with international non-discrimination norms, as laid down generally in the Universal Declaration of Human Rights and the UN Charter, and more specifically in Article 26 of the United Nations' International Covenant on Civil and Political Rights (ICCPR), which prohibits discrimination, among others, on the ground of race and national origin,⁴⁷ the UN Convention on the Elimination of All Forms of Racial Discrimination (CERD),⁴⁸ or Article 14 of the Council of Europe's European Convention on Human Rights (ECHR), which includes national minorities in a general non-discrimination clause.⁴⁹ Non-discrimination is also part of EU conditionality, although there is variation with regard to its strength across different Central and Eastern European Countries (CEECs). On the one hand, since all applicant countries are subject to a general requirement of complete adoption of the *acquis*, they all have a general obligation to develop non-discrimination legislation and specifically to implement the Race Equality Directive. On the other hand, Commission reports make explicit and constant reference to discrimination against Roma, particularly in the accession countries, where their situation is especially problematic. Hence, we can distinguish between general but rather weak and implicit conditionality for all applicants, on the one hand, and strong and explicit conditionality in 'problematic' cases, on the other.

⁴⁶ Open Society Institute 2001a, 22.

⁴⁷ ICCPR art 26: 'All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status'. UN GA Res 2200A (XXI).

⁴⁸ UN GA Res 2106 (XX) of 21 December 1965.

⁴⁹ ECHR art 14: 'The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status'. Council of Europe Convention for the Protection of Human Rights and Fundamental Freedoms, Rome, 4.XI.1950 <http://conventions.coe.int/treaty/en/Treaties/Html/005.htm>.

EU rules and conditionality in the field of minority protection

In sharp contrast to the principle of non-discrimination, the EU has neither developed a minority rights standard within the internal *acquis communautaire*, nor do the member states subscribe to a single European standard.⁵⁰ In the accession *acquis*, the minority criterion also remained ill-defined, thus failing to develop a clear and common standard for all the applicant states. This is partly due to the fact that, despite considerable attempts by all major international organisations –UN, the Organization for Security and Co-operation in Europe (OSCE), Council of Europe –to develop a minority rights standard after the end of the Cold War, protection of minority rights remains a contested norm that is not consensually shared internationally and is susceptible to a wide range of interpretations. Although the EU’s internal non-discrimination rules seem conceptually much closer to the rather ‘thin’ approach to minority protection taken by the UN,⁵¹ which does not require active promotion of minorities,⁵² which grants minority protection also to non-citizens,⁵³ and which strictly rejects collective rights and any connection to self-determination,⁵⁴ the EU has mainly referred to European standards in its external minority rights

⁵⁰ Cf. Amato and Batt 1998; De Witte 2000; Pentassuglia 2001; Schweltnus 2001; Toggenburg 2000.

⁵¹ See eg ICCPR art 27: ‘In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of the group, to enjoy their own culture, to profess and practice their own religion, or to use their own language.’ UN GA Res 2200A (XXI) and the Declaration of Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities in 1992 (UN Doc A/RES/47/135).

⁵² Blumenwitz and Pallek 2000, 49.

⁵³ Thiele 1999, 4. Cf. also Eide 1993; 1999; 2000; ‘CCPR General Comment 23: The rights of minorities (Article 27)’ *UN Commission on Human Rights*: (8 April 1994, para. 5.2).

⁵⁴ Cf the rejection of collective proposals for the minority declaration, eg the 1977 Draft Declaration proposed by Yugoslavia on ‘Rights of Persons belonging to National, Ethnic, Religious and Linguistic Minorities’ (cited in Thornberry 1991, 412 ff) and the explicit denial of any association of minority protection with the two collective rights codified at the UN level, the prevention of genocide and the right of peoples to self-determination. In the preparations of the UN Convention on Genocide, the notion of ‘cultural genocide’ was discussed but rejected, not least because it was seen to reintroduce collective minority rights under another term (ibid, 72f). And in his comments, the UN Special Rapporteur Eide has always denied any connection between minority protection and national self-determination (Eide 1993; 1999; 2000) and therefore rejected the extension of the principle to include ‘internal self-determination’, ie autonomy, which has been developed by scholars working on minority rights (Heintze 1999, 625). The individualist character of the UN minority provision is also not altered by the formulation of Article 27 ICCPR that the rights of persons belonging to minorities can exercise their right ‘in community with

policy. While the EU and member states made early reference to the politically binding norms developed in the Commission on Security and Cooperation in Europe (CSCE) and the OSCE context,⁵⁵ and in specific cases followed the recommendations of the OSCE High Commissioner on National Minorities, which often invoke international standards but follow a case-by-case approach aimed at crisis prevention,⁵⁶ the standard to which the applicants states are held can be derived from the Agenda 2000:

A number of texts governing the protection of national minorities have been adopted by the Council of Europe, in particular the Framework Convention for the Protection of National Minorities and recommendation 1201 adopted by the Parliamentary Assembly of the Council of Europe in 1993. The latter, though not binding, recommends that collective rights be recognised, while the Framework Convention safeguards the individual rights of persons belonging to minority groups.⁵⁷

While Recommendation 1201 was rejected as an additional protocol to the ECHR precisely because it includes collective minority provisions in the form of territorial autonomy, the individualist approach taken by the Framework Convention seems to codify the highest achievable standard beyond non-discrimination shared by at least the majority of European countries.⁵⁸ In any case, the EU's external promotion of collective minority rights declined during the accession process.⁵⁹ Not only was it increasingly clear that collective minority rights

the other members of the group', although this adds an acknowledgement of a certain collective element to the article (Niewerth 1996).

⁵⁵ Especially the Document of the Copenhagen Meeting of the Conference on the Human Dimension of the CSCE, 5 June – 29 July 1990 <http://www.osce.org/docs/english/1990-1999/hd/cope90e.htm>.

