

The EU's minority policy and Europe's Roma: cultural differentiation or cosmopolitan incorporation?

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Cover picture:

The red spoked-wheel image incorporated into the EU flag on the first page represents a sixteen-spoked chakra, adopted at the First World Romani Congress in London in 1971 as the international Romani symbol. The chakra which can also be found in the center of the Roma flag (in recognition of the Indian origin of the Roma) represents movement and the burst of fire from which all creation emerged at the beginning of time.

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Abstract

Through explicitly political criteria for membership the EU has committed itself to securing important democratic values including the respect and protection of minorities. The situation of minorities, such as the Roma's, is therefore being taken into consideration in assessing the capacity of candidate countries to become members of the EU. This thesis is concerned with how the discourses of EU institutions on Roma-related issues have developed over time and how political space continues to be opened up. The aim of the analysis is not only to trace the makeup of the EU's minority policy and its evolution over time, but also to investigate which normative theoretical concepts are linked, or tied together as necessary companions, to minority protection within the EU. The main questions of this thesis are 'what kind of minority policy does the EU have' and 'what are its implications'? Two distinct theoretical models for how minority issues should be dealt with in democratic polities are discussed, and in the absence of an 'EU Minority Rights Aquis' the conceptual framework of constitutive theory is used as a tool to help identify the institutional realities concerning minority issues within the EU.

An analysis of the EU's constitutive structures related to minority protection, i.e. formal institutionalisation, using only the tools of constitutive theory, shows however that it is not possible to determine whether the development is heading towards 'cultural differentiation' in accordance with a multicultural approach, or deliberative 'cosmopolitan incorporation'. By addressing the necessary, though not sufficient preconditions that make action possible, constitutive theory can only establish the scope of available arguments by marking what counts as a plausible argument within a given context. The norm of minority protection is thus not only contested within political normative theory, but also remains contested within the constitutive structures of the EU.

Based on the characteristics of ethnicity, political participation, political autonomy and concerns for social and political unity in the EU it is argued, though, that the deliberative approach to minority protection is best suited to face both the challenges European Roma and the EU face today. Because national and ethnic cultures are neither necessary ingredients for the democratic process, nor central to liberal theory, and the emergent European polity can only rest on a shared commitment to rules and procedures perceived as fair and efficient, on the principle of toleration and institutional guarantees of respect for diversity, i.e. non-discrimination, minority protection can only be justified by minorities' experience of structural

constraints, that is, their 'political difference'. Within such a perspective the Roma claim for non-discrimination and respect of their human rights can be met. Their claim for recognition as a 'non-territorial nation' with representational rights in accordance with the multicultural approach will however be rejected on both empirical, but most importantly normative grounds.

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Chapter I

Introduction

It is now commonplace to note that nation-states are challenged by the related processes of globalization and social differentiation. The one involves greater interconnectedness at an international level, the other leads to greater heterogeneity at regional and local levels. In the field of culture there are important processes of regionalisation at the sub-state levels, as well as inter-state levels, due to the new wave of 'identity politics'. Pluralism, which has always been an important feature of Europe, is becoming more salient in political life, as "old territorial nation-state borders are challenged by sub-state regional and minority identities, global cultural communications, and assertive cross-boarder interest groups" (Amoto and Batt 1999:5).

Ethnic and cultural revival within and among states is associated with more complex conceptions of citizenship and notions of community and identity, which may be more, or less, inclusive than those associated with the nation-state (Broderstad 2000:230). Especially the campaigns by many national minorities¹ for greater regional autonomy to establish distinct legal and political frameworks and calls for cultural recognition by ethnic and religious

¹ According to the definition provided by F. Caportorti in 1978 (with reference to Article 27 of the International Covenant on Civil and Political Rights of 1966) the term 'minority' refers to: "...a group numerically inferior to the rest of the population of a State, in a non-dominant position, whose members – being nationals of the State – possess ethnic, religious or linguistic characteristics differing from those of the rest of the population and show, if only implicitly, a sense of solidarity, directed towards preserving their cultures, traditions, religion or language.". The term 'national minority' simply designates the minority groups (ethnic, linguistic and religious) that are found on the national territory of a state party.

minorities have highlighted the limitations of the dominant model of the modern nation-state as an administratively centralised and politically and culturally homogeneous state. A particular important set of challenges emanates from the Roma² due to their particular history of discrimination, as well as their present marginalized status in all European countries and their emerging political involvement.

The European Union; unity in cultural diversity?

Making policy on minority issues is far from exclusively a matter of domestic politics as it is furthermore significantly influenced by the norms and standards emerging in the international political arena of contemporary Europe. The sovereignty and governmental capacity of the nation-state are thus affected not only by pluralism at the sub- and inter-state level, economical and technical changes, but also by new political, legal and normative regimes (Eriksen 1999:216). In particular the European Union (EU) has attempted to alter the Central and Eastern European countries' (CEECs) politics related to minorities as minority issues have been given high rhetorical prominence by the EU during the enlargement process to Central and Eastern Europe. The EU has increasingly articulated its aspirations to represent not only stability and prosperity, but also democratic values, cumulating with the adoption of explicitly political criteria for membership at the Copenhagen meeting of the European Council in 1993. Here the EU committed itself not only to future enlargement but also to securing important democratic values including the respect and protection of minorities³. The situation of minorities, such as the

² The public use of the term 'Roma' is a fairly recent phenomenon. EU documents apply the term Roma "as a generally accepted generic name for the group of people who speak Romani tongue and/ or share a common ethnic identity, culture and history" (European Commission 2002:4). Roma communities have been present in Europe since at least the beginning of the fourteenth century. They were originally from Northern India, yet were wrongly perceived by many to have been of Egyptian origin, hence a variety of appellations reflecting this – Tsigan, Zigeuner, Cigány, Gitano, Gypsy etc. These terms are considered by many to be pejorative and are often replaced by the more neutral term Rom/Roma according to the preference of many Roma who are active in the international and national movements on behalf of Roma rights. This thesis uses the term 'Roma' as the plural noun form, as well as to name the group as a whole. As will be discussed in chapter 2, objections to the use of the term 'Roma' have been raised as some believe it represents an essentialist understanding of Roma/Gypsy communities' identity.

³ The Copenhagen criteria lay down conditions for EU membership relating to political and economic matters and alignment with the *acquis communautaire*. They state that "membership requires that the candidate country has achieved stability of institutions guaranteeing

Roma's, is therefore being taken into consideration in assessing the capacity of candidate countries to become members of the EU.

Deliberation of the 'Roma question' at the EU level during the accession process has done much to identify both the problems facing the Roma, as well as those that arise when thinking about majority-minority relations. Focusing on the possibility of viewing the EU as a means to accommodate difference and plurality it becomes obvious that the EU represents an important political and institutional framework with implications for not only the nation-state, but also the standing of the Roma. The EU is, then, not simply an alternative locus of administrative power, but one that also challenges the manner and capabilities of national governance. The EU becomes with this a source of opportunity for all those dissatisfied with status quo.

All polities generate recognition expectations (Fossum 2004:6) and Roma representatives conceive of the EU as a relevant site not only for the rectification of injustice, but also for the recognition of their cultural identity. They expect that minority communities will "benefit from more permeable borders, multi-level contacts with neighbouring ethnic kin and through the limitation and scrutiny of state sovereignty in the EU framework" (Brusis 2003:12). The revival of international Roma politics strengthens the illusion that it is possible to create European-level representation (Kovats 2002:5) and some Roma representatives have consequently called for Roma to be accorded national status at the level of intergovernmental bodies, such as the United Nations (UN) and the Council of Europe (CoE). They have also called for recognition as a 'non-territorial nation' at the EU level and requested a seat at the European Parliament. Are these false expectations?

Problem formulation

Given the structural constraints inherent in the notion of a culturally homogeneous territorial nation-state and its conception of citizenship, the focus of this thesis will be to discuss whether the CEECs entry into the EU will compensate for the lack of state efforts towards the Roma.

democracy, the rule of law, human rights and *the respect and protection of minorities*" (my emphasis). For details of the accession criteria which were defined at the 1993 Copenhagen conference, see Commission website at <http://europa.eu.int/scadplus/leg/en/lvb/e40001.htm>

As Roma-related issues have almost exclusively been dealt with within a ‘minority protection’ framework at the EU level the first question of this thesis will be *what kind of minority policy does the EU have?*

This is not merely an empirical issue but also one dependent on the conceptual lenses we apply. The question will therefore be addressed by analysing (1) the theoretical ‘possibilities’ concerning minority protection, i.e. different normative answers to how minority issues should be accommodated in democratic policies, and (2) the ‘actualities’ of EU minority protection, i.e. the formal institutionalisation at the EU level of policies concerning minorities. Two distinct theoretical models for how minority issues should be dealt with in democratic polities will thus be discussed, and in the absence of an ‘EU Minority Rights Aquis’ the conceptual framework⁴ of constitutive theory will be used as a tool to help identify the institutional realities concerning minority issues within the EU. In other words, what kind of minority policy the EU can be said to have will depend on which of the theoretical models is found to be reflected in the ‘actualities’ of EU minority policy.

