Chapter 7

International Law in the Service of Minority Protection—Hard Law, Soft Law, and a Little Practice

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ABSTRACT

With the increase in the number of international organizations directly or indirectly involved in the protection of human rights on the European continent, a kind of competition has developed in recent decades in the field of fundamental rights: By widening the scope of the rights to be protected on the one hand, and by expanding the forms of legal remedies for their protection on the other, the organizations concerned are becoming increasingly integrated into the internal legal systems of the European states. This is why the shortcomings in the effective, systematic protection of minority rights in Europe are quite obvious. It is therefore a contradictory area of law, which must be examined in the light of the potential and the obvious weaknesses of the existing norms and monitoring systems of minority rights. There are tensions and contradictions at many points between the typically individualistic constitutional systems of our time and the concept of minority rights today. It is also clear, however, that it is precisely the highly developed fundamental rights systems that are expected to protect the rights of minorities. The history of the development of minority rights protection, which has its roots in the distant past, provides ample examples of mistakes to be avoided and of the details to which particular attention should be paid in the course of regulation.

KEYWORDS

minority rights, international law, European law

1. Introductory thoughts

In Europe, the history of minority protection[1] goes back centuries—much further than the concrete historical events that gave rise to international human rights law. The protection of minorities today, which is closely linked to the protection of human rights, is—despite obvious past failures—an upward process, the subject of increasingly effective legislation for the benefit of the groups of people to be protected.

1 The present study deals only with the protection of national and ethnic minorities, and does not address the protection of persons and communities who are in a different situation from the majority on the basis of other characteristics.

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Thus, for example, the establishment and failure of the inter-war minority protection system under the auspices of the League of Nations in the 20th century was both a success and a failure. However, effective minority protection has been limited and raises many unresolved issues, for example in the case of Roma communities.

The protection of minorities is generally qualified as more or less effective by the extent to which civil and political rights are guaranteed—a rating that is much more nuanced for some minority communities, such as the Roma, and certainly requires a multi-directional approach. The development of effective legal protection for such minorities is not made easier by the fact that in their case the usual forms of discrimination are compounded by poverty, social exclusion, and a lack of education and training. Easier international movement of persons and migration for various purposes and in various forms also raises new aspects of and difficulties in the legal framework for the protection of minorities. Effective minority rights protection, which is also in the interests of society as a whole, often becomes a serious economic issue in such a situation.

The community of European states defines itself as a community of law—a high level of fundamental rights protection has been established on the European continent over the last half century. Nevertheless, situations may arise that point to serious shortcomings in the legal protection of certain groups of people. In 2010, for example, there was widespread international outcry over the expulsion of Roma people and even entire Roma communities living in France—highlighting a number of issues of international, EU, and national legislation for the protection of minorities, or even the lack of regulation and uncertainty.

With the increase in the number of international organizations directly or indirectly involved in the protection of human rights on the European continent, a kind of competition for fundamental rights has developed in recent decades: By widening the scope of the rights to be protected on the one hand, and by expanding the forms of legal remedies for their protection on the other, the organizations concerned are becoming increasingly integrated into the internal legal systems of the European states. This is why the shortcomings in the effective, systematic protection of minority rights in Europe are quite obvious.

In order to gain a realistic picture of the current situation, it is worth reviewing the main stages in the development and evolution of minority rights.

Minority rights are considered by international law scholars an international norm with vague contours that are difficult to identify. Today, its content has become very broad and includes a large number of detailed legal provisions, yet its application reveals many shortcomings and raises many doubts. It is therefore a contradictory area of law, which needs to be examined in the light of the potential and the obvious weaknesses of the existing minority rights norms and systems. There are tensions and contradictions at many points between the typically individualistic constitutional systems of our time and the concept of minority rights today. It is also clear, however, that it is precisely the highly developed fundamental rights systems that are expected to protect the rights of minorities. The history of the development of minority rights

protection, which has its roots in the distant past, provides ample examples of mistakes to be avoided and of the details to which particular attention should be paid in the course of regulation.

2. The instrument of political-national assimilation: "Negative" minority protection in Europe before 1945

The international protection of minority rights is much older than the international protection of human rights, the systematic protection of which was first developed within the framework of the United Nations. However, in the early period of the development of minority rights, the first forms of human rights protection were already in place, mainly in the form of the fight against discrimination and the protection of religious minorities. Systematic protection of minorities first emerged at the beginning of the 20th century as a result of the peace negotiations following the Second World War.[2]

By the end of 1919, the Western powers had managed to persuade the last reluctant Central and Eastern European state to sign a treaty for the protection of minorities. This was the end of the negotiating process on the subject of minority protection, which had been on the agenda during the second phase of the Paris conference. The politicians attending the conference—bowing to external pressure—decided to oblige the Central and Eastern European states to sign treaties on the protection of minorities, which, once they entered into force, would be subject to permanent international guarantees and international monitoring. These politicians saw the treaties as a means of securing the territorial changes of 1918–1919 and of avoiding the threat to peace in Europe—and the danger that could upset European peace at any moment was obvious to all reasonable politicians: the partial application of the principle of national self-determination in Central and Eastern Europe. For those national minorities that were not allowed to exercise their right to self-determination after the First World War, minority rights guaranteed in treaty form could, as a kind of satisfaction, have been a way of reconciliation—in the view of the conference participants. The ideal end goal, according to the framers of the treaty system, would have been general political-national assimilation, and treaty guarantees would have made the road to that goal possible and bearable.