⁵⁶ Brusi 2003; Hughes and Sasse 2003; Kymlicka 2001.

⁵⁷ European Commission Agenda 2000: For a stronger and wider Union. COM(97) 2000 Vol 1, 44.

⁵⁸ Blumenwitz and Pallek 2000, 45.

⁵⁹ In May 2001 the Commission replied to a written question that 'with regard to [the minority] criterion, the Commission devotes particular attention to the respect for, and the implementation of, the various principles laid down in the Council of Europe Framework Convention for the Protection of National Minorities'. Answer given by

had no chance of becoming the European standard in the near future, security concerns underlying the promotion of minority protection in the CEECs from the (collective) protection of national minorities – especially the Hungarian minorities in Romania and Slovakia – shifted the EU’s focus to the threat of inter- or intra-state ethnic conflict, and therefore to issues of non-discrimination, in order to prevent mass migration. Subsequently, the EU increasingly linked minority protection and non-discrimination in their justifications for the minority criterion.⁶⁰ In sum, minority protection is not an EU rule and remains a weak rule, lacking a common standard, in the accession *acquis*, with the result that conditionality varies greatly across accession states. Some countries with problematic minority situations are under continuous scrutiny and face explicit and determinate, though not necessarily legitimate EU demands; others have to comply with the minority criterion in general, but do not seem to be subject to any particular minority protection disciplines.

Compliance with EU conditionality in applicant countries: Romania, Hungary, and Poland

The following section surveys the implementation of non-discrimination and special minority rights legislation in three applicant countries, with a view to determining whether and to what extent the EU’s policy of conditionality has led to formal legislation in the candidate countries in line with either the *acquis* or with particularised rules demanded by EU accession criteria.⁶¹ The case selection reflects variation in both EU rules and EU conditionality or rule promotion. As

Mrs Reading on behalf of the Commission (15 May 2001) in reply to Written Question E-0620/01 by Nelly Maes, MEP (Verts/ALE), to the Commission (1 March 2001).

⁶⁰ Hughes and Sasse 2003.

⁶¹ By focusing exclusively on legislative measures, it follows a purely *formal* conception of rule adoption, being fully aware that this is not to be equated with *de facto* implementation or social acceptance, for which social in addition to legal internalisation would be needed (see Koh 1997). It also does not mean that the situation of minorities is fundamentally better in states with adopted minority legislation than in those without.

for the selection of EU norms, as developed in the previous part, non-discrimination is considered a strong and clear EU rule, while minority rights are neither established nor uncontested at the EU level. The country cases are then selected according to variation in the strength and determinacy of EU conditionality: Romania has been under explicit and persistent pressure to implement both special minority rights and measures to counter Roma discrimination; Hungary is a mixed case, in which only the Roma issue was addressed, while the minority protection standard was considered sufficient and even exemplary; Poland is a case, where conditionality has been low in both areas.

Table 2: EU rules and conditionality in Romania, Hungary and Poland

		EU conditionality or rule promotion	
		Weak	Strong
EU rules	Weak	Minority Rights: - Hungary - Poland	Minority Rights: - Romania
	Strong	Non-discrimination: - Poland	Non-discrimination: - Romania - Hungary

Case 1: Romania

As a state with significant internal but negligible external minorities, Romania traditionally figured among the opponents of minority protection.⁶² Furthermore, the relation between the state and its minorities would also be characterised as a conceptual clash between a ‘unitary and

⁶² Bartsch 1995; Hofmann 1992. According to the 1992 census minorities constitute officially 10.7% of the Romanian population.

indivisible nation state,' ethnically defined,⁶³ that rejected collective minority rights on the one hand,⁶⁴ and strong and ever more radicalised claims to collective protection and autonomy by the Hungarian minority, on the other, leading to a 'permanent tension between the expectations of the historical minorities regarding a protection based on group rights, and the fears of the Romanian governments that far reaching minority rights and autonomy would constitute the prelude to secession.'⁶⁵ Given these conflictive domestic conditions, the positive developments achieved since the mid-90s are best explained by the strong and persistent promotion of minority protection by international organisations. Furthermore, the EU also explicitly linked improvements in minority protection to the prospect of Romanian membership. However, the most profound improvement only occurred after the 1996 elections, when the former government, which depended heavily on nationalist forces, was replaced with a democratic and emphatically pro-Western coalition including the Hungarian party.

There were, moreover, limitations to the effectiveness of EU conditionality, which are related to the contested character of the minority rights norm and its resonance within the domestic context. This is most obvious in the failure of international pressure and conditionality to overcome strong domestic resistance and produce a collective minority standard. Although Romania accepted Recommendation 1201, first in relation to its accession to the Council of Europe,⁶⁶ and then in a bilateral treaty with Hungary (which was signed under international

⁶³ Art 1/1 and 4/1 of the Romanian Constitution of 21 November 1991.

⁶⁴ Accordingly, the 1991 constitution does not include collective minority provisions, despite initial promises of the new post-1989 government to 'guarantee individual and collective rights and freedoms for ethnic minorities'. (Shafir 2000, 102; cf. Tontsch 1995, 148). It entails, however, positive individual clauses, a fact that was justified with reference to the lack of international standards regarding collective minority rights (Tontsch 1999, 237). On the other hand, art 6/2 of the constitution states that 'protecting measures taken by the Romanian State for the preservation, development, and expression of identity of the persons belonging to national minorities shall conform to the principles of equality and non-discrimination in relation to the other Romanian citizens', which can be read as a prohibition of 'affirmative action'. Cf. Gabanyi 1998, 216; Tontsch 1999, 236.

⁶⁵ Tontsch 1999, 235 [translation from German – GS].

