Expecting Too Much: European Union's Minority Protection Hide-and-Seek

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EU's deference to the Member State approaches in minority protection can intensify the oppression of vulnerable groups, and its insistence on non-discrimination on the basis of nationality in the minority regions with special rights in place can also produce injustice. Its inability to protect EU-wide minorities, like the Roma, is equally problematic. Although a 'value', minority protection functions incoherently, if at all. It is time to approach the EU as a highly specific minority protection arena not to be confused with its component parts – the Member States. The reform 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 is a minority in the EU's context of a missing majority, what is the appropriate depth of EU's intervention in the area of minority protection, ie how much room for manœuvre 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. This paper briefly explores a series of diverse case studies – from migrant EU citizens, Baltic Russians, and sexual minorities to, most importantly, Roma rights – to make the first attempt to test the proposed synergetic approach.

1. Introduction: A modest case for a synergetic approach

Notwithstanding its 'silver threads among the gold',[1] at the respectable age the EU is still prone to play games. A most fascinating one is being played out in the area of minority protection. Here the Union pretends to have serious stakes and the Member States, playing as if there was consensus on this issue, equally pretend not to obstruct the Union's regular, yet largely rhetoric involvement. This half-hearted engagement in the game of hide-and-seek is taking place

[1] L.W. Gormley, 'Silver Threads among the Gold ... 50 Years of the Free Movement of Goods' (2007) 31 Fordham Int'l L. J. 1637.

notwithstanding the fact that minority protection is one of the fundamental values of the Union[2] and that the Charter of Fundamental Rights of the European Union (CFR) makes a clear reference to minority protection too.[3] Nevertheless, even following the Lisbon revision of the Treaties[4] any minority protection policy is clearly missing.[5] This hide-and-seek game is our focus. Throughout we ask the central question: what is the place of minority protection in the European integration project?

To approach it, we build on a sound tradition of minority protection research in the EU context,[6] adopting an intentionally broad approach to the understanding of what is a minority,[7] to include vulnerable groups suffering from injustice with no relation to the

[2] Article 2 Treaty on European Union [2010] OJ C 83/1 (TEU); L. Pech, '„A Union Founded on the Rule of Law": Meaning and Reality of the Rule of Law as a Constitutional Principle of EU Law' (2010) 6 EUConst 359. On values in EU law, see eg A. Williams, 'Taking Values Seriously: Towards a Philosophy of EU Law' (2009) 29(3) OJLS 549; J.H.H. Weiler, 'On the Distinction between Values and Virtues in the Process of European Integration' (unpublished); P. Leino and R. Petrov, 'Between „Common Values" and Competing Universals' (2009) 15(5) ELJ 654. See also D. Kochenov 'The Issue of Values' in R. Petrov and P. Van Elsuwege (eds), *The Application of EU Law in the Eastern Neighbourhood of the European Union* (Routledge 2013). Such values, which cannot serve as legal bases, are also not easily enforceable: C. Closa, D. Kochenov and J.H.H. Weiler, 'Reinforcing Rule of Law Oversight in the European Union' (2014) EUI WP, RSCAS 2014/25.

[3] Article 21(1) CFR [2000] OJ C 364/01. On the Charter, see G. de Búrca, 'The Drafting of the European Union Charter of Fundamental Rights' (2001) 26 EL Rev 126; J. Dutheil de la Rhochère, 'La charte de droits fondamentaux de l'Union européene: quelle valeur ajoutée, quelle avenir?' (2000) Marché Commun et de l'Union européenne No 443, 674; A. Knook, 'The Court, the Charter, and the vertical division of powers in the European Union' (2005) 42 CML Rev 367; P. Eeckhout, 'The EU Charter of Fundamental Rights and the Federal Question' (2002) 39 CML Rev 945.

[4] See Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, signed at Lisbon, 13 December 2007 [2007] OJ C 306/1.`

[5] Eg A. Van Bossuyt, 'L'Union européenne et la protection des minorités: Une question de volonté politique' (2010) Cahiers de droit européen 425, 427–439. The same equally applies to the definitions of minorities, as Kristin Henrard reports: 'it seems wiser to conclude that there is indeed no set definition of the concept of 'minority' within the EU': K. Henrard, 'An EU Perspective on New Versus Traditional Minorities: On Semi-Inclusive Socio-Economic Integration and Expanding Visions of „European" Culture and Identity' (2010) 17 CJEL 57, 68.

[6] See eg K. Henrard (ed), *Double Standards Pertaining to Minority Protection* (Martinus Nijhoff 2010); K. Henrard and R. Dunbar (eds), *Synergies in Minority Protection: European and International Perspectives* (CUP 2009); M. Weller, D. Blacklock and K. Nobbs (eds), *The Protection of Minorities in the Wider Europe* (Palgrave 2008); G. von Toggenburg (ed), *Minority Protection and the Enlarged European Union: The Way Forward* (OSI 2004); N. Nic Shuibhne, *EC Law and Minority Language Policy: Culture, Citizenship and Fundamental Rights* (Brill 2002); S. Trifunovska and F. de Varennes (eds), *Minority Rights in Europe: European Minorities and Languages* (T.M.C. Asser Press 2001).

[7] Numerous definitions of the term 'minority' are available. The most authoritative one is classically ascribed to Francesco Capotorti: F. Capotorti, 'Study on the Rights of Persons Belonging to Ethnic, Religious, and Linguistic Minorities' (1979) UN Doc E/CN.4/Sub.2/384/Rev.1 (UN Publication Sales No.E.91.XIV.2, 1991) 96. See also J. Deschêne, 'Proposal Concerning a Definition of the Term „Minority"' (1985) UN Doc E/CN.4/Sub.2/1985/31. For an overview, see D. Kochenov, 'A Summary of Contradictions: An Outline of the EU's Main Approaches to Ethnic Minority Protection' (2008) 31 Boston College Int'l & Comp. L. Rev. 1, 35–37.

unhelpful limiting considerations, which are often taken for granted such as the most often quoted factors of nationality,[8] the distinction between 'historical' and 'new' groups,[9] 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 thoroughly criticized for only skimming the surface of the issue, adopting a synergetic approach to minorities is also the 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.[10]

Muslims in Germany, just as Russians in Estonia, are at the same time religious, linguistic and ethnic a minority. It is clear that the same applies to the plurality of minority groups. Migrant EU citizens would also fall within several different minority categories, although the literature is reluctant to view them as such. In so doing however, it is demonstrating inertia and short-sightedness by virtually ignoring the tensions that the maturing of the European integration project tends to generate[11] from the UK,[12] as made particularly clear by the Brexit referendum outcome, to the

[8] There is no general consensus on whether citizenship is a necessary element of minority definition. Both the PCIJ and the European Commission do not regard it as necessary. PCIJ Advisory Opinion Regarding Greco-Belgian 'Communities' [1930] PCIJ Rep Ser B, No 17; 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' (2004) 4 Romanian J. Pol. Sci. 71, 78–87; C. Thiele, 'The Criterion of Citizenship for Minorities: The Example of Estonia' (1999) 5 ECMI WP 2–5. But see A. Wiener and G. Schwellnus, 'Contested Norms in the Process of EU Enlargement: Non-Discrimination and Minority Rights' (2004) 2 Constitutionalism Web-Papers (Bath) 8; 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' (2001) 1 Eur. YB Minority Issues 85, 106.

[9] K. Henrard, 'An E.U. Perspective on New versus Traditional Minorities: On Semi-Inclusive Socio--Economic Integration and Expanding Visions of European Culture and Identity' (2010/2011) 17 CJEL 57, 58; A. Eide, 'The Rights of „Old" Versus „New" Minorities' in T. Malloy and J. Marko (eds), *Minority Governance in and beyond Europe: Celebrating 10 Years of the European Yearbook of Minority Issues* (Brill 2014) 23.

[10] See eg V. Chege, *Multidimensional Discrimination in EU Law: Sex, Race and Ethnicity* (Nomos 2011).

[11] For an analysis, see J. Gerhards, 'Free to Move? The Acceptance of Free Movement of Labour and Non-Discrimination among Citizens of Europe' (2008) 10 Eur. Societies 121 (analyzing acceptance of non-discrimination on the basis of nationality across the EU). On the EU as a project enforcing the *status quo* between the centre and the periphery, see D. Kukovec, 'Taking Change Seriously: The Rhetoric of Justice and the Reproduction of the *Status Quo*' in D. Kochenov, G. de Búrca, and A. Williams (eds), *Europe's Justice Deficit?* (Hart 2015); D. Kukovec, 'Law and the Periphery' (2015) 21(3) ELJ 406.

[12] Strikes against foreign (including EU) workers are common in Britain, where the governments on both sides of the political spectrum seem to be willing to exploit slogans like 'British Jobs for British Workers'. Some unions even strike agreements with local authorities on the quotas of non-British employment, which is in stark violation of EU law. See eg '„British Jobs for British Workers" Is the Cry of Our Worst Instincts' *The Telegraph* (4 February 2009), <http://www.telegraph.co.uk/comment/columnists/maryriddell/4516854/British-jobs-for-British-workers-is-the-cry-of-our-worst-instincts.html> last accessed 10 June 2016. It is clear that for the moment European integration has not resulted in the formation of social acceptance and solidarity, which would be stretching across the nationality divide.

Nordic countries,[13] which are even reflected in EU legislation.[14] Permanently resident 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 Étienne Balibar, a system of '*apartheid européen*'.[15] This group is largely outside of the scope of the essential core of EU law, ie free movement and the Internal Market, to highly problematic effects.[16]

We start with a brief analysis of the specificity of minority protection in the EU's federal setting.[17] Here the emphasis will be put on the need to draw a clear dividing line between Member State-level minority protection and EU-level minority protection

[13] Case C-341/05 *Laval un Partneri Ptd v Svenska Byggnadsarbetareförbundet et al.* [2007] ECR I-5751; Case C-438/05 *International Transport Workers' Union Federation et al. v Vikingline ABP et al.* ECLI:EU:C:2007:809 [2007] ECR I-7779. For elegant analysis in the post-enlargement context, see U. Belavusau, 'The Case of *Laval* in the Context of the Post-Enlargement EC Law Development' (2008) 9 German L. J. 1279. See also D. Kukovec, 'A Critique of the Rhetoric of Common Interest in the European Union Legal Discourse' (2012) IGLP WP (Harvard Law School).

[14] EU law stipulates that in the Member States where the percentage of EU citizen non-nationals exceeds 20% and above, non-discrimination in the area of political representation can be suspended, (temporarily) depriving non-national EU citizens of the right to vote and run in local and EU elections. See Article 14(1) Directive 93/109/EC of 6 December 1993 laying down detailed arrangements for the exercise of the right to vote and stand as a candidate in elections to the European Parliament for citizens of the Union residing in a Member State of which they are not nationals [1993] OJ L 329/34; Article 12(1) Directive 94/80/EC of 13 May 1996 amending Direction 94/80/EC laying down detailed arrangements for the exercise of the right to vote and stand as a candidate in municipal elections by citizens of the Union residing in a Member State of which they are not nationals [1994] OJ L 368/38. For the analysis of the limitations of EU citizens' political participation rights directly connected to the freedom of movement, see D. Kochenov, 'Free Movement and Participation in the Parliamentary Elections in the Member State of Nationality: An Ignored Link?' (2009) 16 Maastricht J. Eur. & Comp. L. 197.

[15] É. Balibar, *Nous, citoyens d'Europe? Les frontières l'Etat, le peuple* (La Découverte 2001) 190, 191. See also I. Ward, 'Law and Other Europeans' (2002) 35 JCMS 79. A growing number of Member States even makes access to local nationalities more difficult to this group, compared with EU citizens. For an analysis, see D. Kochenov, 'Rounding up the Circle: The Mutation of Member States' Nationalities under Pressure from EU Citizenship' (2010) EUI WP (Florence) RSCAS 2010/23, 25–29.

[16] D. Kochenov and M. van den Brink, 'Pretending There Is No Union: Non-Derivative Quasi-Citizenship Rights of Third-Country Nationals in the EU' (2015) EUI WP LAW 2015/07.

[17] It has been rightly argued that 'the fixture of the 'federal' label to the European construct may not be as disputed as it once was: K. Lenaerts and K. Gutman, '„Federal Common Law" in the European Union: A Comparative Perspective from the United States' (2006) 54 AJCL 1. See also R. Schütze, *From Dual to Cooperative Federalism* (OUP 2009); R. Schütze, 'On „Federal" Ground: The European Union as an (Inter)National Phenomenon' (2009) 46 CML Rev 1069; J.-C. Piris, 'L'Union européenne: Vers une nouvelle forme de fédéralisme?' (2005) 41(2) RTD eur 243; D. Sidjanski, 'Actualité et dynamique du fédéralisme européen' (1990) Revue du marché commun No. 341, 655. Judge Pierre Pescatore has pointed out the '*caractère fédérale de la constitution européenne*' even before the formulation of the principle of supremacy by the ECJ: P. Pescatore, 'La Cour en tant que jurisdiction fédérale et constitutionnelle' in *Dix ans de jurisprudence de la Cour de justice des Communautés européennes: Congrès européen Cologne, du 24 au 26 avril 1963* (Heymanns Verlag 1963) 520, 522. See also D. Kochenov (ed), *EU Citizenship and Federalism: The Role of Rights* (CUP 2017).

with important 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 (**2.**). To contextualize the findings, the argument then turns to four brief case studies focusing on EU citizens residing in the EU outside of their Member State of nationality;[18] the protection of the rights of sexual minorities;[19] the position of Baltic 'Russian speakers'[20] without citizenship;[21] and, lastly, the rights of the Roma[22] (**3.**). The case studies exemplify the troubled essence of the current situation with minority protection in the EU, which is largely caused by the limitations put on the EU's competences in this field. This explains the reigning market-driven approach to the issue, as well as the weakness of regulation in those fields, which are – at least partly – in the EU's hands, and further problems with the scope of EU law and the enforcement of EU rules. The part that follows assesses the dynamic evolution of these approaches, touching particularly upon the pre-accession exercise of promoting EU's 'standards' in the Member States-to-be.[23] Our analysis demonstrates that in a situation where a serious gap exists between the external and the internal approaches to EU's minority protection,[24] the EU has failed to formulate a coherent (or, indeed,

[18] See, in general, N. Nic Shuibhne, 'The Resilience of EU Market Citizenship' (2010) 47 CML Rev 1597; D. Kochenov, 'Ius Tractum of Many Faces: European Citizenship and a Difficult Relationship between Status and Rights' (2009) 15 CJEL 169, 181.

[19] R. Windermute and M. Andenæs (eds), *Legal Recognition of Same-Sex Partnerships: A Study of National, European, and International Law* (Hart 2001); K. Slootmaeckers et al. (eds), *The EU Enlargement and Gay Politics: The Impact of Eastern Enlargement on Rights, Activism and Prejudice* (Palgrave 2016).

[20] ‚Russian-speaking minorities' is the more precise term for all those residents of the Baltic states who moved into the region during the Soviet era. Today, the overwhelming majority of non--titular groups in the Baltic states speak Russian as their first language, whence the term. While Baltic politicians, academics and publics habitually refer to these people as 'Russians', the term has misleadingly established itself as not all Soviet-era migrants are ethnic Russians. For detailed discussion, see T. Agarin, *A Cat's Lick: Democratisation and Minority Communities in the Post--Soviet Baltic* (Rodopi 2010) chapter 1; V. Poleshchuk and V. Stepanov (eds), *Ètnopolitika stran Baltii* (Nauka 2013).

[21] J. Hughes, '„Exit" in Deeply Divided Societies: Regimes of Discrimination in Estonia and Latvia and the Potential for Russophone Migration' (2005) JCMS 739; N. Muifoieks (ed), *How integrated in Latvian society? An Audit of Achievements, Failures, and Challenges* (University of Latvia Press 2010); P. Järve, *Sovetskoje nasledije i sovremennaja ètnopolitika stran Baltii*, in V. Poleshchuk and V. Stepanov (ed), *Ètnopolitika stran Baltii* (Nauka, 2013).

[22] I. Baclija and M. Hacek 'Minority Political Participation at the Local Level: The Roma' (2012) 19 International Journal on Minority and Group Rights 53; CoE, *Human Rights of Roma and Travellers in Europe* (CoE 2012); H. O'Nions, *Minority Rights Protection in International Law: The Roma of Europe* (Ashgate 2007).

[23] For the general context, see M.A. Vachudova, *Europe Undivided* (OUP 2005); M. Cremona (ed), *The Enlargement of the European Union* (OUP 2003); C. Hillion (ed), *EU Enlargement: A Legal Approach* (Hart 2004). For a critical account of the implementation of the principle of conditionality in the context of the preparation of the EU's enlargements, see D. Kochenov, *EU Enlargement and the Failure of Conditionality* (Kluwer Law Int'l 2008) (and the literature cited therein).