As this thesis also tries to say something about how equality should be understood in a plural context the second question of his thesis will be *what are the implications the EU’s minority policy?*

In answering this question the EU’s minority policy will be assessed using a liberal normative framework. Hence the thesis analyses here, with reference to the discussed theoretical models, the implications of taking cultural pluralism into account when discussing the elaboration of a just political system and just policies. This approach stipulates that the EU is searching for the ‘right’ minority policy, what is ‘right’ depending on what kind of polity the EU is considered to be. The purpose of this assessment is furthermore to offer a contribution to the breaching of the gap between normative standards and principles on the one hand and empirical realities on the other. A critical issue is therefore what type of minority policy the EU requires, in normative

⁴ I suppose a distinction of what can be called a theory’s conceptual and theoretical framework, and that it is possible to use a theory’s conceptual framework without having to subscribe to its theoretical implications. This will furthermore be made clear within the scope of this thesis as it is deemed necessary to go beyond constitutive theory when trying to identify a legitimate EU minority policy. The use of constitutive theory’s conceptual framework does thus not imply limiting this thesis to it’s theoretical framework.

terms, as well as what the EU can actually draw on and foster, in empirical terms.

Possibilities: multiculturalism versus deliberative theory

Several concepts have been developed concerning minority issues and the accommodation of cultural differences reflecting different ideas on how best to distribute and ensure entitlements to participation, especially on whether the entitlements should be accorded to minorities as groups – and thus be in the nature of collective rights – or be based on individual rights and through integration (not assimilation) of minorities within the larger political community. The *multicultural model* has been put forward as a liberal response to the challenges modern democracies face in the wake of expanding ‘identity politics’ and a cultural pluralism. By incorporating much of the communitarian objections to what has been called ‘identity-blind’ liberalism, they try to show that “deviations from difference-blind rules which are adopted in order to accommodate *ethnocultural* differences are not inherently unjust” (my emphasis) (Kymlicka 2002:365). They advocate with this the idea that legitimate policies must *recognise*, i.e. promote, cultural identity. In contrast, the *deliberative model* emphasises rather the need for a right ‘procedure’ as opposed to multiculturalism’s emphasis on recognition of ‘substance’. Based on an understanding that democracy is more about ‘voice’ than ‘vote’ the deliberative model focuses on the process of deliberation and opinion formation that precedes voting and advocates with this for a substantive reading of the non-discrimination principle derived from an open-minded and morally serious dialogue.

Both ‘non-discrimination’ within the deliberative approach and ‘recognition’ within the multicultural approach pertain to the protection of minorities. While the norms do not necessarily contradict each other and can be combined in a comprehensive approach to minority protection, they can still be distinguished and said to follow different rationales. The basic difference between ‘non-discrimination’ and ‘recognition’ is the question of whether cultural identities should be of any concern. Whilst the first serves to ensure that minorities are not treated different than other individuals, the latter aims at supporting the maintenance of their distinct culture. For the purpose of this thesis, *non-discrimination* and *recognition* shall therefore be treated as two distinct

theoretical norms used to achieve the *protection*⁵ of minorities. What distinguished these norms is the question of whether the specific cultural identity of persons and communities should be positively recognised and emphasised by giving them special rights, or whether, instead, individual equality and non-discrimination should be promoted. The two approaches have different ways of conceptualising the relationship between minority rights and general human rights. They also reflect different political aims, respectively fostering diversity and prevention or redress of discrimination.

Within the scope of this paper I am not concerned with tracing the variety of different and overlapping approaches to the content of the multicultural approach and deliberative democracy. Instead, I will focus on the aspects most relevant to the investigation at hand. This being an assessment of the EU's minority policy, Jürgen Habermas' (1998,2003) approach and development of what he terms 'constitutional patriotism' will be central to the deliberative model. Especially Will Kymlicka's (1995,2001) defence of multicultural policies, but also Charles Taylor's (1994) concept of deep diversity, are elaborated within the multicultural model.

Actualities: recognition or non-discrimination?

That possibilities may be afforded in theory does not however mean they have been actualized in terms of international standards adopted by states in contemporary international relations (Packer 1996:144). It is thus with a view to clarifying the actuality of minority protection within the EU that we move from an examination of what could be 'possible' to what 'is'. Specifically, through an identification and examination of the provisions of positive EU law and so-called 'binding' political commitments, we will see whether the emphasis in EU discourses concerning minorities is placed more on cultural difference than social exclusion, and on affirmative action rather than formal non-discrimination and to what extent theoretical possibilities have been made real and meaningful for their intended beneficiaries.

⁵ The term *minority protection* will in this thesis thus stand for both sides of policies regarding minorities i.e. the enforcement of formal anti-discrimination legislation and support of specific minority rights within the context of recognition.

The EU's normative structure and minority protection resonance

Guido Schwellnus (2001) argues that an EU minority *protection* norm like any other norm has to resonate with the pre-existing normative structure; the existing *acquis* – formally constituted by the Treaties, secondary legislation and rulings by the European Court of Justice (ECJ), but also embedded in informal norms and political practices⁶. Constitutive theory claims that only when new norms can be related to established institutions, traditions and beliefs, does norm transfer become possible. In this view, *resonance* is a structural precondition for enabling effective norm diffusion. Because “resonance entails an ability to create compelling and coherent arguments within a social context...and to relate the norm positively to institutions, traditions, and ideas that are prevalent to that context” (Wiener and Schwellnus 2004:6) ‘constitutive norms’, i.e. points in the existing normative framework that allow for linking a proposed new norm to it, set out the framework of possible actions within a structural context. In the absence of an ‘EU Minority Rights Aquis’ it therefore becomes important to identify what constitutive norms and values within the normative structure of the EU an eventual European minority policy can be built upon, i.e. in what direction are present developments pointing? Is the overall orientation promotion and protection of equal dignity or rather promotion and protection of cultural difference?

The EU can be said to focus on minority issues in general in two different areas, none of which result directly in a ‘Minority Rights Aquis’, but may sustain the basic elements, or guidelines, for the further development of an adequate minority protection policy (Stepanek 2002); (1) cross-border co-operation within EU’s external relations policy, including the Copenhagen Criteria and PHARE⁷ support in connection with the eastern enlargement,

⁶ To avoid all confusion that may arise regarding the term ‘normative’ it must be made clear that this thesis does in no way mean to give the *aquis* implicit ‘normative value’ when using the term ‘normative structure’ to describe it. ‘Normative structure’ refers rather to the existing norms, i.e. rules, within the EU’s *aquis*. The term ‘norms’ is furthermore not used in the Habermasian sense as denoting ‘moral rightfulness’ when talking about ‘normative structures’, norms refer here rather to rules prescribing certain roles within a logic of appropriate action.

⁷ The PHARE program is an EU program that guarantees economic support to the applicant countries in Central and Eastern Europe so that the membership criteria can be met as quickly as possible. Respect and protection of minorities being such a criterion implies that different projects, such as promoting education for Roma-children, receive economic support to improve the situation.

and (2) the Parliament and Commission's normative approach, as well as policies and programmes on related issues surrounding human rights, asylum, antiracism and regional activities. Two 'constitutive norms' can furthermore be identified within the constitutive structure of the EU; (1) the principle of cultural diversity and (2) non-discrimination. The possible construction of an EU minority policy shall therefore be assessed by analysing these norms within the *aquis communautaire*; the Treaties, EC legislation and ECJ rulings, as well as from a wider political practice and discourse with reference to the EU's normative foundations. The thesis is here concerned with how the discourses of EU institutions on Roma-related issues have developed over time and how political space continues to be opened up. The focus will be on especially what kind of theoretical framework these discourses are reflective of; the multicultural or the deliberative?

Constitutive resonance and complex normative structures

Social constructivists would emphasise that norms must have a sufficiently degree of specificity as well as commonality among the actors within a social system in order for them to have an impact. This is because constructivists or political institutionalists⁸ predominantly emphasise the 'logic of appropriateness' as the key logic of action. Such a logic of rule guided behaviour is particularly salient the more these situation-specific obligations are clearly identifiable and the more actors take these norms for granted. This implies that the EU should be able

...to rule out at least some behavioural options as inappropriate and there has to be a consensus among EU-policy makers not only about the general importance of these norms, but also to the extent they have to be prioritised over competing concerns in a given situation.

(Sedelmeier 2003:11)

However since complex normative structures consist of sometimes competing or even contradictory norms and broad principles in need of interpretation, they are not necessarily so internally coherent, hierarchical and deeply internalised as to determine the outcome of norm diffusion by rendering every alternative impossible or unthinkable. Constitutive norms in complex normative structures do not therefore determine action;

⁸ See March and Olsen (1989)

...instead of taking the EU's constitutive norms as determining the outcome of new norms...they are conceptualised as enabling different forms of action, ranging from NGO mobilisation to political and judicial activity, by providing justifications for action.