⁶⁶ Ram 2001, 72.

pressure and EU conditionality), it rejected the notion of collective rights and autonomy included in the document by insisting that an additional footnote be added to the treaty. This re-interpretation was criticised by the Western organisations and by Hungary, as well as by the Hungarian minorities themselves. It could be justified, however, on the basis of the existing European standard, as represented by the Framework Convention, and it was finally accepted.⁶⁷ In the following years, EU attention shifted from the issue of special minority rights to the issue of discrimination, especially with regard to Romania's Roma population. The European Commission report of 2000 concluded that 'the treatment of minorities in Romania is mixed. The lack of progress with regard to tackling discrimination against the Roma is a subject which has been raised in previous regular reports but which has still not been adequately addressed. On the other hand, a series of progressive initiatives has greatly improved the treatment of other minorities.'⁶⁸ Thus, the EU explicitly spelled out non-discrimination as a missing element in the Romanian minority protection system. The Romanian government responded to this assessment by adopting an Ordinance on the Prevention and Punishment of All Forms of Discrimination in November 2000, which 'gives Romania the most comprehensive anti-discrimination framework among EU candidate countries',⁶⁹ and which incorporates many aspects of the EU directive against racial discrimination. The 2001 Commission report consequently praised it as a major anti-discrimination development.⁷⁰

⁶⁷ In the same way, the rejection of collective minority clauses in the 1991 constitution could be justified with reference to international and European standards. On the other hand, the rhetorical ability to link a criticised law to international norms did not always dilute EU pressure and probably delayed, but did not prevent rule adoption (cf. Ram 2001, 76 ff).

⁶⁸ 2000 Regular Report of the Commission on Romania's Progress towards Accession (Brussels, 8 November 2000) http://europa.eu.int/comm/enlargement/report_11_00/pdf/en_ro_en.pdf, 24 ff.

⁶⁹ Open Society Institute 2001d, 393.

⁷⁰ Commission of the European Communities: 2001 Regular Report on Romania's Progress towards Accession. SEC(2001) 1753 (Brussels, 13 November 2001) http://europa.eu.int/comm/enlargement/report2001/ro_en.pdf, 22.

In sum, both minority protection and non-discrimination legislation in Romania seem to have been in large part triggered by external conditionality and rule promotion, especially by the EU. However, externally driven rule adoption was limited to minority protection concepts that resonated with Romanian institutions ensuring that ‘the treatment of individuals rather than groups as the subject of minority rights legislation has been fairly consistent over the past decade’.⁷¹ This individualist preoccupation could not even be overcome by a combination of minority mobilisation, kin-state support, and EU conditionality.

Case 2: Hungary

With regard to minority protection, Hungary can hardly be viewed as an instance of EU conditionality or Western norm transfer in any meaningful sense. Not only was the legal system, guaranteed by the constitution and specified in the Minority Act of 1993, well developed by the time the minority criterion in the EU accession acquis was formulated, but Hungary has long been a promoter of minority rights; it was in fact among the main forces seeking to put minority protection on the international agenda after 1989. On the other hand, Hungary failed in its attempts to ‘upload’ the internally developed collective minority protection standard onto the international level, given the predominantly liberal-individualist character of the current European and global human rights norms, as well as the strong opposition to collective minority rights among some Western European countries.

Two main reasons account for the unique Hungarian approach to minorities. There is, first, a specific minority situation. Not only does Hungary have large external minorities (ie fellow-Hungarians constituting minorities in neighbouring countries) and a rather low percentage of

⁷¹ Horvath and Scaco 2001, 253.

internal minorities, but the external minorities are predominantly concentrated territorially, while the internal minorities are dispersed, well integrated and to a large extent assimilated.⁷² All of this gave Hungary a strong incentive to promote collective rights. Second, the cornerstones of minority protection go back to an intellectual tradition based on the concept of ‘personal autonomy,’ which was first proposed by Karl Renner, as a model for the Austro-Hungarian empire and was subsequently developed by Hungarian scholars.⁷³ Thus, it is clearly domestic conditions and legacies, not European norms, that were the driving forces behind the development of the Hungarian minority protection system. Since the level of minority protection in Hungary was perceived as exceeding European standards, this conceptual difference was praised, rather than criticised, in the EU assessments.

The purely domestic factors accounting for the Hungarian minority protection system gain importance for a study of EU influence only when combined with an assessment of the Hungarian record on non-discrimination. The Hungarian constitution includes a general non-discrimination provision, and several laws feature anti-discrimination clauses. On the other hand, Hungary does not have a general anti-discrimination law. NGOs complained that, apart from being scattered, ‘Hungary’s anti-discrimination legal framework is largely inoperative.’⁷⁴ The European Commission has repeatedly addressed the issue of discrimination, specifically with regard to the Roma population, beginning with the initial accession opinion and throughout the annual reports.⁷⁵ Furthermore, combating Roma discrimination was prominently included in

⁷² Krizsán 2000, 247.

⁷³ *ibid.*, 250 ff.

⁷⁴ Open Society Institute 2001b, 224.

⁷⁵ Commission Opinion on Hungary’s Application for Membership of the European Union, DOC/97/13 (Brussels, 15 July 1997) <http://europa.eu.int/comm/enlargement/dwn/opinions/hungary/hu-op-en.pdf>, 20.

the accession partnership.⁷⁶ Therefore, the non-discrimination principle is supported not only by reasonably clear European standards, but also by persistent EU conditionality. Still, these demands have not been transposed into anti-discrimination legislation. Although the Ombudsman for Minorities produced a draft, the Minister of Justice in 2000 explicitly rejected the idea of introducing of legislation in this field. Rather, external pressures to implement anti-discrimination measures seem to have been re-interpreted and ‘diverted’ into measures within the positively assessed collective minority protection system. This was reinforced by the Commission’s judgment that, despite the obvious legal shortcomings, Hungary had fulfilled its short-term priorities on the issue.⁷⁷ Only in 2001 was a committee established to review existing legislation, and a non-discrimination law is currently under preparation. Although this means that Hungary finally will adopt EU rules, the time lag compared to Romania is considerable.