[24] D. Kochenov, 'A Summary of Contradictions' (n 7).

any) minority protection policy which could be detached from Internal Market considerations.[25] Thus, it offers 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 Europe[26] 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.[27] **(4.)** Coming to mildly positive conclusions, the paper acknowledges that the EU's meagre success in the field of minority protection was not achieved as a result of the declared commitment to human rights and the respect for diversity; rather, as we acknowledge, the Union's contribution has been made possible only as a result of strict distinction between the Union's and the Member States' approaches to minority protection as a part of commitment to the Internal Market.

2. The general context of minority protection in the EU

Minority protection is one of the most sensitive areas of EU law, 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[28] and have not even ratified the Framework Convention[29] – the main international law instrument on the issue in

[25] Article 26(2) Treaty on the Functioning of the European Union [2010] OJ C 83/1 (TFEU).

[26] Council of Europe (CoE) documents, especially the European Convention on Human Rights (ETC 005), and human rights jurisprudence of the European Court of Human Rights in Strasbourg (ECtHR) play the role of principles of EU law (Article 6(3) TEU) before the Union joins the Convention system to be bound by CoE documents directly, as required by Article 6(2) TEU. On minority rights in front of the ECtHR, see eg 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' (2004) 46 Ger. YB Int'l L. 401; K. Henrard, 'A Patchwork of „Successful" and „Missed" Synergies in the Jurisprudence of the ECHR' in K. Henrard and R. Dunbar (eds), *Synergies in Minority Protection: European and International Perspectives* (CUP 2009) 314.

[27] S.F. Kreimer, 'Federalism and Freedom' (2001) ANNALS Am. Acad. Pol. & Soc. Sci. No 574, 66; M.W. McConnell, 'Federalism: Evaluating the Founders' Design (reviewing *Federalism: the Founders' Design* by Raoul Berger' (1987) (4)54 U. Chi. L. Rev. 1484, 1494; A.O. Hirschman, *Exit, Voice, and Loyalty* (2nd edn Harvard University Press 1990). See also D. Kochenov, 'On Options of Citizens and Moral Choices of States: Gays and European Federalism' (2009) 33 Fordham Int'l L. J. 156. See also F. de Witte, 'The Role of Transnational Solidarity in Mediating Conflicts of Justice in Europe' (2013) 18 ELJ 694.

[28] These include, most notably, France and Greece.

[29] Framework Convention for the Protection of National Minorities (adopted 1 February 1995, in force 1 February 1998) ETS 157. The Member States of the Union which have not ratified the Convention include Belgium, France, Greece, and Luxembourg. For the commentary on the Framework Convention, see eg M. Weller (ed), *The Rights of Minorities: A Commentary on the European Framework Convention for the Protection of National Minorities* (OUP 2006); A. Verstichel, A. Alen, B. de Witte and P. Lemmens (eds), *The Framework Convention for the Protection of National Minorities: A Useful Pan-European Instrument?* (Intersentia 2008).

Europe[30] – or did so with extremely far-reaching derogations. This innate suspicion, results in a predictable stance against granting the EU relevant powers, and is popularly viewed as a way to defend the sovereignty of the Member States of the organization.[31] A solid legal basis for effective minority protection action in the EU is hard to come by.

However much one may repeat the story of the EU's creeping encroachment on the competences of Member States,[32] the fact remains that the EU is an organization based on delegated powers, where powers not conferred on the EU unquestionably remain with the Member States.[33] Even though 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,[34] 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[35] which the Union is striving to achieve – even if such actions fall outside the scope of EU law *sensu stricto*[36] – such negative integration does not open up the way to regulate the areas

[30] The Framework Convention is an indirect source of principles of EU law. This functions via ECHR law – since it is settled case law that the ECJ will protect human rights based, *inter alia*, on the principles of law contained in the ECHR as interpreted by the ECtHR, the ECJ is bound to take into consideration the position embraced by the Strasbourg Court with regard to the role to be played by minority protection norms in the Council of Europe legal system. In a number of decisions ECtHR has not only recognized the 'minority way of life' within the context of Article 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: ECtHR, *Chapman v UK* [2001] App No 27238/95, para 93; ECtHR, *Muñoz Diaz v Spain* [2010] App No 49151/07. For analysis, see K. Henrard, 'An EU Perspective' (n 5) 85–87; A. Van Bossuyt, 'Fit for Purpose or Faulty Design? Analysis of the Jurisprudence of the European Court of Human Rights and the European Court of Justice on the Legal Protection of Minorities' (2007) J. Ethnopolitics & Minority Issues in Eur. 1.

[31] Sovereignty is not a value in itself, however. It has to be used in a way to improve lives. Being able to decide does not mean that bad decisions have to be taken: J.H. Carens, 'Citizenship and Civil Society: What Rights for Residents?' in R. Hansen and P. Weil (eds), *Dual Nationality, Social Rights and Federal Citizenship in the U.S. and Europe* (Randall Books 2002) 100, 115.

[32] Literature on this issue is abundant: S. Prechal, 'Competence Creep and General Principles of EU Law' (2010) 3 Rev. Eur. Adm. L. 8; S. Weatherill, 'Competence Creep and Competence Control' (2004) 23 YEL 1; M.A. Pollack, 'Creeping Competence: The Expanding Agenda of the European Community' (1994) 14 J. Eur. Pub. Pol'y 95.

[33] The EU is based on the principle of conferral: Article 5(2) TEU.

[34] Article 4(3) TEU. On this principle, see eg J. Temple Lang, 'Article 10 EC – The Most Important „*General Principle*" of Community Law' in U. Bernitz, J. Nergelius and C. Cardner (eds), *General Principles of EC Law in a Process of Development* (Kluwer Law Int'l 2008) 75; L.W. Gormley, 'Some Further Reflections on the Development of General Principles of Law within Article 10 EC' in U. Bernitz, J. Nergelius and C. Cardner (eds), *General Principles of EC Law* 303.

[35] The values are outlined in Article 2 TEU and the objectives in Article 3 TEU. See also, C.J. Bickerton, *European Integration: From Nation-states to Member States* (OUP 2012).

[36] For a discussion, see J.H.H. Weiler, 'Epilogue: Living in a Glass House: Europe, Democracy and the Rule of Law' in C. Closa and D. Kochenov (eds), *Reinforcing Rule of Law Oversight in the European Union* (CUP 2016 (forthcoming)).

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',[37] does not guarantee that the Union will have an ability to regulate, let alone enforce the far-reaching promises the Treaties contain.[38]

Thus, even if approached from a federal perspective, the EU fails to build on clearly-articulated and enforceable values helping to distil an idea of justice underlying its law.[39] The Union is more or less powerless in the face of a defiant Member State refusing to take the values of Article 2 TEU seriously.[40] In the context of minority protection, it is unquestionable that the relevant provisions of the Charter of Fundamental Rights of the Union aiming at the respect of minorities[41] know the same limitations and can merely serve as interpretative aids,[42] not as a legal basis for action.[43] 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;[44] the second – in

[37] Article 2 TEU.

[38] Anneleen Van Bossuyt provides a compelling analysis of the limitations of the reference to minorities in the value article: A. Van Bossyut, 'L'Union européenne' (n 5) 440–444. For more on EU values and their legal effects, see eg C. Hillion, 'Overseeing the Rule of Law in the EU: Legal Mandate and Means' in C. Closa and D. Kochenov (eds), *Reinforcing Rule of Law Oversight* (n 36); D. Kochenov, 'The EU and the Rule of Law – Naïveté or a Grand Design?' in M. Adams et al. (eds), *Constitutionalism and the Rule of Law: Bridging Idealism and Realism* (CUP 2016). On the general problems with the enforcement of EU Values, see C. Closa and D. Kochenov (eds), *Reinforcing Rule of Law Oversight* (n 36); A. Jakáb and D. Kochenov (eds), *Enforcement of EU Law and Values: Methods to Ensure Compliance* (OUP 2016).

[39] See, for a discussion, D. Kochenov, G. de Búrca and A. Williams (eds), *Europe's Justice Deficit?* (n 11). But see K. Lenaerts, 'The Court of Justice of the European Union and the Protection of Fundamental Rights' (2011) 31 Polish YB of Int'l L. 79.

[40] J.W. Müller, 'Should the European Union Protect Democracy and the Rule of Law in Its Member States' (2015) 21 ELJ 141; D. Kochenov, 'EU Law without the Rule of Law: Is the Veneration of Autonomy Worth It?' (2015) YEL 34.

[41] Article 21(1) of the Charter. For the general analysis see K. Henrard, 'An EU Perspective' (n 5) 85–88; G.N. Toggenburg, 'The EU's Evolving Policies *vis-à-vis* Minorities: A Play in Four Parts and an Open End' (2008) EURAC Research Paper (Bolzano); G. Schwellnus, 'Much Ado about Nothing? Minority Protection and the EU Charter of Fundamental Rights' (2001) Webpapers on Constitutionalism & Governance beyond the State No 5. For an excellent commentary, see S. Peers, T. Harvey, J. Kenner and A. Ward, *The EU Charter of Fundamental Rights* (Hart 2014).

[42] K. Henrard, 'An EU Perspective' (n 5) 86–87. Henrard puts an emphasis on the role to be played by the Charter at the pre-legislative stage, when the Commission screens the legislative proposals against the provisions of the Charter. Yet, the actual contribution of such screenings can be put in doubt, since its effectiveness in other fields has been abundantly criticized. See eg G. Davies, 'Subsidiarity: The Wrong Idea, in the Wrong Place, at the Wrong Time' (2006) 43 CML Rev 63, demonstrating that such pre-screening in the context of the principle of subsidiarity does not work.

[43] A. Van Bossuyt, 'L'Union européenne' (n 5) 447.

[44] According to Article 48 TEU two types of amendment procedures are possible. Both of them require national ratifications. The third possibility would be to try to use the flexibility clause of Article 352

attaching the regulation of the field concerned to a broader context of the Internal Market acquis, without putting an emphasis on the potentially sore issue.[45]

However, the former is not a real option at the moment: 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. Politicians are not always acting in the ways which faithfulness to the ideal of democracy would entail, ie avoiding the tyranny of the majority.[46] 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',[47] is clearly not the best option on the menu. It follows that in the context of minority protection, the Union is to act in the grey area, attaching minority-relevant measures to the broader legal bases, mostly related to issues of Internal Market integration.

Consequently, lacking clear specific legal bases, lacking Member States' consensus, and without a clear 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 overlap in the issue area of minority protection, making EU's intervention at times terribly contested. This is amplified by the fact that 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*[48] *to Angonese*[49] that minority protection could be a legitimate objective for the Member States to pursue even in deviation from the EU's acquis,[50] strict proportionality test applies ensuring that there is no guarantee that minority protection, however highly cherished, will actually prevail.[51]

TFEU, but it seems to be hardly applicable in this context, given that it is tied to the Internal Market and the protection of minorities will likely be a departure from the general economic rationale of European integration.

[45] In one example, although the EU does not have competences in the area of family law, its Internal Market rules potentially have far-reaching effect on the spread and *de facto* recognition of same-sex unions and families around the Union. For analysis, see D. Kochenov, 'On Options of Citizens' (n 27). Poland, disappointed with the perceived current developments even appended a special Declaration to the Treaties, trying to shield its family law from liberal influences and the Charter of Fundamental Rights of the Union (Declaration No 61).

[46] As analysed by Publius in Federalist No 10.

[47] Article 48 TEU.

[48] Case C-379/87 *Anita Groener v Minister for Education and the City of Dublin Vocational Educational Committee* ECLI:EU:C:1989:599 [1989] ECR I-3967.

[49] Case C-281/98 *Roman Angonese v Cassa di Risparmio di Bolzano SpA* ECLI:EU:C:2000:296 [2000] ECR I-4138; Case C-274/96 *Horst Otto Bickel and Ulrich Franz* ECLI:EU:C:1998:563 [1998] ECR I-7637.

[50] C. Delcourt, 'The *Acquis Communautaire*: Has the Concept had its Day?' (2001) 38 CML Rev 829.

[51] The literature on the limiting effects of the Internal Market on regional specificity, including regional powers and minority protection is voluminous. See eg G. N. Toggenburg, 'A Remaining Share or a New

The situation is further complicated by a simple fact that taken as a whole, the EU is remarkably diverse, boasting numerous categories of the recognized (as well as *de facto* clandestine) majorities, which makes it almost impossible to come up with any tenable and shared idea of *minorities* in the Union. Majorities thus only exist at the Member State, not at the EU level. Lacking an EU-level majority[52] does not mean, however, that the same applies to minorities. Indeed, absent dominant culture, language, historical tradition, etc, etc, anyone – indeed, everyone – in the Union belongs to a minority of some kind, and the vulnerability of numerous minority groups can even be seen as augmented as a result of EU integration. This concerns as much the EU-wide minorities, such as the third country nationals residing in the EU,[53] or the EU's Roma,[54] as it does the localized minorities, such as Baltic 'Russian speakers', Danube Aromanians, or Frisians.

EU's commitment to facilitating the freedom of movement for its citizens[55] and long-term resident third country nationals[56] within its territory can only lead to the

Part? The EU's Role *vis-à-vis* Minorities after the Enlargement Decade' in M. Weller, D. Blacklock and K. Nobbs (eds), *The Protection of Minorities in the Wider Europe* (Palgrave Macmillan 2008) 95, 111; R.F. Weber, 'Individual Rights and Group Rights in the European Community's Approach to Minority Languages' (2007) 17(2) Duke J. Comp. & Int'l L. 361; D. Kochenov, 'Regional Citizenships in the EU' (2010) 35 EL Rev 307.

[52] EU citizens could theoretically be proclaimed as such a majority, however, such proclamation would be very problematic in the light of the fact that EU law does not apply to EU citizens automatically. Although they are by definition within the personal scope of EU law, the ECJ requires that a material connection be found between EU law and the situation of EU citizens. Since such a connection is missing in the majority of cases, the majority of EU citizens are excluded from the material scope of application of EU law, profoundly undermining the supranational status of citizenship: D. Kochenov, 'Citizenship without Respect: The EU's Troubled Equality Ideal' (2010) Jean Monnet WP No 8/10, 201. On the different approaches to EU citizenship, see D. Kochenov, 'The Essence of European Citizenship Emerging from the Last Ten Years of Academic Debate: Beyond the Cherry Blossoms and the Moon' (2013) 62 ICLQ 97.

[53] See eg A. Wiesbrock, *Legal Migration to the European Union* (Martinus Nijhoff 2010).

[54] G. Kostadinova, 'Minority Rights as a Normative Framework for Addressing the Situation of Roma in Europe' (2011) 39(2) Oxford Development Studies 163; K. Henrard, 'The Council of Europe and the Rescue of Roma as a Paradigmatic Case of Failed Integration? Abstract Principles versus Protection in Concreto' 2013 (10) Eur. YB Minority Issues 271–315; H. O'Nions, *Minority Rights Protection in International Law: The Roma of Europe* (Aldershot 2007); M.H. Ram, 'European Integration, Migration and Representation: The Case of Roma in France' (2013) 13(3) Ethnopolitics 203; P. Vermeersch, 'The European Union and the Roma: An Analysis of Recent Institutional and Policy Developments' 2013(10) Eur. YB Minority Issues 341.

[55] Article 21 TFEU. For an analysis, see F. Wollenschläger, 'A New Fundamental Freedom beyond Market Integration: Union Citizenship and Its Dynamics for Shifting the Economic Paradigm of European Integration' (2011) 17 ELJ 34; D. Kochenov and R. Plender, 'EU Citizenship: From an Incipient Form to an Incipient Substance? The Discovery of the Treaty Text' (2012) 37 ELRev 369. For key problems with the free-movement paradigm, see D. Kochenov, 'The Citizenship Paradigm' (2013) 15 CYELS 197.

[56] This category probably benefits from free movement law more fictitiously, than in reality. Article 11 Directive 2003/109 concerning the status of third-country nationals who are long-term residents [2004] OJ L 16/44. For analysis, see D. Acosta Arcarazo, 'Civic Citizenship Reintroduced? The Long-Term

growth of cultural, religious and any other possible kinds of diversity in the Union in the future. If anything, this calls for a synergetic approach to tackling minority protection. While regrettably, 'minorities are not determined at the EU level with reference to the entire [Union]',[57] there is no reason why this approach should prevail into the future, at least in the context of the vulnerable groups *created* by EU law.[58] In fact, EU law generates markedly different outcomes in the sphere of the protection of minorities (or 'local interest') depending on the framing of the issue. In the cases when the issue is presented in economic terms – eg how can minorities be protected without this affecting domestic or European economy? – EU law is bound to intervene, striking down the measure;[59] however, if minority protection is taken outside the economic context, the issue remains *de facto* mute without any protection ensued.[60] This is the consequence of the fact that the whole EU legal system is based on – mostly, undisclosed – market-focussed assumptions,[61] such as the (economic) objectives of the integration process which are not contestable by democratic means.[62] The EU is a system, in the right characterization by Joseph Weiler, where a citizen '*è ridotto a un consumatore di resultati politici*'.[63] This is not good news for the vulnerable groups in need of protection, particularly so given how blurred the border line between 'market-related' and 'non-market-related' issues is.

