

EU MINORITY PROTECTION: A MODEST CASE FOR A SYNERGETIC APPROACH

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Abstract

In a stark contrast with the dominant minority-protection literature in the EU this paper proposes a synergetic approach to minority protection in the Union, acknowledging that attempts to draw clear distinctions between different minority groups on the basis of a number of criteria can be profoundly unhelpful and is able to undermine the efforts to improve the lives of Europeans belonging to the most vulnerable groups. Such synergetic approach provides a solid point of departure for the discussion of the problems in the area of minority protection that the EU is facing, which is the main focus of the paper. It is argued that theorizing minority protection can only result in the sound resolution of outstanding problems if unnecessary compartmentalization of the vulnerable groups is avoided.

Introduction and structure of the argument

Notwithstanding the fact that minority protection is one of the fundamental values of the Union after the Lisbon revision of the Treaties, any minority protection policy,¹ as well as a definition of a minority,² is clearly missing. So what is the place of minority protection in the European integration project? To approach this question, this article, which builds on a sound tradition of minority protection research in the EU context,³ adopts an intentionally broad approach to the understanding of what is a minority⁴ to include vulnerable groups suffering from injustice with no relation to the limiting considerations, such as the most often quoted factors of nationality,⁵ the distinction between

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¹ A. van Bossuyt, 'L'Union européenne et la protection des minorités: Une question de volonté politique', *CDE* 2010-4, pp. 427-439.

² K. Henrard, 'An EU Perspective on New Versus Traditional Minorities', *CJEL* 2010-17, p. 68.

³ K. Henrard (ed.), *Double Standards Pertaining to Minority Protection*, Leiden: Martinus Nijhoff 2010; Weller *et al.* (eds.), *The Protection of Minorities in the Wider Europe*, Basingstoke: Palgrave 2008; G. von Toggenburg (ed.), *Minority Protection and the Enlarged European Union: The Way Forward* Budapest: OSI 2004.

⁴ J. Deschêne, 'Proposal Concerning a Definition of the Term "Minority"', UN Doc E/CN.4/Sub.2/1985/31.

⁵ D. Kochenov, 'Pre-Accession, Naturalisation, and "Due Regard to Community Law": The European Union's "Steering" of Citizenship Policies in Candidate Countries during the Fifth Enlargement', *Romanian J. Pol. Sci* 2004-4, pp. 78-87; P. Roter, 'Managing the "Minority Problem" in the Post-Cold War Europe within the Framework of a Multilayered Regime for the Protection of National Minorities', *Eur. Y.B. Minority Issues* 2001-1, p. 106.

'historical' and 'new' groups,⁶ or attempts to draw clear lines between minority groups based on their classification as ethnic, linguistic, religious etc. Although such a broad framework can obviously be criticized for very sound reasons, adopting a bird's-eye approach to minorities can also be most illuminating. In fact, EU minority protection literature today seems to be suffering a great deal from the specialization and compartmentalization of the subject matter of research in a situation where cross-sectional discrimination is obviously on the rise and requires closer study and better understanding.

Muslims in Germany, just as Russians in Estonia, are a religious, linguistic and ethnic minority at the same time. It is clear that the same applies to the majority of minority groups. Migrant EU citizens would also fall within several different minority categories, although the literature is generally absolutely reluctant to view them as such at all, demonstrating a kind of inertia and short-sightedness by virtually ignoring the tensions that the maturing of the European integration project tends to generate from the UK (with the strikes against foreign, including EU, workers) to the Nordic countries,⁷ which are even reflected in EU legislation, limiting political rights of EU citizens in the Member States where there are 'too many' of them.⁸ Third-country nationals in general can also clearly be singled out as a minority group suffering for a whole array of aforementioned characteristics in the Union which has established, in the words of Balibar, a system of 'apartheid européen'.⁹

Such vision automatically disqualifies any attempts to approach the issue of defining a minority deductively: EU Institutions', or Member States' documents will tell us little about which minorities there are and what belonging to a minority means:¹⁰ that Muslims are a religious minority in the eyes of the EU's Fundamental Rights Agency, rather than an ethnic one,¹¹ for instance, does not remove an ethnic component from the identity of this minority, if not reinforcing it. Policy considerations cannot alter reality. Minority characteristics are necessarily super-imposed, mutually diffused and profoundly intertwined in the world of overlapping identities.¹² Adopting a classical dual approach to

⁶ K. Henrard, 'An EU Perspective on New Versus Traditional Minorities', *CJEL* 2010-17, pp. 57-99; A. Eide, 'The Rights of "Old" Versus "New" Minorities', *Eur. Y.B. of Minority Issues* 2004-2, pp. 365-380.

⁷ Case C-341/05 *Laval* [2007] ECR I-5751; Case C-438/05 *Viking* [2007] ECR I-7779.

⁸ D. Kochenov, 'Free Movement and Participation in the Parliamentary Elections in the Member State of Nationality: An Ignored Link?', *MJ* 2009-16, pp. 197-223.

⁹ E. Balibar, *Nous, citoyens d'Europe?*, Paris: La Découverte 2001, p. 191.

¹⁰ K. Henrard, 'An EU Perspective on New Versus Traditional Minorities', *CJEL* 2010-17, pp. 65-67.

¹¹ *Idem*, p. 67

¹² W. Kymlicka, *Multicultural Citizenship: A Liberal Theory of Minority Rights*, Oxford: OUP 1996.

minority protection going back to the Permanent Court of International Justice (PCIJ) Opinion in the *Albanian Schools* case,¹³ which includes a fusion of non-discrimination on the one hand and special measures on the other,¹⁴ it is clear that just as identities intertwine, so do possible grounds of discrimination, as well as the particular needs of minority groups. Consequently, the ways to deal with vulnerable groups in terms of providing for a sufficient legal framework for non-discrimination and minority protection equally experience mutual diffusion.

In this context, special minority protection measures targeting a specific strictly-defined group can be harmful for the Members of *the same* group in their other, equally relevant, capacities: protecting the Kanak or the Faroese culture against European influence can disregard important interests of the islanders as EU citizens;¹⁵ just as the protection of migrant EU citizens in the Åland Islands can harm the (presumed) interests of the local community. Such conflicts arise in the EU on a daily basis. When discussing minority protection the whole picture of personal identity complexity as well as the structural complexity of the EU's system of governance necessarily needs to be kept in mind in order to avoid the compartmentalization of protection as well as to ensure that the interests of the actual human beings, with all their sophistication are actually protected with due respect to all the elements of their identity, rather than only one, usually quite arbitrarily chosen characteristic of their personality. The time has arrived for a synergetic tackling of minority protection issues.

