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“Much ado about nothing?”

Minority Protection and the EU Charter of Fundamental Rights

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Introduction¹

The role of minority protection within the European Union context poses a paradox: On the one hand, it has acquired an immensely important role in the Union's external relations after the end of the Cold War, where it was included in the guidelines for the recognition of new states after the break-up of Yugoslavia, the second wave of Europe Agreements with Central- and Eastern European Countries and the Stability Pact for South-eastern Europe, and most significantly the political accession criteria spelled out at the Copenhagen European Council in 1993. It was indirectly even incorporated into the Treaties by quoting the principles of two major documents of the Conference on Security and Cooperation in Europe (CSCE), namely the Helsinki Final Act and the Charter of Paris, which both contain minority provisions (albeit only politically binding ones), as foundational goals for the Union's foreign relations in Article 11 of the Treaty of the European Union (TEU).²

On the other hand, minority rights played hardly a role in the internal development of the *acquis communautaire*. There exists therefore a deep contrast between the internal and external application of the minority norm by the EU, so that among the political accession

¹ An earlier version of this paper has been presented at the UACES 31st Annual Conference and 6th Research Conference, Bristol, 3-5 September 2001, the 4th IR Conference of the ECPR Standing Group on International Relations, Canterbury, 8-10 September 2001, and the International Relations / European Integration Colloquium at the Institute of European Studies, Queen's University of Belfast, 24 October 2001. I would like to thank the participants and especially Lynn Dobson, Jo Shaw and Antje Wiener for helpful comments. The responsibility for this version is mine.

² The numbers of all Treaty Articles cited in the following refer to the version after the renumbering of the Amsterdam Treaty.

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 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.”³ This difference is most obvious in the Commission’s 1999 composite paper on the progress towards accession by the candidate countries, which summarises the political criteria as follows:

“The Copenhagen European Council stated that ‘membership requires that the candidate country has achieved stability of institutions guaranteeing democracy, the rule of law, human rights, and the respect for and protection of minorities’. Article 6 of the Amsterdam Treaty enshrines the constitutional principle that ‘The Union is founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms and the rule of law’.”⁴

If there is any movement towards an EU standard for minorities, it can be traced back only to very recent developments and is grounded on non-discrimination legislation rather than minority rights. In the Amsterdam Treaty, Article 13 of the Treaty of the European Community (TEC) enabled the Community to “take appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation”⁵ On this basis Directive 2000/43/EC implementing the principle of equal treatment between persons irrespective of racial or ethnic origin was proposed by the Commission as part of its “Article 13 package” and adopted by the Council.⁶ Finally, in the Charter of Fundamental Rights Article 21 adds “belonging to a national minority”⁷ to the list of criteria on the basis of which discrimination is forbidden and is therefore the first instance of including minority rights into the internal *acquis communautaire* as opposed to its use only in external relations. Still, it has to be concluded from the course of events that minority protection is not a “natural” part of the EU’s normative foundations long established in the common constitutional traditions of the Member States, their shared commitment to international instruments such as the European Convention of Human Rights, and the ruling of the European Court of Justice in human rights issues, but is rather constructed *post hoc* after the issue has entered the Union’s agenda in the context of its Eastern enlargement.

³ De Witte 2000, 4 [emphasis in original].

⁴ European Commission: *Composite Paper – Reports on progress towards accession by each of the candidate countries* 1999, http://europa.eu.int/comm/enlargement/dwn/report_10_99/en/composite_en.doc, 11.

⁵ Art. 13 TEC. Cf. Toggenburg 2000, 20ff.

⁶ Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin. OJ L180, 19/07/2000

⁷ EU Charter of Fundamental Rights, Art. 21; cit. in Feus 2000, 245.

This does not only raise the question of whether the EU has imposed “double standards” on applicant states, given the fact that the Copenhagen criteria “go beyond simply specifying non-discrimination and require ‘respect for and protection of minorities’”, and that this formula clearly meant “that affirmative action to protect their interests is expected”,⁸ but also whether a minority norm can be and perhaps already is in the process of being constructed within the context of the EU *acquis communautaire*, and how such a norm might look like.

To that end this paper shows that different conceptions of minority rights are possible, presenting as ideal-types a liberal human rights based and a communitarian collective rights approach, and discussing the different proposals for the inclusion of a minority clause in the Charter. It argues that an EU minority norm like any new norm has to resonate with the pre-existing normative structure, *i.e.* the existing *acquis communautaire*, which is formally constituted by the Treaties, secondary legislation and rulings of the European Court of Justice (ECJ), but also embedded in informal norms and political practices.⁹ The paper then sets out causal and constitutive accounts for the necessity of norm resonance and develops the idea of “resonance points” as a constitutive explanation, *i.e.* as an explanatory tool to assess the possibility of establishing discursive links with the existing normative framework of the EU.

The empirical part argues that three connections are possible and in fact being pursued within the EU: First, the inclusion of minorities into the general non-discrimination legislation, second the establishment of a norm in favour of cultural diversity, and third through the construction of a link between minority protection and the combat against racism and xenophobia. While the first two lines are developed within the *acquis*, the third, while connected to the legal principle of non-discrimination, is manifest largely in political practice – it has been *e.g.* pursued by political elites in certain Member States during the Austrian crisis – but finds itself also in documents relating to the minority issue within the context of enlargement and has been institutionalised within the EU with the establishment of an European Monitoring Centre on Racism and Xenophobia (EUMC).

Liberal and Communitarian Concepts of Minority Rights

Before trying to assess the possibility of establishing minority protection resonant with EU norms it has first to be pointed out, that different conceptions of minority rights are possible. To begin with, while human rights such as freedom of expression, assembly or religion can be

⁸ Gower 2000, 233; cf. also De Witte 2000.

⁹ Wiener 1998; 2001a.

invoked by minorities as an indirect means of group protection, special minority rights are not by definition part of universal human rights as established after the Second World War.

In fact, human rights were meant to replace minority protection, only after 1989 a consensus emerged that “respect for the rights of persons belonging to national minorities as part of universally recognized human rights is an essential factor for peace, justice, stability and democracy in the participating states.”¹⁰ Only then it was agreed that “[i]ssues concerning national minorities as well as compliance with international obligations concerning the rights of persons belonging to them, are matters of legitimate international concern and consequently do not constitute exclusively an internal affair of the respective State.”¹¹ The fact that this connection, instead of being historically stable or conceptually necessary, is a recently established one is easily overlooked, when the EU is conceived of as a community of liberal democracies based on shared norms, which are often described as including “nonviolent and compromise-oriented resolution of political conflicts, the equality of the citizens, majority rule, tolerance for dissent, and the rights of minorities. These norms are firmly embedded in the political culture of liberal states”.¹²

There is nonetheless a liberal human rights-based path to minority protection, apart from the indirect beneficial impact of human rights such as freedom of expression, assembly or religion, namely via the general principle of non-discrimination. This principle not only plays a dominant part in the EU context, but is also a cornerstone of predominantly liberal human rights instruments, most notably the Council of Europe’s European Convention on Human Rights (ECHR) and the United Nations’ International Covenant on Civil and Political Rights (CCPR).

The ECHR is of particular importance with regard to assessing the EU’s normative foundations, since it is ratified by all EU Member States, constantly referred to by the ECJ and enshrined in Article 6 TEC. Article 14 of the Convention contains a general non-discrimination clause, also aimed at national minorities: “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.”¹³

¹⁰ CSCE Document of the Copenhagen Meeting [1990] §30; cit. in Bloed 1993, 456.