Residence Directive as a Post-National Form of Membership' (2015) 21(2) ELJ 200. There is a general problem of availability of EU legal space, as a legal system, to those who are not formally recognized as citizens of the EU: D. Kochenov and M. van den Brink, 'Pretending There Is No Union' (n 16).

[57] K. Henrard, 'An EU Perspective' (n 5) 64. See also K. Topidi, *EU Law, Minorities, and Enlargement* (Intersentia 2010) 98.

[58] The reasons provided for not adopting a broader approach usually relate to the fact that the EU is 'not (yet) a state-like entity' (K. Henrard, 'An EU Perspective' (n 5) 64) and other uniquely doctrinal considerations which seem to ignore the ability of the Union, through its legal system, to affect the situation of certain (vulnerable) groups in the most profound ways, as well as create them – which is the case with third country nationals and EU citizens. A limiting State-centred approach is not at all helpful in this context.

[59] Pretty much all of the non-discrimination on the basis of nationality case law is a testimony to this approach, which is at the core of what the EU is about.

[60] Eg C-391/09 *Runevič-Vardyn and Wardyn*, EU:C:2011:291.

[61] M.A. Wilkinson, 'Politicising Europe's Justice Deficit: Some Preliminaries' in D. Kochenov, G. de Búrca and A. Williams (eds), *Europe's Justice Deficit?* (n 11); G. Peebles, '„A Very Eden of the Innate Rights of Man"? A Marxist Look at the European Union Treaties and Case Law' (1998) 22 L. and Social Inquiry 581.

[62] G. Davies, 'Social Legitimacy and Purposive Power: The End, the Means and the Consent of the People' in D. Kochenov, G. de Búrca and A. Williams (eds), *Europe's Justice Deficit?* (n 11) 259. On how a certain pre-selected understanding of justice can (and does) mute democratic considerations, see A.J. Menéndez, 'Whose Justice? Which Europe?' in D. Kochenov, G. de Búrca and A. Williams (eds) 137.

[63] J.H.H. Weiler, 'Europa: „Nous coalisons des Etats noun n'unissons pas des hommes"' in M. Cartabia and A. Simoncini (eds), *La Sostenibilità della democrazia nel XXI secolo* (Il Mulino 2009) 51, 64. But see, for a much more positive presentation of the citizenship-democracy connection in the EU, which we do not necessarily endorse: K. Lenaerts and J.A. Gutiérrez-Fons, 'Epilogue: EU Citizenship. Hopes and Fears' in D. Kochenov (ed) *EU Citizenship and Federalism: The Role of Rights* (CUP 2017).

It is submitted that the literature has not paid sufficient attention to the need and to the vistas of a necessary adaptation to the supranational reality, which is officially tongue in cheek 'apolitical',[64] where the restriction on buying a home to protect the local interest (which is usually illegitimate, but can also be legitimate) is a violation of EU law,[65] while having a name misspelled in a state-orchestrated campaign of eradicating public presence and visibility of minority cultures is permissible.[66] The level of scholarly complacency with this state of affairs in minority protection (and other spheres) is, regrettably, extremely high.[67]

It is time to view the EU as a highly specific minority protection arena suffering from its own unique constitutional flaws stemming from the design and the functioning of its legal system,[68] not to be confused with the troubles stemming from the EU's component parts – the Member States. The reform of the Member State-centred thinking should start at the level of approaching the core issue. It should include the assessment of such core normative questions as what is a minority in the EU's context of a missing majority, what is the appropriate depth of EU's intervention in the area of minority protection, ie how much room for manœuvre should reasonably be left with the Member States without disrupting the effectiveness of EU's regulation and definition what successful 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 without, however, fetishizing the Internal Market considerations at the core of the EU law edifice today.

In the Union context it would be misleading to follow strictly any of the accepted State-centred definitions of what a minority is. Most importantly, 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, ie those created by the Union itself. These include EU citizens residing outside of their Member State of nationality and third country nationals who are long-term residents in the EU.[69] Although some scholars attempted to make connections between the Member State-mandated minority categories and these two groups, applying national

[64] A.J. Menéndez, 'Whose Justice?' (n 62).

[65] Joined cases C-197/11 & C-203/11 *Libert e.a. v Gouvernement flamande* and *All Projects & Developments NV e.a. v Vlaamse Regering* ECLI:EU:C:2013:288; cf: L.W. Gormley, 'Keeping EU Citizens our Is Wrong' (2013) Journal de droit européen 316.

[66] *Runevič-Vardyn and Wardyn* (n 60).

[67] But see, for notable exceptions, G. Peebles, '„A Very Eden of the Innate Rights of Man"? (n 61); M. Bartl, 'Internal Market Rationality, Private Law and the Direction of the Union: Resuscitating the Market as the Object of the Political' (2015) 21(5) ELJ 572; D. Kukovec, 'Law and the Periphery' (n 11).

[68] D. Kochenov, 'The EU and the Rule of Law' (n 38).

[69] AG Poiares Maduro explicitly acknowledged that 'third country nationals (...) constitute „discrete and insular minorities"' in his Opinion in Case C-327/02 *Panayotova v Minister voor Vreemdelingen en Integratie* ECLI:EU:C:2004:110 [2004] ECR I-4759, para 47 (footnotes omitted).

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,[70] for instance, 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, notwithstanding the desire of some Member States to introduce an artificial split into these minority groups. There are no 'old' Turks and 'new' Turks in Cyprus,[71] just as there are no 'new' and 'old' Russians in Estonia or Latvia.[72] The same largely applies to migrant EU citizens – treating them as 'new' immigrants in their newly-chosen Member States of residence grinds the Union's commitment to equality apart: The EU citizens are clearly not foreigners anymore[73] and Member States' nationalities are, effectively, 'abolished'[74] in the sphere of application of EU law. They cannot, for that reason, be equated with other migrants.[75] 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 members of all other so-called non-autochthonous groups.

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[76] and affirmative action policies.[77] These sit

[70] K. Henrard, 'An EU Perspective' (n 5) 59. Also, D. Roughneen, *The Right to Roam: Travellers and Human Rights in the Modern Nation-State* (Cambridge Scholars Publishing 2010).

[71] M. Brus et al., *A Promise to Keep: Time to End the International Isolation of the Turkish Cypriots* (Tesev Publications 2008); E. Kozakou-Marcoullis, 'The So-Called Isolation of the Turkish Cypriot Community' (2007) 2 Cyprus YB Int'l Rel. 9.

[72] V. Poleshchuk (ed), *Chance to Survive: Minority Rights in Estonia and Latvia* (Fond Istoricheskoj Perspektivy 2009); G. Guliyeva, 'Lost in Transition: Russian-Speaking Non-Citizens in Latvia and the Protection of Minority Rights in the European Union' (2008) 33 EL Rev 843.

[73] D. Kochenov 'Rounding up the Circle' (n 15).

[74] G. Davies, '„Any Place I Hang My Hat?" or: Residence Is the New Nationality' (2005) 11 ELJ 43, 55.

[75] The fact that EU citizens need to enjoy special protection in the Member States of residence is widely recognized. In fact, there was a special institutional provision to this end in the first EU citizenship proposal tables by the Spanish delegation to the Maastricht IGC, involving special representatives in each Member States empowered to collect EU citizens' complaints: '*Se designará en cada Estado miembro un Mediador que tendrá la mission de asistir a los ciudadanos de la Unión en defensa de los derechos reconocidos en su favor por el presente Tratado ante las autoridades administrativas de la Unión e de sus Estados miembros, así como de hacer valer tales derechos ante las instancias judiciales, por si mismo o en apoyo de los interesados*' (Article 9(1)). This proposal was not destined to become law. See 'Propuesta de texto articulado sobre ciudadanía europea presentado por la Delegacion española a la Conferencia Intergubernamental sobre Unión Política (20 de febrero de 1991)' (on file with the authors).

[76] This is usually done via local citizenships or special statuses, which are severely undermined by EU law, since they cannot be in conflict with the law of the Union, ie cannot actually be consequential in promoting difference in treatment between EU citizens. See G. von Toggenburg, 'A Remaining Share' (n 51) 111; R.F. Weber, 'Individual Rights' (n 51) 361; D. Kochenov, 'Regional Citizenships' (n 51).

[77] For an analysis, see eg S. Pager, 'Strictness and Subsidiarity: An Institutional Perspective on Affirmative Action at the European Court of Justice' (2003) 26 Boston College Int'l & Comp. L. Rev. 35; D. Ca-

uneasily with the *acquis* for a simple reason that minority protection is not among the policies implemented by the EU, which ensures that EU law, for the biggest part, is, to agree with Henrard, 'minority agnostic'.[78] This has obvious negative consequences for the development of the law and policy at both the EU and the Member State levels, 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,[79] EU law does not allow for reserved domains of regulation where the EU would not be 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 regulation of minority protection be in line with the principles and objectives of EU integration as interpreted by the ECJ.[80] Deferring to the latter is a great pretext for the Court to picture itself as an institution sensitive to the Member States' concerns;[81] yet, in this same context, the EU equally can be viewed as accommodating the practices of the Member States designed to humiliate and oppress their minority citizens. This makes effective minority protection highly unlikely in the context of Member States' growing concerns for the protection of their majority populations' cultural specificity within the broader context of the EU as a whole.

Moreover, the application of any minority protection measures is necessarily tainted with the Internal Market bias, as long as the safeguarding and development of the EU's Internal Market in treated as *the* measure of EU's success. This introduces a systemic disregard of other potentially vital interests, thus manifesting EU's justice deficit.[82] At the same time, due to minority protection not working as a full-fledged objective of the EU, the ECJ's exercise of self-restraint often implies leaving the Member States free to engage in direct ethnic discrimination.[83] In this context it is not surprising that minority-related laws and policies introduced by the Member

ruso, 'Limits of the Classical Method: Positive Action in the European Union after the New Equality Directives' (2003) 44 Harv. Int'l L. J. 331.

[78] K. Henrard, 'An EU Perspective' (n 5) 58.

[79] A. von Bogdandy and J. Bast, 'The European Union's Vertical Order of Competences: The Current Law and Proposals for Reform' (2002) 39 CML Rev 227.

[80] Eg Case C-135/08 *Janko Rottman v Freistaat Bayern* ECLI:EU:C:2010:104 [2010] ECR I-1449, para 55; Case C-369/90 *Mario Vicente Micheletti and others v Delegación del Gobierno en Cantabria* ECLI:EU:C:1992:295 [1992] ECR I-4239, para 10. This is fully in line with the principle of sincere cooperation expressed in Article 4(3) TEU.

[81] K. Lenaerts, 'The Court of Justice of the European Union' (n 39).

[82] For the analysis of this problem, see D. Kochenov, G. de Búrca and A. Williams (eds), *Europe's Justice Deficit?* (n 11).

[83] On a broad range of examples relating to ethnic discrimination connected to language, see eg D. Kochenov, V. Poleshchuk and A. Dimitrovs, 'Do Professional Linguistic Requirements Discriminate? A Legal Analysis: Estonia and Latvia in the Spotlight' (2013) 10 Eur. YB Minority Issues 137.

States are very likely to either fail the test or turn into an anti-minority measure. It seems that the Member States willing to protect minorities end up being hostages of those Member States, such as Greece or France, which are hostile to the idea: EU law, which is insensitive to the minority protection issues due to the labours of such Member States, can also affect negatively the minority protection in all the other states. 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 TEU.

This being said, the rhetoric of cultural diversity between the Member States has so far encouraged the quashing of minorities and their rights. This practice needs to be put into reverse: culture is a coin of two sides and focusing uniquely on the side, which is state-endorsed and state-mandated – something that has been done by the EU – neglects and harms the 'other' culture of the Member States, as lived and perceived by all the inhabitants of the state in question, including those who are excluded from the official narrative. For a Pole in Vilnius to hear that Lithuanian language is the most cherished heritage of the tiny nation which is bound to justify the misspelling of her name – there is simply no 'w' in the language, never mind a whiskey bottle in every bar – is a plausible reasoning turned untenable in a city gifted to the Lithuanian SSR by Stalin, where Polish culture is historically omnipresent.[84] Yes, we fully realize that history is complex, which is exactly the point: there is no Lithuania without a ‚w' in the past, just as there is no Lithuania without a ‚w' in the present, official position of the state – abusive to minorities – notwithstanding. Similarly, refusing a Latvian Jew a right to have a real name which is not misspelled by Latvian authorities in order to hide his Jewish identity has nothing to do with the protection of Latvian culture, as the UN Human Rights Committee has rightly found in a decision never followed by the ECJ.[85] The fact that the ECJ ends up endorsing light-hearted tinkering with history at the expense of the minority cultures is most alarming, particularly so given that purely economic arguments suddenly *do* bring about a result involving the protection of a name and identity.[86] This undermines the coherence and consistency of EU's engagement with minority protection.

[84] On the experiences of Wilno by two leading poets, both natives of the city, see T. Venclova, *The Winter Dialogue (with a dialogue between the author and Czesław Miłosz)* (Northwestern University Press 1999), illustrating how untenable the Court-endorsed 'culture' is; cf: R. Lopata, *National Question in Lithuania: Acculturation, Integration and Sepratedness? NATO Research Fellowship Programme 1996-1998* (Vilnius University 1998); A. Ramonaite, N. Maliukevičius and M. Degutis, *Tarp Rytų ir Vakarų: Lietuvos visuomenės geokultūrinės nuostatos* (Versus aureus 2007); M. C. Steinlauf, *Bondage to the Dead: Poland and the Memory of the Holocaust* (Syracuse University Press 1997).

[85] UN Human Rights Committee, *Raihman v Latvia* (Communication No 1621/2007).

[86] Case C-168/91 *Christos Konstantinidis v Stadt Altensteig* ECLI:EU:C:1993:115 [1993] ECR I-1191.

3. Four brief case studies

Navigating among a myriad of conflicting interests, the EU depends on the Member States' approaches and sensitivities, which often lie at the core, precisely, of minority rights violations. The general systemic capacity of the European Union as a mechanism of 'taming liberal nationhood',[87] to 'force' tolerance on the Member States aside, minority protection is in constant danger of being hollowed out. In this light, a closer look at the problems of some of the special groups the EU has a potential to protect reveals just how dysfunctional the regulation currently in place actually is.

To illustrate this, the practice of the current regulation will be approached from four angles. Firstly, the paper offers a brief investigation of the situation of EU citizens outside of their Member States of nationality: The EU strived to protect this obviously vulnerable group, from the very first days of integration, but irrespective of its successes, the EU's approach to dealing with this group necessarily puts special national minority rights policies, our key focus here, in danger. On the other side of the same coin, the EU undermines the dubious claims of the Member States related to the necessity to impose the local culture on the newcomers, who are viewed as unable, by definition, to function in the new society successfully.[88] The EU is thus very effective in exposing the real goals behind 'cultural integration'. Secondly, our analysis of the sexual minorities' position in the EU demonstrates that members of the group benefit more than any other minority group from the free movement right as an enhancer of their liberty, alongside the benefits they gain from EU-wide non-discrimination framework which the Member States *de jure* have no freedom not to implement. This being said, the successes seem to be rather modest.[89] Thirdly, we look at the shameful lack of progress in dealing with the case of the Baltic Russians,[90] where the EU and the Member States alike failed to solve an overwhelmingly important minority protection problem having all the necessary tools at hand during the period of Baltic states' EU accession negotiations. Last section, reporting our core case study, outlines the recent EU's Roma rights scandals

[87] W. Kymlicka, 'Liberal Nationalism and Cosmopolitan Justice' in S. Benhabib et al. (eds), *Another Cosmopolitanism* (OUP 2006) 128, 133; 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* (T.M.C. Asser Press 2010).

[88] D. Kochenov, 'Mevrouw de Jong Gaat Eten: EU Citizenship and the Culture of Prejudice' (2011) EUI WP RSCAS 2011/06.

[89] U. Belavusau, 'A Penalty Card for Homophobia from EU Non-Discrimination Law' (2015) 21 CJEL 237.