Building on this premise, the paper is structured as follows. It starts off with a brief analysis of the specificity of minority protection in the EU's federal setting,¹⁶ emphasising the need to draw a clear dividing line between Member State-level minority protection and EU-level minority protection with clear consequences for the definition of minorities, as well as approaches to the regulation of the whole sphere of minority protection and the assessment of its successes. The analysis then turns to the criticism of the classical framework of EU-level minority protection analysis, demonstrating that the transposition of Member State-level solutions to the context of the EU as a whole, if at all possible, is potentially counterproductive. The section that follows takes a closer look at the EU's 'motivations' in protecting minorities as well as at the most important tools the Union employs in this context. Assessing the dynamic

¹³ [1935] PCIJ Rep. 17.

¹⁴ K. Henrard, *Equal Rights versus Special Rights? Minority Protection and the Prohibition of Discrimination*, Brussels: European Communities 2007.

¹⁵ D. Kochenov, 'Regional Citizenships in the EU', *ELRev* 2010-35, pp. 307-326.

¹⁶ R. Schütze, *From Dual to Cooperative Federalism*, Oxford: OUP 2009.

evolution of these approaches and also touching upon the pre-accession exercise of promoting EU's 'standards' in the Member States-to-be,¹⁷ the section demonstrates that the EU failed to formulate a coherent (or, indeed, any) self-standing minority protection policy which would be detached from Internal Market considerations in a situation where a serious gap exists between the external and the internal approaches to EU's minority protection. Turning to the internal facet, which is most important for the purposes of this paper, and viewing minority protection through the prism of EU citizenship and economic integration in the post-Lisbon context where the Charter of Fundamental Rights of the EU¹⁸ has acquired binding force,¹⁹ the paper goes on to illustrate the positive contribution made by the EU in the field of minority protection. The EU's advances in this area took shape through the employment of two techniques. This is by offering some minority groups direct protection through the non-discrimination standards formulated at the EU level or entering the EU legal system from the Council of Europe²⁰ and backed by the Commission's enforcement machinery, as well as defended against Member States' encroachment by the Court of Justice of the European Union (ECJ); and by providing for a Europe-wide legal environment where the freedom of movement between different legal systems is guaranteed, necessarily enhancing liberty in the vein of the classical US federalism thinking.²¹ The article concludes that the approach to minority issues in the EU suffers from many a deficiency, which is largely caused by the limitations put on the EU's competences in this field which explains the reigning market-driven approach to the issue, as well as the weakness of regulation in those fields which are actually (at least partly) in the EU's hands, and further problems with the scope of EU law and the enforcement of EU rules. Coming to mildly positive conclusions, the paper acknowledges that the EU's successes in the field of minority protection were not achieved under the banner of human rights and the respect for diversity and suggests a realistic positive way to view the Union's contribution through its strict delimitation between the Union's and the Member States' approaches.

¹⁷ D. Kochenov, *EU Enlargement and the Failure of Conditionality*, The Hague: Kluwer 2009.

¹⁸ OJ C 83/1, 2010.

¹⁹ Art. 6(1) TEU.

²⁰ K. Henrard, 'A Patchwork of "Successful" and "Missed" Synergies in the Jurisprudence of the ECHR', in Kristin Henrard and Robert Dunbar (eds.) *Synergies in Minority Protection*, Cambridge: CUP 2009, pp. 314-364.

G. Pentasuglia, 'Minority Issues as a Challenge in the European Court of Human Rights: A Comparison with the Case Law of the United Nations Human Rights Committee', *Ger. Y.B. Int'l L.* 2004-46, pp. 401-451.

²¹ S.F. Kreimer, 'Federalism and Freedom', *Annals Am. Acad. Pol. & Soc. Sci.* 2004-574, pp. 66-80.

I. The general context of minority protection in the EU

Navigating among a myriad of conflicting interests, the EU depends on the Member States' approaches and sensitivities. Minority protection is one of the most sensitive areas, since any consensus on this issue among the Member States is missing. Many of them do not recognize the idea of minority protection as such (*e.g.* France and Greece) and have not even ratified the Framework Convention for the Protection of National Minorities – the main international law instrument on the issue in Europe²² – or did so with extremely far-reaching derogations. Nevertheless, the Framework Convention is an indirect source of principles of EU law via the law of the Council of Europe – since it is settled case-law that the European Court of Justice (ECJ) will protect human rights based, *inter alia*, on the principles of law contained in the European Convention on Human Rights (ECHR) as interpreted by the European Court of Human Rights (ECt.HR). In a number of decisions ECt.HR has not only recognised the 'minority way of life' within the context of Art. 8 ECHR, but also found that the Framework Convention is a product of the general consensus on the issue of minority protection among the Member States of the Council of Europe, which has a clear potential to move the Framework Convention within the context of EU law.²³ This does not, however, change the fact that a legal basis for minority protection action in the EU does not exist.

The EU is an organization based on delegated powers.²⁴ The ECJ will normally intervene in order to ensure that Member States' own competences are not used to the detriment of the achievement of the objectives of integration as stated in the Treaties,²⁵ as well as to ensure that EU law and national implementing measures are all interpreted in the light of the values on which the Union is built and the objectives, which the Union is striving to achieve.²⁶ However, such negative integration does not open up the way to regulate the areas which are not perceived as lying within the scope of the Union's competences. In other words, the breadth of the formulation of the goals of integration, as well as the values on which the Union is said to be based, 'including the [protection of the] rights of persons belonging to minorities',²⁷

²² Verstichel *et al.* (eds.), *The Framework Convention for the Protection of National Minorities: A Useful Pan-European Instrument?*, Antwerp: Intersentia 2008.

²³ ECt.HR *Chapman* [2001] App. No. 27238/95, para. 93; ECt.HR *Muñoz Diaz* [2010]; K. Henrard, 'An EU Perspective on New Versus Traditional Minorities', *CJEL* 2010-17, pp. 85-87.

²⁴ Art. 5(2) TEU.

²⁵ Art. 4(3) TEU.

²⁶ Arts. 2 and 3 TEU.

²⁷ Art. 2 TEU.

does not guarantee that the Union will have an ability to regulate.²⁸ The relevant provisions of the Charter of Fundamental Rights of the Union aiming at the respect of minorities²⁹ know the same limitations and can merely serve as interpretative aids, not as a legal basis for action.

Should regulation of a particular field where no powers have been explicitly delegated be deemed required at the level of the Union, rather than at the level of the Member States, two options are open to the Union. The first consists in trying to secure a Treaty amendment, enlarging the scope of its powers;³⁰ (the second consists of attaching the regulation of the field concerned to a broader regulation effort, not making an emphasis of the potentially sore issues too much.