Already during the war, the need to compensate for the very partial exercise of the right of self-determination was raised. During the peace negotiations, the American delegation showed itself open to this question, and in May 1919, with its preparations and drafts, it formally launched the process that resulted in the establishment of a treaty system of minority protection. The fate of the Romanian Jews before the First World War was of decisive importance for the diplomatic actions and perseverance of

2 For a monographic examination of this process, see Szalayné Sándor, 2003, p. 247.

the American peace delegation. Moreover, the members of this delegation were those who took up the initiative of the Eastern European and American Jews. At the heart of these proposals was the guarantee of individual and collective minority rights and national autonomy. In the background was the acceptance of the fact that the states of Central and Eastern Europe are multi-national. However, the idea and model of the unitary nation-state still dominated the atmosphere at the Peace Conference, preventing the above concepts from gaining ground, which were eventually taken off the negotiating table. In the face of the concepts of autonomy, one of the most frequently mentioned arguments, which is peculiarly of a nation-state character in nature, was the danger of a "state within the state" situation. It was also the maintenance of the fiction of the nation-state that led the great powers that were participants at the Peace Conference—less so the American and more so the British and especially the French delegates—to decide to create an internationally guaranteed system of minority protection on the basis of proposals drawn up by Jewish organizations. At that time, the dominant politicians did not really have in mind a positive protection of minorities, but saw the potential of the treaties to pave the way for comprehensive national assimilation. This kind of logic could even be seen as a kind of "negative" minority protection. The prominent politicians of the Allies, through overt and covert references, gave voice to these expectations in 1919, and later as well, in the interpretation of certain terms and concepts.

As the texts of the minority treaty provisions were ready in May 1919, a new problem arose: The politicians of the great powers were confronted with the partly instinctive and partly conscious resistance of the states concerned, which sought to avert the assumption of treaty obligations to protect minorities as a restriction of their sovereignty and an interference in their internal affairs. All the Central and Eastern European states concerned expressed reservations and concerns about the draft treaties. Their opposition and rejection foreshadowed the reasons for the subsequent failure of the minority protection system: The peace conference-conference had created a unilateral system of a political nature without real sanctions.

The sources of the specific international minority law guaranteed by the League of Nations largely took the form of bilateral or multilateral international treaties and certain treaty provisions or declarations—these were elements of substantive minority law. Resolutions adopted by the League of Nations for the protection of minorities, for the purpose of monitoring and accounting for the international treaty obligations entered into, were the sources of formal minority law. The latter contained rules of procedure and provisions for the enforcement of treaties, and were concerned with, and presumed to concern, the functioning of the League of Nations and its Council.

The sources of law for the minority rights created between the two world wars with the help of the League of Nations could be grouped as follows:

a) general treaties for the protection of minorities—the territorial scope of these treaties covered the entire territory of the state concerned and sought to regulate the relationship between the state and its minority in a comprehensive manner:

- — the so-called minority treaties—concluded between the Allied and Associated Powers and the new, i.e., territorially enlarged, states (Poland, Czechoslovakia, Serb-Croat-Slovenian State, Romania, Greece, Armenia)
- — relevant chapters of peace treaties—concluded between the Allied and Associated Powers and the former Central Powers (Austria, Bulgaria, Hungary, Turkey);

b) special treaties for the protection of minorities—the territorial scope of these treaties covered only certain areas of the states concerned, or only certain minority rights (e.g., Åland Islands, Upper Silesia, the Memel Region, the Free City of Gdansk)

c) minority declarations—certain states were expected by the League of Nations to make unilateral minority declarations (Albania, Estonia, Latvia, Lithuania, Iraq).

The League of Nations' system of minority protection between the two world wars, briefly described above, failed. The failure was ultimately caused by the resistance of states to the protection of minorities guaranteed by the international law of the time. The labyrinthine political situation over minority and territorial issues after 1919 ultimately confirmed those who had reservations about the Treaty of Versailles. This also led the term "minority rights" to be discredited after the Second World War. The space limitations of this manuscript do not allow for a listing and analysis of the phenomena and events that justify the refusals of the obligated states.[3] A United Nations (hereinafter UN) Secretary-General's report[4] on the impact of the treaty system as a whole, its aftermath, and the scope of the individual minority treaty obligations was produced in 1950, which, on the basis of various legal arguments, came to the general conclusion—which is otherwise disputable on a number of points—that the inter-war minority treaty system had ceased to exist. This summary statement, made in 1950, has taken on particular meaning in Europe during the ethnic upheavals in the Balkans in the 1990s.

3. Striving for freedom of identity choice: "Positive" minority protection regimes in a human rights/fundamental rights context after 1945

After the Second World War, the issue of minority rights in Europe was taken off the agenda: The mass extermination of some ethnic groups and the mass expulsion of others from their birthplace gave the false impression that special rules for the protection of minorities were no longer needed—or so the victorious powers thought. The protection of communities was relegated to the background, and the protection

3 See in detail Szalayné Sándor, 2003, Chapter II.

4 United Nations Secretary-General, 1950. For an evaluation of the study in Hungarian, see Szalayné Sándor, 2003, Chapter IV.

of individual rights, together with the individualistic concept of the protection of human rights under international law, came to the fore. However, the realization that fundamental human rights—and with them the rights of persons belonging to minorities—can only be understood in relation to the social embeddedness of the individual (social and cultural rights) and that many human rights can only be exercised through membership in a community (right of association, right of assembly) was relatively quickly established. There is a long way from recognition to implementation and the setting of a right balance: It is not easy to guarantee minority rights without the states concerned feeling that their national sovereignty is under threat. The situation was further complicated after 1945 by the relatively rapid onset of the Cold War. During this period, traditional legal categories were superseded by ideological differences, previously apparently clear points of alignment became ensnared, and disorders of orientation were created and re-emerged from time to time.

For the majority of liberal Western states, minority protection was not an alien phenomenon after the Second World War—but these states were determined to build a broad, individualist conception of fundamental rights protection. At the same time, they were suspicious of any right or claim that emphasized the collective nature of the human rights to be protected.

In the same period, the socialist-communist states ultimately reached the same position from the opposite direction: They supported (in principle) the strengthening of the collective nature of human rights in international relations, but when the international community wanted to emphasize this collective component in the introduction of international human rights instruments and procedures, the socialist-communist states reacted with the same suspicion and rejection as the liberal Western states.