[90] P. Van Elsuwege, *From Soviet Republics to EU Member States: A Legal and Political Assessment of the Baltic States' Accession to the EU*, vol 1 (Martinus Nijhoff 2008); V. Poleshchuk, *Chance to Survive: Minority Rights in Estonia and Latvia* (Foundation for Historical Outlook 2009); G. Guliyeva, 'Lost in Transition' (n 72).

which demonstrated, as if we needed yet another reminder, that EU law, however beautiful on the books, suddenly stops in its trails when a particularly vulnerable minority group enters into the picture.[91] We outline how the fundamental gaps in the scope of EU's competences, lack of political will, insufficient law-making ability, as well as enforcement mechanisms, all undermine the situation of the vulnerable groups and the credibility of EU's self-image as an effective protector of not only minority, but also human rights.[92]

3.1. Migrant EU citizens

EU citizens moving across the internal borders within the Union are protected from any attempts of the Member States to 'integrate' them into their society by repressive means.[93] Their situation stands out as a rare example of a liberal *laissez-faire* approach in the problematic reality of opposition to immigration in Europe.[94] Non-discrimination on the basis of nationality within the scope of application of EU law creates a very special legal context for migrant EU citizens. EU citizens are shielded from the highly problematic practice of the testing of the knowledge of the local 'culture', language and 'history', which over the years has gained in popularity in the Member States[95] and is applied exclusively to third-country nationals.[96] This highly problematic practice is declared to improve the social cohesion in the society,[97] yet *de facto* is employed to discourage immigration amounting, in the wise words

[91] M. Willers, *Ensuring Access to Rights for Roma and Travellers. The Role of the European Court of Human Rights. A Handbook for Lawyers Defending Roma and Travellers* (Council of Europe, Strasbourg 2009) 65; A. Robles-Gil, 'Final Report on the Human Rights Situation of the Roma, Sinti and Travellers in Europe, for the Attention of the Committee of Ministers and the Parliamentary Assembly', CommDH (2006) 1, Office for the Commissioner of Human Rights (Strasbourg, 15 February 2006); See also D. Ringold, M.A. Orenstein and E. Wilkens, *Roma in an Expanding Europe. Breaking the Poverty Cycle* (World Bank 2005).

[92] European Parliament, *Measures to Promote the Situation of Roma EU Citizens in the European Union* (Bruxelles 2011).

[93] T. Triadafilopoulos, 'Illiberal Means to Liberal Ends? Understanding Recent Immigrant Integration Policies in Europe' (2011) 37(6) J. Ethnic and Migration Studies 861; C. Joppke, 'Double Standards? Veils and Crucifixes in the European Legal Order' (2013) 54 Eur. J. Sociology 97.

[94] L. Orgad, '„Cultural Defence" of Nations: Cultural Citizenship in France, Germany and the Netherlands' (2009) 15(6) ELJ 719.

[95] R. Bauböck and C. Joppke (eds), 'How Liberal Are Citizenship Tests?' (2010) EUI WP, RSCAS 2010/41; R. van Oers, E. Ersbøll and D. Kostakopoulou, *A Re-definition of Belonging?: Language and Integration Tests in Europe* (Brill 2010) 307; C. Joppke, 'Beyond National Models: Civic Integration Policies for Immigrants in Western Europe' (2007) 30 West Eur. Politics 1.

[96] For the analysis of the whole context of the use of culture as a method of exclusion in Europe, see eg C. Joppke, *Citizenship and Immigration* (Polity Press 2010) 111–144. See also L. Orgad, 'Illiberal Liberalism: Cultural Restrictions on Migration and Access to Citizenship in Europe' (2010) 58 AJCL 53.

[97] D. Kochenov, 'Mevrouw de Jong' (n 88).

of Joseph Weiler, to the ultimate example of intolerance.[98] 'Come, be one of us'[99] becomes an insistent invitation to cease being oneself at the same time.[100]

There is no doubt that, should EU law not prohibit nationality discrimination, Member States would eagerly subject EU citizens to the same treatment. This puts them on a totally different footing compared with third country nationals, because migrant EU citizens have to be treated as the locals are treated.[101] Moreover, should the national regulation create any actual[102] or potential[103] obstacles to free movement – either discriminatory or not on the basis of nationality[104] – or obstacles to the enjoyment of the essence of other EU citizenship rights,[105] it will not be tolerated by the Union, as long as a link with EU law – the weakest and the most esoteric part of the current construct – is demonstrated and recognized.[106] This means that the Member States' policies aiming at the 'integration' of migrants,[107] which is arguably the main goal behind the assimilationist policies targeting third country nationals in a huge number of the Member States, do not apply to EU citizens.

The protection of EU citizens from the possible intervention into their lives by the authorities of their new Member State of residence is directly connected with

[98] 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* (CUP 2003) 7. For a different, somewhat idealistic approach, see K. Henrard, 'An EU Perspective' (n 5) 83–86. It is impossible to agree with Henrard that 'the integration issue is more acute when it comes to [third country nationals]. This again makes sense in the context of the European integration process, since [third country nationals] come from outside the EU Member States and hence pose a particular challenge in terms of integration', at 85. Such statements are rarely based on any empirical evidence and only reflect EU's self vision as a culture somehow superior to others.

[99] J.H.H. Weiler, 'In Defence of the *Status Quo*' (n 98) 19.

[100] I. Michalowski, 'Required to Assimilate? The Content of Citizenship Tests in Five Countries' (2011) 15(6–7) Citizenship Studies 749. G. Sasse, 'Securitization or securing rights? Exploring the conceptual foundations of policies towards minorities and migrants in Europe' (2005) 43(4) JCMS 673.

[101] Eg G. Davies, '„Any Place I Hang My Hat?"' (n 74). For the general context, see D. Kochenov, 'Beyond the Cherry Blossoms and the Moon' (2013) 62 ICLQ 97.

[102] C-192/05 *Tas-Hagen en Tas and R.A. Tas v Raadskamer WUBO van de Pensioen- en Uitkeringsraad* ECLI:EU:C:2006:223.

[103] C-148/02 *Carlos Garcia Avello v Belgian State* ECLI:EU:C:2003:539 [2003] ECR I-11613.

[104] F. Jacobs, 'Citizenship of the European Union – A Legal Analysis' (2007) 13 ELJ 591.

[105] Eg C–34/09, *Gerardo Ruiz Zambrano v Office national de l'emploi* ECLI:EU:C:2011:124 [2011] ECR I-1177 (*Ruiz Zambrano*). D. Kochenov, 'A Real European Citizenship; A New Jurisdiction Test; A Novel Chapter in the Development of the Union in Europe' (2011) 18 CJEL 55; K. Lenaerts and J. Gutiérrez-Fons, 'Epilogue: EU Citizenship. Hopes and Fears' in D. Kochenov (ed), *EU Citizenship and Federalism: The Role of Rights* (CUP 2017).

[106] On the problematic nature of such 'links with EU law' as currently construed, see E. Spaventa, 'Earned Citizenship – Understanding Citizenship through Its Scope' in D. Kochenov (ed), *EU Citizenship and Federalism: The Role of Rights* (CUP 2016).

[107] For a general overview, see eg R. Cholewinski, 'Migrants and Minorities: Integration and Inclusion in the Enlarged European Union' (2005) 43 JCMS 695.

the obligation lying on the EU to respect the identities of the Member States.[108] This clearly applies not only to the Member States as such, but also to their nationals, who are entitled to live anywhere in the Union without being forced to relinquish their cultural, political and socio-economic ties with the Member State of nationality.[109] It has two important consequences for minority protection in the EU in general: a positive one, and a negative one. The first one demonstrates that EU citizens moving into other Member States put national integration policies in doubt, since EU citizens seem to be able to function pretty well in the host societies, hinting at the fact that instead of tests, suspicion, and political rituals establishing the rite of passage,[110] basic equal treatment can be the key to actual, not theoretical social integration. The role that EU citizens come to play in the context of the migrants' 'integration' policies therefore is pivotal in showcasing that integration policies are unnecessary, their only function possibly being to discriminate against third country nationals on the wrong premises, which do not apply to EU citizens.

The negative aspect is directly related to the special position enjoyed by the migrant EU citizens in any host Member State: should the host Member State have a special minority protection policy in place, which would provide for special rights to be granted to a certain group of local citizens, the newcomers from other Member States cannot be excluded from benefitting from those rights. Such extension of the special treatment to them[111] can undermine the policy underlying the establishment of such special treatment in the first place.[112] Only the minority protection initiatives put into the Primary Law of the EU in the pre-accession context,[113] such as the provisions on Sami agriculture,[114] for instance, seem to be immune from the ever-penetrating effects of the principle of non-discrimination on the basis of nationality. An argument can be made that even the residents of highly legally specific minority-inhabited

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[108] For analyses, see E. Cloots, *National Identity in the EU* (OUP 2015); T. Konstadinides, 'Dealing with Parallel Universes: Antinomies of Sovereignty and the Protection of National Identity in European Judicial Discourse' (2015) 34 YEL 127.

[109] The requirement to give up one's previous EU nationality upon naturalising in the Member State of residence following the exercise of EU free movement rights (which is still the law in almost one third of the Member States) is obviously in conflict with this logic and represents an important problem: D. Kochenov, 'Double Nationality in the EU: An Argument for Tolerance' (2011) 17 ELJ 323. For general analyses, see T. Triadafilopoulos, 'Dual Citizenship and Security Norms in Historical Perspective' in T. Faist and P. Kivisto (eds), *Dual Citizenship in Global Perspective: From Unitary to Multiple Membership* (Palgrave Macmillan 2007) 27; P. Spiro, *Beyond Citizenship: American Identity after Globalisation* (OUP 2008).

[110] S. Lukes, 'Political Ritual and Social Integration' (1975) 9 Sociology 289.

[111] C-274/96 *Criminal Proceedings against Bickel and Franz* [1998] ECR I-7637; [1999] 1 CMLR 348.

[112] D. Kochenov, 'Regional Citizenships' (n 51); Henrard, 'An EU Perspective' (n 5) 88.

[113] D. Kochenov, 'A Summary of Contradictions' (n 7).

[114] D. Perrot and F. Miatti, 'Les lapons et les îles Åland dans le quatrième élargissement: Contribution à l'étude de la différenciation juridique au sein de la Communauté européenne' (1997) 413 Revue du marché commun et de l'Union européenne 670.

territories which are not entirely within the scope of EU law could not benefit from preferential treatment in all cases.[115]

This reality, however problematic it is for the Member States with strong minority protection regimes, is not easy to deal with, legally speaking. The conflict between the desire to grant special rights to minorities and the fundamental importance of the status of EU citizenship, which is intended, in the words of the Court, to be 'the fundamental status of the nationals of the Member States',[116] is too pronounced in this context to be downplayed easily.[117] Should any stable consensus among the Member States arise that this issue represents a problem (which is unlikely, given the firm doctrinal vision of such Member States as France and Greece, for instance), the only way to deal with it seems to be a better incorporation of minority protection issues. This could be done by placing a particular emphasis on special rights corresponding to the second part of the *Albanian Schools* test in the Primary Law of the Union. Such reflection missing, there is no valid reason, in the context of EU law, for discriminating between migrant EU citizens and the locals, even if belonging to a minority, in terms of access to special rights provided by the Member States.[118] This clearly demonstrates that EU citizens remain the most, if not the only, truly privileged group in EU law, exemplifying the tensions with regards to minority protection and special rights inherent in the system of EU law.

3.2. Sexual minorities

One of the central issues we have identified above is the centrality of the Internal Market integration for the EU's rationale in ensuring equality among EU citizens when they cross national borders within the Union. However, one ought not be taking for granted the fact that not all EU citizens move to another Member State to avail of the greater pool of opportunities on the market of services or of labour; rather, some

[115] D. Kochenov, 'EU Citizenship in the Overseas' in D. Kochenov (ed), *EU Law of the Overseas: Outermost Regions, Associated Overseas Countries and Territories, Territories Sui Generis* (Kluwer Law Int'l 2011).

[116] *Ruiz Zambrano* (n 105) para 41.

[117] Although it is indeed possible that minority protection in the EU will move forward through minority-conscious implementation of general EU policies, as Kristin Henrard suggests, in the majority of cases such implementation seems to be posing a threat of *contra legem* application of the law, limiting the possible effect of this approach: K. Henrard, 'An EU Perspective' (n 5) 58.

[118] Although the ECJ recognizes, as has been stated above, that minority protection can form a legitimate ground for deviating from the provisions of the *acquis*, it is impossible to predict how far it will be willing to go in allowing for such deviations to happen. So far, Case C-379/87 *Anita Groener v Minister of Education* ECLI:EU:C:1989:599 [1989] ECR I-3967 remains probably the only, albeit somewhat dubious example of ECJ's permissiveness in this field: K. Henrard, 'An EU Perspective' (n 5) 89. The language policy invoked obviously could hardly serve the purpose for which it has been established.

EU citizens might tap the opportunity to resettle to another Member State to access a greater pool of rights which they can enjoy unreservedly.

The sexual minorities clearly cannot be characterized as privileged in any sense in the EU today. Notwithstanding all the recent improvements of the legal climate with regard to protecting their rights, the situation is still far from being perfect. Abundant literature exists demonstrating that the logical grounds for distinguishing between sex discrimination and sex-orientation discrimination are not perfectly sound,[119] which is reflected in the decisions of the UN Human Rights Committee.[120] And yet, notwithstanding the progressive case law of the ECtHR, the *Grant* case law of the ECJ[121] is still not overruled: The Court refuses to extend sex-discrimination protections to sexual minorities, even if it has done precisely that in the case of transsexuals.[122] We happily acknowledge that the majority of the Member States allows for same-sex unions and/or marriages and the criminalization of consensual homosexual acts between adults has been removed from all the criminal codes around Europe.[123] But the situation is still problematic as the Directive dealing with this ground of discrimination[124] only applies to work relationships, thus undermining the goal of protecting this vulnerable group as enjoying a much narrower scope of application than the Race Directive.

Given a strong negative position adopted by a number of Member States, any attempts to change this situation are likely to fail if conducted outside of the Court

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[119] A. Koppelman, 'Why Discrimination against Lesbians and Gay Men is Sex Discrimination' (1994) 69 NYUL Rev. 197. See also D. Kochenov, 'On Options of Citizens' (n 27); A. Koppelman, 'Defending the Sex Discrimination Argument for Lesbian and Gay Rights: A Reply to Edward Stein' (2001) 49 UCLA L. Rev. 519; M.A. Fajer, 'Can Two Real Men Eat Quiche Together? Storytelling, Gender--Role Stereotypes and Legal Protection for Lesbians and Gay Men' (1992) 46 U Miami L. Rev. 511, 631–650.

[120] UN Human Rights Committee (HRC), Communication No 941/2000: Views of the Human Rights Committee Under Article 5, Paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights (*Young v Australia*), 10.2–13 (2003); HRC, Communication No 488/1992: Views of the Human Rights Committee Under Article 5, Paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights (*Toonen v Australia*), 16.9–7.6 (1994).

[121] Case C-249/96 *Lisa Jacqueline Grant v South-West Trains Ltd.* ECLI:EU:C:1998:63 [1998] ECR I-621. This is logically undistinguishable from the anti-miscegenation case law of the US Supreme Court of a century ago, see A. Koppelman, 'The Miscegenation Analogy: Sodomy Law as Sex Discrimination' (1988) 98 Yale L. J. 145, 154–164.

[122] G.N. von Toggenburg, '„LGBT" Go Luxembourg: On the Stance of Lesbian Gay Bisexual and Transgender Rights Before the European Court of Justice' (2008) Eur. L. Reporter 174, 180.

[123] Under ECtHR influence and the influence of the pre-accession exercise: D. Kochenov, 'Democracy and Human Rights: Not For Gay People?' (2007) 13 Texas Wesleyan L. Rev. 459.

[124] Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation. See also D. Kochenov, 'An Argument for Closer Cooperation between the European Union and the Council of Europe in the Field of Enlargement Regulation' (2006) 2 Croatian YB Eur. L. & Pol'y.

context. The ECJ could probably achieve progress relatively efficiently, however, by simply following the academic doctrine and the UN bodies. In a situation when unanimity of the Member States is required in order to move forward,[125] no advancement on this issue via law-making can be expected. Moreover, notwithstanding the broad gender-blind definition of the spouse in the EU Citizens' Free Movement Directive,[126] the majority of the Member States officially hostile to this minority group fail to apply the law correctly, *de facto* limiting the positive effects of free movement when refusing the recognition of same-sex marriages and unions in their territory.[127]

All these deficiencies of the current system of protection should however be put into the context of the level of protection of sexual minorities before the introduction of Article 13 EC by the Treaty of Amsterdam: no protection was awarded in the majority of the Member States or at the Union level, some candidate countries still criminalized homosexuality, and no same-sex unions or marriages were available in the majority of jurisdictions across the Union. A truly breathtaking dynamism and the progress made during the last decade in the sphere of sexual-minorities' protection should thus give cause to but mild optimism, especially when viewed in the context of general homophobia, which is particularly strong in some regions of the Union and even caused diplomatic scandals.[128] The problems in the level of protection related to the uncooperative stance of the Court and the limited scope of the relevant Directive should be dealt with as a matter of urgency as these are additionally coupled with the implementation problems which *de facto* deprive gay EU citizens from their main EU-granted right.[129]

3.3. Russian-speaking minorities in the Baltic states

Despite an intense monitoring before the EU accession, the Baltic states formally adhered to Copenhagen Criteria and implemented the *acquis*, yet failed to assume responsibility over their residents of ethnic minority. The ethnic composition of Baltic societies has been challenging from both a political and a social point of view[130] and Baltic governments systematically pursued policies to encourage

[125] Article 19 TFEU.

[126] For a compelling analysis, see A. Tryfonidou, 'EU Free Movement Law and the Legal Recognition of Same-Sex Relationships: The Case for Mutual Recognition' (2015) 21 CJEL 195.