In the context of minority rights protection the former is almost never an option, as Treaty revision is a badly politicized process and the levels of suspicion *vis-à-vis* minorities, especially ethnic and sexual, as well as the 'new' immigrants, are quite high in the absolute majority of the Member States. Populism has been generally on the rise in Europe in the recent years ensuring that attempting to change the Treaties, with the necessary ratification in accordance with the Member States' 'constitutional requirements',³¹ is clearly not the best option. It follows that in the context of minority protection, the Union is left to play in the grey zone, attaching minority-relevant measures to the broader, mostly Internal Market, legal bases. Consequently, lacking clear specific legal bases, lacking Member States' consensus, and minority protection policy, the EU's possibilities to act in this field are all but clearly articulated. This brings about a reality, where the expectations of the citizens, minority groups and the Member States almost never match in the minority protection field, making the EU's intervention at times terribly difficult.

The situation is further complicated by a simple fact that taken as whole, the EU is remarkably diverse, boasting numerous minorities, which makes it impossible to come up with any tenable idea of a *majority* for the Union. Indeed, absent dominant culture, language, historical tradition etc. etc., anyone in the Union certainly belongs to a minority of some kind – this is particularly true of EU citizens who changed their Member State of residence. Majorities

²⁸ A. van Bossuyt, 'L'Union européenne et la protection des minorités: Une question de volonté politique', *CDE* 2010 3-4, pp. 440-444.

²⁹ K. Henrard, 'An EU Perspective on New Versus Traditional Minorities', *CJEL* 2010-17, pp. 85-88.

G.N. von Toggenburg, 'The EU's Evolving Policies *vis-à-vis* Minorities: A Play in Four Parts and an Open End', *EURAC Research Paper* 2008 (Bolzano).

³⁰ Art. 48 TEU.

³¹ *Ibid.*

thus only exist at the Member State, not at the EU level. Simultaneously, the relevance of the Member States as such in determining the legal position of EU citizens *vis-à-vis* EU law is necessarily fading away with the progress of EU integration. This is so, since the ECJ is starting to deal with reverse discrimination, limiting the possibility for the Member States to regulate the legal position of their own nationals in the situations perceived as having no connection with EU law.³² This is particularly true in the light of the recent case-law of the ECJ, which points in the direction of the emergence of a uniform concept of the territory of the Union – corresponding to the uniform concept of Union citizenship.³³ Moreover, EU law is said to apply in the situations when the application of national law can result in obliging EU citizens to leave the Union.³⁴ This marks a new development in the Union's self-vision.³⁵ Consequently, what is sometimes obvious at the level of the individual Member States might form a profoundly different picture at the level of the Union – a fact at times ignored by the commentators.

Lacking an EU-level majority does not mean, however, that the same applies to minorities. Indeed, the vulnerability of numerous groups can even be seen as augmented as a result of EU integration. This concerns the EU-wide minorities, such as the third country nationals residing in the EU, or the EU's Roma, as much as it does the localized minorities, such as Baltic Russians and Ukrainians, Danube Aromanians, or Frisians. Supranational EU regulation has a clear potential to delude national minority-sensitive policies, as they come to be regarded as incompatible with the Internal Market. Although the ECJ recognized in its case-law from *Groener*³⁶ to *Angonese*³⁷ that minority protection could be a legitimate objective for the Member States to pursue even in deviation from the EU's *acquis*, strict proportionality test applies ensuring that there is no guarantee that minority protection, however highly cherished, will actually prevail.³⁸

³² A. Tryfonidou, 'Reverse Discrimination in Purely Internal Situations: An Incongruity in a Citizens' Europe', *LIEI* 2008-35, p. 44.

³³ D. Kochenov, 'A Real European Citizenship: The Court of Justice Opening a New Chapter in the Development of the Union in Europe', *CJEL* 2011-18: forthcoming.

D. Kochenov, 'Citizenship without Respect: The EU's Troubled Equality Ideal', *Jean Monnet Working Paper* (NYU Law School) 2010-6.

³⁴ Case C-34/09, *Ruiz Zambrano* [2011] n.y.r., para. 44

³⁵ D. Kochenov, 'A Real European Citizenship: The Court of Justice Opening a New Chapter in the Development of the Union in Europe', *CJEL* 2011-18: forthcoming.

D. Kochenov, 'Citizenship without Respect: The EU's Troubled Equality Ideal', *Jean Monnet Working Paper* (NYU Law School) 2010-6.

³⁶ Case C-379/87 [1989] ECR I-7637.

³⁷ Case C-281/98 [2000] ECR I-4138.

³⁸ D. Kochenov, 'Regional Citizenships in the EU', *ELRev* 2010-35, pp. 307-326.

G.N. von Toggenburg, 'A Remaining Share or a New Part? The EU's Role *vis-à-vis* Minorities after the Enlargement Decade', in Weller et al. (eds.) *The Protection of Minorities in the Wider*

Given the whole context of operation of EU law, the idea of minority protection as a whole, including the definition of minorities, the outline of the most appropriate modes of action and the benchmarks for the measurement of success, should be seriously rethought, compared with the nationally acceptable models, adopted by the Member States. Such models need to be adapted to the reality of a global federal regulation of the twenty-seven Member States with a population of half a billion citizens.

It is submitted that the literature has not paid sufficient attention to the need and to the vistas of such necessary adaptation so far. It is time to view the EU as a highly specific minority protection arena not to be confused with its component parts – the Member States. The adaptation of the Member State-centred thinking should start at the level of approaching the core issues. It should include the assessment of such questions as what a minority is in the EU's context of a missing majority, what the appropriate depth of EU's intervention in the area of minority protection is, *i.e.* how much room for manoeuvre should reasonably be left with the Member States without disrupting the effectiveness of EU's regulation, as well as the approach to defining what a success in minority protection should be, in the EU context. The latter should be done, in particular, with due regard to the division of competences between the EU and the Member States in this and other relevant fields.

EU's commitment to facilitating the freedom of movement can only lead to the growth of cultural, religious and any other possible kinds of diversity in the Union in the future, calling for a synergetic approach to tackling minority-related issues outlined above. Regrettably, 'minorities are not determined at the EU level with reference to the entire [Union]'.³⁹ There is no reason why this approach should prevail in the future as well, at least in the context of the vulnerable groups *created* by EU law.

In the Union context it would be misleading to follow any of the accepted State-centred definitions of what a minority is strictly. Most importantly, the EU's approach should necessarily include the global groups which are either invisible or purposefully ignored in the minority rights discourse at the level of the Member States, *i.e.* those created by the Union itself. These include EU citizens

Europe, Basingstoke: Palgrave 2008, p. 111; R.F. Weber, 'Individual Rights and Group Rights in the European Community's Approach to Minority Languages', *Duke J. Comp. & Int'l L.* 2007-17, pp. 361-413.