¹¹ CSCE Geneva Report on National Minorities [1991] §II(3); cit. in Bloed 1993, 595.

¹² Risse-Kappen 1996, 366. Cf. also Moravcsik 2000; Schimmelfennig 1999; 2000; 2001.

¹³ ECHR Art. 14, cit. in Gandhi 2000, 196. This provision is accessory and only to be invoked in combination with another provision of the Convention. Recently, however, Protocol 12 has been adopted (although it is not yet in force) which elevates the formulation of Article 14 to a generally valid non-discrimination clause.

The CCPR, being the other significant instrument signed by all EU Member States, also contains a general non-discrimination clause in Article 26, but adds a specific provision on national minorities. Article 27 reads: “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.”¹⁴

However, whether included in a general non-discrimination clause or spelled out as a special minority provision, the definition of minorities implied in liberal minority conceptions widens the scope of application beyond the minority groups targeted, which might cause limitations in the depth of the rights granted, since “if one agrees with the extremely broad minority definition of the UN Human Rights Committee, the set of rights for the protection of minorities cannot go way beyond the prohibition of discrimination. This UN Human Rights Committee definition states that “[j]ust as they don’t need to be nationals or citizens, [minorities] need not be permanent residents. Thus, migrant workers or even visitors (...) are entitled not to be denied the exercise of those rights.”¹⁵ Such a liberal approach is taken in most general international human rights instruments, when they address minorities.

Another limitation of human rights-based minority approaches lies in the non-discrimination principle itself, which limits the possibility of positive action to support minority groups. Still, it does not prevent it entirely. Although “affirmative action” is a formal breach of the non-discrimination principle and therefore not actively demanded under such liberal instruments, it might be permitted either as a reasonable exception, or as a request to establish a more complex view of equality instead of a merely formal one. The European Court of Human Rights stated for example that “the right under Article 14 not to be discriminated against (...) is violated when States treat differently persons in analogous situations without an objective and reasonable justification. (...) [It] is also violated when States without an objective and reasonable justification fail to treat differently persons whose situations are significantly different.”¹⁶

This does not mean, however, that a minority rights conception based on liberal human rights is able to justify a demand for rather than merely permission of positive measures to protect minorities, at least not in the interpretation applied by the European Court of Human Rights,

¹⁴ CCPR Art. 27, cit. in Gandhi 2000, 70.

¹⁵ UN Commission on Human Rights: *CCPR General Comment 23: The rights of minorities (Art. 27)*, 08/04/94, §5.2.

¹⁶ European Court of Human Rights (Grand Chamber) Case 34369/97 *Thlimmenos v Greece* [2000], §44, cit. in Gilbert 2001, 6.

who stated that “the Convention does not compel states to provide for positive discrimination in favour of minorities”.¹⁷ The same applies to Article 27 CCPR, where affirmative action is acknowledged as a possible means of reversing discrimination, but the “dominant opinion denies that article 27 CCPR entails an obligation to actively promote minorities.”¹⁸

In contrast to the liberal concept of individual non-discrimination, communitarian approaches hold that in order to protect the existence and identity of minority groups, rather than granting the group members individual rights, they have to be protected *qua* groups. This view holds that individual protection against discrimination is unable to protect minority groups and to reverse structural discriminations. The main argument for granting collective rights to minorities is “that the preservation and promotion of minority cultures and languages are rights which can only meaningfully be enjoyed by communities, and that securing equal rights for minorities may require positive action and special measures on the part of the state.”¹⁹ Therefore, rights have to be granted to the groups themselves, while at the same time affirmative action is constantly needed to counter assimilationist pressures from the majority population.

Furthermore, national minorities can be perceived as being entitled to special collective rights, because they constitute “collectivities who possess that trait which is the current normative underpinning of states, namely nationhood, and yet for practical purposes cannot enjoy outright political independence.”²⁰ This implies that national minorities have a right to self-determination, albeit rather an internal than an external one, meaning autonomy, not secession. Adding to the reasons given beforehand, this right is to be collective because it is grounded on the well established collective right to national self-determination as laid down in several international instruments, among them the CCPR.²¹

Collective minority rights have been endorsed by few and mostly political instruments like the CSCE Copenhagen Document, which states that “the participating states will protect the ethnic, cultural, linguistic and religious identity of national minorities and create conditions

¹⁷ European Court of Human Rights Case 25035/94 *Magnago and Südtiroler Volkspartei v Italy* [1996]; cit. in De Witte 2000, 10. De Witte goes on to invoke complex rather than formal equality to criticise that “[t]his interpretation is disputable; one could well argue that the principle of equal treatment *does* entail a duty for public authorities to differentiate among persons (...) in accordance with objective differences among them, and therefore also a duty to enact special rules enabling the use of minority languages and, more generally, the development of minority cultures.” (Ibid.).

¹⁸ Blumenwitz and Pallek 2000, 49.

¹⁹ Amato and Batt 1998, 10.

²⁰ Preece 1998, 17.

²¹ Heintze 1997, 408; Wright 1999, 625.

for the promotion of this identity.”²² However, they are on the agenda of most minority groups and the NGOs supporting them, they also have been implemented and supported by some of the applicant states, most notably Hungary, and have been endorsed in the external policy of the EU. An example is the Agenda 2000, which introduces the basis for the minority standard expected to be fulfilled by the applicant states by pointing out that

“[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 recognized, while the Framework Convention safeguards the individual rights of persons belonging to minority groups.”²³

However, while “[t]he first document, though in force has not been ratified by states like Belgium, France and Greece, the latter document is not even in force but still being negotiated”,²⁴ with one major obstacle being the resistance of the mentioned Member States. This means that the tension between the internal and external application of a minority norm by the EU is not necessarily one between the existence or absence of minority rights, but between different concepts of minority protection.

The Discussion of Minority Rights in the Drafting Phase of the Charter

Minority rights have also been put onto the agenda of the Draft Charter of Fundamental Rights, both in their individual and collective form. Whereas the initial draft as well as the final outcome address the minority issue within the context of general non-discrimination, justified by referring to both Article 14 ECHR and Article 13 TEC,²⁵ there have been about a dozen submissions strongly urging for a separate minority clause to be included in the document. Among the submitting bodies were EU institutions like the European Parliament and the Committee of the Regions, the Parliamentary Assembly of the Council of Europe, and NGOs related to minority rights and minority language protection.

²² Document of the CSCE Copenhagen Meeting [1990] §33, cit. in Bloed 1993, 457.

²³ European Commission: *Agenda 2000: For a stronger and wider Union*. COM(97) 2000 Vol. 1, 44.

²⁴ Blumenwitz and Pallek 2000, 41.

²⁵ Cf. e.g. the Remarks of the President in CHARTE 4112/2/00 REV2 BODY 4, 27 January 2000, 5; and the Presidium in CHARTE 4137/00 CONVENT 8, 24 February 2000, 7f.

With respect to the proposed standard and the argumentation applied to justify it, different positions and strategies can be identified. First, although non-discrimination is often mentioned as the basis and starting point of minority protection,²⁶ none of the submissions regards it as being sufficient. This is hardly surprising, given the fact that a general notion of non-discrimination sees minorities as one group among many others to be protected, rather than entitled to special measures, so that advocates of this principle normally do not make a special mention of minorities.