3.1. The level of universal international law: The role of the UN

The final result of years of preparatory work and negotiations was a compromise: Article 27 of the International Covenant on Civil and Political Rights, drafted under the auspices of the United Nations. Its text is as follows:

> "In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language."

Immediately after the adoption of the Universal Declaration of Human Rights—of the nature of a recommendation—in 1948, preparatory negotiations began on the drafting of international covenants to protect human rights with treaty force. The above-mentioned Article 27 on the protection of minorities was already ready in 1954, but it was finally adopted in 1966, together with the full text of the International Covenant on Civil and Political Rights, and entered into force in 1976, after the necessary

number of ratifications had been received—just a quarter of a century after the start of the preparatory negotiations.

In order to protect the Covenant, and with it the rights enshrined in Article 27, procedural rules had to be established. This was the purpose of the possibility of an individual complaint, which is still covered by the First Additional Protocol to the Covenant. The Protocol is also optional: It allows individual complaints only against States that have ratified it. Thus, any person who suffers a violation of a right under the Covenant, such as Article 27 on minority rights, may submit a complaint to the Human Rights Committee[5] set up by the Covenant and operating since 1977. The Committee comments on the petition after hearing the other party, i.e., the State complained against. This procedure, which can be regarded as a rather "sovereignty-saving" one, has in recent decades helped to interpret and clarify some fundamental issues relating to the concept of minorities, their rights, and the obligations of states. For example, in the Lovelace case,[6] it has established the freedom of choosing one's identity, and traditional crafts were established as part of the cultural heritage of minorities in the Kitok case.[7] In 1994, a general commentary[8] on Article 27 was published by the Human Rights Committee with the intention of serving as a compendium of conclusions and explanations drawn from the cases examined so far, and as a reference point in the application of minority rights.

The Declaration on the Rights of Persons Belonging to National or Ethnic, Religious or Linguistic Minorities, adopted by the UN General Assembly on December 18, 1992,[9] contributed to further clarifying the content of concepts and rights and the level of requirements imposed on the state. The text of the Declaration was preceded by a lengthy debate, in particular on the definition of minorities. Its main virtue is that it exists, even if its content and wording have become very limited: Several minority rights that are considered fundamental are missing from it. The Declaration considers the legislative activity of the territorial state to be absolutely necessary for the protection of minorities (Article 1), and it requires the active behavior of the territorial state instead of a defensive (*non-facere*) attitude. It also requires the state to protect the existence and identity of minorities. The specific rights of members of minorities: the right to practise their religion, to use their language, or to participate in decisions affecting them, are regulated in Article 2. The subjects of the minority rights listed is defined in Article 3, in accordance with Article 27 of the International Covenant on Civil and Political Rights, insofar as members of minorities may exercise their rights individually and in community with other members of the minority concerned, without discrimination. Due to its declaratory nature, it has no binding force in international law and, despite the existence of the UN Working Group on

5 In detail see http://www.ohchr.org/EN/HRBodies/CCPR/Pages/Membership.aspx.
6 *Lovelace v. Canada*, Comm. No. 24/1977, UN Doc. CCPR/C/13/D/24/1977.
7 *Kitok v. Sweden*, Comm. No. 197/1985, UN Doc. CCPR/C/33/D/197/1985.
8 United Nations Human Rights Committee, 1994.
9 United Nations General Assembly, 1992.

Minorities[10]—replaced by the Minority Forum in 2007—these bodies are not empowered to formally review complaints. The Declaration reflects the state of minority protection reached at the universal level by the early 1990s. It clearly reflects the recognition that there is a collective component to minority protection, but does not go so far as to recognize the collective nature of minority rights in the narrow sense. Despite its lack of binding force in international law, the Declaration reflects the position of the majority of the international community on the rights to be granted to minorities and can therefore be regarded to some extent as a general minimum standard.

To sum up the role of the UN: Despite the serious political doubts about the legal protection of minorities immediately after the Second World War—and not least due to the adoption of international treaties on general and specific human rights—a modest but nevertheless existing system of the general content of minority rights (substantive law) and the mechanisms for their protection (formal law) seems to have taken shape. At the beginning of the 21st century, the main aspects of international legal protection of minorities developed at the universal level are the following:

a) The protection of minorities is present in international law as part of the universal protection of human rights. Minority rights are individual rights, i.e., rights that can be exercised individually, even if it is recognized and accepted that the identity and exercise of rights of a person belonging to a minority can only be understood within that community and with its members. The protection of minority rights as collective rights is therefore enforced only indirectly.

b) It has long been debated whether Article 27 of the 1966 Covenant is only capable of protecting persons belonging to minorities against discrimination, or whether it also includes a positive duty of protection incumbent on states. The latter interpretation is now the more common. In certain circumstances, states are also obliged to provide financial support for the exercise of minority rights.

c) The freedom to choose one's identity is a subjective criterion and a fundamental principle of belonging to a minority. [11] Objective criteria can only be taken into account if belonging to a minority would be abused. As a general rule, a person cannot be denied the right to identify himself or herself as belonging to a minority (Lovelace case).[12]

d) The protection of natural habitats and ways of life, and the need to preserve traditional crafts as a minority right, especially for indigenous peoples, has been on

10 See Working Group on Minorities from 1995 to 2006, then replaced in 2007 by the Forum on Minority Issues and the Special Rapporteur on minority issues. Download here: http://www.ohchr.org/EN/Issues/Minorities/Pages/TheformerWGonMinorities.aspx and http://www.ohchr.org/EN/HRBodies/HRC/Minority/Pages/ForumIndex.aspx.