³⁹ K. Henrard, 'An EU Perspective on New Versus Traditional Minorities', *CJEL* 2010-17, p. 64.

residing outside of their Member State of nationality and third country nationals who are long-term residents of the EU. Although some scholars attempted to make connections between the Member State-mandated minority categories and these two groups, applying national understanding of what a minority is to them seems to be unwarranted, if not misleading. So treating third country nationals as 'new' minorities, as Kristin Henrard does, for instance,⁴⁰ does not do justice to this group, as a large number of EU residents without EU citizenship have been in the Member States for generations: distinguishing between 'new' and 'old' parts of *the same* minority seems to be highly problematic. There are no 'old' Turks and 'new' Turks in Cyprus, just as there are no 'new' and 'old' Russians in Estonia or Latvia, notwithstanding the desire of some Member States to introduce an artificial split into these minority groups. The same largely applies to migrant EU citizens – treating them as 'new' immigrants in their newly-chosen Member States of residence deludes the Union context, where EU citizens are clearly not foreigners anymore⁴¹ and Member States' nationalities are, effectively, 'abolished'⁴² in the sphere of application of EU law. They cannot, for that reason, be equated with other migrants. Member State-level oriented approach also suffers from turning a blind eye to the profound differences in the rights, including culturally-sensitive rights, which are granted to migrant EU citizens, as opposed to all others.

The progress of EU integration necessarily limits the Member States' ability to regulate a number of vital issues related to minority protection, including, in particular, granting minorities special rights – affirmative action.⁴³ Such an approach sits uneasily with the *acquis* for the simple reason that minority protection is not among the policies implemented by the EU, which ensures that EU law, for the biggest part, is 'minority agnostic'.⁴⁴ This has obvious negative consequences for the development of the law and policy at both the EU and the Member State level, since it undermines the ability of both legal orders in question to introduce any minority protection measures. This is especially true in the context of the Member States. Given that the powers of the Union are interpreted teleologically and in a goal-oriented manner, EU law does not allow for reserved domains of regulation where the EU would not be

⁴⁰ *Idem*, p. 59.

⁴¹ D. Kochenov, 'Rounding up the Circle: EU Citizenship's Influence of the Nationalities of the Member States', *EUI Working Paper RSCAS* 2010.

⁴² G. Davies, "'Any Place I Hang My Hat?' or: Residence Is the New Nationality", *ELJ* 2005-11, p. 55.

⁴³ S. Pager, 'Strictness and Subsidiarity: An Institutional Perspective on Affirmative Action at the European Court of Justice', *B.C. Int'l & Comp. L. Rev.* 2003-26, pp. 35-76; D. Caruso, 'Limits of the Classical Method: Positive Action in the European Union after the New Equality Directives', *Harv. Int'l L.J.* 2003-44, pp. 331-386.

⁴⁴ K. Henrard, 'An EU Perspective on New Versus Traditional Minorities', *CJEL* 2010-17, p. 58.

able to intervene. In practice, this means that even in the areas where the Member States have a sole power to regulate, EU law demands that such regulation be in line with the principles and objectives of EU integration.⁴⁵ The ECJ will apply proportionality, turning into the last arbiter of all the disputes arising at the jurisdictional border between the legal orders. Although the positive contribution of this approach in terms of improving the legitimacy of the law in force at all the levels of regulation in the EU is obvious,⁴⁶ this also severely restricts the Member States. Minority-related laws and policies are very likely to fail the test. The fact is that the Member States willing to protect minorities end up being hostages of those Member States which are hostile to the idea, such as Greece and France, since EU law, which is insensitive to the minority protection issues due to the labours of such hostile Member States can also affect national minority protection policies in all the other states negatively. Consequently, at this stage the national regulation of this sphere will benefit from a better reflection of the objective of minority protection at the EU level, including, possibly, an introduction of a special legal basis to this end, rather than merely a mention in Article 2 EU.

Keeping in mind the constant tensions between the EU and its component parts in terms of the allocation of competences, it is necessary to adopt a realistic approach to the assessment of the failures and successes of EU's minority protection. It is most unwise to expect the EU to do what the Member States are best suited to excel in. Our EU-related expectations should be focused on providing sufficient *flexibility* in terms of possible accommodation of the Member State-level policies in the context of the Internal Market and, equally importantly, on dealing with Europe-wide *non-discrimination* and cultural diversity protection issues, including the situation of third-country nationals, EU citizens, and trans-border minorities, such as the Roma.

II. Indirect minority protection

Since there is no legal basis for minority protection in the Treaties and reflecting the fact that no powers in this domain have been explicitly transferred to the EU by the Member States whose own perspectives remain deeply divided, direct engagement of the EU with its minorities is made difficult. In other words, it is hardly possible to speak about the EU's engagement with minority issues at both levels of the *Albanian Schools* test,

⁴⁵ e.g. Case C-135/08 *Rottmann* [2010] n.y.r., para. 55.

⁴⁶ M. Kumm, 'The Idea of Socratic Contestation and the Right to Justification: The Point of Rights-Based Proportionality Review', *L. & Ethics of Hum. Rts.* 2010-4, Art. 1.

which requires a complex engagement with minorities and comes down to ensuring both non-discrimination and special minority protection measures. Indirectly, however, a number of important possibilities are open for the Union to regulate the issues related to the legal situation of the vulnerable minority groups. This happened mostly via two lines of development. The first is confined to the evolution of the non-discrimination requirements, not minority protection measures *sensu stricto*.⁴⁷ The second theoretically concerns full-fledged minority protection, but is only limited to the external action of the Union and has only an indirect bearing on the legal situation of minorities inside the Union. All in all, the fundamental question of whether minorities should be awarded special protection seems to be still unresolved in the Union context, reflecting the divisions among the Member States over this issue.

Non-discrimination requirements were viewed as an integral part of, first, the Internal Market – including non-discrimination on the basis of sex and nationality – and, later, as belonging to the fundamental principles of European integration.⁴⁸ The broadening of the range of the prohibited grounds of discrimination in the EU is a painful story.⁴⁹ The Union has always been much better on paper and in its own eyes, than in practice. In fact, moving beyond the prohibition of sex discrimination and discrimination on the basis of nationality, the Union's role in fighting discrimination was very limited until the most recent amendments of the Treaties. In one example, the *Grant* case,⁵⁰ the Court safely disregarded international practice only not to end discrimination based on sexual orientation⁵¹ – the ECJ cannot generally boast a very distinguished human rights record.⁵²

The introduction of Article 13 EC by the Treaty of Amsterdam (now Art. 19 TFEU) was, partly, a reaction to the Court's embarrassing reactionism in this field and ultimately resulted in two Directives⁵³ prohibiting discrimination on a

⁴⁷ B. de Witte, 'The Constitutional Resources for an EU Minority Protection Policy', in G.N. von Toggenburg (ed.) *Minority Protection and the Enlarged European Union*, Budapest: OSI 2004, pp. 118-123; K. Henrard, *Devising an Adequate System of Minority Protection: Individual Human Rights, Minority Rights and the Right to Self-Determination*, The Hague: Kluwer 2000.