(Scwellnus 2001:13)

An institutional analysis looking for such points within the constitutive normative framework into which a new norm is to be introduced is thus merely a starting point for identifying the range of possible norm interpretations. Diffuse norms in complex normative structures create scope for interpretation and argumentation about what the 'right' course of action might be in a particular situation (Sedelmeier 2003:12). But where potential resonant interpretations of norms often stay contested one needs to go beyond constitutive theory in order to determine what the 'best' argument is.

Normative assessment

The concept of contextual rationality embedded within constitutive theory cannot assess prevailing norms; it can not tell which valid interest a given normative order favours or whether some norms rank or should rank higher. The contextual concept of 'rationality' does not solve the real question of rationality, which has to do with the problem of the validity of norms (Eriksen 1999:226). Extending the basic explanatory categories is therefore required in order to understand the broader set of assessment criteria involved in the development of a minority protection standard. Adding to the *logic of consequences* and the *logic of appropriateness* (March and Olson 1989), there is a need for *logic of justification* that provides a basis for the rational assessment of norms, i.e. their validity. Actions may be justified with regard to consequences or with regard to prevailing rules or norms, but neither is sufficient to justify public provisions in a pluralistic context (Eriksen 1999:218). A normative assessment of the EU's minority policy is needed and this thesis will therefore examine the relationship between the Roma and the EU in light of contemporary normative political theory. Liberal theory, one of the major schools of contemporary political thought, is chosen as the basic normative framework for understanding the requirements of a just political system and just policies. Through this approach, which stipulates that philosophy informs law-making, the theoretical debate, the 'possibilities', will be transferred back to the EU context. Kymlicka's multicultural model and Taylor's concept of 'deep diversity' will be examined and contrasted with

Habermas' notion of 'constitutional patriotism', and the implications of both the deliberative and multicultural models for the Roma and the EU are discussed.

....the main question in understanding politics, and especially politics in international settings, is not the question of whether or not norms exist, but whether or not they deserve recognition.

(Eriksen 1999:230)

Further structure

Chapter 3 will discuss and contrast two distinct theoretical models of minority protection; the multicultural and the deliberative. Based on documents published by EU institutions, secondary literature and informal discussions with officials from the Commission, representatives of Roma organisations⁹ as well as participation at the 17th MG-S-ROM meeting of the CoE (29–30 March 2004)¹⁰ chapter 4 will then try to identify which of the two models is reflected within the constitutive normative structure of the EU¹¹. Chapter 5 will then assess the EU's minority policy within the framework of normative theory by discussing the characteristics of ethnicity, political participation, political autonomy, and concerns for social and political unity in the EU. Chapter 6 will discuss what implications a minority policy based on cosmopolitan incorporation has for our understanding of the EU. First, however, the main characteristics and problems facing the Roma minority and the following claims Roma organisations put forward will be

⁹ Amongst these were the European Roma Information Office (ERIO) and the European Roma Rights Centre (ERRC). ERIO was founded in 2003 with the aim to establish and maintain a Romani presence in Brussels. More specifically, ERIO seeks to convince the EU institutions of the need to prioritize equitable development opportunities for the Roma in all the current and future EU member states. ERRC is an international public interest law organisation engaging in a range of activities aimed at combating anti-Romani racism and human rights abuse of Roma. They have consultative status with the Council of Europe as well as with the Economic and Social Council of the United Nations.

¹⁰ The setting up by the Committee of Ministers of a Specialist Group on Roma, Gypsies and Travellers (MG-S-ROM) was decided in September 1995. This Group is the first Council of Europe body responsible for reviewing the situation of Roma and Travellers in Europe on a regular basis.

¹¹ The existing *acquis* – formally constituted by the Treaties, secondary legislation and rulings by the European Court of Justice (ECJ), but also embedded in informal norms and political practices.

presented in chapter 2 in order to clarify what kind of challenge the Roma pose, i.e. in what sense are their claims a problem for conceptions of citizenship and belonging based on national systems of democratic governance.

Chapter 2

The Roma

Europe's largest minority

There are around 8 million Roma living in Europe today, with the vast majority, around 6 million, living in Central and Eastern Europe (CEE). Present in all European countries, and still crossing borders, for mostly economic reasons, but also due their social organisation, the Roma are objectively a European people.

Table 1: Roma populations in selected EU member states and candidate countries (official estimates)

Country	Total population (millions)	Roma populations (est.)	% Roma in total population
<i>EU members</i>			
France	59.3	340,000	0,6
Germany	82.8	130,000	0,2
Italy	57.0	100,000	0,2
Spain	40.0	800,000	2,0
UK	59.5	120,000	0,2
<i>Candidate countries</i>			
Bulgaria	7.8	800,000	10,3
Czech Republic	10.3	300,000	2,9
Hungary	10.1	600,000	5,9
Romania	22.4	2,000,000	8,9
Slovakia	5.4	520,000	9,6

Sources: European Commission, DG-Enlargement; Enlargement Briefing, EU Support for Roma Communities in Central and Eastern Europe, December 1999

Many different Romani groups exist in very different political systems. The plurality finds expression, on the one hand, in differences between West European Gypsies and Central and Eastern European Roma and, on the other hand, within these groups themselves. Given widespread dispersion and their existence as small minority communities within a variety of different societies and mainstream cultures, the Roma are a particularly difficult social group to conceptualise accurately (Kovats 2001b:7). Specific concepts or sets of concepts may be theoretically and politically meaningful in some countries, but meaningless or even misleading for Roma communities in other countries. As the OSCE's High Commissioner on National Minorities has noted, Roma "compromise an extremely heterogeneous set of communities that are perhaps best understood in their own specific circumstances" (cited in Kovats 2002:1).

Because of the diversity within the Roma people, it is unclear what Romani identity is. This is also especially true since the Roma do not consider themselves members of a cohesive ethnic group, but instead identify with the subgroup to which they belong. Diverse levels of assimilation among Roma, lack of communication between different Roma groups and territorial dispersion have further made difficult the efforts of Roma activists to promote an understanding of the Roma as an ethnic group. Fundamentally, however, all European Roma share to some extent the same origins, language, culture and historical experiences (Barany 2002:15). For the purpose of this thesis I shall employ this generalised concept of the Roma¹², putting particular emphasis on two relevant aspects of the Roma-reality; marginalisation¹³ and transnationalism.

Roma identity is in addition increasingly becoming a political identity, putting forward claims of non-discrimination and, in some cases, to be recognised as a nation. This development needs to be understood in the context of the wider political environment. Within a rapidly changing European context, the Roma are facing new challenges concerning influence

¹² In no way should this choice of terminology be taken as an endorsement of approaches aimed at homogenising Roma and other groups perceived as 'Gypsies' in Europe or at eliminating the rich diversity among Roma, Gypsies, Travellers and other groups perceived as 'Gypsies'.

¹³ Research points to a common situation across all or most member states and candidate countries and examples used in this thesis are therefore used for illustrative purposes rather than to expose practices within individual countries.

and participation. One of these challenges is connected to the nation-state as the main actor in international co-operation¹⁴ another is related to the systematic social, economic and political marginalisation of Roma populations throughout the European continent.

A marginalised minority

Roma communities have been subjected to a variety of policies adopted by national and local authorities, ranging from outright persecution to attempted containment and assimilation measures. At no point during the conduct of these policies was there any attempt to understand the Roma, their culture and way of life. Lack of understanding and prejudice were, and still are, at the root of many discriminatory policies directed against them (Liegeois and Gheorghe 1995). The Roma constitute with this a group which has been prevented from developing according to its own interest, and marginality, the condition of being subordinated to or excluded by others, is a central theme in the Romani experience. The current situation of the Roma in Europe can therefore not be fully understood without an understanding of the history of the treatment of the Roma in Europe.

Since their arrival in Europe about seven centuries ago, the dominant populations in the region have politically, socially, culturally and economically marginalised the Roma. From the second half of the fifteenth century onward Western states introduced repressive policies against the Roma, who were perceived as unproductive vagrants. The effect was to limit their numbers, while at the same time, continued migration offered a means of escaping severe treatment. To some extent, the development of capitalism in Western Europe helped to develop modern Romani nomadism in the form of 'service nomadism'. By contrast, the persistence of a feudal type of economy in Central and Eastern Europe maintained the need for a large, coerced labour force which took various forms of servitude. Thus, in some countries of Eastern Europe the need for an extensive labour force led to their incorporation into the local labour market and to the eradication of Romani nomadism – that is, their sedentarization and the creation of large Romani ghettos¹⁵.

¹⁴ Broderstad (2000:248) identifies the same challenge when talking about the Sámi people.

¹⁵ For an analysis of the different constitutive assumptions underlying EU discourses on 'Gypsies' versus 'Roma' see Simhandl (2004).

These differences across Europe gave birth to contrasting stereotypes of the Roma: in the Western context "Gypsies" means nomadic, travelling, or migrant, whereas in the Central and Eastern context, the corresponding terms, "Tsigani" or "Cigany," imply socially subordinate, impoverished, and marginal groups.