Regarding the granting of collective rights, The Committee of the Regions combined an individualist non-discrimination clause based on Article 14 ECHR and Article 13 TEC in the section on “economic, social and cultural rights” with a generic but collectively formulated “[r]ight of minorities to protection for their religion, language and culture” in the “civil and political rights” section.²⁷ The NGO “Society for Threatened People International” claimed that “the only effective source of protection for linguistic, ethnic, religious and similar communities is the guarantee of their collective rights”, although being aware that probably “following the tradition of international agreements on human rights already in force and the constitutions of the European democracies, the Charter of Fundamental Rights will embody individual rights”. Still, it insisted on the inclusion of affirmative action, so that “groups that have suffered discrimination should qualify for special support.”²⁸

Most submissions acknowledged the individualistic character of the Charter and formulated substantial minority protection clauses consistent with it, while at the same time trying to establish an argument to go beyond mere non-discrimination. The European Parliament backed its pro-active stance on minority rights by listing “the position of regional and ethnic minorities” under “[e]xisting Union competences that may engender legitimate proposals for the inclusion of individual or collective rights”. It assumed that “Member States may wish to elevate some elements drawn from their common constitutional traditions into the Charter” and listed the UN CCPR as well as the Council of Europe’s Framework Convention and

²⁶ As one example, the ECMI proposal stated that “[a] general provision for non-discrimination will undoubtedly be contained in the Charter. (...) One might consider to add a special provision which precludes non-discrimination expressly on certain grounds connected with a minority identity”, then going on to formulate further going propositions. European Centre for Minority Issues: *Informal Advisory Paper, Draft Charter of Fundamental Rights of the European Union: Possibility of inclusion of a provision on non-dominant groups*. CHARTE 4297/00 CONTRIB 169, 10 May 2000, 6.

²⁷ Committee of the Regions: *Opinion of the Committee of the Regions of 16 February 2000 on the Process of drawing up a Charter of Fundamental Rights of the European Union*. CHARTE 4153/00 CONTRIB 40, 8 March 2000, 6f.

²⁸ Society for threatened peoples international: *Towards the effective protection of minorities in the EU’s future Charter on Fundamental Rights*. CHARTE 4266/00 CONTRIB 139, 22 May 2000, 3.

Charter for Regional and Minority Languages among others as “relevant international treaties” for that purpose.²⁹

The most substantial NGO submissions followed this line of reasoning. Therefore, the submission of the International Institute for Right of Nationality and Regionality reviewed at length the existing international instruments on minorities with a view to extracting a “European standard of minority protection”.³⁰ It concluded that “the Framework Convention of the Council of Europe for the Protection of National Minorities of 1995 should be the guideline for the substantive content for a minority protection provision in a Charter of Fundamental Rights of the European Union”,³¹ since it reflected this standard in a legally binding document and formulated a minority clause accordingly. Likewise, the propositions of the ECMI included alternatively pointing out the relevant international instruments or summing them up in a “mini-catalogue of substantive minority rights”.³² And the submission of the Minority Rights Group International again featured an individualistic minority clause that resembled the formulations of these international and regional instruments, while additionally calling for the inclusion of an “‘affirmative action’ clause, similar to that relating to gender”.³³

The Parliamentary Assembly of the Council of Europe also referred to its own Framework Convention when it stated in a report that it “regrets that the draft Charter makes no express reference to the rights of persons belonging to ethnic, religious or linguistic minorities (...) which are protected by Council of Europe instruments such as the Framework Convention for the Protection of National Minorities”.³⁴

A second point of reference was the Union’s commitment to value cultural diversity. This was invoked especially with regard to protective measures for linguistic minorities. The European Bureau for Lesser Used Languages stated that “[c]ultural and linguistic diversity in Europe lies at the heart of fundamental rights for its citizens”³⁵ and proposed a clause that “European

²⁹ European Parliament Committee on Constitutional Affairs: *Report on the drafting of a European Union Charter of Fundamental Rights*. Final A5-0064/2000, RR\407158EN.doc, PE 232.648/fin, 3 March 2000, 17f.

³⁰ Blumenwitz and Pallek 2000, 4.

³¹ *Ibid.*, 53.

³² European Centre for Minority Issues: *Informal Advisory Paper, Draft Charter of Fundamental Rights of the European Union: Possibility of inclusion of a provision on non-dominant groups*. CHARTE 4297/00 CONTRIB 169, 10 May 2000, 8.

³³ Minority Rights Group International: *The European Union Charter of Fundamental Rights and Ethnic, Religious and Linguistic Minorities*. CHARTE 4478/00, 30 August 2000, 2f.

³⁴ Committee on Legal Affairs and Human Rights of the Parliamentary Assembly of the Council of Europe: *Charter of Fundamental Rights of the European Union. Revised report*. CHARTE 4499/00 CONTRIB 349, 4 October 2000, 3.

³⁵ European Bureau for Lesser Used Languages: *Call for Linguistic Rights in European Fundamental Rights Charter*. CHARTE 4166/00 CONTRIB 50, 16 March 2000, 2.

Citizens have the right to maintain and develop their own language and culture, in community with other members of their group, as an expression of the cultural and linguistic diversity that is a common heritage of Europe”.³⁶ Like the submissions mentioned above, the clause was justified by noting that the “principle is already established in other documents binding the member states of the European Union”.³⁷ Two submissions even argued that an obligation to minority protection already existed in the EU’s *acquis communautaire*, either by pointing to the principle of cultural diversity³⁸ or by trying to establish it as part of the common constitutional traditions of the Member States.³⁹

The main shortcoming of all these argumentative strategies is, however, that a common European standard of minority rights, *i.e.* binding commitments shared by all EU Member States either in their respective constitutional traditions or in an international treaty signed and ratified by all of them, does not exist. The only strong basis is the ECHR, which contains, as shown above, merely a non-discrimination clause applied to national minorities. Even the modest special minority clause in Article 27 CCPR is not shared property of all Member States: although they all ratified the treaty, France issued a reservation stating that this article does not apply there, since the existence of minorities runs contrary to the constitution. Accordingly, France (and other countries like Belgium and Greece) has not ratified treaties like the Framework Convention, while the OSCE documents are purely political. It was therefore no surprise that, in the end, France vetoed all proposals aimed at introducing a minority protection clause into the Charter.

This raises the question, whether the mobilisation in favour of such a clause was merely “much ado about nothing”, an attempt doomed to failure now and in the future given the presence of a strong veto player who sees minority rights as running contrary to his interests and constitutional traditions? Or is the raising of the issue in the Convention already a sign that the Union becomes more and more entangled in a minority discourse, which over time pressurises even the strongest opponents into admitting at least a minimal minority standard?

³⁶ European Bureau for Lesser Used Languages: *Statement of the European Bureau for Lesser Used Languages on European languages in the Charter of Fundamental Rights of the European Union*. CHARTE 4237/00 CONTRIB 110, 18 April 2000, 3.

³⁷ *Ibid.*

³⁸ Gesellschaft für bedrohte Völker: “Gefährdung der Vielfalt der Sprachen und Kulturen in der EU”. *Stellungnahme der GfbV vor der Kommission für Menschenrechte der Vereinten Nationen, Unterkommission für die Vermeidung von Diskriminierung und den Schutz von Minderheiten (51. Sitzung, Genf 1999) Item 8 der Tagesordnung*. http://www.gfbv.de/uno/genf/99eu_d.htm.