⁴⁸ T. Tridimas, *The General Principles of EU Law*, Oxford: OUP 2006, p.59.

⁴⁹ M. Bell, 'The Principle of Equal Treatment: Widening and Deepening', in P. Craig and G. de Búrca (eds.), *The Evolution of EU Law*, Oxford: OUP 2011, p. 611.

⁵⁰ Case C-249/96 [1998] ECR I-621.

⁵¹ D. Kochenov, 'On Options of Citizens and Moral Choices of States: Gays and European Federalism', *Fordham Int'l L.J.* 2009-33, pp. 176-180.

⁵² A. Williams, *The Ethos of Europe*, Cambridge: CUP 2010; D. Kochenov, 'Citizenship without Respect: The EU's Troubled Equality Ideal', *Jean Monnet Working Paper* (NYU Law School) 2010-6.

⁵³ 2000/43/EC, OJ L 180/22, 2000; 2000/78/EC, OJ L 303/16, 2000.

number of important grounds which are, however, far from perfect⁵⁴ and applied by the Court not in the clearest possible way.⁵⁵ The lobby of the Member States which see a problem in the prohibition of discrimination ensures that the improvement of the current situation via law-making is virtually impossible: to move forward, according to Article 19(1) TFEU unanimity is required. All in all, following the entry into force of the Directives and case-law developments, such as ECJ's decisions in *Maruko*⁵⁶ and *Feryn*,⁵⁷ however much criticized, the EU ended up building up an anti-discrimination framework which more or less functions on paper – a huge step forward compared with the looming vacuum of the preceding decade – which is still to be tested in terms of its practical effectiveness. The Treaty of Lisbon added a binding Charter of Fundamental Rights to the framework of Primary EU law, which is a potentially important development the consequences of which are, however, to be seen.

The story is somewhat more pessimistic in the area of minority protection *sensu stricto*. Minority protection, just as any other human rights issue, was not in the Treaties from the very beginning and was gradually developed over the years. In the course of its development a seemingly natural divide emerged between internal and external aspects of minority protection. This is due to the fact that minority issues first appeared on the EU's agenda in the context of enlargements – when new Member States were being incorporated into the Union. An interesting evolution can be observed in this context. From an exclusionary logic of the first enlargement round, when the inhabitants of the Isle of Man, the Channel Islands and the Faroe Islands were (partly) excluded from the application of the provisions of the Treaties;⁵⁸ with an aim of safeguarding the local identities, the EU moved towards promoting somewhat more subtle measures during the enlargement rounds that followed.

⁵⁴ L. Waddington and M. Bell, 'More Equal than Others: Distinguishing European Union Equality Directives', *CMLRev.* 2001-38, pp. 587-611.

⁵⁵ K. Henrard, 'The First Substantive ECJ Judgement on the Racial Equality Directive', *Jean Monnet Working Paper* (NYU Law School) 2009-9.

⁵⁶ Case C-267/06 [2008] ECR I-1757; G.N. von Toggenburg, "'LGBT" Go Luxembourg: On the Stance of Lesbian Gay Bisexual and Transgender Rights before the European Court of Justice', *ELR* 2008-5, pp. 174-185.

⁵⁷ Case C-54/07 [2008] ECR I-5187; K. Henrard, 'The First Substantive ECJ Judgement on the Racial Equality Directive', *Jean Monnet Working Paper* (NYU Law School) 2009-9.

⁵⁸ D. Kochenov, 'A Summary of Contradictions: An Outline of the EU's Main Approaches to Ethnic Minority Protection', *B.C. Int'l & Comp. L. Rev.* 2008-31, pp. 15-17; G.N. von Toggenburg, 'Minority Protection in a Supranational Context: Limits and Opportunities', in G.N. von Toggenburg (ed.) *Minority Protection and the Enlarged European Union: The Way Forward*, Budapest: OSI 2008, p. 24.

The real boost of interest in minority protection issues only happened, however, during the last two enlargement rounds,⁵⁹ to incorporate the former socialist states of Central and Eastern Europe. While the enlargements that preceded the latest rounds allocated only a very limited role to minority protection via exclusion from the scope of the law, driven by the considerations of the preservation of minority cultures, the last two rounds saw an overwhelming securitization of minority protection issues. Faced with the war in Yugoslavia and later problems in Kosovo and Macedonia, the EU acknowledged the potential threat to the stability of the continent coming from minority-related issues which are not properly resolved.⁶⁰ It is notable that although the general trend of EU's minority sensitive approach to the regulation of its own enlargements remained, the main motivation behind minority protection has shifted considerably, just as the means did: the last two rounds of enlargements did not approach minority protection issues via exclusion.

Given the discrepancy between the internal and external competences of the Union which is especially pronounced in the context of the preparation of enlargements, the Institutions were free to impose any conditions on the candidate countries, also including those which would not be backed by corresponding internal competences of the Union.⁶¹ Minority protection became one of such conditions. First established by the European Council as part of the Copenhagen political criteria in 1993,⁶² the duty to ensure the 'respect for and the protection of minorities' became a direct condition addressed to all the countries willing to join the Union. This requirement was built into the conditionality-based approach to the legal regulation of enlargements.⁶³ The implementation of conditionality by the Union has been criticized in the literature.⁶⁴ In the fields of both sexual and ethnic minority protection, which were outside the scope of EU's internal competences at the

⁵⁹ C. Hillion, 'Enlargement of the EU – The Discrepancy between Membership Obligations and Accession Conditions as Regards the Protection of Minorities', *Fordham Int'l L.J.* 2006-27, pp. 715-740.

J. Hughes and G. Sasse, 'Monitoring the Monitors: EU Enlargement Conditionality and Minority Protection in the CEECs', *JEMIE* 2003-1, pp. 1-36.

K. Henrard, 'The Impact of the Enlargement Process on the Development of a Minority Protection Policy within the EU', *MJ* 2002-9, pp. 357-391.

⁶⁰ A. van Bossuyt, 'L'Union européenne et la protection des minorités: Une question de volonté politique', *CDE* 2010 3-4, p. 425.

⁶¹ D. Kochenov, *EU Enlargement and the Failure of Conditionality*, The Hague: Kluwer 2009, pp. 80-82.