(Migra and Gheorghe 1997:5)

Negative stereotype of Roma is a notable feature of public life in countries where Roma experience frequent acts of discrimination and racially motivated violence. Racism, discrimination and social exclusion are characteristic for the Roma population in Central and Eastern Europe, as highlighted in all the European Commission's Regular Reports on the progress made by candidate countries towards accession. Agenda 2000¹⁶ reported that in general the integration of minorities was satisfactory "except for the situation of the Roma minority in a number of applicant countries, which gives cause for concern"¹⁷. The conditions under which most Roma live, especially in the CEECs, are unquestionably poorer in numerous areas of life than their non-Roma neighbours and Roma communities more than any other group still face the problem of exclusion from the main fields of the economic, political and social life. Martin Kovats (2002) thus identifies unemployment, poverty, poor housing, health, social tensions and educational disadvantages as the fundamentals of the contemporary 'Roma question'.

The Roma are considered to be an ethnic minority and most of them also belong to the socially disadvantaged groups of society. They therefore form a special minority group, insofar as they have a double minority status. The Roma issue has in effect emerged as one of the most complex minority issues in the CEECs, while it must be remembered that in Western Europe the

¹⁶ The European Commission published 'Agenda 2000' on 16 July 1997. This three-part policy document looks at the future of the main areas of Community policy; the European Union's financial perspectives for the period 2000-2006 and the Union's enlargement. Agenda 2000 also establishes a financial framework for supporting the pre-accession process in the applicant countries.

¹⁷ Those mentioned were 'Bulgaria, the Czech Republic, Hungary, Poland, Romania, and Slovakia', where Roma were reported as suffering 'discrimination and social hardship' (European Commission 1997).

treatment of the Roma community is far from exemplary¹⁸ as prejudice against the Roma has been equally strong in both East and West.

Counterculturalism

Universally subjected to negative stereotyping, often perceived to be criminals, or social deviants, the approach in recent years has typically been to see the Roma as a social problem, a group of misfits who do not fit into the settled structures of the state (Liegeois and Gheorghe 1995).

Opinion polls regularly report that significant proportions of the general public support the physical segregation of Roma from 'normal' people, advocating what amounts to apartheid as a solution. Such exceptionally hostile perceptions are based on the popular belief that Roma are not just ethnically different from other groups but in a special category of their own.

(Guy 2001:4)

From the perspective of the state, the Roma are usually viewed as a countercultural group that contests and even rejects the very norms and values of society. This notion of counterculturalism or deviancy explains the numerous attempts to eradicate so-called gypsyism (Migra and Gheorghe 1997:5), including the attempt during World War II to extinguish the Romani people. Hence the European Commission talks about the importance of promoting the Roma's *social* inclusion (2004a:1).

The Romani sense of identity is, as mentioned, highly affected by the Roma's historical experiences of, and continuing vulnerability to, the most severe forms of exploitation, policies of discrimination and forced assimilation. But the Roma division of the world into Roma and *gadje*¹⁹ is an equally important aspect of Roma marginalisation. Roma were, and are, separated from the non-Roma world not merely by their comparative poverty and illiteracy, but also by feelings of innate difference. These feelings are reinforced by the *marimé*, or pollution, code which Roma communities observe. Compliance with these codes insures the virtual, and self-imposed, segregation of the Roma from *gadje*. Thus, segregation imposed on the Roma by a frequently hostile and suspicious outside world has been equally

¹⁸ See Open Society Institute (2002).

¹⁹ All non-Roma are viewed as *gadje*.

mirrored by a quite voluntary separation effected by the Roma themselves²⁰. Many policies implemented with the intention of improving the situation of the Roma fail since they do not take into account the deep-seated mistrust on the side of the Roma. Only recently has there been an attempt to understand the Roma as a distinct ethnic group with a unique culture and specific problems and needs related to centuries of discrimination and prejudice.

A transnational minority

The Roma in Europe are not immigrants who want to integrate, nor are they found in European nation-states as compact, cultural, religious, or linguistic minorities that have appeared as a consequence of forced incorporation. Nor are the Roma easily compared with other ethnic minorities in Europe who have struggled for greater independence²¹. In contrast to other minorities in the region the Roma can for example not rely on an external state dominated by their kin. Indeed the uniqueness of the Roma lies precisely in the fact that they are a transnational, non-territorially based people who do not have a 'home state' to provide a haven or extend protection to them (Barany 2002:2). The lack of powerful backing from an external 'mother-country' is also an important factor when trying to explain why the Roma traditionally have received little political attention.

The concept of the Roma as a 'European issue' was formally acknowledged in the 1993 Recommendation 1203 of the Council of Europe, which declared Roma to be a 'true European minority'. The Roma are therefore also increasingly being conceptualised as a transnational ethnic group by representative associations. Since the Roma do not have a homeland and make no territorial claims, they conceive their transnational identity as a stateless European nation whose members form a community of memory based on a shared history, culture and language (Meyer 2001:297).

Emerging political elites

Members of the newly emerging Romani political elites have started to play an increasingly important role in the deliberations on the 'Romani issue', both at the national and international level (Migra and Gheorghe 1997:3).

²⁰ Interactions between the poor Roma and non-Roma are, however, more frequent, which suggests the existence or emergence of class (rather than ethnic) solidarity (Ivanov 2002).

²¹ See Kymlicka and Opalski (2001).

The emphasis in these public discourses is put on either the language of ethnicity and cultural identity through stressing the importance of recognition, or on that of non-discrimination and equality within the framework of more general human rights. The Romani agendas are thus plural in the sense that both 'ethnic' and 'civic' agendas are being put forward.

Romani organisations that promote a civil-rights-orientated approach focus on the elimination of discrimination and downplay issues of cultural diversity. Having especially the extreme marginalisation characteristic of Roma communities in mind, the enforcement of non-discrimination legislation is put forward as an important claim by several human rights organisations (Roma as well as non-Roma). Other Roma organisations promote a more ethnocultural-orientated approach, which demands positive recognition and accommodation of cultural difference. Two different ways of ensuring Roma participation are portrayed in these ethnocultural deliberations (1) through integration in national societies, i.e. the formal recognition of the Roma as national minorities within their respective states, or (2) through self-determination, i.e. recognition of the Roma as a European non-territorial nation. According to the first proposal the Roma should aim at acquiring the legal status and recognition already enjoyed by other national minorities in each country where Roma reside. According to the second proposal the Roma's rights should be protected both internationally, especially at the European level, and in each country where Roma reside. Within the framework of a new Europe extending its democratic standards and borders, some Romani elites are with this attempting to enter European politics and to gain political representation through recognition of their ethnicity. This second alternative has been asserted by the Romani National Congress (RNC) and the International Romani Union (IRU).

A non-territorial nation

The Roma are among the last groups in Europe to discover the potential and power of ethnonationalism and to struggle for a political space of their own (Migra and Gheorghe 1997:3)²². It is still unclear though whether demands of nationhood and for special rights within a 'united Europe' will prevail over the integrationist demands based on the achievements of only non-

²² Comparisons have been made with Zionism, 'Romanistan' being the Roma equivalent of the Jewish minority's establishment in Israel.

discrimination (Petrova 2001:66). But the IRU has since the beginning of the 1970s attempted to create a cohesive political Roma identity and claim the status of a 'transnational' or 'European' minority whose rights ought to be protected by a European-wide charter, rather than by domestic legislation within each country. The concept of a Romani nation, with its basic symbols, an anthem and a flag emerged and the congress of the IRU in July 2000. Neither the IRU or RNC demand their own territory or state, they talk about a Roma nation, a nation without a state. Roma representatives have adopted with this a 'non-territorial nation' platform, forming a Europe-wide network to formalise their discussions. To legitimize their claim, they advance other elements of the nation-concept than the territorial, such as the common roots of the Romani people, their common historical experiences, culture, language, and socio-economic position;

The RNC and the IRU base their positions on historical and sociological arguments. These include past experience, similarities of the Romani communities in social status and cultural characteristics, dispersion throughout Europe and even beyond, and discrimination.

(Migra and Gheorghe 1997:15)

The IRU pays particular attention to the Romani language and to the construction of a Romani university, and serious attempts are made to develop a standardized literary Romani language, strongly supported by the CoE. They are also requesting European citizenship to be granted to all Roma (PER 2001:34). The RNC has focused more on the ratification of a 'Romani Rights Charter'. Calling for a 'European Charter of Romani Rights' the RNC seeks recognition of the Roma's rights to political representation as an ethnic minority in national legislatures and as a nation (without territory) in multilateral organisations. Through the voices of their leaders, the Roma are thus mobilizing and expressing demands for standards better adapted to their situation and for the protection of national as well as international laws and provisions. In this claim they are not alone, they join the increasing number of persons and groups who are lifelong residents of different states, yet are not and cannot become citizens of those states under present standards and laws. Whether or not the concept of a 'transnational, non-territorial nation' is likely to mobilize support and eventually turn out to be the uniting principle of the Roma movement is as mentioned still too early to say, but it is clear that the concept challenges the traditional

understanding of national sovereignty and needs to be contextualised at the European level.