³⁹ Evangelische Kirche A.B. in Österreich, *Übermittlungsvermerk betr. Entwurf der Charta der Grundrechte der Europäischen Union*. CHARTE 4491/00 CONTRIB 341, 29 September 2000, 3. In an interesting argumentative move this contribution states that minority rights “belong following the Treaties of St. Germain and Vienna to the [Austrian] constitutional property and have been demanded by France and Great Britain” [*ibid.*, my translation].

To answer this question, one has to scrutinise the recent development of the broader normative framework of the EU with a view to identify trajectories which enabled the arguments favouring positive measures to protect minorities, and which may be the basis for further mobilisation and even action by more pro-active EU institutions.

Causal and Constitutive Approaches to Norm Resonance

The question whether and how an EU minority norm can be constructed (and perhaps already is under construction) within the *acquis communautaire* brings the issue of norm resonance to the fore. It can be argued that new norms have to be modelled as to “*resonate* with pre-existing collective identities embedded in political institutions and cultures in order to constitute a legitimate political discourse.”⁴⁰ The importance to establish a ‘fit’ between new norms and existing formal and informal institutions⁴¹ can be conceptualised in different ways, using either causal or constitutive arguments.

Rationalist Institutionalism and “Focal Points”

From the perspective of rational choice institutionalism, norm resonance is best explained with reference to the construction of “focal points”.⁴² It has been argued that, while game-theoretic explanations often fail to produce unique equilibria to predict institutional choices, shared ideas and experiences can “act as ‘focal points’ around which the behavior of actors converges.”⁴³ Furthermore, since institutional solutions can be “locked in” to constrain future choices, and strategic interactions always take place in an environment already filled with existing formal as well as informal institutions, rational calculation can induce path-dependent institutional developments which in turn facilitate or even force future institutional decisions to converge around focal points which are in resonance with existing institutions.⁴⁴

Within such a locked in institutional arrangement, adjustments are made by handling problems of incomplete contracting, which is solved either by delegation of interpretive power to an independent body such as a court, or renegotiation of the institutional settlement.

⁴⁰ Marcussen et al. 1999, 615. For a general discussion of the literature on norms in IR including arguments about resonance see Finnemore and Sikkink 1998. See also Wiener 2000; 2001a; 2001b.

⁴¹ Cf. North 1990 and Wiener 1998 for the embeddedness of formal institutions in informal social institutions.

⁴² The concept has first been introduced by Schelling 1960.

⁴³ Garrett and Weingast 1993, 176. Cf. also Goldstein and Keohane 1993, 18f.

⁴⁴ For path-dependence cf. Krasner 1988; North 1990; Thelen and Steinmo 1992; Pierson 1996; 2000; Wiener 2001a; Bulmer and Burch 2001. Institutional “lock in” effects are also put forward by Moravcsik 1998, 489ff; 2000. For pre-institutionalised environments cf. Klotz 1995, 22; Schimmelfennig 2000.

With high costs attached to the reopening of settled deals delegation can be the rational solution despite of its high sovereignty costs. This in turn reinforces the implementation of resonant norms, since these norms “should be compatible with settled rules if possible, so that bargains need not be reopened. In any case they should be compatible with the basic principles of the relevant regime, so that legal coherence is maintained.”⁴⁵

Given the fact that a shared understanding of the norm of minority protection does not exist among the Member States, since there is “a sharp contrast between the common regime of protection of *fundamental rights* (where there is considerable similitude between Western European countries) and the special case of *minority rights* which are still very much an idiosyncratic feature of certain countries or parts of countries”,⁴⁶ it would seem that a liberal approach to minorities based on individual human rights and general non-discrimination represents a lowest common denominator outcome, so that the diverging interests and ideas of the Member States press “towards a liberal conception of race and ethnicity being adopted simply because it is the least disruptive.”⁴⁷

Also, the mostly liberal shared values of the EU Member States, institutionalised and embedded in the *acquis*, serve as a “focal point” on which all Member States can agree. This gives a “negative” as well as a “positive” account to why a norm resonant to the liberal constitutive norms of the EU is likely to emerge, while norms inconsistent with it, like collective minority rights, are excluded. The argument begins with the interests of actors, which give a framework of possible outcomes, while ideas and institutions as “focal points” serve to determine the actual choice.⁴⁸

However, a conceptualisation of resonant norms as “focal points” has its shortcomings. First, it introduces the issue only *ad hoc*, when arguments based purely on interests and strategic interaction fail to produce a definitive explanation, and therefore does not lead to a systematic exploration of the normative framework. Second, even in cases when resonant norms are influential as “focal points”, the argument still starts with the assumption of strategic, interest-based calculations of rational actors. In contrast to this rationalist view, a “core constructivist research concern is what happens *before* the neo-utilitarian model kicks in.”⁴⁹

⁴⁵ Abbott and Snidal 2000, 430.

⁴⁶ De Witte 2000, 8 [emphasis in original].

⁴⁷ Chalmers 2000, 16.

⁴⁸ Cf. Jachtenfuchs 1999, 46ff, who uses this line to put forward a moderate constructivist argument, which gives ideas a greater role than in rationalist approaches (e.g. Goldstein and Keohane 1993).

⁴⁹ Ruggie 1998, 867.

Constitutive Theory and “Resonance Points”

Unlike the conception of “focal points”, where ideas and institutions are introduced as an additional intervening variable to overcome the indeterminacy of functional theories when confronted with multiple equilibria, a constitutive approach reverses the course of reasoning, starting from constitutive rules and norms as an enabling framework for action and precondition for making causal claims.⁵⁰ In contrast to causal theories, constitutive theories do not ask why a specific course of action was taken, but set out the framework of assessing the possibility of actions within a structural context.

“By explicating the rules governing social contexts a constitutive approach shows how it is possible that in those contexts certain actors are empowered to engage in certain practices and others are not, and it also shows how those practices – when performed – in turn instantiate (or fail to instantiate) the rules.”⁵¹

This does not mean, however, to treat the constitutive norms of the EU shared by all Member States and laid down in the *acquis communautaire* as independent structural variables within a causal explanatory framework, which are exogenously given and stable,⁵² since this would lead to an “ontologization of norms, *i.e.* the assumption that, once a norm is identified, its meaning is no longer in question.”⁵³ So, instead of taking the EU’s constitutive norms as determining the outcome of new norms resonant with the normative framework, thereby creating an almost “Kelsenian” hierarchy of norms in which a “logic of appropriateness”⁵⁴ would dominate, they are conceptualised as enabling different forms of action, ranging from NGO mobilisation to political and judicial activity, by providing justifications for action.⁵⁵

It also has to be noted that the norms in question here are not “rules of the game” in the sense of defining and thereby constituting actors and their role in the process of EU legislation and decision-making. Rather, the formal and informal *acquis communautaire* constitutes the normative framework and the identity of the EU as a community. These norms “empower” actors pursuing the introduction of a new norm not by conferring powers to them, but by providing reasons to justify their arguments.

⁵⁰ Cf. Wendt 1999, 83. On constitutive theory cf. also Wendt 1998.

⁵¹ Wendt 1991, 390.

⁵² Ruggie 1998; Shaw and Wiener 2000, 71f. For a critique of constructivist work on norms that treats norms as causes see Checkel 1997; 2001.

⁵³ Wiener 2000, 13.

⁵⁴ March and Olsen 1989; 1998.