[127] cf U. Belavusau, 'EU Sexual Citizenship: Sex beyond the Internal Market' in D. Kochenov (ed), *EU Citizenship and Federalism: The Role of Rights* (CUP 2017).

[128] See, among countless examples, 'Dutch Envoy Steps down, Citing Abuse of His Partner' *The New York Times* (6 August 2006), available at: <http://www.nytimes.com/2006/06/08/world/europe/08iht-envoy.1929519.html?_r=2&>.

[129] D. Kochenov, 'On Options of Citizens' (n 27).

[130] Statistics Estonia counted 1,352,399 residents in Estonia on 1 March 2014, of which over 450,000 individuals are Russian speakers. Of 2,180,442 residents of Latvia on 1 January 2014, 26.9% are

the Russian-speaking minority to leave.[131] Baltic states formalised titular majorities' privileged access to state institutions,[132] punitively enforced public sphere monolingualism in the titular language,[133] reinstated citizenship rights to those who had pre-Soviet citizenship[134] and left little space for minority rights in their legislative corpus.[135] These policies however had a different impact in each state. In the run-up to independence, Lithuania granted all those willing residents the right of the post-Soviet citizenship.[136] This guaranteed all Lithuania's Poles and Russians, both accounting for around 7 percent of the population in 1991, the enjoyment of full political and other rights. Estonia and Latvia issued identification documents for 'aliens' (in Estonia) and 'non-citizens' (in Latvia) to around 20 and 30 percent of the countries' populations at the time, making wide sections of local populations *de jure* statelessness.[137] The residents of Estonia without domestic citizenship[138] do not have a right to vote in the national elections; however, all permanent residents can participate in municipal elections allowing

Russians, 3.4% Belarusians, 2.4% Ukrainians, and 2.2% Poles. During the 2011 population census in Lithuania 6.6% declared Polish, 5.8% Russian, and 1.2% Belarusian ethnicity. *Statistical offices of Estonia, Latvia and Lithuania* (2014).

131 D.J. Galbreath and N. Muižnieks, 'Latvia: Managing Post-imperial Minorities' in B. Rechel (ed), *Minority Rights in Central and Eastern Europe* (Routledge 2009) 135; M. Lagerspetz, 'From NGOs to Civil Society: A Learning Process' in M. Lagerspetz et al. (eds), *Non-Profit Sector and the Consolidation of Democracy: Studies on the Development of Civil Society in Estonia* (Kunst 2004) 86.

132 T. Agarin, 'Russian Speaking Communities and Democratic Consolidation in the Post-Soviet Baltic Societies' in H. Pääbo and A. Kasekamp (eds), *Promoting Democratic Values in the Enlarging Europe: The Changing Role of the Baltic States from Importers to Exporters* (Tartu UP 2006). J. Hughes, '„Exit" in Deeply Divided Societies: Regimes of Discrimination in Estonia and Latvia and the Potential for Russophone Migration' (2005) 43(4) JCMS 739. D.D. Laitin, *Identity in Formation: The Russian-Speaking Populations in the Near Abroad* (Cornell UP 2006).

133 D. Kochenov, V. Poleshchuk and A. Dimitrovs, 'Do Professional Linguistic Requirements Discriminate?' (n 83).

134 D. Budryte, *Taming Nationalism? Political Community Building in the Post-Soviet Baltic States* (Ashgate 2005). D.J. Smith, A. Pabriks, A. Purs, and T. Lane, *The Baltic States: Estonia, Latvia and Lithuania* (Routledge 2002).

135 D. Budrytė and V. Pilinkaitė-Sotirovič, 'Lithuania: Progressive Legislation without Popular Support' in B. Rechel (ed) (n 131) 151.

136 D. Budrytė and V. Pilinkaitė-Sotirovič, 'Lithuania: Progressive Legislation without Popular Support' (n 135). N. Kasatkina, G. Kadzauskas and K. Sliavaite 'Ethnic Minorities and Public Policy: The Case of Lithuania' in S.S. Akermark et al. (eds), *International Obligations and National Debates: Minorities around the Baltic Sea* (The Åland Islands Peace Institute 2006) 347. V. Popovski, *National Minorities and Citizenship Rights in Lithuania. 1988–1993* (Palgrave 2000).

137 A. Antane and B. Tsilevich, 'Nation-Building and Ethnic Integration in Latvia' in P. Kolstø (ed), *Nation-Building and Ethnic Integration in Post-Soviet Societies* (Westview Press 1999) 63; S. Smooha and P. Järve, *The Fate of Ethnic Democracy in Post-Communist Europe*, Local Government and Public Service Reform Initiative (OSI 2005).

138 On 1 February 2014, there were approx. 83,600 'aliens' in Estonia (6.5% of residents) and around 7.25% of Estonia's residents carried Russian Federation passports on 1 January 2014. *Statistical Office of Estonia* 2014.

minority communities some representation at the level of municipalities.[139] Latvia's 'non-citizens' have no voting rights and no opportunity to engage in political decision-making at any level of government.[140] Like Estonia's stateless Russians, they are not EU citizens.[141]

Ahead of the EU accession, OSCE, NATO and the CoE have pressed Latvian and Estonian governments to redress status inequalities between titular and Russian-speaking residents, especially those resulting from *de jure* statelessness. Concessions made by governments of both Estonia and Latvia during the EU accession included granting children of stateless parents right to acquire citizenship, diplomatic protection for 'non-citizens' travelling abroad and a somewhat reduced scale of *de jure* discrimination nationally.[142] In the period between 1999–2004 integration of Russian speakers featured on agendas of Estonian and Latvian governments, avenues for naturalisations were opened,[143] yet after the accession in 2004 the interest pitted out and, following the meltdown of local economies, funding for the integration of Russian speakers was cut with dedicated governmental bodies disbanded by late 2008, albeit reinstated later with a much more limited mandate, largely focussing on the assimilation of minorities into the national 'culture'.[144]

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[139] V. Poleshchuk, *Advice Not Welcomed: Recommendations of the OSCE High Commissioner to Estonia and Latvia and the Response* (LitVerlag 2001)

[140] On 1 January 2014, there were 295,122 'non-citizens' living in Latvia (approx. 14.25% of residents), down from approximately 715,000 in 1991; around 1.64% of Latvia's carried Russian Federation passports on 1 January 2014. *Latvia's Population Register* 2014. See also N. Muižnieks, *How Integrated Is Latvian Society? An Audit of Achievements, Failures and Challenges* (University of Latvia Press 2010); V. Poleshchuk, 'Legal Aspects of National Integration in Estonia and Latvia', ECMI Report (2002), available at: <http://www.ecmi.de/uploads/tx_lfpubdb/report_33.pdf>; G. Pridham, 'Securing the Only Game in Town: The EU's Political Conditionality and Democratic Consolidation in Post-Soviet Latvia' (2009) 61 Europe-Asia Studies 51.

[141] D. Kochenov and A. Dimitrovs, 'EU Citizenship for Latvian „Non-Citizens": A Concrete Proposal' (2016) 37 Houston J. Int'l L.

[142] D. Kochenov, 'Pre-Accession, Naturalisation, and „Due Regard to Community Law"' (n 8); N. Muižnieks and I. Brands-Kehris, 'The European Union, Democratization, and Minorities in Latvia' in P.J. Kubicek (ed), *The European Union and Democratization* (Routledge 2003) 30; V. Poleshchuk, *Advice Not Welcomed* (n 139); D. Budrytė and V. Pilinkaitė-Sotirovič, 'Lithuania: Progressive Legislation without Popular Support' (n 135); V. Poleshchuk and J. Helemäe, 'Estonia: in Quest of Minority Protection' in S.S. Akermark et al. (ed) (n 136) 109.

[143] V. Pettai and K. Kallas, 'Estonia: Conditionality Amidst a Legal Straightjacket' in B. Rechel (ed) (n 131) 104; N. Kasatkina and T. Leončikas, *Lietuvos Etniniu Grupiu Adaptacijos Kontekstas Ir Eiga. Tyrimos Modelis* (Eugrimas 2000).

[144] These dedicated offices included the Ministry of Population and Ethnic Affairs in Estonia, the Special Assignments Minister for Social Integration in Latvia, and the Department for National Minorities in Lithuania. In Latvia, integration-related functions were reassigned to the Ministries of Justice, of Welfare and of Culture at the end of April 2009. In Estonia the reforms took effect in June 2009 with the Minister of Social Affairs taking over the population policies, the Ministry of Culture mandated with the task of coordinating minority education, and further responsibilities transferred

Though saving scarce economic resources for cash-stripped governments and mainstreaming of the minority issues to ministries should not have been a bad thing, minority participation on a par with the majorities is still widely seen as anathema by political leadership in the region. All this took place despite the repeated calls from the EU for narrowing the gap in the representation of minorities, inclusion of non-citizens into decision-making at the national level and enhancing credibility of state institutions – and as such of the EU – with populations these govern. Both Estonia and Latvia have been exposed to virulent criticism for 'provoking' the so called 'Bronze-night' crisis in 2007 in Tallinn[145] and weeklong street protests in Latvia over the transition to increased education in titular language in 2004 (in Latvia). Russian Federation's heated rhetoric over the discrimination of its 'compatriots' in Estonia and Latvia on both these occasions and overall in the context of these states' membership in both the EU and NATO lends minority issue a peculiar status as a challenge for stability not only of these two states, but of the internal EU's minority rights protection as a whole.[146]

Since the Baltic states submitted their applications to join the EU in 1995, two overlapping yet distinct sets of issues that could, but have not made a difference for the status of non-citizens dominated the region's relations with the EU. Firstly, the EU's relationships with Estonia, Latvia, and Lithuania were largely focused on 'boosting the economy', rather than 'promoting democracy'.[147] Economic performance placed Estonia apart from Latvia and Lithuania in the club of the 'favoured potential members', with its excellent economic (yet tainted political) compliance record, despite the fact that some 15 percent of Estonia's resident population were 'non-citizens' (as opposed to 0.3% in Lithuania, which was not a ‚favoured potential member'). The fact that the EU opened accession negotiations with Estonia before doing so with Latvia, or indeed Lithuania, puts the spotlight on the failure of the

to the Minister for Regional Affairs. Likewise, after disbanding the State Department for National Minorities on 1 January 2010, its responsibilities went to the ministries of social affairs, education and culture. For detailed discussion, see T. Agarin, *A Cat's Lick* (n 20) chapter 6.

[145] K. Brüggemann and A. Kasekamp 'The Politics of History and the „War of Monuments" in Estonia' (2008) 36(3) Nationalities Papers 425; Legal Information Centre for Human Rights (ed), 'Bronze Soldier: April Crisis' (Legal Information Centre for Human Rights, Tallinn 2007); D.J. Smith, '„Woe from Stones": Commemoration, Identity Politics and Estonia's War of Monuments' (2008) 39(4) J. Baltic Studies 419.

[146] P. Kalinichenko, 'Some Legal Issues of the EU-Russia Relations in the Post-Crimea Era: From Good Neighbourliness to Crisis and Back?' in D. Kochenov and E. Basheska (eds), *Good Neighbourliness in the European Legal Context* (Brill 2015).

[147] The EU invited Estonia, among the three countries to start negotiations as part of the first wave countries, when Latvia and Lithuania were put on hold for the second wave enlargement two years later in February 2000. N.M. Gelazis, 'The Effects of Conditionality on Citizenship Policies and the Protection of National Minorities in the Baltic States.' in V. Pettai and J. Zielonka (eds), *The Road to the European Union: Estonia, Latvia and Lithuania* (Manchester UP 2003) 46.

EU to link limited democratic accountability of the state to resident minorities,[148] consistent application of non-discrimination legislation[149] and political representation of national minorities. Being more interested in economic performance and Estonia's integration into the Internal Market, the EU preferred to overlook the deficits of minority participation, systematic social exclusion of large sways of local residents and undermined its credibility as 'rights based actor' with both local minorities, as well as issued a *carte blanche* for domestic political elites to ratchet up their assimilatory pressures.[150]

Secondly, limited coordination of EU's approach to the rights of non-citizens in Estonia and Latvia reduced considerably the adjustment costs of accession for the two countries.[151] EU's failure to establish uniform regulation of the status of resident non-citizens, their freedom of movement in the EU and adjudicate their right for participation in political process at the EU level without granting them access to domestic political participation have marked a technocratic, rather than a normative approach to candidate countries in the pre-accession context.[152] In the process of negotiating EU membership Estonia allowed persons with 'undetermined citizenship' to participate in the municipal elections, while in Latvia the issue remains subject to debate.[153] Particularly, in relation to the use of languages other than the official language (*de facto* all languages, except eponymous Estonian, Latvian and Lithuanian) in private business, Latvia particularly (but also Estonia and Lithuania to a comparable degree) entrenched the role of

[148] T. Agarin, 'Resident Aliens? Explaining Minority Disaffection with Democratic Politics in the Baltic States' 2013 12(4) Ethnopolitics 331.

[149] J. Aidukaite, 'From Universal System of Social Policy to Particularistic? The Case of the Baltic States' (2003) 36 Communist and Post-Communist Studies 405; R. Karklins and Z. Brigita, 'Poltical Participation in Latvia 1987–2001' (2001) 32(4) J. Baltic Studies 334.

[150] M. Feldmann, 'Emerging Varieties of Capitalism in Transition Countries: Industrial Relations and Wage Bargaining in Estonia and Slovenia' (2006) 39(7) Comp. Pol. Stud. 829; J. Hughes and G. Sasse 'Monitoring the Monitors: EU Enlargement Conditionality and Minority Protection in the CEECs' (2003) 1 JEMIE. J. Hughes, G. Sasse, and C. Gordon, 'Conditionality and Compliance in the EU's Eastward Enlargement: Regional Policy and the Reform of Sub-national Government' (2004) 42(3) JCMS 523.

[151] The EU promoted directly opposing approaches to minority inclusion in different Member States to the detriment of coherence and improvements on the ground: D. Kochenov, 'A Summary of Contradictions' (n 7).

[152] This additionally impacted the development of the EU-wide regulations on the status of non-citizens in other candidate countries, eg in the case of Slovenia's 'erased'. B.K. Blitz, 'Statelessness and the Social (De)Construction of Citizenship: Political Restructuring and Ethnic Discrimination in Slovenia' (2006) 5(4) J. Human Rights 453. G. Falkner, 'Institutional Performance and Compliance with EU Law: Czech Republic, Hungary, Slovakia and Slovenia' (2010) 30 J. Pub. Pol'y 101. J. Zorn, 'Citizenship Practices of Non-Citizens in Slovenia: „you Cannot Fight the System Alone"' (2013) 17(6–7) Citizenship Studies 803.

[153] M.E. Commercio, *Russian Minority Politics in post-Soviet Latvia and Kyrgyzstan: The Transformative Power of Informal Networks* (University of Pennsylvania Press 2010).

state language in public sphere and state institutions; when the EU pressed Estonia to grant citizenship to children born to stateless parents on their parents' application, this country's government limited access to education in languages other than Estonian; similarly, Lithuania went to great lengths to remove public signs in languages other than Lithuanian, moved by the desire to enhance state language's visibility public space.[154]

Many of these steps are understandable from the point of view of domestic legislators and political elites looking back at over 40 years of Soviet domination and fears of considerable numbers of European migrants arriving in the region after the EU accession in 2004. These fears are yet to materialise. But the impact of countermeasures had alienated domestic minorities from both the state where they live and the EU as an institution, able but utterly unwilling to protect their rights *vis-à-vis* nationalising states.[155] The shallow understanding of minority rights, virulent nation-state building and disengagement of majority populations from politics outside the debate on the 'national survival'[156] provide an excellent indicator that the Baltic states made but tokenistic changes to minority protection legislation.[157] Over the twelve years since the 2004 EU accession, many of the above-mentioned legal benchmarks were watered down, leading the overwhelming majority of non-citizens to see minorities' disenfranchisement as being part and parcel of EU's rhetoric – but in no way substantial – commitment to ensuring non-discrimination as well as minority rights application throughout the region. As a result, and not unexpectedly, the EU is perceived by the region's majorities as well as minorities to be a protector of majorities' interests, rather than minority rights,[158] depriving minorities even of a right to a name.

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[154] J. B. Adrey, 'Minority Language Rights before and after the 2004 EU Enlargement: The Copenhagen Criteria in the Baltic States' (2005) 26(5) J. Multilingual and Multicultural Development 453; T. Bulajeva and G. Hogan-Brun, 'Language and Education Orientations in Lithuania: A Cross-Baltic Perspective Post-EU Accession' (2008) 11(3–4) Int'l J. Bilingual Education and Bilingualism 396; I. Druviete, 'The Latvian Language Law Debate: Some Aspects of Linguistic Human Rights in Education' in R. Phillipson (ed), *Rights to Language: Equity, Power and Education* (Lawrence Erlbaum Associates 2000) 83, 83–86; B. Tsilevich, 'Development of the Language Legislation in the Baltic States' (2001) 3(2) J. Multicultural Societies 1; D. Kochenov, V. Poleshchuk and A. Dimitrovs, 'Do Professional Linguistic Requirements Discriminate?' (n 83).