⁶² Bull. EC 6-1993; C. Hillion, 'The Copenhagen Criteria and Their Progeny', in C. Hillion (ed.) *EU Enlargement: A Legal Approach*, Oxford: Hart 2004, pp. 1-22.

⁶³ D. Kochenov, *EU Enlargement and the Failure of Conditionality*, The Hague: Kluwer 2009, pp. 65-80.

⁶⁴ *Idem passim*.

time, before the entry into force of the Treaty of Amsterdam which introduced Article 13 EC (now 19 TFEU), the EU has largely relied on the Council of Europe standards⁶⁵ and failed to formulate any coherent set of demands, demonstrating a huge variation in its approaches to different countries and different minorities.⁶⁶ The candidate countries and the Union alike viewed Council of Europe standards as sufficient in order to meet the Union's dubious minority protection test⁶⁷ instead of providing minimal requirements. Consequently, the key problems of minority protection remained unsolved.

It is thus impossible to characterize the Union in its external action as a successful promoter of minority protection standards: there were no common standards and they were not uniformly promoted.⁶⁸ Eastern European countries entered the Union with the homophobic rhetoric by the top officials, ethnically segregated schools⁶⁹ with huge percentage of their populations deprived of citizenship on the grounds of belonging to minority groups⁷⁰ and with linguistic inspections established for the 'protection' of the state language,⁷¹ promoting societal division and intolerance. Even the correct spelling of names in minority languages was not allowed, depriving individuals belonging to minority cultures of the essential core of their personality.⁷²

Based on the experience of the legal regulation of the last two enlargement rounds it is possible to conclude that the Union's engagement with the minority protection issues in the candidate countries fell far short of what could actually be achieved, given the desire of those countries to join and the huge leverage available to the Union in the process. However, what is important, pre-accession regulation gave the EU Institutions the first taste of engaging with minority protection issues, which was obviously consequential for the

⁶⁵ G.N. von Toggenburg, 'A Remaining Share or a New Part? The Union's Role *vis-à-vis* Minorities after the Enlargement Decade', *EUI Working Papers Law* No. 2006-15.

D. Kochenov, 'An Argument for Closer Cooperation between the European Union and the Council of Europe in the Field of Enlargement Regulation', *Croatian Ybk Eur. L. & Pol'y* 2006-2, pp. 311-342.

⁶⁶ D. Kochenov, 'A Summary of Contradictions: An Outline of the EU's Main Approaches to Ethnic Minority Protection', *B.C. Int'l & Comp. L. Rev.* 2008-31, pp. 1-51.

C. Hillion, 'The Copenhagen Criteria and Their Progeny', in C. Hillion (ed.) *EU Enlargement: A Legal Approach*, Oxford: Hart 2004, pp. 1-22.

J. Hughes and G. Sasse, 'Monitoring the Monitors: EU Enlargement Conditionality and Minority Protection in the CEECs', *JEMIE* 2003-1, pp. 1-36.

⁶⁷ W. Kymlicka, *Multicultural Citizenship: A Liberal Theory of Minority Rights*, Oxford: OUP 1996.

⁶⁸ D. Kochenov, 'A Summary of Contradictions: An Outline of the EU's Main Approaches to Ethnic Minority Protection', *B.C. Int'l & Comp. L. Rev.* 2008-31, pp. 1-51.

⁶⁹ ECt.HR *D.H. at al.* [2007] 57325/00.

⁷⁰ G. Guliyeva, 'Lost in Transition: Russian-Speaking Non-Citizens and the Protection of Minority Rights in the European Union', *ELRev.* 2008-33, pp. 843-869.

⁷¹ ECt.HR *Podkolzina* [2002] 46726/99.

⁷² UN HRC *Raihan v. Latvia* [2010] 1621/2007.

amendments of the Treaty texts. If not for the practice of the last two enlargement rounds, the reference to the protection of minorities as one of the values of the Union would hardly be included in Article 2 EU.⁷³ At the same time, upon the completion of enlargement, the Union lost the possibility to influence the policy in the field of minority protection in all the new Member States. Minority protection thus remains, in the words of Bruno de Witte ‘an export product and not one for domestic consumption’.⁷⁴ A mention of minority protection among the values does not provide the Union with a legal basis to tackle this issue making its direct intervention in the context of any of the Member States – either ‘new’ or ‘old’ – legally impossible. In other words, although enlargements marked an important turn in the EU’s approach to minority related issues – for the first time in history as the Union put its weight on the side of the minorities – it is still the case that apart from the external competences to be used in the course of enlargement preparation, the Union does not have the legal means to promote minority protection *sensu stricto*.

All in all, most importantly, the debate whether embracing minority protection at the EU level would be beneficial for the progress of the European integration project and the achievement of its goals has never taken place in Europe. If for not the admirable academic activism of scholars such as Bruno de Witte, Gabriel von Toggenburg and Kristin Henrard, among numerous others, this issue would not be on the agenda at all outside of the highly securitized context of the conduct of the latest enlargements. Given the reality of the regulation in place in the EU, the reference to minorities in Article 2 EU is obviously half-hearted.

This inability to embrace the values potentially reaching further than Internal Market considerations, which is obviously in conflict with the present state of EU integration, where EU citizenship came to play a decisive role, is just one of the many facets of a much larger problem, related to the failure by the Union to embrace any substantive vision of justice which would go beyond the market-driven logic and the limited interpretation of the founders’ intent.⁷⁵

⁷³ G.N. von Toggenburg, ‘A Remaining Share or a New Part? The Union’s Role *vis-à-vis* Minorities after the Enlargement Decade’, *EUI Working Papers Law* No. 2006-5; K. Henrard, ‘The Impact of the Enlargement Process on the Development of a Minority Protection Policy within the EU’, *MJ* 2002-9, pp. 357-391.

⁷⁴ B. de Witte, ‘Politics versus Law in the EU’s Approach to Ethnic Minorities’, in J. Zielonka (ed.) *Europe Unbound: Enlarging and Reshaping the Boundaries of the European Union*, London: Routledge 2002, p. 139.

⁷⁵ A. Williams, ‘Taking Values Seriously: Towards a Philosophy of EU Law’, *OJLS* 2009-20, pp. 560-561; A. Williams, *The Ethos of Europe*, Cambridge: CUP 2010; D. Kochenov, ‘Citizenship without Respect: The EU’s Troubled Equality Ideal’, *Jean Monnet Working Paper* (NYU Law School) 2010-6, pp. 74-85.

This issue of fundamental importance was analysed by Williams with admirable clarity and, although it lies outside the scope of this paper, should constantly be kept in mind, as it has to do with a fundamental deficiency, which the Union has been unable to address throughout the entire history of its existence.