Case 3: Poland

EU conditionality on Poland with regard to minority rights and non-discrimination has been very low, due to the fact that throughout the accession process, the Commission considered the political criteria fulfilled.⁷⁸ Nonetheless, NGOs have described Polish non-discrimination legislation as being ‘minimal’ and falling ‘far below the requirements of the EU Race Equality Directive.’⁷⁹ The Polish Constitution contains a general non-discrimination clause, but simple legislation, especially on racial discrimination, is virtually absent. This has not however, raised much EU concern. For example, the 2000 Commission report confines itself to the lapidary

⁷⁶ DG Enlargement: Hungary: 1999 Accession Partnership (Brussels 1999) http://europa.eu.int/comm/enlargement/dwn/ap_02_00/en/ap_hu_99.pdf, 4.

⁷⁷ Open Society Institute 2001b, 218.

⁷⁸ Cf: Commission Opinion on Poland’s Application for Membership of the European Union, DOC/97/16 (Brussels, 15 July 1997) <http://europa.eu.int/comm/enlargement/dwn/opinions/poland/po-op-en.pdf> .

⁷⁹ Open Society Institute 2001c, 350 and 346.

statement (found in most of the other applicants assessments as well) that ‘legislation transposing the EC directive based on Article 13 relative to discrimination on the grounds of race or ethnic origin has to be introduced and implemented.’⁸⁰ The 2001 report notes, in a similarly unspectacular fashion, that ‘the transposition of this principle, including the anti-discrimination acquis, has been limited.’⁸¹ Significantly, despite the legal shortcomings, the issue of non-discrimination was not specifically connected to the situation of the Roma, which, contrary to the other cases, ‘has not been a focal point in Poland’s EU accession negotiations.’⁸² Ultimately, it can therefore be concluded that the low adaptational pressure on Poland in the area of non-discrimination has contributed to the neglect of the issue in Polish domestic legislation, the robustness and clarity of the norm in the EU context notwithstanding.

A similar outcome might therefore be expected in the area of minority rights. At first sight, this conclusion is supported by the fact that after external pressures – especially coming from Germany – were responded to through bilateral treaties,⁸³ and some legislative measures concerning preferential representation and education for minorities were introduced, the development of comprehensive minority legislation was (and still is) slow and contested.⁸⁴ However, even the Polish reluctance to ratify the Framework Convention, which the EU considers to be the central European minority rights instrument, was barely criticised in the EU assessments.⁸⁵ Still, the Polish case remains a puzzle when it comes to explaining the emerging

⁸⁰ 2000 Regular Report of the Commission on Poland’s Progress towards Accession (Brussels, 8 November 2000) http://europa.eu.int/comm/enlargement/report_11_00/pdf/en/pl_en.pdf, 57.

⁸¹ Commission of the European Communities: 2001 Regular Report on Poland’s Progress towards Accession. SEC(2001) 1752 (Brussels, 13 November 2001) http://europa.eu.int/comm/enlargement/report2001/pl_en.pdf, 22.

⁸² Open Society Institute 2001c, 345.

⁸³ Łodziński, 1999; Mohlek 1994.

⁸⁴ Vermeersch 2003, 10f.

⁸⁵ Although Poland signed the Framework Convention on the first day it was opened for signature in 1995, it was not before 1999 that the ratification document entered parliament for the first reading. The Convention was ratified in December 2000 and came into force in April 2001, which made Poland one of the last applicant countries to do so (only Latvia has still not ratified it and was severely criticised by the EU for this failure). As an example for the

minority protection model, which is normally described as following the principle of ‘positive support and protection of individual rights of persons belonging to minorities (positive individual approach) (...) based on OSCE and Council of Europe standards.’⁸⁶

This outcome, while obviously not a result of external pressure, can also not be accounted for by a purely domestic explanation, for no clear national preference for a specific minority protection model can be deduced either from the minority situation or from national institutions or legacies.⁸⁷ Furthermore, far from having an established view on the issue, Polish political élites faced a high degree of uncertainty as to the form of protection to be implemented when the minority problem was ‘re-discovered’ in 1989, since they were rather taken by surprise by the mobilisation of minorities that were believed to be marginal or even non-existent.⁸⁸ On the other hand, the minorities themselves– in contrast to their Hungarian counterparts – had no clear idea as to the minority protection concept they preferred.⁸⁹ Absent sufficiently clearly defined internal or external determining factors, a closer look at the process of domestic norm construction and an inclusion of *discursive* (as opposed to formal institutional) factors of rule adoption is therefore required, if we are to explain the congruence between the emerging Polish minority standard and European norms. The following section elaborates in greater detail on the exceptional Polish case.

almost non-existent criticism in the Polish case, the 2000 report simply stated that ‘Poland has ratified the major Human Rights conventions with the exception of the Council of Europe’s Framework Convention on the protection of National Minorities (...) and has an established track record of providing appropriate international and constitutional legal safeguards for human rights and protection of minorities’. 2000 Regular Report of the Commission on Poland’s Progress towards Accession, 57.

⁸⁶ Łodziński 1999, 1.

⁸⁷ With a comparatively low amount of internal minorities (3-5%) and external minorities that do not necessarily benefit from international minority protection, because they are, eg in Germany, not recognised as minorities, no clear preference for or against collective minority rights can be deduced (Bartsch 1995), and historical legacies also vary widely.