[155] For a legal proposal to connect the Latvian minorities without citizenship with the EU directly, see D. Kochenov and A. Dimitrovs, 'EU Citizenship for Latvian „Non-Citizens' (n 141).

[156] R. Rose, *New Baltic Barometer VI: A Post-Enlargement Survey* (Centre for the Study of Public Policy, Glasgow 2005).

[157] D. Budryte, *Taming Nationalism?* (n 134); P. Van Elsuwege, *From Soviet Republics to EU Member States* (n 90).

[158] D.J. Galbreath, 'European Integration through Democratic Conditionality: Latvia in the Context of Minority Rights' (2006) 14 J. Contemporary Eur. Stud. 69; T. Agarin, 'Civil Society Versus Nationalizing State? Advocacy of Minority Rights in the Post-socialist Baltic States' (2011) 39(2) Nationalities Papers 181.

3.4. Roma minorities in Europe

The EU is built around the ideal of the freedom of movement: a virtually absolute right of movement between the Member States is granted to EU citizens. Free movement is at the core of the European integration project.[159] This 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 worldview, culture, or nature is better reflected in the vision of what is 'right' espoused by the majority.[160] This is in sharp contrast with general international law, where the right to move is not provided beyond proclamations, which is, in the words of Stig Jägerskiöld, a ‚source of much unnecessary suffering around the world'.[161]

Roma communities constitute Europe's largest and most vulnerable minority, with around 15 million people living throughout the Council of Europe area and present in all EU Member States.[162] Tellingly, it is the OSCE High Commissioner on National Minorities, rather than any of the EU institutions, who has repeatedly brought the issue of Roma discrimination and pushed Romani individuals' equal access opportunities. Likewise, the European Court of Human Rights has repeatedly emphasised 'a positive obligation imposed on the Contracting States by virtue of Article 8 to facilitate the Gypsy way of life',[163] affirming the respect for the freedom of movement. Yet, only few states heed such rights of access and movement. In the majority of cases, state policies dissuade Roma from following their customary practices with the result that many Roma families are unable to find accommodation, access healthcare, attain levels of education comparable with those of the majority and are systematically discriminated in the labour market.[164] As such therefore in this fourth section, we should turn to the peculiar situation of Roma who can stay put, or move across the territory of the Union, but always remain excluded from the scope of minority rights.

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[159] Eg N. Nic Shuibhne, 'The Resilience of EU Market Citizenship' (2010) 47 CML Rev 1597.

[160] For analysis, see eg D. Kochenov, 'Ius Tractum' (n 18) 194–197.

[161] S. Jägerskiöld, 'The Freedom of Movement' in L. Henkin (ed), *The International Bill of Rights: The Covenant on Civil and Political Rights* (Columbia UP 1981) 166, 167; D. Kochenov, 'The Right to Leave Any Country Including Your Own in International Law' (2012) 28 Connecticut J. Int'l L. 43.

[162] The most recent data by the Council of Europe <http://www.coe.int/fr/web/portal/roma/> last accessed 12 June 2016. N. Sigona and N. Trehan (eds), *Romani Politics in Contemporary Europe: Poverty, Ethnic Mobilization and the Neoliberal Order* (Palgrave Macmillan 2009).

[163] ECtHR, *Chapman v the United Kingdom* [2001] App No 27238/95. Dissenting Opinion of Judge Petitti, ECtHR judgment in the case of *Buckley v the United Kingdom*, 26 August 1996.

[164] OSCE-HCNM, 'Report on the Situation of Roma and Sinti in the OSCE Area' (OSCE-HCNM 2000) 15. R. Brett and E. Eddison, 'The CSCE Human Dimension on National Minorities: Can National Minorities Be Considered Positively?' (1993) 4(3) Helsinki Monitor 39, 40. European Parliament, 'Resolution on the situation of Roma in the European Union' (adopted 28 April 2005), P6_TA(2005)015, para 27.

Roma across the EU traditionally face at times insurmountable difficulties when moving from one Member State to another despite the fact that following the EU enlargement into countries with relatively large Romani populations, freedom of movement should have been equally extended to those EU citizens who are Roma.[165] A very diverse group in terms of religion, language, economic situation, and way of living, contemporary Roma are largely sedentary, though they are often perceived to 'migrate' availing of the EU freedom of movement and settle in societies less hostile to them. However different across EU Member States, Roma experience rampant discrimination and other human rights abuses settling in Member States whether for economic reasons or in order to avoid discrimination in the country of origin. Yet, particularly those states where Roma individuals tend to move to in search of better living conditions and employment opportunities have been repeatedly engaging in collective expulsions.[166]

As is underlined by the Fundamental Rights Agency, there is a 'negative Roma-specific dynamic' at play with policies and practices undermining opportunities for Roma to exercise their right for free movement.[167] At the core of this distinction some see inability of local authorities to appreciate Roma lifestyle choices. Differential treatment seems to reflect the wider rationale and economic focus on migrants' skills and benefits for the local economy, something that is extremely difficult to gauge in the case of Roma.[168] In line with this argument, many EU states have in the past expelled Roma from their territory, in contravention of EU law, along with undertaking discriminatory measures aimed at hindering access to territory and residence for Roma who are EU citizens.[169]

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[165] See Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation [2000] OJ L 303/16; Council Directive 2003/109/EC of 25 November 2003 concerning the status of third-country nationals who are long-term residents [2004] OJ L 16/44; and Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin [2000] OJ L 180/22.

[166] R. Guglielmo and T.W. Waters, 'Migrating towards minority status: shifting European policy towards Roma' (2005) 43(4) JCMS 763; H. O'Nions, 'Roma Expulsion and Discrimination: the Elephant in Brussels' (2004) 13 EJML 4; S. Baldin, 'Il Consiglio d'Europa e l'inclusione Sociale dei Rom e dei Viaggianti' in S. Baldin and M. Zago (eds), *Il Mosaico Rom. Specificità culturali e Governance Multilivello* (Franco Angeli 2011) 161.

[167] European Union Fundamental Rights Agency, 'The situation of Roma EU citizens moving to and settling in other EU Member States' (November 2009) 16, available at: <http://fra.europa.eu/sites/default/files/fra_uploads/705-Roma_Movement_Comparative-final_en.pdf> last accessed 12 June 2016.

[168] Commissioner for Human Rights, 'European migration policies discriminate against Roma people', viewpoint (22 February 2010). Also, J. Marko, 'Equality and Difference: Political and Legal Aspects of Ethnic Group Relations' in F. Matscher (ed), *Vienna International Encounter of Some Current Issues Regarding the Situation of National Minorities* (NP Engel Verlag 1997) 67; F. Palermo and J. Woelk, *Diritto costituzionale comparato dei Gruppi e delle minoranze* (2nd edn CEDAM 2011).

[169] Already ruled out by the ECHR and in breach of ruling that the collective expulsions of aliens are prohibited. Access to adequate housing is closely linked to other provisions necessary to enhance

Given the importance of the freedom of movement in the Union, it seems odd that the Union has dedicated so little attention to breaches of this fundamental freedom by its Member States *vis-à-vis* Romani EU citizens.[170] The earliest recorded case of discrimination of Roma EU citizens was reported in Italy. In the period of 2006–2009 fourteen Italian municipalities adopted 'Security Pacts' allowing officials to target Roma for removal from the areas where they had settled.[171] Authorities in Milan and Rome granted national and regional authorities powers in the Act on 18 May 2007 to evict Roma living there. In both cases, Roma were targeted for alleged criminal practices and evicted from unauthorised settlements: an estimated 10,000 Roma were displaced.[172] The systematic maltreatment and prejudice against Roma – regardless of their citizenship status, Italian citizens, EU citizens, or third-country nationals – have been identified by the Fundamental Rights Agency as being in conflict with the 'enjoyment of fundamental rights'.[173] Despite complaints to the European Commission,[174] the Italian Government made use of a temporary emergency decree allowing the expulsion of EU citizens in cases where local security

Roma participation, issues often connected in domestic legislations tangent upon Roma rights. Report submitted by Ireland pursuant to Article 25(1) of the Framework Convention for the Protection of National Minorities ACFC/SR(2001)006 received on 13 November 2001, 15. Special provisions for the education of Roma are ensured in *inter alia* Romania Article 32.4 of the Constitution, Slovakia Article 43.2(a) of the Constitution, Hungary Article 43, Lithuania Article 2, Czech Republic Act on the Rights of Members of National Minorities of 2001 No107/819 Official Gazzette 273/2001. In the Republic of Ireland guarantees of the right to education and employment are spelt out in the Employment Equality Act No 21 of 1998, in the Equal Status Act No 8 of 2000 and in the Equal Status Act No 24 of 2004, and in the Housing (Miscellaneous Provisions) Act No 9 of 2002. Poland's legislation refers to the protection of economic and social rights of minorities in Constitutional Rights spelt out in Article 6.1.2 of Act of 6 January 2005. Similar provisions are made in Slovenia by means of Article 4 Roma Community Act.

170 European Committee of Social Rights, Decision on the Merits, Collective Complaint No 58/2009, *Centre on Housing Rights and Evictions (COHRE) v Italy* (25 June 2010).

171 The most prominent selection includes, Legge regionale N 9/88 Regione Sardegna 'Tutela dell'etnia e della Cultura dei nomadi'; legge regionale N 47/88 Regione Emilia Romagna 'Norme per le minoranze nomadi in Emilia-Romagna'; legge regionale N 77/89 Regione Lombardia 'Azione Regionale per la Tutela delle Popolazioni appartenenti alle etnie tradizionalmente nomadi o semi-nomadi'; legge regionale N 32/90 Regione Umbria 'Misure per favorire l'inserimento dei nomadi nella società e per la tutela della loro identità e del loro patrimonio culturale'; legge regionale N 6/92 Regione Liguria (no Heading); legge regionale 25 February 1993 Regione Piemonte 'Interventi a favore della popolazione zingara'.

172 P. Bonetti, 'I nodi giuridici della condizione di Rom e Sinti in Italia' in P. Bonetti, A. Simoni and T. Vitale (eds), *La condizione giuridica di Rom e Sinti in Italia* (Giuffré Editore 2011) 15. F. Palermo, 'Rom e Sinti come minoranza. Profili di diritto italiano e comparato e di diritto internazionale' in P. Bonetti, A. Simoni and T. Vitale (eds), *La condizione giuridica di Rom e Sinti in Italia* 151.

173 European Union Fundamental Rights Agency, 'The situation of Roma EU citizens' 14.

174 Discussed in C. Tavani, 'La protezione delle minoranze in Italia e il mancato riconoscimento della Minoranza Rom: ragioni e conseguenze' (2013) 3 Eur. Diversity and Autonomy Papers (EDAP, Bolzano).

was 'compromised.'[175] The EU Roma protection efforts, although bustling with action on paper, have not done much in practice to improve the life of the Roma minority, it seems.

The most publicity has been received by the treatment of Romanian and Bulgarian EU citizens in the summer of 2010, when French authorities decided to remove the Roma without French citizenship from France. Much attention was paid to the incompatibility of French actions with the principle of free movement of EU citizens and the EU Charter of Fundamental Rights. Following President Sarkozy's statement that the 'illegal camps inhabited by Roma' were 'sources of criminality', similar rhetoric was used to justify evictions particularly during July–August 2010. In the circular issued to local authorities, explicit reference was made to 'illegal camps inhabited by the Roma'. After the European Commission threatened infringement proceedings against France, the order was replaced with one referencing 'any illegal settlement, whoever inhabits it'. Reports by NGOs on evictions in 2010–2011 suggest up to 13,000 Romanian and Bulgarian citizens were removed from their 'illegal settlements'. Such reports were rebuked by French authorities with redrafting immigration legislation. The resulting Besson Law, while officially aiming at improving the situation, did not alter French authorities' (non-)compliance with EU law and contained provisions that directly contradicted the principle of free movement and 'appear[ed] to be conceived to facilitate the expulsion of Roma who are in France.'[176]

The removal from and destruction of residence facilities has often been used to encourage Roma to leave. The removal of Roma from France in 2010 gained particular attention due to repeated anti-Roma statements from high-ranking officials in France and a drummed-up 'threat against public security'.[177] In July 2010 similar events took place in Denmark, when 23 EU citizens of Roma origin were arrested and 'returned' to Romania, banned from re-entering Denmark for the next two years.[178] In September 2009, the municipality of Bourgas, Bulgaria, demolished as

[175] I. Clough Marinaro, 'Between Surveillance and Exile: Biopolitics and the Roma in Italy' (2009) 1(2) Bulletin of Italian Politics 265; N. Sigona, 'The Governance of Romani People in Italy: Discourse, Policy and Practice' (2011) 16(5) J. Modern Italian Stud. 590.

[176] 'Le respect par la France de la Directive européenne relative à la liberté de circulation et l'éloignement de ressortissants européens appartenant à la communauté Rom', information document submitted by Human Rights Watch to the European Commission in July 2011 (published 28 September 2011).

[177] Commissioner for Human Rights, 'Anti-Roma rhetoric in Europe: politicians should avoid feeding prejudice' (9 September 2010).

[178] Danish Institute for Human Rights, 'Parallel report July 2010 to the UN Committee on the Elimination of Racial Discrimination on the 18th and 19th periodic reports by the government of Denmark on the implementation of the international convention on all forms of racial discrimination' (July 2010) 21–22. The decision was reportedly reversed by the Ministry of Interior in April 2011. See ERRC, 'Danish Authorities Reverse Decisions in Roma Expulsions' (18 April 2011); CoE, *Human Rights of Roma and Travellers in Europe* (n 22).

many as 50 homes and evicted the residents with the assistance of the local police. Denying Roma access to social services in states of which they are not citizens has been particularly in the focus of the European Parliament's attention to promote and protect the rights of Roma, yet much more remains to be done.

The discrimination in the area of access to citizenship has been equally rampant.[179] The adoption of differentiated citizenship criteria and passing of several rather restrictive laws on citizenship has been discussed above with regard to Baltic states' 'Russian speakers', however across the post-communist region Roma have been widely affected as well, especially after the dissolution of Czechoslovakia[180] and Yugoslavia,[181] where Roma have been excluded from their right to automatic citizenship, and made de facto (and at times even de jure[182]) stateless. In fact, this is one of the areas where the EU managed to produce positive effects: Czech anti-Roma citizenship legislation has been successfully amended to grant citizenship to the Czech Roma threatened with expulsions to Slovakia.[183]

Familiar patterns of anti-Roma discrimination are being reported to the European Commission from nearly all EU Member States. First, these point out the neglect of special needs and responsibilities of Member States to enact equal access to citizens of the EU regardless of their lifestyle, culture, and language. Roma are regularly subjected to police violence both in public places and in Roma settlements, often subjected to police harassment and targeted during ethnically-profiled 'stop and search'. Second, access to social services is particularly difficult for Roma as a result of their not infrequent lack of registration with the authorities, insufficient awareness of their rights as EU citizens in countries of which they are not nationals, and lack of information on institutional avenues for remedial action following infringement

[179] An overview of status and citizenship issues concerning Roma in Europe is provided in C. Cahn and S. Skenderovska, 'Roma, citizenship, statelessness and related status issues in Europe', briefing paper for expert consultation on issues related to minorities and the denial or deprivation of citizenship, 6–7 December 2007, convened by the UN Independent Expert on Minority Issues, available at: <http://nationalromacentrum.org/en/publications/research/roma-citizenship-statelessness-and-related-status--issues-in-europe> last accessed 12 June 2016.

[180] J. Lajcakova, 'Advancing Empowerment of the Roma in Slovakia through a Non-Territorial National Autonomy' (2010) 9(2) Ethnopolitics 171. P. Vermeersch, 'Ethnic Minority Identity and Movement Politics: The Case of the Roma in the Czech Republic and Slovakia' (2003) 26(5) Ethnic and Racial Studies 879.

[181] The example of Slovenia is particularly telling here as Roma were equally affected as Serb, Croat and Bosnian ethnics by the so called 'erasure' in 1992 and up to 13,400 of the 'erased' had not settled their status in Slovenia and their residence was unknown in 2010. I. Baclija, M. Brezovsek and M. Hacek, 'Positive Discrimination of the Roma Minority: The Case of Roma Local Councillors in Slovenia' (2008) 8(2) Ethnicities 227. K. Erjavec, 'Media Representation of the Discrimination against the Roma in Eastern Europe: The Case of Slovenia' (2001) 12(6) Discourse & Society 699.

[182] D. Kochenov, 'EU Influence on the Citizenship Policies of the Candidate Countries: The Case of the Roma Exclusion in the Czech Republic' (2007) 3 JCER 124.

[183] D. Kochenov, 'EU Influence on the Citizenship Policies of the Candidate Countries' (n 182).

of their rights. Third, most Roma experience restrictions of their rights as citizens of the EU, due to constantly mounting obstacles to their freedom of movement observable de facto across the Member States (such as restricted or denied access to social services and entitlements, among numerous other possible examples).