⁵⁵ In other words, constitutive norms are treated as reasons for action rather than causes of actions (Ruggie 1998, 869).

It thus can be argued that certain structural preconditions are required in order to make resonance possible. These preconditions can be referred to as “resonance points”, *i.e.* points in the existing normative framework that allow for linking a proposed new norm to it and thereby provide a persuasive argument in favour of this norm. It follows that new norms have to possess certain characteristics so that they can be legitimately related to the normative framework.⁵⁶ This resembles Thomas Franck’s notion that “[t]he degree of a rule’s legitimacy depends in part on its coherence, which is to say its connectedness, both internally (among the several parts and purposes of the rule) and externally (between one rule and other rules, through shared principles).”⁵⁷

Although there might be a strong pull towards a unified construction and interpretation of a legal framework to conform to what Dworkin calls the “two principles of political integrity: a legislative principle, which asks lawmakers to try to make the total set of laws morally coherent, and an adjudicative principle, which instructs that the law be seen as coherent in that way, as far as possible”,⁵⁸ complex normative frameworks are not necessarily so internally coherent, hierarchical and deeply internalised as to determine the outcome by rendering every alternative impossible or unthinkable. Rather, different norms and principles embedded in the existing framework, which might overlap or even contradict each other, open up the possibility to link a new norm to the context and therefore make a convincing argument in favour of its incorporation, so that different ways of creating resonance may be possible.

“Resonance points” therefore are a necessary, but not sufficient structural precondition for the possibility of norm resonance, the realisation of which has to be discursively enacted,⁵⁹ since “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.”⁶⁰ Therefore, to explain norm resonance it is not only necessary to distinguish the “resonance points” available (which is the aim of this paper), but also to accord for the actors and the way in which they discursively fit new norms into the context.

⁵⁶ Cf. Finnemore and Sikkink 1998, 908; Payne 2001, 38. This does not mean, however, that certain universal characteristics of successful norms can be singled out, be they formal (cf. Finnemore and Sikkink 1998, 906f; Zürn and Wolf 1999, 280; Franck 1990; Chayes and Chayes 1995) or substantial (cf. Finnemore and Sikkink 1998, 907; Keck and Sikkink 1998). Rather, every successful introduction of a new norm is contingent on the specific context, *i.e.* the normative framework into which the norm is introduced.

⁵⁷ Franck 1990, 180.

⁵⁸ Dworkin 1986, 176.

⁵⁹ Cf. Kratochwil 1989, see also Shaw and Wiener 2000, 71 who state that “communication about norms establishes their meaning and subsequently their impact.”

⁶⁰ Finnemore and Sikkink 1998, 908.

For the purposes of this paper, three different groups of actors, who can for different reasons become promoters of minority protection as a new EU norm, can be singled out: First, EU institutions, NGOs and maybe even Member State officials can form an “advocacy coalition”⁶¹ and mobilise to support minority rights. Especially NGOs, which gain access within the context of the drafting of the Charter through the relatively open Convention procedure, engage in strategic framing as well as true argumentation and persuasion when trying to make an impact. Second, political elites in the Member States, who might use normative arguments strategically or rhetorically in order to achieve instrumental, often domestic goals.⁶² And third, the ECJ can contribute to the formulation, interpretation and evolution of the EU *acquis* as to include minority protection.

As a concluding remark, the limitations of a constitutive explanation as put forward here shall be addressed. To begin with, constitutive theory does not provide an alternative explanation to causal accounts of norm resonance. Rather than being a rival theory, it should be viewed as complementing and preceding causal explanations.⁶³ This implies that a constitutive examination of the normative framework cannot provide a full explanation for the success or failure of introducing a new norm, since “rules cannot provide closure for the purposes of carrying on because rules are not the sufficient agency whereby intentions become equivalent to causes.”⁶⁴ Constitutive theory remains largely agnostic about the logic of action applied in the process of argumentation.⁶⁵ Still, by addressing the necessary, though not sufficient

⁶¹ Keck and Sikkink 1998; cf. also Finnemore 1996b; Forschungsgruppe Menschenrechte 1998; Risse et al. 1999.

⁶² Merlingen et al. 2000; 2001. For the concept of “rhetorical action” cf. Schimmelfennig 1997; 1999; 2000; 2001.

⁶³ Wendt 1999, 83. The constitutive approach of this paper is most similar to the constitutive role of the *acquis* in explaining the EU sanctions against Austria in Merlingen et al. 2000: “The ‘embedded *acquis*’ played a *constitutive* role: it constituted the shared meaning which made possible the collective action by the EU Fourteen” (ibid., 4f). However, while Merlingen et al. lend more attention to the following causal part of the explanation (without being able to determine the logic of action in place, cf. ibid., 9), this paper makes a conscious decision to focus on the constitutive part, while acknowledging that for a complete account a systematic attempt to causal explanation has to be added.

⁶⁴ Onuf 1989, 51.

⁶⁵ Possible logics include strategic action following a “logic of consequences” (March and Olsen 1989; 1998), “strategic social construction” and “framing” (Finnemore and Sikkink 1998), “rhetorical action” (Schimmelfennig 1997; 1999; 2000; 2001); “communicative action” following a “logic of arguing” (Risse 2000; Payne 2001), and rule-guided behaviour based on a “logic of appropriateness” (March and Olson 1989; 1998). This openness for different logics of action should not be viewed as a weakness of constructivist research (Schimmelfennig 2000, 115), but as a precondition for systematically exploring the framework conditions of these logics (Checkel 1997), rather than simply assuming one of them, as it is the case in rationalist research.

preconditions that make action possible (*i.e.* justifiable), constitutive theory can “provide explanations of how certain kinds of (...) behavior are possible, or even probable, and why.”⁶⁶

The Construction of an EU Minority Norm? - Three Resonance Points

On the basis of this theoretical framework the possibility of the construction of an EU minority norm shall be assessed by reviewing the *acquis communautaire* in the narrower sense - the Treaties, EC legislation, and ECJ rulings - as well as from the wider political practice and discourse with reference to the Union’s normative foundations. Three possible argumentative links can be recognised: First, the general principle of non-discrimination, which is strongly institutionalised in the Treaties, legislation and ECJ rulings and has been expanded to include national minorities in the Charter. Second, the principle of cultural diversity, which is also laid down in the Treaties and the Charter, but only in rather unspecific terms, and lacks backing in specific legislation. And third, the primarily political construction of a link between minority protection and the combat against racism and xenophobia.

It has to be stressed that these “resonance points” are not meant to be mutually exclusive and a matter of choice. Rather, in combination they open up the possibility to make a compelling argument in favour of minority protection within the EU context and might therefore be considered as building blocks for the discursive construction of an EU minority norm.

Resonance Point No.1: Human Rights and General Non-Discrimination

Although not mandated by the Treaties, the European Court of Justice (ECJ) established a competence for human rights issues within its case law by declaring human rights as “integral part of the general principles of law the observance of which the Court ensures” and clarifying that to this end “the Court is bound to draw inspiration from the constitutional traditions common to the member states and cannot uphold measures which are incompatible with the fundamental rights established and guaranteed by the constitutions of these states. Similarly, international treaties for the protection of human rights, on which the member states have collaborated or of which they are signatories, can supply guidelines which should be followed within the framework of community law.”⁶⁷ Subsequently, the ECJ regularly referred to the

⁶⁶ Barnett and Finnemore 1999, 701.