11 See for this the most renowned and quoted work of Bíró, 1995, p. 290.

12 *Lovelace v. Canada*, Comm. No. 24/1977, UN Doc. CCPR/C/13/D/24/1977.

the agenda of the Human Rights Committee in several cases (the Kitok case,[13] Lubicon Lake Band case,[14] and Länsman case[15]).

e) The question of whether Article 27 of the Covenant is intended to protect only traditional, indigenous, and historical minorities, or whether it also covers new minorities such as immigrants is a matter of ongoing debate. In this context, it is now accepted that a distinction can and should be made between the two groups, with classical minority rights being reserved for historical minorities. However, new minorities should also benefit from at least the prohibition of discrimination.

f) The monitoring of minority rights is carried out not only through individual complaints against the state under the Optional Protocol to the Covenant, but also through a kind of monitoring procedure. [16] Every five years, the States Parties to the Covenant are obliged to submit reports to the Human Rights Committee, which analyses and investigates in depth cases relating to the rights of minorities—in the course of these procedures, minorities have the opportunity to provide the Human Rights Committee with information, express their views, and make use of the possibilities for enforcing their interests through publicity and providing the general public with information.

g) There are many other sources of international law and other documents and international monitoring procedures, most of which were established after the Second World War, mainly under the auspices of the United Nations. These procedures, if not directly aimed at guaranteeing the protection of minorities, are indirectly for their benefit: Such treaties contain a number of provisions prohibiting discrimination on various grounds—national, ethnic, linguistic, religious, and others—and, by protecting the rights of persons belonging to special groups (children, women), they also provide for the protection of the rights of those members of minority communities who belong to such special groups as well.

3.2. Activity at the European level

The idea of minority protection is rooted in the history of Europe. The cultural framework and the ideological-historical background for the protection of human rights is more homogeneous here than at the universal level. [17] It is therefore possible to start from the assumption that there is a consensus at European level for a broader, stronger, and more effective protection of human and minority rights than at universal level. The facts and the results support this assumption, even if the process by which Europe has reached the current level of protection of human and minority rights has

13 *Kitok v. Sweden*, Comm. No. 197/1985, UN Doc. CCPR/C/33/D/197/1985.
14 *Lubicon Lake Band v. Canada*, Comm. No. 167/1984 (1990) A/45/40.
15 *Länsman et al. v. Finland*, Comm. No. 511/1992, UN Doc. CCPR/C/58/D/671/1995.
16 Universal Periodic Review (UPR).
17 The analysis of cultural diversity and cultural heritage in conjunction with human rights and their interaction is a rare phenomenon. In this context, the following work is noteworthy: Langfield, Logan and Craith, 2010, p. 255.

not been smooth. Backsliding and restarting have been as much a part of this development as progress or stagnation, depending on historical events, domestic and foreign policy priorities, and even security policy circumstances.

3.2.1. The role of OSCE

After the Conference on Security and Cooperation in Europe and its subsequent transformation into an organization, the Organisation for Security and Cooperation in Europe (hereinafter OSCE) not only brought Europe out of the Cold War, but has also been a great service to the development of modern European minority protection. The Copenhagen Conference on Human Dimension in 1990[18] was of decisive importance in this process, dealing in detail with the issue of minority protection and succeeding in bringing the issue of the effective protection of minorities back to the negotiating table. The OSCE, due to its role and tasks, approaches the minority issue from at least two different perspectives. On the one hand, it places direct emphasis on improving the plight of minority communities and their members, but on the other hand, the protection of minorities is merely a means of implementing security policy. The tasks, powers, and activities of the OSCE High Commissioner on Minorities are evidence of this dichotomy: He does not perform an ombudsman function and does not investigate individual minority violations. In recent years—since 2003—the OSCE has placed great emphasis on the education, health, and housing issues of Roma communities and their members, and has monitored the manifestations of law enforcement agencies and the media, also in relation to Roma communities.[19]

3.2.2. The role of the Council of Europe

In the past decades, two mammoth organizations on the European continent have been developing complementary processes: The development and stabilization of the Council of Europe's human and minority rights protection mechanism has been accompanied by the European Union's steps to protect fundamental rights and minorities. The European Convention on Human Rights, which entered into force 70 years ago, does not contain an explicit provision on the protection of minorities. Article 14 of the Convention can, as a rule, provide ancillary protection: It can only be invoked in proceedings before the European Court of Human Rights in the event of a violation of another right.

> "The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status."

18 See: https://www.oscepa.org/publications/reports/special-reports/election-observation-reports/documents/1344-osce-copenhagen-document-1990-eng/file.
19 See Organization for Security and Co-operation in Europe (OSCE) and OSCE Office for Democratic Institutions and Human Rights, 2013.

However, the 12th Additional Protocol to the Convention, which entered into force in 2005 after ratification by ten contracting parties, already contains an explicit non-discrimination provision for national minorities, which allows the right to the protection of minorities to be enforced independently. However, ratification of this protocol is proceeding very slowly. Until now, 37 of the 47 member states of the Council of Europe have signed it and only 18 have ratified it. [20] Article 1 of the Protocol, on the general prohibition of discrimination, obliges Member States to ensure that:

> "1. The enjoyment of any right set forth by law shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.
> 2. No one shall be discriminated against by any public authority on any ground such as those mentioned in paragraph 1."

For a long time, the legal remedy bodies established by the Convention, including the European Court of Human Rights itself, have shown little inclination to use the remedies provided for in the Convention in the interests of minorities. Recently, however, the concept has changed: The large number of complaints from Kurdish and Roma minorities and the seriousness of the violations have led the Court to modify its previously restrictive interpretation of the Convention in favor of minorities. In the case of the Kurdish minority, Turkey has been condemned by the Strasbourg Court on several occasions, in particular for violations committed in prisons. In the case of the Roma minority, the types of rights violated and discrimination are much broader than in the case of the Kurdish minority. The European Court of Human Rights has already been confronted also with extreme situations and violations of the Roma minority motivated by the very intention to discriminate and, at the same time, by a conscious violation of rights by the state. The forced sterilization of Roma women in Slovakia and the destruction of Roma settlements on the island of Crete, in France, and in Romania are just some of the cases mentioned, which have been dealt with by the Strasbourg Court in various versions in recent years. The seriousness of the cases is shown by the fact that on more than one occasion, the Court has found not only a violation of the prohibition of discrimination, but also a violation of Article 3 of the Convention: Therefore it has repeatedly condemned certain States for inhuman or degrading treatment.[21]

20 At the time of finalization of this manuscript the countries of our region are at the following stage of recognizing the binding force of Protocol 12: Hungary, Austria, Czech Republic, and Slovakia have signed but not ratified; Romania, Slovenia, Ukraine, Croatia, and Serbia have signed and ratified, Bulgaria has not signed. See Chart of signatures and ratifications of Treaty 177.