The Roma rights situation in Europe is increasingly difficult to dissociate from the rights of EU citizens to free movement without explicit contribution to socio-economic and financial development at the new place of residence. Indeed, the reasons for their expulsions from EU Member States frequently amount to covert economic rationale boiling down to preventing the presence of non-nationals on territories of EU Member States if these are not contributing to political economies of scale. The exclusion of Roma both in their states of citizenship and in many EU Member States is explicable in reference to an age-old sentiment of antiziganism.[184] Unfortunately, no EU government and no EU institution has been able to successfully improve the situation of 'their' Roma in non-discrimination and access to social services and enjoyment of freedom of movement. Though some tolerance was achieved towards Romani EU citizens in the 1990s, the rise of economic pressures in both sending and receiving societies from the late 2000s only ushered new waves of public hostility and intolerance towards Roma, further undermining the meagre scope of minority rights protection guaranteed by the Union to all EU citizens.

4. Indirect minority protection: An almost pessimistic balance sheet

In the light of the case studies presented above it becomes crystal-clear that it is hardly possible to speak about the EU's engagement with minority issues at both levels of the *Albanian Schools* test, including 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. Two lines of development come to mind in this regard. The first is confined to the evolution of non-discrimination requirements, not minority protection measures *sensu stricto*.[185] 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

[184] T. Agarin (ed), *When Stereotype Meets Prejudice: Antiziganism in European Societies* (Ibidem 2014).

[185] Although copious literature has been dedicated to discovering the tools in the Treaties and secondary legislation which would be usable in order to introduce the second facet of minority protection into the law of the Union, it has not moved far from well-informed guesses and speculations. For the outline of some possibilities see eg D. Kochenov, 'A Summary of Contradictions' (n 7) 12–15; B. de Witte, 'The Constitutional Resources for an EU Minority Protection Policy' in G. von Toggenburg (ed), *Minority Protection and the Enlarged European Union* (OSI 2004) 107, 118–123; K. Henrard, *Devising an Adequate System of Minority Protection: Individual Human Rights, Minority Rights and the Right to Self-Determination* (Kluwer Law Int'l 2000).

the legal situation of minorities *inside* the Union. All in all, the fundamental question of whether minorities should be awarded special protection seems to remain unresolved in the Union context, reflecting the divisions among the Member States over the issue.

Non-discrimination requirements were viewed first as an integral part of the Internal Market – including non-discrimination on the basis of sex[186] and nationality[187] – and, later, as belonging to the fundamental principles of European integration.[188] Moreover, the Court also recognized an unwritten general principle of equality to be part of EU law.[189] The broadening of the range of the prohibited grounds of discrimination in the EU is a painful story.[190] As any other polity, probably, the Union has always been much better on paper and in its own eyes, than in practice.[191] 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 to the Treaties. In one example,[192] the Court safely disregarded international practice[193] only *not* to end discrimination based on sexual orientation[194] – the ECJ cannot generally boast a really distinguished human rights record.[195]

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[186] See eg E. Ellis, *EU Anti-Discrimination Law* (OUP 2005).

[187] G. Davies, *Nationality Discrimination in the European Internal Market* (Kluwer Law Int'l 2003). On the possibility of including non-EU nationalities see P. Boeles, 'Europese burgers en derdelanders: Wat betekent het verbod van discriminatie naar nationaliteit sinds Amsterdam?' (2005) Sociaal--economische wetgeving No 502, 12.

[188] T. Tridimas, *The General Principles of EU Law* (2nd edn OUP 2006) 59; G. de Búrca, 'The Role of Equality in European Community Law' in A. Dashwood and S. O'Leary (eds), *The Principle of Equal Treatment in EC Law* (Sweet and Maxwell 1997) 13, 14.

[189] Eg C-292/97 *Kjell Karlsson and Others* ECLI:EU:C:2000:202 [2000] ECR I-2737, para 39; Joined cases C-27 & 122/00 *The Queen v Secretary of State for the Environment, Transport and the Regions, ex parte Omega Air Ltd and Omega Air Ltd, Aero Engines Ireland Ltd and Omega Aviation Services Ltd v Irish Aviation Authority* ECLI:EU:C:2002:161 [2002] I-2569, para 79; Case C-300/04 *M. G. Eman and O. B. Sevinger v College van burgemeester en wethouders van Den Haag* ECLI:EU:C:2006:545 [2006] ECR I-8055, para 57. This principle allows for some accommodation of minorities' needs: Case C-130/75 *Vivien Prais v Council of the European Communities* ECLI:EU:C:1976:142 [1976] ECR 1589.

[190] See eg M. Bell, 'The Principle of Equal Treatment: Widening and Deepening' in P. Craig and G. de Búrca (eds), *The Evolution of EU Law* (2nd edn OUP 2011) 611.

[191] B. Carolan, 'Rights of Sexual Minorities in Ireland and Europe: Rhetoric versus Reality' (2001) 19 Dickinson J Intl L 387. In general, see D. Kochenov, G. de Búrca and A. Williams (2015) *Europe's Justice Deficit?* (n 11).

[192] *Grant v South-West Trains* (n 121).

[193] UN Human Rights Committee Communication No 941/2000 *Young v Australia* [2003] paras 10.2–13; UN Human Rights Committee Communication No 488/1992 *Toonen v Australia* [1994] paras 6.9–7.6. For the analysis of their dismissal by the ECJ, see eg D. Kochenov, 'On Options of Citizens' (n 27) 176–180 (and the literature cited therein).

[194] See also A. Koppelman, 'The Miscegenation Analogy in Europe, or Lisa Grant Meets Adolf Hitler' in R. Wintermute and M. Andenæs (eds), *Legal Recognition of Same-Sex Partnerships: A Study of National, European, and International Law* (Hart 2001) 623.

[195] This especially concerns the failure to apply the same human rights protection principles to the situations of EU citizens and third country nationals, as well as the missing substantive vision of the

The introduction of Article 13 TEC by the Treaty of Amsterdam (now Article 19 TFEU) was, partly, a reaction to the Court's embarrassing reactionism in this field[196] and ultimately resulted in two Directives[197] prohibiting discrimination on a number of important grounds. These are, however, far from perfect[198] and are not applied by the Court in the clearest possible way.[199] 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 unanimity is required.[200] All in all, following the entry into force of the Directives and ECJ's decisions in *Associația Accept*,[201] *Maruko*,[202] and *Feryn*,[203] however much criticized, the EU ended up building up an anti-discrimination framework which is standing to bear fruit[204] – a huge step forward compared with the looming vacuum of the preceding decade. The sweetness of this fruit is still unclear, however.

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

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main principles of law: A.J. Williams, *The Ethos of Europe: Values, Law and Justice in the EU* (CUP 2010); D. Kochenov 'Citizenship without Respect' (n 52). See, on the most recent developments, P. Eeckhout, 'Opinion 2/13 on EU Accession to the ECHR and Judicial Dialogue – Autonomy or Autarky?' (2015) 38 Fordham Int'l L. J. 955.

196 For analysis, see eg B. Carolan, 'Judicial Impediments to Legislating Equality for Same-Sex Couples in the European Union' (2005) 40 Tulsa L. Rev. 527.

197 Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial and ethnic origin [2000] OJ L 180/22; Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation [2000] OJ L 303/16. For analyses, see eg H. Meenan (ed), *Equality Law in an Enlarged European Union: Understanding the Article 13 Directives* (CUP 2007); D. Schiek, 'A New Framework on Equal Treatment of Persons in EC Law?' (2002) 8 ELJ 290; L. Waddington and M. Bell, 'More Equal than Others: Distinguishing European Union Equality Directives' (2001) 38 CML Rev 587.

198 L. Waddington and M. Bell (2001) 'More Equal than Others' (n 197) 587.

199 K. Henrard, 'The First Substantive ECJ Judgement on the Racial Equality Directive: A Strong Message in a Conceptually Flawed and Responsively Weak Bottle' (2009) Jean Monnet WP (NYU Law School) 09/09.

200 Article 19(1) TFEU.

201 Case C-81/12 *Associația ACCEPT*. For a wonderful discussion, see U. Belavusau, 'A Penalty Card for Homophobia from EU Non-Discrimination Law' (2015) 21 CJEL 237. cf U. Belavusau and D. Kochenov, 'Federalizing Legal Opportunities for LGBT Movement in the Growing EU' in K. Slootmaeckers, H. Touquet and P. Vermeersch (eds), *EU Enlargement and Gay Politics, The: The Impact of Eastern Enlargement on Rights, Activism and Prejudice* (Palgrave Macmillan 2016 (forthcoming)).

202 Case C-267/06 *Tadao Maruko v Versorgunsanstalt der Deutschen Bühnen* ECLI:EU:C:2008:179 [2008] ECR I-1757. See, for an analysis, G.N. von Toggenburg, '„LGBT" Go Luxembourg: On the Stance of Lesbian Gay Bisexual and Transgender Rights before the European Court of Justice' (2008) Eur. L. Rep. 174; D. Kochenov, 'On Options of Citizens' (n 27) 179ff.

203 Case C-54/07 *Centrum voor gelijkheid van kansen en voor racismebestrijding v Firma Feryn NV* ECLI:EU:C:2008:397 [2008] ECR I-5187. Analyzed by K. Henrard, 'The First Substantive ECJ Judgment on the Racial Equality Directive: A Strong Message in a Conceptually Flawed, and Responsively Weak Bottle' (2009) Jean Monnet WP No 09/09.

204 Eg E. Ellis *EU Anti-Discrimination Law* (n 186); V. Chege, *Multidimensional Discrimination* (n 10).

Treaties from the very beginning and was gradually developed over the years.[205] 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 EU's agenda when new Member States were being incorporated into the Union, ie in the context of enlargements.[206]

We observe an interesting evolution 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 Færœ Islands were (partly) excluded from the application to them of the provisions of the Treaties[207] with an aim of safeguarding local identities, the EU moved towards promoting somewhat more subtle measures during the enlargement rounds that followed.[208] The real boost of interest in minority protection issues only happened, however, during the last two enlargement rounds,[209] incorporating 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, driven by the considerations of the preservation of minority cultures via exclusion from the scope of the law,[210] the last three 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.[211] It is notable that although the general trend of EU's minority-sensitive approach to the regulation of its own enlargements remained on agenda, the main motivation behind minority protection shifted considerably, just as did the means: the last three rounds of enlargements did not approach minority protection issues via exclusion, but rather via the non-discrimination approach to be found in the Treaties in force.

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[205] Federico Mancini provides an excellent overview of the limitations marking the EU at its inception: F. Mancini, *Democracy and Constitutionalism in the European Union, Collected Essays* (Hart 2000).

[206] For an analysis, see D. Kochenov 'A Summary of Contradictions' (n 7) 2ff (and the literature cited therein).

[207] D. Kochenov 'A Summary of Contradictions' (n 7) 15–17. See also G. von Toggenburg, 'Minority Protection in a Supranational Context: Limits and Opportunities' in G. von Toggenburg (ed), *Minority Protection and the Enlarged European Union* (OSI 2004) 1, 24.

[208] D. Kochenov 'A Summary of Contradictions' (n 7) 17–18; D. Perrot and F. Miatti, 'Les lapons et les îles Åland dans le quatrième élargissement' (n 114).

[209] For the analysis of this process, see D. Kochenov, 'A Summary of Contradictions' (n 7); C. Hillion, 'Enlargement of the EU – The Discrepancy between Membership Obligations and Accession Conditions as Regards the Protection of Minorities' (2003) 27(2) Fordham Int'l L. J. 715; J. Hughes and G. Sasse, 'Monitoring the Monitors' (n 150); K. Henrard, 'The Impact of the Enlargement Process on the Development of a Minority Protection Policy within the EU: Another Aspect of Responsibility / Burden Sharing?' (2002) 9 Maastricht J. Eur. & Comp. L. 357.

[210] A direct alternative to such an approach is sketched by J. Waldron in 'Minority Cultures and the Cosmopolitan Alternative' in W. Kymlicka (ed), *The Rights of Minority Cultures* (OUP 1995) 93.

[211] A. Van Bossyut, 'L'Union européenne' (n 5).

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, including also those which would not be backed by corresponding internal competences of the Union.[212] Minority protection became one of such conditions.[213] First established by the European Council as part of the Copenhagen political criteria in 1993,[214] 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 same line was reinforced in the context of the ongoing Balkan pre-accession process through the formulation of the principle of 'good neighbourly relations' to which all the acceding states now have to subscribe.[215] This requirement was built into the conditionality-based approach to enlargement,[216] which has since been criticized in the literature for the limits of implementation.[217] In the fields of both sexual and ethnic minority protection, which remained outside the scope of EU's internal competences before the entry into force of the Treaty of Amsterdam which introduced Article 13 TEC (now 19 TFEU), the EU largely failed to formulate any coherent set of demands, demonstrating a huge variation in its approaches to different countries and different minorities.[218] Instead, it relied

[212] For the analysis, see D. Kochenov, *EU Enlargement and the Failure of Conditionality* (n 23) 80–82.

[213] See, for a detailed analysis, D. Kochenov, 'A Summary of Contradictions' (n 7) 20–22; D. Kochenov, 'Behind the Copenhagen Façade: The Meaning and Structure of the Copenhagen Criterion of Democracy and the Rule of Law' (2004) 8(10) EIoP; J.W. van der Meulen, *Bescherming van minderheden als criterium bij EU-uitbreiding: de Europese Commissie en Midden-Europa* (Clingendael 2003); K. Henrard, 'The Impact of the Enlargement Process' (n 209).

[214] Bull EC 6-1993. On the Copenhagen criteria, see C. Hillion, 'The Copenhagen Criteria and Their Progeny' in C. Hillion, (ed), *EU Enlargement: A Legal Approach* (Hart 2004) 1; D. Kochenov, 'Behind the Copenhagen Façade' (n 213).

[215] P. Van Elsuwege, 'Good Neighbourliness as a Condition of Accession to the European Union: Finding Balance between Law and Politics' in D. Kochenov and E. Basheska (eds), *Good Neighbourliness in the European Legal Context* (Brill 2015). See also E. Basheska, 'The Position of the Good Neighbourliness Principle in International and EU Law' in D. Kochenov and E. Basheska (eds), *Good Neighbourliness in the European Legal Context* (Brill 2015).

[216] D. Kochenov, *EU Enlargement and the Failure of Conditionality* (n 23) 65–80. See also M. Maresceau, 'Pre-Accession' in M. Cremona (ed), *Enlargement of the European Union* (OUP 2003) 9; K. Inglis, 'The Pre-Accession Strategy and the APs' in A. Ott and K. Iglis (eds), *Handbook on European Enlargement: A Commentary on the Enlargement Process* (T.M.C. Asser Press 2002).

[217] D. Kochenov, 'Overestimating Conditionality' in I. Govaere, E. Lanon, P. Van Elsuwege and S. Adam (eds), *The European Union in the World: Essays in Honour of Marc Maresceau* (Martinus Nijhoff 2014); D. Kochenov *EU Enlargement and the Failure of Conditionality* (n 23) (and the literature cited therein).

[218] D. Kochenov 'A Summary of Contradictions' (n 7); D. Kochenov, 'Democracy and Human Rights – Not for Gay People?: EU Eastern Enlargement and Its Impact of the Protection of the Rights of Sexual Minorities' (2007) 13 Tex. Wesleyan L. Rev. 459; C. Hillion, 'Enlargement of the EU' (n 209); J. Hughes and G. Sasse, 'Monitoring the Monitors' (n 150); T.J. Langekamp, 'Finding Fundamental Fairness: Protecting the Rights of Homosexuals under European Union Accession Law' (2003) 4 San Diego Int'l L. J. 437.

on the Council of Europe standards[219] for providing minimal requirements that were viewed by the candidate countries and the Union alike as sufficient in order to meet the Union's dubious minority protection test.[220] Moreover, the elaboration of any clear standards was made particularly difficult through the veto-wielding position of some Member States hostile to the very idea of minority protection,[221] especially Greece.[222]

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.[223] Eastern European countries entered the Union with the homophobic rhetoric of top officials,[224] ethnically segregated schools[225] and newly-built ghettos,[226] with huge percentages of their populations deprived of citizenship on the ground of belonging to minority groups[227] and with linguistic inspections established for the 'protection' of the state language,[228] promoting societal division

[219] G. von Toggenburg, 'A Remaining Share' (n 51); D. Kochenov, 'An Argument for Closer Cooperation between the European Union and the Council of Europe' (n 124). See also T. Joris and J. Vandenberghe, 'The Council of Europe and the European Union: Natural Partners or Uneasy Bedfellows?' (2008) 15 CJEL 1.

[220] W. Kymlicka, 'The Evolving Basis of European Norms of Minority Rights: Rights to Culture, Participation and Autonomy' in M. Welles, D. Blacklock and K. Nobbs (eds), *The Protection of Minorities in the Wider Europe* (Palgrave 2008) 11.

[221] E. Basheska, '(Mis)application of the Good Neighbourliness Principle in International and EU Law: The Case of the Republic of Macedonia' in D. Kochenov and E. Basheska (eds), *Good Neighbourliness* (n 215).