⁸⁸ Łodziński 1999, 3.

⁸⁹ Gawrich 2001, 255f.

Domestic norm construction and European standards: contested minority concepts in Poland

The first major advance in developing a Polish minority protection norm was the inclusion of a minority clause in a new constitution. To ensure the protection of national minorities, whose status was still defined by a rigid non-discrimination clause under the old communist constitution⁹⁰ which, taken at face value, prohibited any form of minority protection by the means of positive measures.⁹¹ The drafts proposed in 1991 by constitutional committees of both chambers of the Polish parliament, the Sejm and the Senate, contained special minority clauses on the basis of collective formulations.⁹² It therefore seems that the initial position in the debate over the minority clause to be included in a new Polish constitution was at least to some extent based on a collective understanding of minority rights. Moreover, the minority provisions contained in the constitutional proposals advanced by the major political parties in 1994 reflected a clear dichotomy between individualist approaches promoted by liberal parties, which focused mainly on non-discrimination in a manner clearly reminiscent of Article 14 ECHR,⁹³ and positive minority provisions included in the drafts handed in by the post-communists and different groups of the Solidarity right based on a collective approach, following mostly the Senate draft.⁹⁴

⁹⁰ Polish Constitution of 1952, Article 81(1) ‘Citizens of the Republic of Poland, irrespective of nationality, race, or religion, shall enjoy equal rights in all fields of public, political, economic, social, and cultural life. Infringement of this principle by any direct or indirect privileges or restrictions of rights by reference to nationality, race, or religion shall be punishable.’ http://www.uni-wuerzburg.de/law/p101000_.html

⁹¹ Mohlek 1994, 24.

⁹² Hofmann 1992, 50 ff; Kallas 1995, 179; Mohlek 1994, 26 and 62.

⁹³ These were the proposals handed in by the liberal Democratic Union (UD) and on the part of President Wałęsa, which featured as the fundamental rights section a Charter of Rights and Freedoms elaborated by the Helsinki Committee, a Warsaw based human rights NGO. The drafts are reproduced in Chruściak 1997, I/75 and 267; Kallas 1995, 182; Mohlek 1994, 63.

⁹⁴ Cf for the different drafts Chruściak 1997; Kallas 1995; Mohlek 1994.

A third option resembling the ‘positive individualist’ approach taken by the Council of Europe’s Framework Convention was developed within the Sejm committee on national and ethnic minorities. The committee initially based its work on the Senate draft. However, after consultation with legal advisors, it replaced the collective formulation with an individualised one.⁹⁵ This version was also adopted by a group of legal specialists set up to develop a unified document building on the different constitutional drafts,⁹⁶ and was subsequently adopted by the Constitutional Committee of the National Assembly in March 1995. However, discussion of the article was initially conducted along the old front line, with representatives of the Solidarity trade union (NSZZ-Solidarność) favouring a collective formulation⁹⁷ against strong opposition by the liberal Freedom Union (UW).⁹⁸ Again, the ‘positive individualist’ consensus was reached only after the intervention of legal advisors⁹⁹ and the invocation of international and European standards as examples of individual formulations of minority rights.¹⁰⁰

⁹⁵ Kallas 1995, 180.

⁹⁶ Projekt jednolity Konstytucji Rzeczypospolitej Polskiej z dnia 20 I 1995 r. (w ujęciu wariantowym) [Unified project of a Constitution of the Republic of Poland, 20 January 1995 (with alternative provisions)]. Cited in Chruściak 1997, II/12. Cf. also Tkaczynski and Vogel 1997, 170. The unified document included only the individualist formulation, despite the different approaches taken in the party proposals and the possibility of providing optional variations for each paragraph.

⁹⁷ Piotr Andrzejewski (NSZZ-S) reiterated the draft article proposed by his party, which ‘stands on the basis of the protection of minority rights also as group rights’. Komisja Konstytucyjna Zgromadzenia Narodowego, II kadencja, nr 14 (7 March 1995) [Constitutional Committee of the National Assembly, 2nd term, session no 14 (7 March 1995)], 62 [translation from Polish – GS]. Further cited as *Constitutional Committee*. All minutes of parliamentary debates and committee sessions are taken from the Polish parliament’s database at <http://www.sejm.gov.pl>. In addition, another member of the NSZZ-Solidarność proposed the original version elaborated by the Senate: Alicia Grzeškowiak in *Constitutional Committee* II/14 (7 March 1995), 68.

⁹⁸ [W]e cannot include into the Constitution rights in collective form, because we would entangle ourselves in problems that are extremely difficult to resolve. We know from our history that the granting of group rights and their inclusion in state laws led to nationality conflicts instead of resolving problems. (...) I am against all formulations (...) that propose the protection of group rights in the Constitution of the Republic of Poland’. Hanna Suchocka (UW) in *Constitutional Committee* II/14 (07.03.1995), 69 ff. [translation from Polish – GS].

⁹⁹ Cf the contributions of Andrzej Rzepliński and Leszek Wiśniewski in *Constitutional Committee* II/14 (07.03.1995), 72.

¹⁰⁰ The examples cited included the ICCPR, the CSCE documents and the Framework Convention. Czesław Śleziak (SLD) in *Constitutional Committee* II/14 (7 March 1995), 66.