21 See among others Prohibition of discrimination: landmark judgments.

Particular attention was paid to the judgements against the Czech Republic and Greece, where the Strasbourg Court found discrimination against Roma children in school. In these countries, Roma children were systematically—as measured by statistical data—sent to special educational institutions for children with learning difficulties. The statistically measurable number of children concerned was sufficient evidence for the court to find that discrimination had occurred. The fact that the Roma parents themselves had allegedly requested the admission of their children to special schools was not considered relevant by the court in finding an infringement. The pressure exerted in Greek society, including at the street level, to segregate Roma children in schools was another factor for the court that called into question the sincerity of the parents' consent or request for admission, whereby the Court excluded the admissibility of this aspect and only confirmed the existence of discrimination and the violation of the Convention.[22] The high level of activism by human rights activists and human rights institutions has been one of the decisive factors in the change of approach of the Strasbourg Court. The Strasbourg Court now treats events involving the Roma community and its members as a systematic, recurrent violation, with a variety of litigation management and procedural tools facilitating and expediting the adjudication process.[23]

In addition to the European Convention on Human Rights and its associated judicial remedies, the Council of Europe member states developed in the 1990s a set of hard-soft law instruments, mainly in the form of country reports, shadow reports, and monitoring procedures, in the form of the European Charter for Regional or Minority Languages and the Framework Convention on Minority Rights. It is hard law, because by signing international treaties the signatory states have assumed real obligations, but due to the lack of an international judicial alternative of enforcement, these treaties have a purely soft law effect. However, they have led to a strengthening of international public opinion and the role of domestic and international NGOs.[24] The Parliamentary Assembly of the Council of Europe has also paid attention to the current situation of many minority groups; for example, in 2014 it adopted the Kalmár-Report, which sought to explore the legal situation of indigenous/historical minorities.[25]

3.3. The seeds of indirect protection of minorities in the European Union—EU protection of fundamental rights as a Trojan horse?

Great expectations have been placed on the role of the institutions of European integration in this area. In the early decades of the European Community, it sought to avoid not only the question of minority protection, but even the question of fundamental rights. The reason for this was—to put it somewhat simplistically—the fact that the Member States kept decision-making on human rights and, by extension, minority

22 See as above.
23 See http://www.echr.coe.int/Pages/home.aspx?p=press/factsheets&c.
24 European Charter for Regional and Minority Languages, 1998 and Framework Convention for the Protection of National Minorities, 1998.
25 See http://assembly.coe.int/ASP/Doc/XrefDocDetails_E.asp?FileID=20561.

rights to themselves: They did not give the Community legislative powers. However, from the 1990s onwards, European integration began to deepen: The creation of the European Union was accompanied by a wide-ranging extension of competences, including in fundamental rights matters.

The break-up of Yugoslavia and the Soviet Union finally forced the European Union—then still a Community—to take an open stance on minority issues. The then four-decade-old integration organization and its member states were forced to create a recognition strategy and a matching set of conditions. The Community and, from November 1993, the Union quickly recognized that the extremely complex national and ethnic characteristics of the Balkans and Eastern Europe made the protection of minorities in that part of Europe a key issue for stability. In its guidelines on the recognition of new states,[26] published on December 16, 1991, the Community identified adequate minority protection as a precondition for recognition. An eerily similar situation and condition was found in the resolutions adopted at the Berlin Congress of 1878. Returning to the early 1990s, although the successor states of Yugoslavia showed a willingness to accept the European Community/Union's requirements for the protection of minorities, as is well known, the process of disintegration of the Yugoslav state was tragically accompanied by the most serious ethnic conflicts and crimes. In other geographical regions, however, the European Union's recognition policy has proved capable of contributing to the peaceful transformation of communist regimes that had swept ethnic differences under the surface into democratic regimes that have sought to acknowledge and address ethnic conflicts and minorities in general, rather than to silence them.

In the first half of the 1990s, in parallel with the events taking place in the Balkans, the European Union developed its accession criteria. As an integral part of the gradual approach to EU membership, a set of requirements was formulated for the Central and Eastern European countries wishing to join. These were economic, political, and legal obligations (Copenhagen criteria—1993),[27] among which human rights and the protection of minorities were given a high priority—and the situation of the Roma communities was also given special emphasis in this process.

In the following years, the EU began to apply its human rights and minority rights standards in its external policy to its own internal functioning, and minority issues were increasingly raised not only with the applicant countries but also with the EU Member States. The application of double standards was a recurrent reproach from the Central and Eastern European states, and the steps taken to resolve the situation within the EU have brought to the surface a number of sometimes sharply divergent views. The European Parliament has been—and remains—the main arena for debate and forward-looking action: since the 1980s, some reports by Model European Parliaments (hereinafter MEP; Arfé, Kujpers, Stauffenberg, Alber) [28] have kept on the

26 Türk, 1993.
27 See Copenhagen European Council, 1993.
28 See the evaluation in detail at the round-table event celebrating the 15th anniversary of the Framework Convention for the Protection of National Minorities, 2013.

agenda the search for a solution, mainly based on the concept of ethnic groups. These proposals, which were essentially based on German ideas, met with strong resistance, particularly from France, but also from the United Kingdom. For the French, the British, and several other European states, the reports and proposals submitted to the Parliament placed too much emphasis on the collective nature of minority rights. For these states, the way to the legal protection of minorities can only lead through a system of fundamental rights of a purely individual nature—at least within the institutional system of the Union and through its mediation, if there could be at all any legal protection of minorities within the legal system of the Union. In its judgment of 1998,[29] the European Court of Justice in Luxembourg paved the way for this interpretation: It declared that the protection of minorities is a legitimate objective of the Union, and that the Union's legal order must therefore also take account of it.