⁶⁷ ECJ Case 4/73 Nold [1974] ECR 491, §2. The first two aspects, “general principles” and “common constitutional traditions” were established before in the cases 29/69 Stauder [1969] ECR 419 and 11/70 Internationale Handelsgesellschaft [1970] ECR 1125. Cf. Betten and Grief 1998, 56ff.

ECHR as the basic European human rights document.⁶⁸ Therefore, the introduction of Article 6/2 TEU, stating that “[t]he 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”⁶⁹ codified the existing interpretation set out by the Court, while being at the same time narrower than the range of documents referred to by the ECJ in its rulings.

As to the scope of the application of the principle of non-discrimination, the Court subsumed the forms explicitly mentioned in the Treaties, namely discrimination on the ground of gender and nationality, as being particular instances of a more general non-discrimination norm.⁷⁰ On the other hand, since forms of discrimination that are not addressed by Community legislation have not been acknowledged by the ECJ so far,⁷¹ it is of special importance that within the Amsterdam Treaty the list of prohibited grounds for discrimination has been expanded: Article 13 TEC now provides the competence for the Community to “take appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation.”

Although this provision has no direct effect and poses high hurdles on the introduction of measures,⁷² it was nonetheless possible to pass a Framework Directive on equal treatment in employment and occupation,⁷³ and, more significantly, a Directive on the prohibition of discrimination on the basis of racial or ethnic origin.⁷⁴ Given that the Framework Directive, which covers all grounds for discrimination mentioned in Article 13 except sex and race/ethnicity is confined to be applied in the workplace only, while the “Race Directive” has to be considered “the most wide-sweeping equal opportunities legislation in the Community’s history”,⁷⁵ it can be concluded that rather than establishing a “horizontal approach” to general non-discrimination race and ethnicity has gained a privileged status only equalled by the Community’s long established focus on gender equality.⁷⁶

⁶⁸ The first reference to the ECHR appeared in Case 36/75 Rutili [1975] ECR 1219. Cf. Betten and Grief 1998, 59; Dehousse 1998, 64.

⁶⁹ Art. 6, §2 TEU.

⁷⁰ ECJ Case 2/74 Reyners [1974] ECR 631. Cf. Chalmers 2001, 10f.

⁷¹ Waddington 1999, 149f; Guild 2000; Chalmers 2001.

⁷² For the adoption of measures unanimity in the Council is required, and the role of the Parliament, which has always been a pro-active force in this field, in the process is rather weak. See Article 13 TEC; cf. also Waddington 1999.

⁷³ Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation. OJ L303, 3/12/2000, 16-22.

⁷⁴ Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin. OJ L180, 19/07/2000, 22-26.

⁷⁵ Chalmers 2001, 2.

⁷⁶ Bell 2000; Waddington 2000.

Hence it seems reasonable to consider, whether an EU minority norm based on ethnic non-discrimination could be constructed along the line of the well formulated gender equality norm,⁷⁷ especially concerning positive measures. At first sight, judging from the Treaties, gender equality seems to keep an enhanced status, since it is dealt with additionally to Article 13 in Article 141, where measures of “affirmative action” at the level of the Member States are explicitly permitted.⁷⁸ This codification again followed a precedent case, where the ECJ changed its former rejection of “affirmative action” legislation as discriminatory⁷⁹ to apply a complex instead of a purely formal notion of non-discrimination.⁸⁰

However, the Directive 2000/43 contains a provision that allows for “measures intended to prevent or compensate for disadvantages suffered by a group of persons of a particular racial or ethnic origin”,⁸¹ and a similar paragraph was included into the Framework Directive 2000/78. This is consistent with the interpretation of non-discrimination in the ECHR and the UN Covenants, which was also applied by the ECJ, namely that “similar situations shall not be treated differently unless differentiation is objectively justified”.⁸² It is also in line with the liberal interpretation of minority rights as human rights included in these instruments, since both Article 13 TEC and the non-discrimination directives are applicable to all persons including third country nationals.

In its rulings, the ECJ also established an interpretation of non-discrimination that allows for positive measures for minorities. It recognised the requirement of bilinguality in order to protect a minority language as reasonable⁸³ and considered that the right for a linguistic minority to use their language in judicial and administrative procedures as a measure for “the protection of such a minority may constitute a legitimate aim”,⁸⁴ which therefore does not in itself run contrary to the non-discrimination principle. The rulings have, however, also a clearly liberal trajectory, by accepting special minority rights not as being generally prior to the aims of market liberalisation, but as limiting them only when it can be clearly established that protective measures would be “undermined if the rules in issue were extended to cover

⁷⁷ Bell 1997.

⁷⁸ Article 141 TEC, §4. For an interpretation that this constitutes a difference to the other grounds of discriminations mentioned in Art. 13 TEC see Toggenburg 2000, 21.

⁷⁹ ECJ Case C-450/93 Kalanke [1995] ECR I-3051.

⁸⁰ ECJ Case C-409/95 Marschall [1997] ECR I-6363. For a thorough discussion of both cases and the shift they imply see Charpentier 1998.

⁸¹ Council Directive 2000/43/EC (see fn. 32), §17.

⁸² ECJ Case 117/76 Ruckdeschel [1977] ECR 1753, §16-17.

⁸³ ECJ Cases C-379/87 Groener [1989] ECR 3967 and C-281/98 Angonese [2000] ECR I-4139. Cf. also De Witte 1999.

⁸⁴ ECJ Case C-274/96 Bickel/Franz [1998] ECR I-7637, §12.

(...) nationals of other Member States exercising their right to freedom of movement.”⁸⁵ Although not necessarily, this might have negative effects on national minority norms, since measures aimed at the protection of a particular minority group are only admitted when they are also granted to residents⁸⁶ or even visitors⁸⁷ from other EU countries, unless the negative effects of such an inclusive approach are clearly visible. Such an interpretation fails to establish the basis for a complex reading of equality as invoked in the gender equality case.⁸⁸

That minority protection is viewed as a special form of the general non-discrimination principle can also be seen in the EU report on human rights 1999, which includes the formulation that “[c]ompliance 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.”⁸⁹ Thus, a link between the “external” minority norm and the “internal” non-discrimination principle is created.

The Charter of Fundamental Rights mostly reiterates and reinforces the non-discrimination principle as established in Article 13 TEC and through ECJ rulings. There is, only one major innovation, namely the inclusion of belonging to a national minority to the list. Article 21 of the Charter reads: “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.”⁹⁰ This can, however not in itself be considered as a breakthrough in the EU’s commitment to minority rights. Rather, it resembles the wording of Article 14 and Protocol 12 ECHR, thus bringing the explicit features of the *acquis* in line with the already acknowledged basis for its human rights commitment, established by the Court and laid down in Article 6 TEC. It also reflects the standard common to all members and therefore consequently refrains from establishing a separate minority clause as e.g. in Article 27 CCPR, which, although ratified by all Member States, has prompted France to issue a reservation stating that the

⁸⁵ ECJ Case Bickel/Franz, §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.

⁸⁶ ECJ Case 137/84 Mutsch [1985] ECR 2681. For a discussion see De Witte 1999; Toggenburg 1999.

⁸⁷ ECJ Case Bickel/Franz.

⁸⁸ This may e.g. affect the willingness of national authorities to grant far-reaching rights to minorities, when the minority can be “enlarged” by migration. This, in turn, points to a central problem of authors favouring collective minority rights, who for that purpose have to establish a clear distinction between “old” and “new” minorities. See e.g. Blumenwitz and Pallek 2000.