A European Issue

More recently, attempts have been made by various European institutions – notably the CoE and the EU – to understand the problems faced by Roma communities throughout Europe. Since the collapse of communism, the Roma have become a subject of increasing political interest and significance. This unprecedented international concern with Roma-related issues has been either a reaction to reports of increasingly common physical assaults on Roma in the CEECs or to the severe social and economic problems experienced by Roma in the CEECs in the transition from communism (Pogany 1999:159). Moreover, as an indirect result of the relaxation of border restrictions in the region, the CEEC’s “Roma problem” has effectively become a European problem as tens of thousands of Central and East European Roma travel to Western Europe in search of more attractive economic opportunities and to escape discrimination. The above mentioned escalation of interest on the part of Western governments, the EU and international organisations has therefore also been prompted by highly publicised waves of Roma refugees seeking asylum in the West. The exodus of refugees reached its peak precisely at the point when the EU had begun entry negotiations with the CEECs. These formally communist states are as mentioned home to a bulk of the continent’s Roma population and their incorporation into the EU carries the potential of further westward migration of Roma – but this time as EU citizens with rights to freedom of movement (Guy 2001:3).

The prospect of mass migration of mostly poor and under-qualified Roma from certain CEE states to the more prosperous and apparently liberal societies of Western Europe, within the borders of an expanded European Union, no doubt helped focus the minds of EU political leaders on the need to assure effective protection of national and ethnic minorities in the post-communist states, and of the necessity of special measures of aid and assistance for the Roma in their countries of origin.

(Pogany 2004:11)

But there is also a particularly compelling reason for the EU to concern itself directly when the protection of minorities is, or should be, a matter of concern to all member states. This applies in particular to the case of the

Roma, who now constitute the largest pan-European minority, historically present in all existing member states and now emerging throughout CEECs as by far the largest, most marginalised and disadvantaged minority (Amoto and Batt 1999:42). European institutions, **in particular the EU, have** therefore a vital role to play in preventing further disintegration and ethnic fragmentation and averting the social conflict, political instability and economic stagnation that may otherwise ensue (Kovats 2002:1).

The risk is that, if postponed, the cost of finding solutions for marginalised groups will be immeasurably higher and will have few chances of success. The human security costs of exclusion will spiral, potentially resulting in political extremism and setbacks for the democratic process.

(Ivanov 2002:5)

The EU has furthermore far greater legal and political authority than international organisations such as the Council of Europe (CoE) and the OSCE, as well as the capacity to all considerable material resources. Therefore the EU's relationship with Roma issues is qualitatively different both in respect of effecting change and in the wider political consequences of its activities. The manifest disadvantages of Roma communities throughout the continent, which appear to point to common limitations of nation-states in tackling these problems²³, seem to not only open an opportunity for, but also necessitate, a superior form of governance at the European level.

There is a need for political institutions that are capable of non-arbitrary and consistent norm enforcement, and in the advent of a democratised and empowered UN, regional institutions like the EU are of utmost significance.

(Eriksen 2004:5)

EU-Roma relations

EU activity related to the Roma has traditionally developed along two key lines; local sensitivity and resource provision. The first initiatives took place in the mid 1980s when the EU (then the European Community) took an interest in the issue of educational provision for Gypsy and Traveller

²³ Roma expectations to new political tools such as the EU's PHARE programme should for example be understood in light of absence of state efforts.

children²⁴. Four years later the European Parliament recommended that EU member governments should co-ordinate approaches towards their Roma populations (Liégeois and Gheorge 1995:22). Policy interest intensified after 1989 with the prospect of European enlargement and since the 1990s Roma related activities have considerably augmented. In identifying the most pressing problems concerning minorities, the European Initiative for Democracy and Human Rights (EIDHR) defines the situation of the Roma throughout a number of CEECs²⁵ as being one of them²⁶ (European Commission 1999b:3). The first financing vehicle of the EU, in countries where Roma are a significant minority, was the PHARE²⁷ programme. As the Roma case is becoming a policy-area within the EU, policy framed at the EU level may promote Roma institution-building through policy expansion.

Effectively engaging with the Roma is however no easy task. Governments, international organisations and the Roma themselves have embarked on a difficult, and often contentious, search for effective responses to deeply rooted problems, both within the Romani communities and between the Roma and majority populations. Whether the EU represents a type of norm context that might induce the member states to deal with Roma issues in accordance with Roma claims will be dealt with in this thesis, keeping in mind that the eastward enlargement of the EU also poses the question of how increasing internal diversity can be managed without compromising the coherence of the Union. Minority protection is not just about minorities; it is about

²⁴ Resolution No. 89/C 153/02 of the European Union Council on School Provision for Gypsy and Traveller Children (1989), Resolution of the European Parliament on the Situation of Gypsies in the Community (1984), Resolution No. A2-379/88 of the European Parliament on Illiteracy and Education for Children whose Parents have no Fixed Abode (1989), Resolution of the European Parliament on Education for Children whose Parents have no Fixed Abode (1984), Resolution No. B4-0974/95 of the European Parliament on Discrimination against Roma (1995), Resolution No. A3-0124/94 of the European Parliament on Gypsies in Community (1994), Resolution of the Council and the Ministers of Education Meeting within the Council on School Provisions for Children of Occupational Travellers (1989), Resolution of the Council and Representatives of Member States' Governments Meeting within the Council on the Response of Educational Systems to the Problems of Racism and Xenophobia (1995).

²⁵ Most importantly in Bulgaria, the Czech Republic, Hungary, and Romania.

²⁶ The remaining two cases concerned the Russian speaking minority in Latvia and Estonia, and the recognition of the Kurdish people in Turkey.

²⁷ From 2001 to 2003 the PHARE programme contributed 77million to Roma projects in the then ten accession countries, covering a range of infrastructure, public awareness and sector-specific projects. See European Commission 2002.

patterns of coexistence and exclusion, co-operation and tensions between minorities and majorities. It therefore becomes important to analyze the implications of taking cultural diversity into account when discussing the elaboration of a just political system and just policies in not only Central and Eastern European countries, but also in the EU.

Chapter 3

Possibilities; multiculturalism versus deliberative theory

Introduction

A central concern for considerations of justice in pluralistic democracies is that members of minority groups often lack the means to influence decisions that have an impact on their lives. Questions like; what does it mean for citizens with different cultural identities, often based on ethnicity, race, gender, or religion, to recognize themselves as equals in the way they are treated in politics? what are the moral arguments for or against group-differentiated rights? and, in particular, how do they relate to the underlying principles of a liberal society, such as individual freedom, social equality, and democracy? therefore become important. As equality is a highly contested term and there is also controversy about the appropriate nature of legal responses to inequality (Shaw 2004:12) several concepts have been developed concerning minority issues and the accommodation of cultural differences reflecting different ideas on how best to distribute and ensure entitlements to participation. One view is that separate provisions should be permanently established for minority participation, as in legislative representation and executive power, and that there should be as much self-government by minorities as possible. I shall refer to this approach as *multiculturalism*. The other view is that forms of participation should be based on individual rights

and designed to encourage the political integration of minorities. This view will be referred to as the *deliberative* approach.

The multicultural and deliberative approach have different answers to the question of whether the specific *cultural identity* of persons and communities should be positively recognised and emphasised by giving them special rights, or whether the focus should instead be on non-discrimination. The dispute can be seen as one concerning the appropriate organization and distribution of formal political powers and competencies in pluricultural societies. While non-discrimination aims at the removal of all obstacles to the enjoyment of equal rights and full integration of persons belonging to minorities into society, recognition requires permanent positive state action in support of the minority group, in order to preserve its identity and prevent assimilation. When talking about equality between different cultural groups within the same polity multiculturalists will therefore advocate for recognition of cultural identity whilst deliberative theory will opt for a substantive understanding of the non-discrimination principle.

Multiculturalism

Multiculturalism can be defined as a situation produced by cultural diversity, a pluralism characteristic of industrial societies. This fact becomes a normative approach when cultural diversity justifies, or even seems to require, the recognition of particularistic identities and accommodation of difference in the public sphere²⁸. The claim is that democracy is excluding or discriminating against its citizens in a morally troubling way when major institutions fail to take account of their particular identities (Gutmann 1994). A variety of theorists have therefore sought to develop a liberal theory of minority rights supplementing the focus on common rights with greater attention to cultural pluralism and group-differentiated rights. These approaches go under the names of ‘the politics of identity’, ‘the politics of difference’, and will here be referred to as ‘multiculturalism’²⁹. Common to

²⁸ As a concept multiculturalism can thus refer to both a demographic reality and a normative approach requiring recognition. In this thesis the term ‘multiculturalism’ will be used exclusively to denote a normative approach. The term ‘pluricultural’ will be used when referring to multiculturalism as a demographic reality.