In the 1990s, a number of factors emerged that led the European Union to take an increasingly visible stance in favor of the protection of minorities. The main factors were the growth in awareness of fundamental rights, the intensification of academic debate, and the emergence of international NGOs. In the EU Member States and in the EU institutions themselves, there has been a growing awareness of fundamental rights at the level of citizens and EU institutions alike, not to mention the proactive case law of the Luxembourg Court. At the same time, academic debates on fundamental rights have multiplied and the protection of minorities, which is seen as an integral part of fundamental rights protection, has come into the spotlight, although there remains disagreement about the individual or collective nature of minority rights. The lobbying activities of NGOs focusing on the protection of human rights and minority rights, as well as actions by the members of international academic networks and monitoring committees, have become increasingly intensive.[30] Phenomena related to federalism has become more widespread and more common in the state structures of many EU Member States, and there is a growing willingness to expand minority rights in these states.

In summary, as a result of the development process briefly described above, the Member States of the European Union have recognized the need to enshrine the need for legal protection of minorities in the primary law of the Union and to establish certain indirect forms of protection at the level of the principles—twenty years ago one could not even dream of the current EU legal instruments of protection. The most relevant legal sources are listed below.

a) Article 21 of the Charter of Fundamental Rights of the European Union, adopted in its first version in December 2000 and legally binding since December 1, 2009, when the Lisbon Treaty entered into force, prohibits discrimination on the ground of belonging to a national minority, and Article 22 protects culture, religion, and languages.

29 See Case C-274/96 Bickel and Franz (ECR 1998, I-7637, 44), ECLI:EU:C:1998:563.
30 See, e.g., http://www.coe.int/t/dghl/monitoring/minorities/6_resources/PDF_FCNM_15th_Anniv_AEide_en.pdf.

> "Any discrimination based on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation shall be prohibited." (Charter of Fundamental Rights of the EU, Article 21 paragraph (1))
> "The Union shall respect cultural, religious and linguistic diversity." (Charter of Fundamental Rights of the EU, Article 22)

b) Under Article 19 of the Treaty on the Functioning of the European Union (hereinafter TFEU),[31] the EU can take action, including EU law, against racial or ethnic discrimination. This power provided the legal basis for the adoption of Council Directive 2000/43/EC implementing the principle of equal treatment between persons irrespective of racial or ethnic origin (July 19, 2000).

c) The Lisbon Treaty, in force since December 1, 2009, has finally taken an even stronger step toward the protection of minorities. The Treaty on European Union (hereinafter TEU) and the Treaty on the Functioning of the European Union (hereinafter TFEU) make the following provisions a primary legal obligation. Compliance with these provisions—given their primary nature—is expected of all the institutions and bodies of the Union in the course of their work, but Member States are also obliged to comply with the provisions and requirements, at least in the context of the application of EU law.

Primary law and the application of its rules are under the control of the Union's institutions—finally, and if there is a dispute, it is subject to the jurisdiction of the Court of Justice of the European Union. The—although apparently soft—wording of these provisions and their place in the Treaty (common provisions, provisions of general application) suggest that they represent a horizontal obligation: They are binding on all actors in the Union and in the Member States, whatever their specific policy area or form of action. Their only drawback is that they are not enforceable on their own—they can only be enforced before the Court of Justice in conjunction with a specific breach of EU law.

The wording of the Union's core values is as follows:

> "The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail." (Article 2 TEU)

31 Article 19 of the Treaty on the Functioning of the European Union was incorporated into the EU Treaty by the Treaty of Amsterdam, which entered into force on May 1, 1999.

Combating discrimination is also a generally applicable obligation:

> "In defining and implementing its policies and activities, the Union shall aim to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation." (Article 10 TFEU)

The following EU objective indirectly affects the situation of certain minorities, such as the Roma, and therefore, in my opinion, also indirectly serves the interests of minorities:

> "In defining and implementing its policies and activities, the Union shall take into account requirements linked to the promotion of a high level of employment, the guarantee of adequate social protection, the fight against social exclusion, and a high level of education, training and protection of human health." (Article 9 TFEU)

Among the efforts made by the European Union as a specialized international integration organization in recent years, a number of further steps should be mentioned. Among other things, the EPP Group in the European Parliament paid particular attention to the legal situation of indigenous minorities at a public hearing in April 2015. [32]

4. Applicability of existing standards in EU minority protection?

Approximately 9% of the total population of the European Union comprises people belonging to national minorities—currently around 45 million people. In this light, it is perhaps surprising that the European Union's primary law, the founding treaties, which are the Union's basic constitutional documents, made no mention of national minorities before the entry into force of the Lisbon Treaty in 2009. Of course, mere mention does not in itself bring about substantive changes, and it is usually very difficult for Member States to agree on amendments to the founding treaties, especially on more sensitive issues. In the absence of an explicit EU legislative mandate for minority protection, the question then arises as to whether there are other ways, such as the introduction of standards of international law, to supplement minority protection at the EU level. In this context, it is worth examining whether, for example, any form of sanction could be imposed for violations of the rights of national minorities. It is also worth examining whether the standards developed within the Council of Europe can be applied in this context.