The individually formulated minority clause, with some minor changes, was included in the final version of the constitution adopted on 2 April 1997.¹⁰¹ It is widely recognised that the ‘protection of minority rights prescribed by this article goes beyond general principles of equality and non-discrimination of citizens as embodied in the old (communist) Constitution of 1952’,¹⁰² and the achievement was praised in the Commission Opinion on Poland’s accession.¹⁰³ Although the second paragraph reintroduces a collective formulation, leading some foreign scholars to conclude that the constitution protects minority rights in both individual and collective terms,¹⁰⁴ the dominant interpretation in Poland is that the new constitution upholds ‘an individualised approach to the protection of minorities by using a phrase ‘Polish citizens belonging to national or ethnic minorities’, which is consistent with the currently existing international standards’.¹⁰⁵

A parallel development can be observed in the drafting of a law on national minorities. The initial text, worked out by a group of specialists from the Helsinki Committee, a Warsaw-based but transnationally organised human rights NGO, followed an entirely individualist approach to minority rights.¹⁰⁶ In ensuing discussions within the Sejm Committee on National and Ethnic Minorities, the question of group rights emerged several times, but was dismissed by the legal advisor from the Helsinki Committee. Finally, a consensus emerged that ‘[t]he legislative

¹⁰¹ ‘Art. 35: 1. The Republic of Poland ensures Polish citizens belonging to national and ethnic minorities the freedom to maintain and develop their own language, to maintain customs and traditions, and to develop their own culture. 2. National and ethnic minorities have the right to establish educational and cultural institutions designed to protect their religious identity, as well as to participate in the resolution of matters connected with their cultural identity.’ *Konstytucja Rzeczypospolitej Polskiej z dnia 2 kwietnia 1997 r.* [Constitution of the Republic of Poland, 2 April 1997]. Cited in R Chruściak, see n 93, II/389. English translation in: Łodziński 1999, 8.

¹⁰² S Łodziński 1999, 8.

¹⁰³ *Agenda 2000 – Commission Opinion on Poland’s Application for Membership of the European Union* (Brussels 1997) DOC/97/16, 18.

¹⁰⁴ Diemer-Benedict 1997, 226; 1998, 237; A Gawrich 2001.

¹⁰⁵ Łodziński 1999, 8. The same conclusion is drawn by P Bajda et al. 2001, 211.

¹⁰⁶ Kallas 1995, 184. The group was comprised of Zbigniew Hołda, Gregorz Janusz (who served as an advisor to the Minority Committee throughout the process), Marek Nowicki and Andrzej Rzepliński.

project regulates the individual rights of minorities, ie the rights of persons belonging to a minority' as opposed to 'group rights, which are practically impossible to codify.'¹⁰⁷ In the final version of the draft, the explanatory note stressed that 'by using the construction of individual rights, the bill contains, in accordance with European standards, a catalogue of fundamental rights (...). Thereby group rights are excluded'.¹⁰⁸ This consensus on the minority protection concept united the pro-minority parties, which formerly had been split along the individual-collective rights line as well as between special rights and general non-discrimination, behind the 'positive individualist' formula. When the bill was discussed in the first parliamentary reading, support was based predominantly on two arguments: first the individualist character of the draft, and second its 'fit' with both the Polish constitution and European standards.¹⁰⁹ Opponents of the bill had two major arguments: first, in reply to the 'positive individualist' presentation of the draft, special minority rights as such were equated with group rights and attacked as privileges violating the principle of (formal) non-discrimination.¹¹⁰ Second, and mainly to counter the

¹⁰⁷ Henryk Kroll in Komisja Mniejszości Narodowych i Etnicznych, III kadencja, posiedzenie nr 12 (17 March 1998) [Sejm Committee on National and Ethnic Minorities, 3rd term, session no. nr 12 (17 March 1998)]. Further cited as: *Sejm Committee on National and Ethnic Minorities* [translation from Polish – GS].

¹⁰⁸ *Komisyjny projekt ustawy o mniejszościach narodowych i etnicznych w Rzeczypospolitej Polskiej* (druk nr 616 wpłynął 22 September 1998), uzasadnienie [*Committee project of a law on national and ethnic minorities in the Republic of Poland* (written matter no. 616, issued 22 September 1998), explanation], 2 [translation from Polish – GS].

¹⁰⁹ This line of reasoning was already laid out in the presentation of the project: 'In Art 35/2 of the Constitution the rights of minorities are mentioned. The Framework Convention on National Minorities also speaks about national minorities. (...) [B]ut this in no way changes the fact that (...) no group rights emerge from this law.' Jacek Kuroń (UW) in Sejm III kadencja, 46 posiedzenie, (18 March 1999) [Sejm, term III, session 46 (18 March 1999)] [translation from Polish – GS]. Further cited as: *Sejm*. For more pro-arguments based on references to international or European standards see Henryk Kroll (German minority) and Mirosław Czech (UW), in *Sejm III/46* (18 March 1999).

¹¹⁰ For example: 'The law has to be equal for everybody, not differentiated, so that one group of citizens has other rights than another group, because such a situation would be discriminatory. I concur with the opinion that the bill would differentiate and privilege minorities on the basis of granting them group rights, thereby violating the equality of all citizens of this country. (...) I think that we do not need group or minority rights.' Ewa Sikorska-Trela (AWS), in: *Sejm III/46* (18 March 1999) [translation from Polish – GS]. In the same vein, Andrzej Zapałowski, speaking for the extreme rightist KPN and ROP groupings, insisted that 'every Polish citizen, independent of his declared nationality, independent of his opinions or world views, has rights guaranteed in the Constitution. (...) The rights proposed in the law on national and ethnic minorities privilege the minority against the rest of the Polish citizens.' Andrzej Zapałowski, in: *Sejm III/46* [translation from Polish – GS].