²⁹ Among the most influential multicultural responses to issues of cultural pluralism and identity has as mentioned been the work of Will Kymlicka (1995, 2001), whose ideas have become

these positions is that there are not only two estimated poles, autonomy and equality, which the political settlement must mediate between, but rather as all choices are believed to take place within bounded social contexts, the poles of autonomy and equality are submerged within the broader paradigm of identity. The politics of multiculturalism is about *recognising* these identities, especially because many members of groups feel marginalized, not (or not only) because of their social-economic status, but because of their socio-cultural identity – their ‘difference’ (Kymlicka 2002:329).

Recognition

Multiculturalists do not only posit pluralism as a fact, but also hold out pluralism as an objective. They accuse modern liberals of adopting an abstract and individualistic approach and propose instead a more contextual and community-sensitive approach. Community exists in the form of common social practices, cultural traditions and shared social understandings, all of which need to be respected and protected. Multiculturalists try to show that “deviations from difference-blind rules which are adopted in order to accommodate ethnocultural differences are not inherently unjust” (Kymlicka 2002:365). They claim that the general principle of non-discrimination is not sufficient for the exercise of influence and participation by minorities, and their aim is to “articulate a politics that validates and affirms those differences which procedural liberalism eliminates from its agenda” (Patrick 2000:33).

Nancy Fraser (2000) describes the politics of recognition as focusing on cultural injustices, rooted in social patterns of representation, interpretation and communication, including cultural domination (being subject to patterns of interpretation associated with another culture), non-recognition (being rendered invisible in the authoritative communicative practices of one’s culture) and disrespect (being disparaged in stereotypic public cultural representations or in everyday life interactions). The thesis is that “our identity is partly shaped by recognition or its absence, often by the misrecognition of others” (Taylor 1994:25). Groups, defined by relations of recognition in which they enjoy lesser esteem, honour and prestige than other groups therefore receive special attention, and the remedy for the injustices they are submitted is cultural or symbolic change to upwardly

particularly influential within the constellation of NGOs in Europe concerned with minorities in Europe.

revalue their disrespected identities and cultural products in addition to positively valuing cultural diversity.

Cultural protection is thus ultimately bound up with a group's notion of dignity, and cultural identity is closely linked to a person's self-identification. The self-respect of an individual is closely linked to the esteem in which that person's national group is held.

(Fossum 2001:185)

As a normative approach, multiculturalism focuses therefore not only on the elimination of cultural injustices, but also emphasise the importance of *recognising* cultural difference. Legitimate policies within the multicultural approach thus consist of promoting cultural distinctions and collective identity as well as assuring their equal representation in the political community. This includes re-questioning the cultural unity of the nation-state;

I think it is possible to view [minorities'] claims to multiculturalism as a response to the perceived injustices that arise out of nation-building processes.

(Kymlicka 2002:365)

The right to cultural identity

According to Kristin Henrard a 'full-blown' system of minority protection is a system based on two pillars, or basic principles, which together form "a conglomerate of rules and mechanisms enabling an effective integration of the relevant population groups, while allowing them to retain their separate characteristics" (2000:9). The first pillar is based on the prohibition of discrimination, i.e. rules that guarantee formal equality and are at the same time conducive to achieve substantive equality, while the second pillar, which presupposes the existence of the first one, reflects measures designed to protect and promote the separate *identity* of the minority groups. These measures are actively geared towards realizing a multicultural understanding of equality. Multiculturalists believe that each system of minority protection should follow this double approach because the requirement that all individuals be accorded equal respect entails recognition of the structures that enable individuals to develop and project their own identities and, through that, achieve some form of self-fulfilment and self-realization. In this case it is

not agency that is protected, but the structures and beliefs that stabilise and inform identification (e.g. gender, race, sexual orientation, ethnicity etc.).

Kymlicka argues that liberal theory itself gives national minorities the right to preserve their culture and that this right places certain obligations on the state (1995:37). He attempts with this to incorporate cultural identity into an egalitarian vision of social justice, in which cultural membership is viewed as one of the goods essential to liberal citizenship. The right to equality is here seen as dependent minorities' right to recognition of their cultural identity. Recognition, understood as 'a right to cultural identity', implemented either as affirmative action or as more permanent 'special' measures for minorities thus becomes important. This represents a significant modification of the traditional liberal principle that the state should above all remain neutral concerning the varying substantive ethical commitments of its citizens.

Cultures as interpretive communities

Within the multicultural approach cultural identity is understood as providing individuals with the specific sorts of background knowledges, vocabularies and shared historical experiences – ethical substance – that together constitute “an enabling condition to the adoption of abstract principles and procedures of the democratic constitutional state” (Pensky 2000:68). This hermeneutic conception of cultures as interpretive communities is the foundation for Kymlicka's defence of group-differentiated rights as his conclusions rest on the premise that culture provides individuals with the necessary framework to evaluate options and exercise true liberty. As only cultural communities can provide this framework, the protection of these communities would be accepted as a public good behind Rawls's veil of ignorance. This conception of cultural identity, based upon a primordial understanding of the sources of identity, argues for the indifference between nation and cultural group and leads therefore directly to a broader argument in favour of the kind of 'liberal nationalism' familiar from Yael Tamir's (1993) work.

Collective rights

Recognition implies with this the granting of positive rights and can conceptually be subdivided in individual and collective minority protection concepts. But the question whether recognition should be conceptualised as individual or collective rights, i.e. as rights granted to persons belonging to minorities or rights granted to groups as such in the form of self-government,

autonomy or self-determination, remains highly contested. Kymlicka (1995) claims however that individual human rights cannot provide an adequate minority protection in that the existing human rights standards are unable to resolve some of the most important and controversial questions relating to cultural minorities. These questions are situated at the level of concrete implementation of standards relating to for example appropriate language policy and the drawing of political borders.

Culturally differentiated citizenship and deep diversity

In political systems based on 'recognition', group affiliation determines the legal power distribution to a large degree. Recognizing and treating members of some groups as equals requires public institutions to acknowledge rather than ignore cultural particularities. In this view effective participation requires that special procedures, institutions and arrangements be established through which members of minorities are able to make decisions, exercise legislative and administrative powers, and develop their culture. Groups are given rights that help guarantee their continued existence as separate cultural entities, such as for example guaranteed representation in public institutions and political autonomy. When multiculturalists seek in this way to extend the minorities' agenda beyond general anti-discrimination they articulate rights that are due not to all individuals, but only to certain individuals as members of groups, or even to the groups themselves. Multiculturalists endorse with this a model of citizenship that grants minorities the right to develop their own distinct legal and political frameworks, designed to protect and perpetuate their cultural identity.

Though recognition theorists have not discussed the EU in any systematic manner, and most also take the existing democratic nation-state framework as their point of departure and spend little time on developing alternative polity frameworks, Taylor (1994) proposes a distinctive model of liberal democratic citizenship that seeks to recognise multiple forms of belonging to a political community which can be applied to the EU (Fossum 2003, 2004). This model of *differentiated citizenship* is a commitment to what Taylor terms 'deep diversity' and is an arrangement that would grant collective group rights to many minorities, including rights to self-government for territorially-based minorities.

In Taylor's view, cultural survival is closely linked with the notion of recognition. In addition to personal cultural rights designed to protect the members of minority cultures from discrimination, Taylor advocates corporate cultural rights that seek to guarantee the long-term survival of a particular culture and identity. He maintains that since individual identity is constructed within a particular cultural context, a secure identity can only be established if the survival of the cultural community in which it is formed is ensured (Baumeister 2003:398). People should therefore be recognised not only as equal citizens, but also carriers of a community identity. On such a model, individual citizens are incorporated into the political unity not universally, but consociationally³⁰; that is, as members of their cultural or national group. Proponents of the multicultural position see citizenship as being intimately connected to membership of a national political community. Because deep diversity refers to a 'plurality of ways of belonging' to a polity it is open to multiple conceptions of citizenship coexisting within the same polity. Thus, members of different cultural and national groups belong to the political unity in different ways and membership of the relevant cultural or national group becomes the primary locus of political identity.

Deliberative democracy

Deliberative theory attempts to provide a solid basis for allegiance to liberal democracy through its commitment to promoting normative rationality and by reconciling the idea of popular sovereignty with the defence of liberal institutions. The main idea underlying the 'deliberative democracy' model is that political decisions in a democratic polity should be reached through a process of deliberation among free and equal citizens. The central claim of deliberative democrats being that

...adequate procedures for deliberation make it possible to reach forms of agreement which satisfy the claims of both rationality, understood as defence of liberal rights, and democratic legitimacy, understood as popular sovereignty.

(Mouffe 2000:115)

³⁰ Characteristics of the consociational model are a government by a grand coalition of the political leaders of all significant segments of a plural society, veto rights of all partners involved in the governing coalition, a high degree of autonomy for each segment to run its own internal affairs and proportionality as the principle standard of political participation, civil service appointments and allocation of public funds (Lijphart 1977:25-52).