As already mentioned above, since the Lisbon Treaty, the Treaty on European Union states that the rights of "persons belonging to minorities" are among the fundamental values of the European Union (Article 2). According to Article 21 (1) of

32 See Hearing on the protection of traditional minorities, 2015.

the Charter of Fundamental Rights, which is now legally binding, any discrimination based on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, affiliation with a national minority, property, birth, disability, age or sexual orientation is prohibited. However, primary law does not explicitly mention minority rights elsewhere than in Article 2 of the TEU, and thus there is no legal basis for the adoption of EU measures specifically affecting minorities. The EU Citizens' Initiative, also established by the Lisbon Treaty, which allows at least one million EU citizens to call on the European Commission to put forward a proposal on matters where citizens consider that an EU legal act should be adopted, was seen by many as a way of bringing minority issues into the framework of EU law. However, the EU citizens' initiative is not an unlimited option:[33] The Commission cannot, of course, go beyond its own powers, and the initiative must serve the purpose of implementing the founding treaties, so this option is also surrounded by uncertainty.

4.1. Article 7 applicable where the fundamental values of the Union are violated

The European Union is often criticized for taking the guarantee of certain values, including citizenship rights, more seriously in relation to the applicant countries than it does in relation to its own Member States. To some extent, Article 7 TEU was (also) intended to address this problem. Without going into details, Article 7 allows for the sanctioning—in the form of the withdrawal of voting rights in the Council—of a Member State that violates the fundamental values of the Union listed in Article 2 TEU. This procedure is not limited to areas where the Union has legislative powers, and can therefore be used in the event of conduct by a Member State that is contrary to the fundamental values of the Union in relation to any matter. The concepts used in Article 7, such as "clear risk of a breach of fundamental values" or "serious and persistent breach of fundamental values," are difficult to define.[34] We can therefore say that there is a possibility of sanctions of a Member State that violates minority rights, but the procedure has its own difficulties and problems.

4.2. Council of Europe standards in the EU legal order?

A number of international law standards apply to the protection of national and ethnic minorities, in particular the Council of Europe acquis. The question is whether these standards of international law—developed primarily by the Council of Europe—can be applied in the EU legal order.

33 The detailed rules can be found in Regulation 211/2011/EU; see the European Citizens' Initiative.

34 For example, it is safe to say that judgements of the European Court of Human Rights condemning Member States—which are also known to find violations of the rights protected by the European Convention on Human Rights against EU Member States—do not constitute a sufficiently serious violation of rights: There are many such judgements, but Article 7, as is known, has never been applied only and exclusively on the basis of a Strasbourg judgement condemning a Member State. Obviously, it cannot be excluded that this might happen in the future.

The relationship between international law and EU law is a complex issue that is only partially covered by primary law in the context of the international treaties concluded by the EU.[35] The founding treaties mention international law in other respects as well. In its relations with the rest of the world, the Union contributes, among other things, to "strict observance and the development of international law, including respect for the principles of the United Nations Charter." [36] The principles enshrined in the UN Charter and the obligation to respect international law must guide the Union's action at international level, both in general and in its common foreign and security policy actions. [37]

More generally, decades before the primary law even mentioned fundamental rights, the Court of Justice of the European Union (CJEU) regularly referred to international human rights instruments (in particular the European Convention on Human Rights) as sources of information in identifying general principles of EU law, including the protection of fundamental rights.[38] Moreover, the Court has ruled that the (relevant) rules of customary international law are also binding on the European Union.[39] In view of this, the possibility cannot in principle be ruled out that the Court of Justice, in its practice of developing the law, may—if this appears necessary and appropriate for adjudicating in a specific case—incorporate even the international standards of minority rights into Union law on a case-law basis by extending the system of the general principles of law. However, it is evident that the Court's case law in this direction is of a case-by-case nature, and thus uncertain and obviously not in line with the scale and value of the minority rights to be protected. So far, only one element of the Court's case law can be identified as one linked to minorities and minority rights: the judgements relating to the use of minority languages—but it must be stressed that these judgements were also delivered in the context of the free movement of persons and the freedom to provide services.[40] It is also worth mentioning that not all EU Member States have ratified the Council of Europe's Framework Convention for the Protection of National Minorities. It also seems likely that if the ECJ were to demonstrate a willingness to incorporate international standards of minority rights into the EU's system of fundamental rights protection through its practice—as I

35 International treaties concluded by the Union are binding on the Union's institutions and its Member States, and these agreements form an "integral part" of Union law from the moment they enter into force and may have direct effect (WTO law being an exception in this last respect). As far as the hierarchical position of these treaties in the EU legal order is concerned, the EU's international treaties are below primary law but above secondary norms—see e.g., C-61/94 Commission v Germany [ECR 1996., p I-3989. o.], ECLI:EU:C:1996:313, Para. 52.

36 Article 3 (5) TEU.

37 Article 21 (1) and Article 23 TEU.

38 Case 29/69 Stauder v Ulm [ECR 1969, p 419], ECLI:EU:C:1969:57; Case 4/73 Nold v Commission [ECR 1974., p 491], ECLI:EU:C:1996:444, Case 44/79 Hauer v Rheinland-Pfalz [ECR 1979., p 3727], ECLI:EU:C:1979:290.

39 Case C-286/90 Anklagemyndigheden v Poulsen and Diva Navigation Corp, para. 9 [ECR 1992, I-6019], ECLI:EU:C:1992:453.

40 See primarily the judgements delivered in the Mutsch, Bickel and Franz, Groener, and Angonese and Haim Cases. Evaluated in Van Bossuyt, 2007.

have indicated above, no such explicit intention can currently be seen—this would be likely to be strongly resisted by a number of Member States, who would consider such a ruling outside the scope of the EU's founding treaties.

Even if it was possible to apply international minority law standards in the EU, there would still be other problems that this segment of international law already struggles with: For example, there is a notorious lack of a generally used and accepted binding definition in international law of traditional national minorities. Furthermore, the monitoring and enforcement of international minority law standards is far from effective, not least because there is no international judicial forum to monitor compliance with the two relevant Council of Europe conventions, the Language Charter and the Framework Convention.