‘European standard’ argument of the pro-camp, reciprocity problems were invoked by comparing Poland, which supposedly already ‘ensures a very high standard of minority rights protection’,¹¹¹ with the status of Polish nationals in other countries, complaining that ‘everything that happened after 1989 from the Polish side with regard to national minorities living in Poland is sadly not reciprocated by our neighbors.’¹¹² The parliamentary discussion concerning the ratification of the Council of Europe’s Framework Convention was conducted roughly along the same lines.¹¹³

It can be concluded that the consensus favouring a ‘positive individual’ version of special minority rights, which started from a contestation between individual non-discrimination and collective minority rights positions, was forged by a desire to comply with the European standard impetus by legal advisors acting as catalysts for the formulation of a shared minority norm conforming to the emerging European standard. The Helsinki Committee was a particularly key player, forming an epistemic community promoting the ‘positive individual’ model as the only solution in line with European norms and matching the Polish situation. At every stage in the process of norm formulation, the involvement of these legal specialists produced a shift towards an individualised approach. Finally, although the question of EU conditionality was occasionally raised during the debates,¹¹⁴ it did not play a major role in domestic norm construction and

¹¹¹ Marian Piłka (AWS), in: *Sejm* III/46 [translation from Polish – GS].

¹¹² Janusz Dobrosz (PSL), in: *Sejm* III/46 [translation from Polish – GS]. Comparable arguments were brought forward by Andrzej Zapałowski (KPN), Marian Piłka (AWS), Jan Chmielewski (AWS) and Krzysztof Anuszkiewicz (AWS). Another example is the rhetorical question: ‘Some of the Sejm members have mentioned European or international standards when it comes to minority rights. I would like to ask, whether it is eg a standard that minority schools in Poland are paid out of the state budget, while in Germany the families have to pay.’ Adam Łozinski, in: *Sejm* III/46 [translation from Polish – GS]. On the other hand, only one supportive AWS member brought forward the reverse argument that Poland could serve as a model for other countries by adopting far-reaching minority legislation. Mirosław Kukliński, in: *Sejm* III/46.

¹¹³ *Sejm* III/65.

¹¹⁴ When after the debate of the minority provision in the Constitutional Committee in 1995 the outcome was presented in the Sejm Committee on National and Ethnic Minorities, it was added that ‘this article has been adopted unanimously. All the indications are that it will be kept, and this will be the key to the European Union.’ Jerzy

functioned rather as background knowledge about the general importance of minority protection in the accession procedure. But given the lack of a coherent EU model for minority protection and the absence of a high adaptational pressure to adopt specific model, the EU option could not play a decisive role in deciding which approach to minority protection should be chosen. Therefore, the standards formulated by the Council of Europe above all had a major impact on the development of an intersubjective meaning among Polish politicians in favour of a minority norm consistent with European standards.

Conclusion: Long-term effects and backlash on the EU

The previous sections elaborated on the different impact exerted by norm types, such as eg human rights and minority rights, on the one hand, and norm meanings, such as general non-discrimination and individual or collective forms of special minority rights, on the other. It can be argued that, if the analytical focus is limited to distinguish different norm types, and processes of contestation over norm meanings are excluded, this is likely to create unintended consequences for rights politics. To sustain this observation empirically, we have reconstructed the emergence of contested norm meanings regarding minority protection in the process of EU enlargement, focusing on the construction of meaning through interactions within international, European and EU contexts. A discursive analysis of norm construction and meaning in the three different country cases of Hungary, Romania and Poland demonstrates that norm contestation is

Szteliga (SLD), in: *Sejm Committee on National and Ethnic Minorities* II/32, 3 [translation from Polish – GS]. And in the parliamentary debate over the Framework Convention, the question was raised, whether there was ‘a certain link with regard to the ratification in the process of negotiation with the European Union.’ Tadeusz Iwiński (SLD), in: *Sejm* III/65 [translation from Polish – GS]. Although the government representative could not see a direct connection between ratification and accession she nonetheless replied: ‘This is undoubtedly one of the most important points, which is monitored all the time in the negotiations.’ Podsekretarz Stanu w Ministerstwie Spraw Zagranicznych [Undersecretary of state in the Foreign Ministry] Barbara Tuge-Erecińska, in: *Sejm* III/65 [translation from Polish – GS].

an ongoing process. That is to say, it is not limited to the construction of international and European norms prior to their respective application in the EU's policy of conditionality or to the process of compliance and domestic rule adoption on the part of the applicant states during the conditionality phase. The story does not end once the accession conditions are fulfilled, or at the moment of full membership. Instead, it is expected that the contestation of minority rights implies unintended long-term effects in the accession countries, as well as potential backlash against the EU after accession.

This concluding section offers an – albeit speculative – account of this possible backlash. A first set of effects concerns the feedback of external minority policies into the internal EU system. It can be concluded that such an influence has already taken place insofar as minority rights have been clearly and persistently placed on the agenda of EU politics, internally as well as externally. However, while the end of the Cold War clearly constituted a critical juncture with regard to general concern over minorities within the international context, the impact of this juncture remains limited to the EU's external policies. Internally, it triggered a development within the existing path of non-discrimination, leading to a gap between the conceptual approaches to minority protection taken in both contexts. In turn, this paper claims that the non-discrimination track pursued in the internal EU context, on the one hand, and the domestic minority protection norms developed by the accession states under influence of the EU's external policy of conditionality, on the other, follow path dependent developments, and, once institutionalised, the gap is not easily closed. Indeed, our research suggests that it is likely to provoke enduring contestation about the meaning of minority rights, and stands to cause, albeit, unintended, yet long-term consequences. These effects will become particularly salient once the accession procedure is complete and the accession states are full members of the EU.