⁸⁹ European Union: *EU Annual Report on Human Rights 1999*, 36.

⁹⁰ Charter of Fundamental Rights of the European Union, Article 21; cit. in Feus 2000, 245.

article was not applicable since minorities did not exist in France by virtue of the constitution. Even less common would have been special provisions taken from the Framework Convention on National Minorities,⁹¹ which is not even signed by all Member States.

Nonetheless, the explicit mentioning of national minorities in the context of the EU's commitment to non-discrimination opens up opportunities for norm entrepreneurs to argue more convincingly in favour of a substantial minority standard than ever before, as well as a point of reference for the ECJ to extend its recognition of national minority protection⁹² and maybe even establish minority protection as a general principle of Community law, which has at least not been excluded in the ECJ rulings so far.⁹³

Resonance Point No. 2: Cultural Diversity

A second possible, far less legally defined way of constructing a Community responsibility for minorities on the basis of existing Treaty provisions is the cultural dimension of the Union, introduced since the Maastricht Treaty and especially formulated in Article 151 TEC, which states that the Community contributes to the “flowering of the cultures of the Member-States, while respecting their national and regional diversity” and should “take cultural aspects into account (...) in particular in order to respect and to promote the diversity of its cultures.”⁹⁴ Article 22 of the Charter of Fundamental Rights reiterates the commitment that “[t]he Union shall respect cultural, religious and linguistic diversity”, thus considering diversity as a constitutional principle.⁹⁵

Although the already mentioned claim of one NGO in support of an EU minority clause that Member States such as France are already breaching the word and spirit of the Maastricht and Amsterdam Treaty⁹⁶ seems to go far beyond the actual requirements of the rather vague provisions, the cultural dimension provides nonetheless a legitimate basis for supporting action for minorities, specifically in the field of the protection of regional and minority languages. Indeed, the European Parliament already bases funding for minority-favouring

⁹¹ This has been suggested by the European Parliament, which stated in its Report on the drafting of the Charter that “[e]xisting Union competences that may engender legitimate proposals for the inclusion of individual or collective rights in the Charter are (...) the position of regional and ethnic minorities” and lists the Framework Convention under “relevant international treaties” for this purpose (European Parliament: *Report on the drafting of a European Union Charter of Fundamental Rights*. RR\407158EN.doc PE 232.648/fin; 3 March 2000, 17).

⁹² Azizi in Toggenburg 2001, 15.

⁹³ Toggenburg 2000, 19.

⁹⁴ Article 151 TEC, §1 and §4.

⁹⁵ Toggenburg 2000, 11 fn 50.

⁹⁶ Gesellschaft für bedrohte Völker: “Gefährdung der Vielfalt der Sprachen und Kulturen in der EU” (see p.10, fn. 38).

institutions on the argument of supporting cultural diversity, although this is not backed by a Council decision and therefore relies on a mainstreaming approach rather than binding normative acts.⁹⁷

In contrast to the non-discrimination principle the appreciation of cultural diversity is much less institutionalised in the *acquis communautaire*, since it is only backed by rather generic formulations in the Treaties and no direct EC legislation or ECJ rulings and might therefore show much less of a normative “compliance pull”.⁹⁸ Nonetheless, its reinforcement in the Charter and placement directly after the non-discrimination article, which now includes national minorities, makes the link between the two principles visible and thus provides an additional argumentative basis for norm-entrepreneurs in favour of minority rights.

Resonance Point No. 3: Combating Racism and Xenophobia

A third possible but at the same time problematic resonance point is political in nature and concerns the linkage of minority protection and the combat against racism and xenophobia. This issue has been a high priority on the Community level as well as in the Member States since the rise of far right parties in the mid-80s. On the one hand the European Parliament has pressed for action against racism and xenophobia ever since the electoral success of the Front Nationale in the EP elections in 1984, expressed in numerous declarations and resolutions.⁹⁹ On the other hand, the threat of a rising far right alternative increasingly worried mainstream right parties, especially in France and Belgium, a fact that finally led the leaders of these countries to invoke European norms to counter this perceived internal threat. “It was politicians like Jacques Chirac and Guy Verhofstadt who forged a link between the EU identity and the collective actions against Austria”.¹⁰⁰ This linked the cause of the European Parliament, which has been the most pro-active player to promote minority rights alongside with combating racism, with two of the most reluctant Member States on the minority issue.

Moreover, within the enlargement context minority rights already had been framed as an integral part of EU norms in general and the fight against racism in particular. The EU-Commission’s communication on countering racism, xenophobia and anti-Semitism in the candidate countries stated with reference to the normative foundations of the EU laid down in Article 6 TEC: “The rejection of racism, xenophobia and anti-Semitism is an integral element

⁹⁷ Toggenburg 2000, 9.

⁹⁸ Franck 1990.

⁹⁹ For an overview see Bell 1997.

¹⁰⁰ Merlingen et al. 2001, 67. Cf. also Merlingen et al. 2000.

of these rights. (...) The concepts of respect for and protection of minorities constitutes a key element of combating racism and xenophobia in the candidate countries.”¹⁰¹ Thus, via the pathway of combating racism, a clear connection was constructed between the fundamental rights shared by all Member States and constituting the normative basis of the Union and the “odd” minority norm in the accession criteria, in order to fight off accusations of setting “double standards” for applicant countries.

The justification of the sanctions against Austria took exactly the same path. The inclusion of a right-winged, openly xenophobic party in the Austrian government was directly linked to accusations of Austria breaching the norm of respect and protection for minorities. “Indeed, in the process of debating the sanctions against Austria, the terms get increasingly mixed, including ‘fundamental human rights’, ‘Christian democratic values’ (Poettering, EP, 2/2/00), and the EU is termed a ‘Union of minorities’ (Prodi, EC, 2/2/00).”¹⁰² When the “three wise men” were sent to Austria in order to scrutinise the situation, their task was also to assess the legal situation of national minorities in the country. In this sense it is possible to view the sanctions as “an expression of an increasing ‘internalisation’ of minority protection in the EU-system”.¹⁰³ At the same time, the situation clearly accelerated the Community’s anti-discrimination legislation, especially the adoption of the Directive 2000/43.¹⁰⁴

However, the case of the sanctions against Austria also reveals the striking weaknesses of the attempt to construct a direct link between minority rights and the fight against racism and xenophobia. Austria, a country with the “most explicitly racist Government in the Union’s history”¹⁰⁵ had to be given a clean record by the “wise men’s report” which stated that its minority rights system “protects the existing national minorities in Austria to a greater extent than such a protection exists in many other European Union countries.”¹⁰⁶

Thus, rather than overcoming the accusations as imposing “double standards” on applicants the sanctions were indeed another instance of the same phenomenon,¹⁰⁷ a fact that Haider could easily capitalise on. They also revealed the manufactured character of the linkage, which was in fact lacking coherence and legitimacy.¹⁰⁸ Still, the argument initially proved a powerful discursive tool, and may well become the source of an “argumentative self-

¹⁰¹ EU Commission: *Communication from the Commission: Countering Racism, Xenophobia and Anti-Semitism in the Candidate Countries*. COM(1999)256 final; 26 May 1999, 2f.

¹⁰² Wiener 2000, 15.

¹⁰³ Toggenburg 2000, 25. Cf. also Wiener 2000.