Deliberative democracy needs, and expresses, with this a “vision of the transformative effects of deliberation” (De Greiff 2000:402). According to this approach, preferences ought not to be taken as given, for they are subject to transformation, deliberation being one of the most important means to effect such transformation. The assumption is that preferences react not only to situational factors, but to reason-giving as well. Liberal citizens must therefore, within this approach, justify their political demands in terms that fellow citizens can understand and accept as consistent with their status as free and equal citizens. Whether the ‘right to cultural identity’ has such universal value must therefore first and foremost be subjected to public deliberation (Habermas 2003).

Dialogical universalisability

Iris Young (2000) appropriates four claims of democratic process that are also features of liberal, deliberative models (1) *inclusion* requires that persons whose options are significantly affected by a decision should be included in the process of decision-making (2) *political equality* requires that these be included on equal terms (3) the prerequisites of *reasonableness* require that the participants be disposed to reach agreement and not bind themselves to the authority of unquestionable beliefs in addition to not just act strategically for personal benefit, i.e. they are committed to seeking mutual understanding through deliberation rather than exclusively seeking personal benefit through bargaining or threats, and (4) *publicity* entails that the decision-making process takes place within a context that enables people not only to hold one another accountable and attribute responsibility, but also to give an informed consent to government action, discuss or criticise it in a well-founded manner and intervene promptly in the political process (Peters 2004:63).

Legitimate policies within the deliberative approach emerge thus through a process of rational deliberation between equal participants who must agree on what should be done (Wheatley 2002:9). The deliberative approach has in this way reinterpreted popular sovereignty in intersubjective terms, redefining it as ‘communicatively generated power’, and the central features of the deliberative model become with this political equality, participation (i.e. inclusion) and consensus. What makes discourse ethics distinctive then is its insistence on the importance of a test of universalisability, or generalisability, that makes the validity of norms dependent on their rational acceptability, and, more specifically, its insistence on a dialogical application of such a test

(De Greiff 2000:404). As “a universal-reciprocal change of perspectives is forced upon the participants” (Eriksen 1999:232) in a free and open debate between affected parties, it is only if norms are scrutinised in such a public discourse we can know if they deserve acceptance.

A deliberative approach advocates with this for an open-minded, morally serious dialogue, in search of common ground and aim at mutual adaptation. In this search, neither majority nor minority can expect all their cultural practices to remain unchallenged, and therefore, unchanged. On the deliberative model citizens are assumed to act in public with the goal of mutual understanding. There is furthermore no presumption in the deliberative model that they share a religious code, cultural sympathies or ethnic identity, but it does demand that citizens share a commitment to arriving at agreement in cases of social and political conflict through a process of public deliberation and debate. Such a conception does not preclude consideration of claims based on ethnic and cultural identity in advance of politics, but makes them instead matters of public debate and scrutiny. Nor does it fix the content and recipients of cultural rights in advance of political discussion and irrespective of other considerations (Festenstein 2000:85). The deliberative model seeks instead to institute dialogue about the values giving rise to claims of cultural right and the consequences for all that may follow from such claims.

Non-discrimination

A deliberative society does not, as mentioned, advocate any substantive view about the ends of life, but tries instead to unite its members around a strong procedural commitment to the principle of equal respect. Because freedom, democracy, autonomy and equality are norms that have deontological standing in our societies, they are “principles with which it is a *duty* to comply even though they could interfere with the values of the majority, particular conceptions of the good, roles, identities or utility calculations” (Eriksen 1999:229). Deliberative visions of politics do therefore not include any independent principle of community, such as shared nationality, language, identity, culture, religion, history or way of life, and the principle of neutrality has often been sited as grounds for rejecting any claims by minorities for distinctive rights that go beyond the standard set of individual civil and political rights accorded to all citizens.

In a decentred, self-reflexive context, the values constitutive of a cultural group have no more foundational a status for identity formation for individuals than any other sort of validity claims.

(Pensky 2000:73)

According to deliberative theory cultural identity does not constitute a privileged source of meaning within a pluricultural polity. Liberal societies enjoin people to tolerate one another's differences, and the assumption is that demands for recognition of racial, ethnic, and sexual difference can be subsumed under the principle of toleration. Deliberative theory therefore interprets struggles for recognition as conflicts in which collective actors assert claims about their legitimate rights in defending themselves against a disregard for their equal dignity. The issue of recognition is with this understood as principally being a matter concerning non-discrimination and formal equal treatment.

Providing explicit recognition or rights to a minority group would be a radical departure from the traditional neutrality of the liberal state and the principle of non-discrimination is therefore limited to the demand for equal treatment or equality of right, without reference to specific circumstances. Non-discrimination is mostly viewed as an individual human right and predominantly understood as a negative right. Consequently,

...individual rights always take priority over any collective rights asserted, and the principle of equal or uniform treatment is never compromised in order to secure a collective goal – like cultural survival – nor indeed to guarantee recognition of the equal worth of distinctive cultural traditions.

(Patrick 2000:34)

But, 'equality of right' is fictional to the extent that conditions of life are not substantially equal, either because of variations in incidental natural endowments (disabilities or disparate availability of resources) or because of past and prevailing intrusions (Packer 1996:128). Members of minorities undeniably find themselves in different circumstances compared to the rest of the population and consequently need rights that are adjusted to these distinctive circumstances. This observation has led to the understanding that a liberal socio-political order requires 'equality of opportunity' in order to make 'equality of right' meaningful. Equality of opportunity aims to equalise

the starting point, accepting that this may necessitate special measures for the disadvantaged groups. These measures potentially include group rights and could also imply positive obligations for the polity regarding minorities, within the deliberative approach these measures are however always meant to be temporary in nature.

The interpretation of the non-discrimination principle may hence vary between a formal and a substantive reading, depending on whether 'affirmative action' is endorsed or not. A substantive reading of the non-discrimination principle allows measures that aim for a more substantive or real equality in the sense that it does not prohibit differential treatment when it has a reasonable and objective justification, but it does not, as the multicultural approach sustains, imply in itself an obligation to differentiate. Therefore, though affirmative action is a formal breach of the non-discrimination principle it might be permitted either as a reasonable exception or as a request to establish a more complex view of equality instead of a mere formal one (Schwellnus 2001:5).

The right to political participation

Because of the essential feature of a minority reality; minority under-representation, minority groups may, in a democracy conceived as an aggregative model of government, fear a tyranny of majority rule. From the standpoint of the aggregative understanding of liberal democracy; as a procedure of preference aggregation, there is no clear way of making sense of the problem posed by minority under-representation;

...if with this understanding of liberal democratic politics we think of legitimacy as a function of majority decisions, it seems that as long as the opportunity to vote is guaranteed, minorities do not have a valid claim against the results of democratic elections, even if they are permanently locked out of representative positions.

(De Greiff 2000:400)

Democratic theorists agree today that the essence of democracy is not the majority principle (Peters 2004:37) and to overcome the shortcomings of the vote-centric approach, democratic theorists are increasingly focusing on the process of deliberation and opinion formation that precede voting.

The deliberative approach argues, as mentioned, that the legitimacy of a law depends not on whether it represents a given balance of interests, but rather on the rational acceptability of a law to all who are affected by it. While it is evident that according to liberal theory, social and political goods should not be distributed in a manner that treats membership itself as a morally relevant factor, deliberative theory identifies other factors that justify unequal treatment on the basis of membership in a group. The norms of inclusion and political equality bring to light the question of representation and political participation (Chalmers 2001:231) and liberal equality requires removing or compensating for undeserved or morally arbitrary disadvantage.

Structurally marginalised groups

The communicative argument in favour of group representation holds that the legitimacy is maintained once those interested parties affected by law have participated in its formation. Because it becomes important to insist on the dialogical application of such rational acceptability deliberative democracy offers particular benefits to minority or marginalized groups. The focus here is on the rights of a political citizenship – that is the rights to political participation and communication. When referring to structurally marginalised minorities these rights are understood as positive rights, which guarantee participation in a common praxis. In a society torn by racism, sexism and other forms of discrimination, securing group representation is a way to guarantee a voice or some degree of power to those who would be systematically excluded otherwise (De Greiff 2000:409). The deliberative norm of inclusion requires that appropriate consideration be given to the proper representation of structurally disadvantaged groups. It is argued that if such groups are to have any real influence in a majoritarian electoral system, it will be through the participating in the formation of public opinion, rather than through winning a majority vote.

The deliberative approach claims that protection of minorities should act consistently according to “purely formal principles, rather than tailoring forms of recognition and allocating rights on a context-sensitive basis” (Pensky 2000:68). On this view affirmative action should be granted only on the basis of objective needs rather than on the basis of the specific demands and wishes³¹ of the groups concerned. The non-discrimination principle is with

³¹ See Kymlicka (1995) for a defence of minority rights based on subjective wishes.

this interpreted in a way that allows at least temporarily for positive measures to counter *de facto* inequalities.