III. Minorities in the federated market

Both hold true for the EU: it is unsure whether minority rights should be protected in the first place and it is unable, by virtue of its very architecture, to provide the second element of the *Albanian Schools* test, consisting of the special protection of minority groups. However, as has been abundantly discussed in the literature,⁷⁶ it would be premature to conclude that the organization is inapt in the field of minority protection. Its lacking competences and general hesitation notwithstanding, the Union contributes to the improvement of the legal situation of minority groups via two broad avenues, which include, firstly, broad minimal standards established by the EU in a number of different fields, including non-discrimination on a number of grounds, and, secondly, the EU's federal essence. Both contribute to the pursuit of liberty, by offering persons belonging to minority groups a broader horizon of opportunities on a number of occasions.

While the first of the two has been briefly discussed above, and represents, in essence, a fundamental part of any minority protection test since the PCIJ's *Albanian Schools* Opinion, the second, coming down to the fundamental connection between federalism and liberty is rarely applied in the context of minority protection.⁷⁷ It consists in the right to change the law applicable to your situation either by moving between jurisdictions, or by ensuring that the law of a different legal order, providing better protection of your rights in a concrete situation, applies to you.⁷⁸

It is in the context of the second avenue outlined that the very purpose of the creation of the EU coincides with the needs of persons belonging to vulnerable

⁷⁶ e.g. D. Kochenov, 'A Summary of Contradictions: An Outline of the EU's Main Approaches to Ethnic Minority Protection', *B.C. Int'l & Comp. L. Rev.* 2008-31, pp. 12-15; B. de Witte, 'The Constitutional Resources for an EU Minority Protection Policy', in G.N. von Toggenburg (ed.) *Minority Protection and the Enlarged European Union*, Budapest: OSI 2004, pp. 107; G.N. von Toggenburg, 'A Rough Orientation through a Delicate Relationship: The EU's Endeavours for Its Minorities', in S. Trifunovska and F. de Varennes (eds.) *Minority Rights in Europe: European Minorities and Languages*, The Hague: T.M.C. Asser Press 2011, pp. 205-234.

⁷⁷ But see D. Kochenov, 'On Options of Citizens and Moral Choices of States: Gays and European Federalism', *Fordham Int'l L.J.* 2009-33: pp. 156-205.

⁷⁸ S.F. Kreimer, 'Federalism and Freedom', *Annals Am. Acad. Pol. & Soc. Sci.* No. 2001-574, pp. 66-80.

groups to improve their situation. It consists in the classical connection between federalism and liberty. Once the regulation of different questions, including the issues perceived as 'moral' at times leading to the suppression of the persons belonging to minority groups with a 'democratic sanction' from the majority (dealing with marriage, religion, education, child adoption etc.) differs from jurisdiction to jurisdiction, new important rights can be supplied by simply introducing a legal possibility of unrestricted movement between the jurisdictions with different regulation. Agreeing with Kreimer, 'state-by-state variation leaves open the possibility to each individual of choosing to avoid repression by leaving the repressive jurisdiction'.⁷⁹ This is the case in the EU. Since harmonization is only used in an exceptionally narrow number of fields, the regulation of key questions of societal organization, just as the level of prejudice, differs from Member State to Member State. The virtually absolute right of movement between the Member States granted to EU citizens⁸⁰ which is at the core of the European integration project ensures that all are given a possibility to benefit from more suitable regulation, escaping legal and societal oppression, or simply finding a more comfortable place, where one's world-view, culture, or nature is better reflected in the vision of what is 'right' espoused by the majority. A Lesbian couple can improve their life by moving from Greece to the Netherlands, a Hungarian family from Cluj to Eger, and a devoted catholic from Bulgaria to Poland.

Although this essential feature of federalism is not directly related to the idea of the protection of minorities, the possible effects of freedom of movement between the Member States for minority life are obvious. These can only be real if, besides the differences in regulation between different jurisdictions three other elements are present,⁸¹ namely:

- Freedom of movement is a guaranteed right;
- Equality with the locals in the new jurisdiction is provided;
- Jurisdictional borders are clearly defined.

All the three factors are clearly present in the EU,⁸² with all the related potential of helping the individuals belonging to vulnerable groups.

⁷⁹ *Idem*, p.71.

⁸⁰ D. Kochenov, 'Ius Tractum of Many Faces: European Citizenship and the Difficult Relationship between Status and Rights', *CJEL* 2009-15, pp. 194-197.

⁸¹ S.F. Kreimer, 'Federalism and Freedom', *Annals Am. Acad. Pol. & Soc. Sci.* No. 2001-574, p. 66.

⁸² D. Kochenov, 'Ius Tractum of Many Faces: European Citizenship and the Difficult Relationship between Status and Rights', *CJEL* 2009-15, pp. 169-237.

Of course, one should be clear about the limits of the freedom of movement in providing a solution for the minority problems in the long run. Whole ethnic and religious groups cannot migrate. Yet, migration increases diversity and ensures that local inhabitants of all the Member States come into contact with the cultures they would not necessarily deem as 'their own' more frequently than what the case would be in the sovereign states with strict border controls, *i.e.* real 'container societies'. Like the States in the US, EU Member States are not empowered to 'select their citizens',⁸³ in the sense that no discrimination on the basis of nationality – among a number of other grounds – is allowed: *all* EU citizens, including gay families, orthodox priests, and the speakers of Luxembourgian, have a right of residence in *any* of the Member States of the Union.

This has far-reaching consequences for the reinforcement of the general spirit of tolerance throughout the EU. This is especially so, due to the vertical division of powers in the Union. Union law protects EU citizens from unfavourable treatment following their decision to move to a different Member State, exercising their fundamental EU citizenship right. This protection is valid against any Member State of the Union, including their own. There is potential for Union law to ensure that mutual recognition of legal acts exists even between the Member States which adopted contrarian 'moral' stances on minority-relevant issues. Although Greece does not recognize same-sex marriage, a couple which married in a Member State that does, and resided in a different jurisdiction and then moved to Greece will have to be treated as a married couple notwithstanding the rules of Greek national law⁸⁴. In another example, spouses of migrant EU citizens who are third-country nationals are shielded by EU law from any assimilationist policies of the new Member State of residence which would apply to citizens and third country nationals perceived as having no connection with EU law,⁸⁵ and include language and 'culture' tests and many hours of irrelevant training.⁸⁶ The practical consequences of the legal duality of rules to apply to the locals and to migrants is such that illiberal local regulation comes to be applied simultaneously alongside the more permissive EU one, *de facto* resulting in further penetration of tolerance into the national legal systems, demonstrating the incoherent nature of the claims and goals behind

⁸³ *Saenz v. Roe*, 526 U.S. 489, 510–511 [1999].