¹⁰⁴ Guild 2000, 416.

¹⁰⁵ Chalmers 2001, 1.

¹⁰⁶ Report by Martti Ahtisaari, Jochen Frowein, Marcelino Oreja, adopted in Paris on 8 September 2000, 10, §29.

¹⁰⁷ Merlingen et al. 2001, 61.

¹⁰⁸ Franck 1990; Payne 2001.

entrapment”,¹⁰⁹ pressurising exactly those political actors who up to now are the main obstacles to introducing a EU-wide minority standard.

Furthermore, the political aim of combating racism has been institutionalised within the EU with the establishment of the European Monitoring Centre on Racism and Xenophobia (EUMC) in Vienna. The prime objective of this centre is “to provide the Community and its Member States with objective, reliable and comparable data at European level on the phenomena of racism, xenophobia and anti-Semitism, study the extent and developments, analyse the causes, consequences and effects, and examine examples of good practice in dealing with the problems.”¹¹⁰ By reviewing the different constitutional, legal, institutional and political measures of EU Member States to combat racism and assessing their compatibility to EU legislation such as Article 13 TEC and Directive 2000/43/EC,¹¹¹ the centre links this political aim back to the legal principle of non-discrimination explored above as “resonance point no.1” and provides a further basis for the development of a minority norm based on the predominantly liberal normative foundations of the Union.¹¹²

The Way Ahead: “Much ado about nothing?”

One crucial question remains open: may the current highlight on the problematic of minority rights still be not more than “much ado about nothing”, *i.e.* a merely temporary and in effect external phenomenon to be easily resolved after Eastern enlargement has taken place? De Witte sets out such a “phasing out” scenario, where minority protection remains

“an ill-defined political requirement with which the CEEC are expected to comply because of the considerable carrot of accession offered to them. (...) Once a country will be accepted for membership, this will *ipso facto* mean that the minority question is settled as far as the EU is concerned. And if Central and Eastern European countries will join the EU with a clean slate in respect of their minorities, then there will be no need for the European Union itself to modify its ‘agnosticism’ in respect of minority protection *inside* the Union.”¹¹³

¹⁰⁹ Risse 2000a; cf. also Fierke and Wiener 1999; Schimmelfennig 1999; 2000; 2001.

¹¹⁰ European Monitoring Centre on Racism and Xenophobia: *EUMC Annual Report 1999 – Summary*. Vienna 1999, <<http://www.eumc.eu.int/publications/ar99/AR99S-EN.pdf>>, 2.

¹¹¹ Cf. European Monitoring Centre on Racism and Xenophobia: *EUMC Annual Report 1999*. Vienna 1999, <<http://www.eumc.eu.int/publications/ar99/AR99-EN.pdf>>, chapter 2 and 3.

¹¹² I thank Kyriaki Ktopidi for alerting me to this point.

¹¹³ De Witte 2000, 21 [emphasis in original].

Three further questions follow from this assumption: First, it has to be asked whether the framework of the EU *acquis communautaire* is in fact hostile to the construction of a resonant minority norm, given the lack of consensus among the Member States with regard to this issue. As the paper has shown, there are “resonance points” which can serve as possible stepping-stones for the establishment of an EU minority norm in line with the existing normative framework and are already addressed by the different actors involved.

Second, it may be asked whether the introduction of such a resonant norm would finally help to overcome the problem of “double standards” with regard to minority protection in the applicant countries. However, given the fact that a minority norm resonant to the *acquis communautaire* is most likely to be based on general non-discrimination, while the EU has supported the granting of collective rights in the Central and Eastern European Countries (CEEC), this is not the case. Any minority norm that fits into the EU context might prove unable to bridge the gap between the Union’s internal and external development. Moreover, since incoming new members and their minorities enter the Union at least in part with a group rights agenda, norm clashes and further discussion are to be expected.

This leads over to the final question, namely whether an EU minority standard is necessary at all, given the liberal practice of the Member States¹¹⁴ and that “newcomers” are induced to comply before entering by the EU’s policy of conditionality. Again, the answer is almost certainly no. Rather, the discourse over minority rights may heat up when minority groups from the new Member States carry their arguments to the ECJ, which then would have to decide the borderline between the liberalising effects of the common market and the freedom of movement on the one hand, and protective measures for certain minority groups, which are already acknowledged to be a legitimate aim, on the other. This may lead to a situation where “[o]nce the European Union has let the devil escape from the bottle, through its activist minority policy towards the CEEC, it may be difficult to put it back in after accession.”¹¹⁵

Conclusion

This paper explored the possibility of establishing a minority norm within the existing normative framework of the EU, based on a constitutive explanation of norm-resonance. Starting from the distinction of two ideal-typical approaches to minority protection, namely a liberal individualist and a communitarian group rights approach, and it has explored the EU’s

¹¹⁴ This was the rationale of the Council of Europe in a study of 1973, arguing against the necessity of a minority protocol. Scherer-Leydecker 1997, 145f.

acquis communautaire in both its formal and informal aspects with regard to elements related to minority protection, with a view to distinguishing “resonance points”, *i.e.* elements in the normative structure to which an EU minority norm can be discursively linked.

The paper has presented three possible connections, highlighting the predominantly liberal individualist character of the *acquis communautaire* in general and the Charter of Fundamental Rights in particular: First, the inclusion of minorities into the general non-discrimination legislation, second the establishment of a norm in favour of cultural diversity, and third through the construction of a link between minority protection and the combat against racism and xenophobia. Pursued by different actors for different reasons, these three resonance points mark the cornerstones as well as possible future pathways of an evolving discourse over minority rights within the EU, of which the drafting phase of the Charter of Fundamental Rights was only one expression. Such an emphasis of evolutionary processes within existing institutional frameworks shows a strong affinity to historical institutionalist accounts stressing incremental path-dependent change absent major policy failure, which might still have transformative effects in the long run.¹¹⁶

The constitutive analysis of the EU’s normative framework in order to distinguish resonance points does therefore not necessarily predict the implementation of minority rights in the EU in a “big bang”, but rather aims at providing an outlook on trajectories and possible developments. However, such an analysis is, as noted, not sufficient to determine, which specific interpretation of a minority norm will be successful and how exactly it is discursively enacted (or why it fails to do so), because the “conceptualisation of the *acquis* as an institution embedded in a structure of intersubjective ideas and values is in principle compatible with (...) different causal mechanisms”,¹¹⁷ and different types of interaction almost certainly influence the construction of successful norm resonance.¹¹⁸

Within complex and partly contradictory contexts potentially resonant interpretations of norms stay contested, and constitutive theory cannot determine what the “best” argument is, it can only establish the scope of available arguments by marking what counts as a plausible argument within the given context. It thereby provides the framework and precondition for a systematic evaluation of the interaction leading to norm resonance. The value added of a constitutive analysis preceding a causal one is that it avoids the “double ontologisation” of

¹¹⁵ De Witte 2000, 22.

¹¹⁶ Bulmer and Burch 2001, 81; cf. also Krasner 1988; North 1990; Thelen and Steinmo 1992; Pierson 1996; 2000; Wiener 2001a.

¹¹⁷ Merlingen et al. 2000, 9.

¹¹⁸ Cf. Checkel 2001, 9; Payne 2001, 39.

normative structures and actors by scrutinising constitutive norms without treating them as exogenously given and stable, while rendering the question of logics of action or types of interaction empirical rather than to be decided by theoretical assumption.

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