4.3. Some open questions and ways forward

Possibilities and proposals for improvement can still be formulated, through which respect for the minority rights standards of the Council of Europe could be enhanced in the EU.

The first such proposal suggests a soft law solution. It would be feasible and useful to feed the results of the monitoring reports of the two relevant Council of Europe Conventions on minorities into the EU system. The development of an early warning system for violations of minority rights—or of the fundamental values of the Union in general—could be a useful complement to the existing European mechanisms for the protection of rights, which are also partly of a soft law nature. The possibilities of the OSCE High Commissioner on Minorities in this area are rather limited and not specifically focused on EU Member States. The European Commission presented a framework for safeguarding the rule of law in the European Union in 2014. As a *soft law* instrument, the document refers to Articles 2, 7, and 49 of the Treaty on European Union as its basis. With this in mind, a similar early warning system could be envisaged for minority rights. The EU Agency for Fundamental Rights already reports on minority rights issues, among others, and could be an active participant in the new mechanism—which would of course require an amendment to Regulation (EC) No 168/2007,[41] which applies to the Agency. In relation to soft law instruments, it is worth noting that the EU Framework for National Roma Integration Strategies already addresses the Roma minority—as a Commission Communication[42]—but these documents have also been subject to much criticism, mainly because they do not focus on combating prejudice and discrimination. A stronger integration of anti-discrimination standards based on the European Convention on Human Rights and developed in the case law of the European Court of Human Rights into the EU Roma Framework Strategy could increase its effectiveness.

41 Council Regulation (EC) No 168/2007 of 15 February 2007 establishing a European Union Agency for Fundamental Rights.

42 See Communication (COM(2011) 173 final) on an EU framework for National Roma Integration Strategies up to 2020.

The application through judicial practice in the EU framework of minority rights standards under international law and linked to the Council of Europe is theoretically possible, but in reality it would raise a number of questions and problems, and such a development does not seem likely at present. Notwithstanding the above, however, the following questions remain to be addressed. Can the European Union ignore the fact that there are some 45 million persons belonging to minorities living on its territory? Can the question of the individual and collective rights of members of such a large (albeit extremely heterogeneous) group be left unanswered by one of the most important and influential regional European organizations, which is based on common interests and integration through law?

There are many autonomy-related and even separatist movements in the EU Member States, some of which have recently intensified their activities. In my view, more (minority) rights and greater autonomy could help to avoid separatist tendencies—and there are many good examples in Europe on which to build.

5. On the relationship between the state and its minorities: Concluding thoughts

A wide range of solutions can be found when looking at the ethnically heterogeneous states of the world, from explicit constitutional recognition to complete lack of recognition, or even denial of recognition. There are diverse intermediate stages: recognition by law or administrative act, recognition of private organizations representing minorities, and many others. The meaning of the term "recognition" varies from one state to another, and may even vary from one period to another within a state. In some places, recognition means the legal personality granted to minorities—rarely, as the evidence shows—whereas in others, members of minorities are granted rights that, taken as a whole, protect the existence and interests of the group, while in others, they are granted scattered rights that do not form a logical system.

In what direction and with what content is state behavior sufficient for a minority, its culture, and its use of language to survive and develop? This question has been asked for a long time by many people, with many different answers. International law has never been the law of nations—as a superficial analysis of the words might lead one to believe—but has always been the law of states, even though the right of peoples and nations to self-determination is an integral part of international law today, and despite the fact that, compared to the first half of the 20th century, the declaration and defence of human rights is a widely accepted phenomenon in the first years of the 21st century. European minorities—which, with a few exceptions, can also be called fragments of nations—are, as a rule, not subjects of the current norms of international law, but at best only their beneficiaries. This was also the case at the time of the minority protection regime under the aegis of the League of Nations.

A minority, even if it had international legal personality, would be incapacitated to act in the absence of statehood. It is therefore logical to conclude that effective

minority protection requires a combination of international and national law. The relationship between these two legal systems cannot be indifferent in any era: Ideally, states should participate in international and regional international conventions on minority protection and their implementation with the naturalness justified by consolidated international public life, and the content of these conventions should merely be a minimum objective for national law. In an ideal situation, the international political climate would render references to national law and arbitrarily interpreted sovereignty superfluous and unacceptable. On the question of the protection of minorities—similarly to the protection of human rights—it is therefore reasonable to accept the controlling role of international law.

However, the protection of minorities requires more than the mere application of the text of positive law. The "psychological climate," the will that can be extracted from the general culture of the citizens, is of vital importance beyond the rules of positive law. With regard to minorities, the prohibition of discrimination and *de facto* equality—i.e., treatment effectively comparable to that of other citizens of the state—go hand in hand with the prohibition of discrimination. If a minority as a group is only guaranteed equal treatment, the very existence of such a community is called into question. Beyond the prohibition of discrimination, there remains a grey area of positive action measures that, by taking into account the specific characteristics of minorities, guarantee real equality. These compensatory measures are the very essence of the prohibition of discrimination in the constructive sense. In other words, the protection of minorities cannot be achieved by applying the principle of equal treatment alone—but it is certainly not possible to interpret it without that.

The (nation-)state can only be understood in conjunction with its minorities,[43] regardless of space and time. The acceptable form of coexistence at any time is a dynamic series of mutual compromises. Neither side should sit back and relax, for the task for both state and minority is the same: The perpetual search for and maintenance of compromises is both an end and a never-ending process. It is the past and present legal environment of international law and, in particular, EU law where we need to operate; it provides the universal and the regional framework for the everyday reality of each country's domestic law and, not least, their minority policy.

43 Bíró, 2014. For other relevant literature see: Galbreath and McEvoy, 2012, p. 213; Vizi, Dobos and Shikova, 2021, p. 327; Bienenstock and Bühler, 2011, p. 230.

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