⁸⁴ D. Kochenov, 'Ius Tractum of Many Faces: European Citizenship and the Difficult Relationship between Status and Rights', *CJEL* 2009-15, pp. 169-237.

⁸⁵ D. Kochenov, 'Citizenship without Respect: The EU's Troubled Equality Ideal', *Jean Monnet Working Paper* (NYU Law School) 2010-6, pp. 34-58.

⁸⁶ van Oers *et al.*, 'Mapping the Redefinition of Belonging in Europe', in van Oers *et al.* (eds.) *A Re-definition of Belonging?*, The Hague: Koninklijke Brill/Martinus Nijhoff 2010, pp. 307-332.
C. Joppke, 'Immigration and the Identity of Citizenship: The Paradox of Universalism', *Citizenship Stud.* 2008-12, pp. 533-546.

the policies of intolerance, stigmatization, and the social exclusion of the other.⁸⁷

All in all, although the EU can boast neither a clear approach to the essence of minority protection nor the ability to effectively meet the *Albanian Schools* test, it still makes an important legal contribution able to empower individuals belonging to vulnerable groups through its non-discrimination instruments and the fundamental right to free movement, which enhances liberty. The latter will be of little help to Latgalians, trying to preserve their language, or to Muslims, fighting for the rights to construct mosques in their communities: the triangular connection between an individual, federalism, and liberty is personal in essence and seemingly has little to offer for the advancement of group rights, which no doubt diminishes its attractiveness in the minority protection context. Yet, it is still a potent tool to improve lives and should be explored with due care.

Taking a somewhat broader perspective of the EU's architecture and functioning it is also possible to uncover a much more general contribution of the Union – it undermines the Member States' monopoly on legitimacy in the use of power,⁸⁸ inherent in the idea of constitutionalism, through rendering a bulk of Member State regulation *per se* inapplicable in an innumerable number of cases. Member States, claiming the ultimate authority on their land, where majoritarian democracy at times produces effects detrimental for the situation of the vulnerable groups, are losing the monopoly of governance. More and more often the EU – which is essentially different from the Member States and is certainly not democratic / majoritarian in the classical sense of the word – will have a final say. This introduces a vital element of plurality into the European legal architecture. States with their constitutional fetishism⁸⁹ and often unhelpful doctrines presuming the existence of the national people (usually only nominally paying attention to the existence of minority groups) at the basis of constitutionalism stand contested. As Tully has abundantly demonstrated,⁹⁰ the idea of constitutionalism is by definition blind to the needs of the minorities, failing to incorporate them into the national mythology. Once there is a possibility to appeal to a higher-level authority (accepting diversity as

⁸⁷ D. Kostakopoulou, 'The Nexus of Migration and Integration in the Light of Human Rights Norms', in Sir Richard Plender (ed.) *International Migration Law*, The Hague: Martinus Nijhoff 2012, forthcoming.

⁸⁸ G. Davies, 'The Humiliation of the State as a Constitutional Tactic', in Fabian Amtenbrink and Peter van den Berg (eds.) *The Constitutional Integrity of the European Union*, The Hague: T.M.C. Asser Press 2010, pp. 147-174.

⁸⁹ J.H.H. Weiler, 'In Defence of the *Status Quo*: Europe's Constitutional *Sonderweg*', in J.H.H. Weiler and M. Wind (eds.) *European Constitutionalism beyond the State*, Cambridge: CUP 2003, pp. 7-26.

⁹⁰ J. Tully, *Strange Multiplicity: Constitutionalism in an Age of Diversity*, Cambridge: CUP 1995.

one of its fundamental building-blocks, thus lying outside of the confines of the doctrinal cage of national constitutionalism), we are facing the dawn of a more tolerant constitutional architecture, taking the necessary diversity, omnipresent in any society much better into account than a classical, even if a liberal, nation state. 'Taming liberal nationhood' can rightly be placed, following Kymlicka,⁹¹ among the main achievements of the EU. The EU's effects on the nation states seem to be more profound, however: the insightful perspective of 'humiliating the state', proposed by Davies,⁹² which seems to be building on the 'taming' vision, probably describes the EU better.

Conclusion

Two essential features in the assessment of the Union's performance in its capacity of a protector of minorities can be outlined. Firstly, the EU is structurally limited in its ability to protect minorities: there is no special legal basis for this, let alone any consensus among the Member States on this issue, and there are no European standards of minority protection which the Union could promote, notwithstanding the pre-accession experience of the recent enlargements and the special status potentially enjoyed by the Framework Convention in the EU legal system. Secondly, the inherent Internal Market bias of the Union not only affects the EU's own ability to protect minorities, but also has potentially negative consequences for the Member States' ability to act in this field: their freedom to deviate from the *acquis* on minority protection grounds is very limited indeed. As a result, the lacking consensus with regard to minority protection strategies which is apparent at the Union level has important implications for the Member States' national policies, thus *de facto* permitting the Member States opposed to the idea to limit other Member States' choices in this field.

In fact, the two deficiencies outlined reflect the specificity of the Union's nature as a polity in charge of half a billion citizens diverse enough not to boast any majority as well as creating new minorities through the operation of its law. Keeping all this in mind allows readjusting expectations concerning what the Union can and should actually do with its minorities. Most importantly, the policies related to the Internal Market are to be scrutinized in order to assess the Union's weakness and strengths: unable to act like a minority-sensitive

⁹¹ W. Kymlicka, 'Liberal Nationalism and Cosmopolitan Justice', in S. Benhabib *et al.* *Another Cosmopolitanism*, Oxford: OUP 2006, pp. 128-144.

⁹² G. Davies, 'The Humiliation of the State as a Constitutional Tactic', in F. Amtenbrink and P. van den Berg (eds.) *The Constitutional Integrity of the European Union*, The Hague: T.M.C. Asser Press 2010, pp. 147-174.

state, the Union can still boast a capacity to promote liberty and human rights through the correct functioning of its federal architecture, particularly by allowing for the freedom of movement across borders and through its general human rights protection instruments.

Given the obvious limitations restraining the Union's capacity to act, it is almost surprising how much has been achieved. Although minority protection as such is not invoked as a starting point for policies, a rich palette of EU human rights instruments has direct implications for the state of minority protection in all the Member States. This is especially the case in the area of non-discrimination and equality, which has known a very productive development over the last decades.

The Union's successes and failures in the field of minority protection should not be measured with the same tools applied to states, which makes the general picture of EU's performance quite an optimistic one. Very much has been done, but even more is likely to be put on the agenda – subject to the principled decision to award minorities special protection, which has not been made at the level of the Union yet.