Secondly, it is important to address the issue of whether, and if so how, changes in the internal *acquis communautaire* had an impact on the external and enlargement policies, leading to a realignment of both tracks. For example, the EU increasingly linked its justifications for the minority criterion with the resonance points developing in the internal *acquis*, namely non-discrimination, cultural diversity and the fight against racism and xenophobia.¹¹⁵ Thus, the EU's 1999 report on human rights states that 'compliance with the principle of non-discrimination is an important element in the EU enlargement process. The European Council in 1993 included in the Copenhagen criteria that membership requires that the candidate country has established respect for and protection of minorities.'¹¹⁶ And in 2001, when one of the focal points of the human rights report was the fight against racism and xenophobia, which 'lies at the core of the European Union human rights policy,'¹¹⁷ a Commission report on that very issue noted that '[t]he notion of the respect for and protection of minorities is a key element in the fight against racism, xenophobia and anti-Semitism in the applicant countries.'¹¹⁸ Furthermore, a Commission communication regarding the 'European Union's Role in Promoting Human Rights and Democratisation in Third Countries,' which sets out to 'promote coherence between the EU's internal and external approaches',¹¹⁹ listed among the thematic priorities for EU action '[c]ombating Racism and xenophobia and discrimination against minorities' as 'an area where

¹¹⁵ Schweltnus 2001.

¹¹⁶ 'EU Annual Report on Human Rights 1999' *Council of the European Union* http://ue.eu.int/pesc/human_rights/main99_en.htm, 36.

¹¹⁷ 'European Union Annual Report on Human Rights 2001' *Council of the European Union* http://europa.eu.int/comm/external_relations/human_rights/doc/report01_en.pdf, 12.

¹¹⁸ Commission of the European Communities: 'Commission report on the implementation of the Action Plan against Racism – Mainstreaming the fight against racism', 11; Commission of the European Communities: Communication 'The European Union's Role in Promoting Human Rights and Democratisation in Third Countries' COM (2001) 252.

¹¹⁹ Commission of the European Communities: 'Communication of the Commission "Countering Racism, Xenophobia and Anti-Semitism in the Candidate Countries' COM (1999) 256, 3.

the EU has significant internal as well as external policy competence.¹²⁰ In addition, the focus increasingly shifted from national minorities – especially the Hungarian minorities in Romania and Slovakia – to the situation of the Roma and therefore from (collective) minority protection to issues of non-discrimination. While this is largely due to the Roma issue becoming part of the EU's 'security agenda,' with the increase of Roma migration from applicant to EU member states, it can nonetheless facilitate attempts to develop a 'coherent' approach towards minority issues. It remains to be seen whether this is a largely rhetorical strategy to fend off claims of double standards, or in turn leads to the institutionalisation of minority rights within the boundaries of Article 6 TEU as the prime human rights foundation of the Union.

Finally, and perhaps most importantly, long-term effects on the minority protection systems in the accession countries may be expected after accession is completed. Shortly before accession, the signals still remain mixed. On one hand, there are encouraging signs that the EU system is, if not supportive, at least permissive regarding the stipulation of far-reaching national minority protection. Consider the ECJ's rulings on language requirements and especially the 'legitimate aim' dictum in the *Bickel/Franz* case.¹²¹ Nonetheless, the Court has not yet established minority protection as a general principle of law,¹²² and it remains to be seen whether and how it will support national minority protection systems if and when they contradict Community aims. It is unlikely, however, that the Court will directly strike down national minority rights protection, given its cautious approach in cases dealing with the autonomy status of South Tyrol, which can be regarded the most important 'test case' for the compatibility of far-reaching national minority

¹²⁰ *ibid.*, 17.

¹²¹ Case C-274/96 *Bickel/Franz* [1998] ECR I-7637, para. 29.

¹²² Toggenburg 2000, 19.

protection and the EU's legal order.¹²³ The potential downside of the ECJ rulings regarding minority protection consists in their lack of appreciation of special minority rights as being generally prior to the aims of market liberalisation, and their limitation of minority rights to cases in which it can be clearly established that protective measures would be 'undermined if the rules in issue were extended to cover [...] nationals of other Member States exercising their right to freedom of movement.'¹²⁴ In effect, measures aimed at the protection of a particular minority group are only admitted when they are also granted to residents¹²⁵ or even visitors¹²⁶ from other EU countries, unless the negative effects of such an inclusive approach are clearly demonstrable. The liberalising thrust of the ECJ rulings towards the inclusion of non-national and non-resident EU citizens is paralleled by the inclusive application of Article 13 and the non-discrimination Directives, which are applicable to all persons even including third country nationals. This fact points towards a potential tension with the minority systems established in the CEECs when measured by European standards and EU conditionality.

Perhaps the most striking example of the 'conceptual double standard' paradox lingering over the enlargement process is that the EU's external minority policy explicitly endorses the European minority protection standard of both the Council of Europe and the OSCE. That is, it accepts a standard which includes or, at least tolerates a restriction to citizens that the UN standard does not. In turn, national legislation based on this principle stands to be undermined by Community law once the CEECs have joined the EU. While this is not necessarily a legal

¹²³ Streinz 1996, 28.

¹²⁴ Case C-274/96 *Bickel/Franz* [1998] ECR I-7637, para. 29. In this case, the court saw no undermining effects when the right in question – that a trial against a German speaker is to be held in German language upon request – was also granted to other German-speaking EU nationals and therefore ruled against the Italian government, which had argued that the measures were designed to protect the German minority and for that reason only to be applied to German-speaking Italian citizens.

¹²⁵ Case 137/84 *Mutsch* [1985] ECR 2681. For a discussion see De Witte 1999; Toggenburg 1999.

¹²⁶ Case C-274/96 *Bickel/Franz* [1998] ECR I-7637.

problem, and might indeed even strengthen rather than weaken the minority protection system (as the ECJ argued in the *Bickel/Franz* case), the potential political reverberations in the CEECs, where the domestic consensus on minority protection is often fragile, could have strong negative consequences, since it could affect the willingness of national authorities to grant or uphold far-reaching rights to minorities, when the minority can be enlarged, so to speak, by migration.

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