[222] E. Basheska and D. Kochenov, 'Thanking the Greeks: The Crisis of the Rule of Law in EU Enlargement Regulation' (2015) 39 Southeastern Europe 392.

[223] The picture in this area was thus not different from what could be observed in other fields: judiciaries, the rule of law, general human rights, etc. For a detailed overview, see D. Kochenov, *EU Enlargement and the Failure of Conditionality* (n 23).

[224] For a number of examples, see D. Kochenov, 'Gay Rights in the EU: A Long Way Forward for the Union of 27' (2007) 3 Croatian YB Eur. L. & Pol'y 479, 486.

[225] J. Greenberg, '*Brown v. Board of Education*: An Axe in the Frozen Sea of Racism' (2004) 48 St. Louis L. J. 869; ECtHR, *D.H. and Others v Czech Republic* [2007] App No 57325/00 (Grand Chamber).

[226] The Commission documented progress in the building and later in the dismantlement of one such ghetto (in Ústí nad Labem) in great detail during the pre-accession monitoring exercise: D. Kochenov 'A Summary of Contradictions' (n 7); L. Cashman, 'Romani Teaching Assistants in the Czech Education System: An Opportunity to Address Barriers to the Labour Market?' in T. Agarin and M. Brosig (eds), *Minority Integration in Central Eastern Europe. Between Ethnic Diversity and Equality* (Rodopi 2009) 305. P. Vermeersch, 'Ethnic Mobilization and the Political Conditionality of European Union Accession: The Case of the Roma in Slovakia' (2002) 28(1) J. Ethnic and Migration Stud. 83.

[227] P. Van Elsuwege, *From Soviet Republics to EU Member States: A Legal and Political Assessment of the Baltic States' Accession to the EU* vol 2 (Martinus Nijhoff 2008) 421–449; V. Poleshchuk, *Chance to Survive: Minority Rights in Estonia and Latvia* (Foundation for Historical Outlook, Tallinn 2009); G. Guliyeva, 'Lost in Transition' (n 72); D. Kochenov, 'Pre-Accession, Naturalization, and „Due Regard to Community Law"' (n 8).

[228] ECtHR, *Podkolzina v Latvia* [2002] App No 46726/99; For the general context, see F. de Varennes, 'The Protection of Linguistic Minorities in Europe and Human Rights: Possible Solutions to Ethnic Conflicts?' (1996) 2 CJEL 107, 136–142.

and intolerance. Even the spelling of names correctly in minority languages was not allowed,[229] depriving individuals belonging to minority cultures of the essential core of their personality.

Following accession the situation has not improved much, if not becoming worse. In fact, minorities are now under threat of losing citizenship in punishment for accepting a nationality of the kin-state;[230] the ECJ has firmly endorsed Member States' rights, under cultural specificity, to erase their Poles, Jews, and other minorities from the records by prohibiting them from using their names;[231] xenophobia and anti-Semitism are on the rise in a number of Member States.[232] Worse still, some Member States are in a free fall, dismantling democracy and the rule of law[233] – and the EU has not been too pro-active or efficient in reinventing itself as an actor able to intervene efficiently to remedy these overwhelming difficulties.[234]

Consequently, while the key problems of minority protection in the EU remained unsolved, it is even more worrisome that numerous other problems related to the Member States' adherence to the values of the Union enshrined in Article 2 TEU have recently resurfaced. It is important to note that pre-accession regulation gave the institutions the first taste of engaging with minority protection issues, which ultimately led to the amendments of the Treaty texts. If not for the practice of the last two enlargement rounds before the accession of Croatia, the reference to the protection of minorities as one of the values of the Union would hardly be included

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[229] UN Human Rights Committee, *Raihman v Latvia* [2010] Communication No 1621/2007. The views of the Committee under the ICCPR thus depart from the position embraced by the ECtHR in similar cases: ECtHR, *Julia Mentzen* (also known as: *Mencena*) *v Latvia* [2004] App No 71074/01; ECtHR, *Kuharec* (also known as: *Kuhareca) v Latvia* [2004] App No 71557/01. J. Ishiyama and M. Breuning, 'What's in a Name? Ethnic Party Identity and Democratic Development in Post-Communist Politics' (2011) 17(2) Party Politics 223. M. Solska, 'Citizenship, Collective Identity and the International Impact on Integration Policy in Estonia, Latvia and Lithuania' (2011) 63(6) Europe-Asia Studies 1089.

[230] J.M. Araiza, 'Good Neighbourliness as the Limit of Extra-territorial Citizenship: The Case of Hungary and Slovakia' in D. Kochenov and E. Basheska (eds), *Good Neighbourliness in the European Legal Context* (Brill 2015).

[231] *Runevič-Vardyn and Wardyn* (n 60).

[232] European Union Agency for Fundamental Rights and Institute for Jewish Policy Research, 'Discrimination and Hate Crime Against Jews in EU Member States: Experiences and Perceptions of Antisemitism' (Publications Office of the EU, Luxembourg 2013).

[233] J.-W. Müller, 'Safeguarding Democracy Inside the EU: Brussels and the Future of Liberal Order' (2013) Transatlantic Academy Paper Series No 3; A. von Bogdandy and P. Sonnevend (eds), *Constitutional Crisis in the European Constitutional Area: Theory, Law and Politics in Hungary and Romania* (Hart Publishing 2015); M. Bánkuti, G. Halmai, and K. Lane Scheppele, 'Hungary's Illiberal Turn: Disabling the Constitution' (2012) 23 J. Democracy 138.

[234] J.-W. Müller, 'The EU as a Militant Democracy, or: Are There Limits to Constitutional Mutations within the Member States?' (2014) Revista de Estudios Políticos 164; Armin von Bogdandy and Michael Ioannidis, 'Systemic Deficiency in the Rule of Law: What It Is, What Has Been Done, What Can Be Done', (2014) 51 CML Rev 59; J.-W. Müller, 'Should the European Union Protect Democracy and the Rule of Law in Its Member States' (2015) 21 ELJ 141.

in Article 2 TEU.[235] Even though it is true that, upon the completion of enlargement, the Union lost the wholesale possibility of influencing policy in the field of minority protection in all the new Member States,[236] one cannot ignore the fact that the very purpose of the creation of the EU coincides with the needs of persons belonging to vulnerable groups to improve their situation beyond the rhetoric commitment to the freedom of movement. 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.

Herein lies the classical connection between federalism and liberty which we are keen to emphasise.[237] Agreeing with Seith Kreimer that 'state-by-state variation leaves open the possibility to each individual of choosing to avoid repression by leaving the repressive jurisdiction'.[238] Realizing that not all groups are invited to the feast is necessary alongside stating clearly the utopian nature of the migration-based view of the enforcement of right. The commitment however is beautiful on paper: a lesbian couple can improve their life by moving from Greece to the Netherlands, an especially patriotic Hungarian family – from Cluj to Eger, and a devoted Catholic from Bulgaria – to Poland to enhance their freedoms in the enjoyment of their rights as a member of a distinct minority group in the Union. Other groups seem to be sharply excluded from rights throughout the Union, as in the example of Roma discussed above or Muslims as Joppke has persuasively demonstrated.[239]

The openness of EU law to the enforcement of citizens' free movement 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,[240] exercising their fundamental EU citizenship right. This protection is valid against any Member State of the Union, including their own.

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[235] See for further analysis of the influence of the last enlargement rounds on EU minority protection: G. von Toggenburg, 'A Remaining Share' (n 51); K. Henrard, 'The Impact of the Enlargement Process' (n 209).

[236] Minority protection thus remains, in the words of Bruno de Witte 'an export product and not one for domestic consumption': 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* (Routledge 2002) 139.

[237] Democracy can also be added to the list, since, in the words of McConnell (providing probably a somewhat extreme perspective), 'a sufficiently decentralized regime with full mobility could perfectly satisfy each person's preferences even with no voting at all': (n 27) at 1494 (with further references).

[238] S.F. Kreimer, 'Federalism and Freedom' (n 27) 71.

[239] C. Joppke, *Citizenship and Immigration* (Polity Press 2010) chapter 4.

[240] EU citizens are covered regardless of whether such unfavourable treatment arises out of discriminatory treatment of those who moved (eg Case C-224/98 *D'Hoop* [2002] ECR I-6191) or without discri-

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 resided and married in a Member State that does so and then moved to Greece will have to be treated as a married couple notwithstanding the rules of Greek national law.[241] 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,[242] such as language and 'culture' tests and many hours of irrelevant training.[243] The practical consequences of the legal duality of rules to apply to the locals and to migrants[244] is such that illiberal local regulation comes to be applied simultaneously alongside the more permissive EU one, *de facto* resulting (or so one would hope) in the further penetration of tolerance into the national legal systems, demonstrating the incoherent nature of the claims and goals behind the policies of intolerance, stigmatization, and the social exclusion of the other.[245]

We are however clear about the limits of the freedom of movement in providing a solution of the problem of Member States' minorities in the long run: whole ethnic and religious groups cannot migrate: the core benefit of EU membership for minority groups clearly lies elsewhere. Let us call it the breaking open of 'container

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mination (eg Case C-192/05 *K. Tas-Hagen and R. A. Tas v Raadskamer WUBO van de Pensioen- en Uitkeringsraad* ECLI:EU:C:2006:676 [2006] ECR I-10451).

[241] This is not the case everywhere, besides France, but a clear argument can be made that the situation is such only because the Member States are breaking the EU law and more clarifications coming from the ECJ are required. For details, see D. Kochenov, 'On Options of Citizens' (n 27); A. Tryfonidou, 'EU Free Movement Law and the Legal Recognition of Same-Sex Relationships' (n 126).

[242] On the problematic tests used by the ECJ in order to establish such connection see, *inter alia*, D. Kochenov, 'Citizenship without Respect' (n 52) 34–58 (and the literature cited therein).

[243] The majority of EU Member States, including Austria, Denmark, France, Germany, the Netherlands, and the UK now require 'culture' and language testing. For overviews, see eg S. Carrera, 'A Typology of Different Integration Programmes in the EU', Briefing Paper IP/C/LIBE/FWC/2005-22 available at: <http://www.europarl.europa.eu/RegData/etudes/note/join/2006/378266/IPOL-LIBE_NT(2006)378266_EN.pdf> last accessed 13 June 2016; R. van Oers, E. Ersbøll and D. Kostakopoulou, 'Mapping the Redefinition of Belonging in Europe' in R. van Oers, E. Ersbøll and D. Kostakopoulou (eds), *A Re-definition of Belonging?* (Brill 2010) 307; D. Kochenov, 'Mevrouw de Jong' (n 88); C. Joppke, 'Immigration and the Identity of Citizenship: The Paradox of Universalism' (2008) 12 Citizenship Stud. 533.

[244] Or to those who are deemed connected with EU law by other means, such as the test of the intensity of Member State's interference with their EU citizenship rights, for instance, as employed by the ECJ in Case C-135/08, *Janko Rottmann v Freistaat Bayern* ECLI:EU:C:2010:104 [2010] ECR I-1449; *Ruiz Zambrano* (n 105); Case C-434/09, *Shirley McCarthy v Secretary of State for the Home Department* ECLI:EU:C:2011:277 [2011] ECR I-3375. For analysis, see D. Kochenov, 'A Real European Citizenship'.

[245] D. Kostakopoulou, 'The Nexus of Migration and Integration in the Light of Human Rights Norms' in Sir Richard Plender (ed), *International Migration Law* (Martinus Nijhoff, The Hague 2014); D. Kochenov, 'Mevrouw de Jong' (n 88).

societies'. EU-wide freedom of movement enhances an opportunity for local inhabitants of all the Member States to come into contact with the cultures they would not necessarily deem as 'their own'. Like the States in the US, EU Member States are not empowered to 'select their citizens',[246] 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 the right of residence in *any* of the Member States of the Union.[247]

Keeping in mind the constant tensions between the EU and its component parts in terms of the allocation of competences,[248] it is necessary to adopt a realistic approach to the assessment of the failures and successes of EU's minority protection. Furthermore, the situations we have described automatically disqualify 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.[249] 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*[250] *and cultural diversity protection issues,*[251] *including the situation of third-country nationals, EU citizens, and trans-border minorities, such as the Roma. That Muslims are a religious minority in the eyes of the EU's Fundamental Rights Agency,*[252] *rather than an ethnic one,*[253] *for*

[246] US Supreme Court *Saenz v Roe*, 526 US 489, 510–511 (1999): 'The States, however, do not have any right to select their citizens'. For the same in the EU context see D. Kochenov, 'On Options of Citizens' (n 27) 169.

[247] The right of residence is not unconditional. See, for an analysis, eg D. Kochenov, 'Ius Tractum' (n 18) 234. We are witnessing an emergence of the right in EU law to reside in the Union as a whole, including one's own Member State of nationality: *Ruiz Zambrano* (n 105) para 44. For analysis see P. Van Elsuwege, 'Shifting Boundaries? European Union Citizenship and the Scope of Application of EU Law' (2011) 38 Legal Issues of Econ. Integration 263; D. Kochenov, 'A Real European Citizenship' (n 105); S. Iglesias Sánchez, *¿Hacia una nueva relación entre la nacionalidad estatal y la cuidadanía europea?* (2010) 37 Revista de derecho comunitario europeo 933.

[248] Such tensions are inherent in any vertical arrangement of power. In this sense 'the European Union is uniquely European in the same sense that other federalisms are uniquely American, German, or Swiss': C. Schönberger, 'European Citizenship as Federal Citizenship: Some Citizenship Lessons of Comparative federalism' (2007) 19 Revue européenne de droit public 61, 67.

[249] For attempts to employ a deductive approach, see eg K. Henrard, 'An EU Perspective' (n 5) 65–67.

[250] Article 3(3)(2) TEU: '[The Union] shall combat social exclusion and discrimination, and shall promote social justice and protection of equality between women and men (...)'.

[251] Article 3(3)(4) TEU: '[The Union] shall respect its rich cultural and linguistic diversity (...)'. See also B. de Witte, 'The Cultural Dimension of Community Law' in *Collected Courses of the Academy of European Law* Volume IV, book 1 (Kluwer Law Int'l 1995) 229.

[252] See, in general, G. von Toggenburg, 'The Role of the EU Fundamental Rights Agency: Debating the „Sex of the Angels" or Improving Europe's Human Rights Performance?' (2008) 33 EL Rev 385.

[253] K. Henrard, 'An EU Perspective' (n 5) 67.

instance, does not remove an ethnic component from the identity of this minority, if not reinforcing it. Adopting a classical dual approach to minority protection going back to the PCIJ's Opinion in the Albanian Schools case,[254] 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 the context where freedom of movement remains the core principle underpinning the Union integration.

5. Conclusion

Given that 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, EU's direct engagement with minority rights issues is difficult and profoundly controversial. Three potential problems arise. Should it go along with the Member States' own definitions and approaches, it risks extending a helping hand in precisely oppressing the minorities and denying them vital rights: national culture is then pre-empted, leaving the minorities at times without any citizenship, at times without a right even to a name. Should the EU promote its own understanding of equality, however bright its intentions, negative outcomes in terms of minority protection look on the horizon, as special rights for minorities are made all but impossible in EU law by the Union's overwhelming focus on the Internal Market. Thirdly, and lastly, should the EU decide to intervene on an EU-wide scale, the deficiencies of its enforcement practices and the weakness of the grip on the sceptical Member States become apparent only underlying the failed attempts to do good, as was the case with Roma rights or the freedom of movement for same-sex married couples. All the three are profoundly problematic, yet, being an accomplice in the humiliation of minorities in the name of local cultural chauvinism deserves more criticism, it seems, than simply failing to adhere to one's own proclamations about rights. In this sense the EU plays quite a different role in Lithuania *vis-à-vis* the Polish minority there and in France *vis-à-vis* the Roma who are being expelled in direct violation of the law.

Clearly, in a context where the Union endorses the discriminatory practices of its Member States as expressed in their 'culture', or, which is the second possibility, finds the regimes of minority protection in place in the Member States to be in contradiction with the Internal Market, a concerted revision of the EU's approach to minorities is likely to remain a task for the future. The trouble is, however, that the EU is not only failing to be consistent in either quashing national minority protection policies

[254] PCIJ Advisory Opinion on *Minority Schools in Albania* [1935] PCIJ Rep 17.

or weighing in with the Member States wishing to punish their minorities for being different. The EU does not consider minority protection as a true value, it seems, depriving it not only of coherence, but also of any systemic importance.

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 altered, compared with the models adopted by the Member States. Such models need be adapted to the reality of a global federal regulation of the twenty-eight Member States with a population of over half a billion citizens. While the connection between different characteristics of certain minority groups has been highlighted in literature, still more synergy seems to be required in the tackling of minority issues in the EU. All in all, the case studies we analysed demonstrate beyond any reasonable doubt that the Union remains extremely weak in the field of the protection of minorities, numerous positive developments in the field of non-discrimination notwithstanding.

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