The defence of group representation can further be, and often is, put in terms of the contribution that minorities make to political deliberation. The defence hinges on a certain “epistemic advantage that minorities enjoy” (De Greiff 2000:409). The deliberative version of the argument is that it is crucial to secure the participation of minorities for their representatives will be able to reveal aspects of institutional life in the polity that the majority would otherwise ignore. Structural inequalities risk remaining unaddressed so long as the voices of marginalised groups are left out of public deliberations, their contributions to the public deliberations being here understood as reminders of the many ways in which the majority might mistakenly think that their norms are fair³². Melissa Williams (1996) claims that politically marginalised groups do not only have a strong claim to special recognition within political institutions, they also have a particularly strong claim to be represented by their own members in legislative bodies. The idea that the fair representation of the interests shared by members of marginalised groups depends on the representation of those groups by their own members rests on the claim that, since members of privileged groups lack the experience of marginalisation, they lack an understanding of what marginalised groups’ interests are in particular policy areas. The norms of political equality and inclusion therefore condition not only the relationship between those participating in the decision-making process, but also the relationships between representatives and their constituencies.

Cosmopolitan incorporation and constitutional patriotism

Some deliberative theorists defend measures to reduce political marginalisation in terms of promoting democratic citizenship. They try to identify the (virtues and) practices needed to promote and maintain the sorts of institutions and policies defended within theories of justice, and in line with liberalism’s ardent opposition to all forms of essentialism, deliberative democrats oppose a politics which enshrines cultural difference. On the contrary, their aim is to construct a new conception of citizenship where cultural differences would become effectively irrelevant.

³² Such as for example the conception of a administratively centralised and politically culturally homogenous nation state.

The logic of moral and political universalism entails a normative demand to question the legitimacy of all particular allegiances that take priority over egalitarian forms of moral and political recognition (Pensky 2000:66). Supporters of the deliberative view argue with this for a rights-based conception of citizenship “that sees the nation state as, at best, a temporary functional expedient and, at worst, the product of irrational, if regrettably still important, emotional ties” (Bellamy 2000:93). Especially three arguments are put forward to illustrate why nationalism is a disabling condition for the growth and strength of global democratic institutions: (1) the functionalist argument that sees the nation state as a pre-modern political arrangement and social construction, (2) the conceptual argument that sees nationalism in conflict with universalistic principles and state that the particularistic forms of solidarity made possible by national identity cannot be justified from a moral point of view, and (3) the pragmatic argument in the context of globalisation (Eriksen 2002:19).

This leads the deliberative approach to oppose models of group representation such as the systems advocated by multiculturalists. Instead they propose a conception of citizenship based on identification with a ‘grammar’ or ‘set of rules’ (Mouffe 1993). In a liberal democracy this ‘grammar’ is defined by a common commitment to the principles of liberty and equality. Habermas has accordingly held up the concept of *constitutional patriotism*.

The crux of this view is that by grounding political community in a shared commitment to core principles liberal democracy can overcome the dark side of ethnic nationalism, in particular its tendency to exclude people outside the ethnos from full political membership, whether or not they live within state boundaries.
(Williams 2004:4)

Constitutional patriotism reflects with this a post-national identity based upon democratic values and human rights as they are articulated in modern constitutions. This identity requires an open and political citizenship separated from any pre-political national or cultural attachments.

A post-national identity has to accommodate difference and plurality. So it has to be an identity in which membership is constituted by recognition of a common system of authority erected and maintained by a constitution...For it is part of the idea that the creation of political community is a morally transformative act

in which human beings develop relationships as citizens that tie them together independently of their prior associational ties to family, religion and the like.
(Ingram 1996:2)

Habermas shares the consensus view of modern political theory that nations are, to use Benedict Anderson's often quoted phrase 'imagined communities'. They are cultural artefacts whose claims to such substantial forms of collective identity as racial or ethnic homogeneity, a shared language, history or destiny, or even a 'common sense of the good' are invariably the "artificial constructs of a population that has needed to adapt to changing political and cultural conditions and to generate better and stronger forms of social solidarity" (Pensky 2000:65). Although nation states have historically been the ordinary locus of democracy, there is no logical necessary link, i.e. there is no conceptual link between *ethnos* and democracy, even though there may be an empirical one. Democracy is thus "a principle of organisation that is not reserved nation states, but can be applied to all kinds of societal structures" (Peters 2004:71).

The EU is often conceived of as a *post-national* entity which promotes a more inclusive sense of identity and belonging. The integration process in Europe is based on the "possibility of transcending particular identities, including those premised on the idea of the homogenous nation-state" (Eriksen 1999:225). Democratic citizenship on the European level, supported by constitutional patriotism, does not base itself upon national identities, but depends instead on socialisation of all citizens into a common political culture. In such a deliberative conception of democratic politics, citizens are thought to share a commitment to continued coexistence and to be reluctant to exercise the option to exit the association or to split it.

A common support of liberal democratic institutions and procedures will according to Habermas establish an "abstract, legally mediated solidarity among strangers" (1998:159). Political integration is necessary because it "makes it possible to cope with difference and collective decisions making without relapse into ethnocentric politics" (Eriksen 2002:20). European identity thus differs from traditional national identity in being purely political, civil, reasonable and universalistic (Kamminga 2001:228). It does not rest on a particular set of values, but on cross-cultural norms and rational principles. Citizens are bound together by their common endorsement of democratic

values rather than by more traditional forms of attachment the nation state has had to rely upon as the prime source of allegiance and unity.

This moral though individualised concept of identity is important to understand how modern societies are integrated...Why these societies hang together may be explained by distinguishing between two kinds of social integration – cultural and political.

(Eriksen 1999:228)

Summary

Minority protection within both approaches is aimed at members of minority groups in response to their *difference* from the general population. The purpose of minority protection, understood in accordance with the multicultural approach, is to protect and promote that difference, i.e. the *cultural identity* of minorities. Contrarily, the purpose within the deliberative approach is to eliminate the difference that distinguishes marginalised minorities, difference here, as mentioned, being understood as *obstacles to the enjoyment of equal rights*. Deliberative theory therefore only supports mechanisms of group representation intended as corrections to distorted communication, meaning that it does not support such measures simply for the sake of recognising cultural diversity;

In keeping with the proceduralist nature of discourse theory, the argument in favour of securing group participation cannot be made to depend on the substance of what participants may say in deliberation. The case for increased minority representation should not hinge on whether they can make a sufficiently distinct contribution to politics on account of their cultural difference...this more ambitious plan needs to go beyond discourse theory for support.

(De Greiff 2000:412)

By contrast, multiculturalists justify mechanisms of minority representation not only because of minorities' experience of the structural constraints, that is, their 'political difference', but also because of all those features that go into defining their group identity, namely their 'cultural difference';

The argument involves, then, a cultural distinctness of minority groups as a rationale for their political inclusion.

(De Greiff 2000:412)

Positive measures within the deliberative approach are by definition only to be employed temporarily and are put into place to remove the underlying distinction while recognition is essentially permanent and aimed at the preservation of the distinctive character of the minority group. When assessing whether a certain technique contributes to an adequate minority protection the multicultural approach claims that the ultimate criterion to make such an evaluation is the *right to cultural identity* of minorities. The deliberative approach chooses to focus on the *right to political participation* of minorities.

Chapter 4

Actualities; constitutive resonance and EU minority policy

Introduction

Moving from what is ‘possible’ within normative political theory, this chapter will deal with the actual aspects of the policies and debates concerning minorities conducted in the EU. The aim of the analysis is not only to trace the makeup of the EU’s minority policy and its evolution over time, but also to investigate which theoretical concepts, i.e. multicultural or deliberative, are linked, or tied together as necessary companions, to the norm of minority protection within the EU. As we saw in the previous chapter, the meaning of minority protection is contested within normative political theory. Whether present policy developments within the EU are pointing towards a multicultural or a deliberative minority policy will be answered by identifying what constitutive norms and values within the normative framework of the EU³³ a future European minority policy can be built upon. Is the EU heading towards cultural differentiation or cosmopolitan incorporation of minorities?

³³ The existing *acquis* – formally constituted by the Treaties, secondary legislation and rulings by the European Court of Justice (ECJ), but also embedded in informal norms and political practices.

Absence of an 'EU Minority Rights Aquis' and complex normative structures

Mark Bell (2003:96) points out that a 'patchwork of models of equality' has emerged in the context of EU law and policy comprising three main strands: ensuring anti-discrimination in the formal sense, working towards substantive equality and managing diversity. He calls this patchwork a 'rather muddled combination of perspectives'. While there is no doubt today that the principle of non-discrimination, as a cornerstone of individual human rights, is institutionalised at the EU level, whether this principle relates to a concept of formal or substantial equality is less clear. EU minority policy meanders between what are called first and second generation rights, i.e. between formal non-discrimination and affirmative action. But although the substantial interpretation has gained a strong foothold in European discourses, recognition of minorities' cultural identities remains deeply contested in its meaning and has been largely, though not completely, absent from the EU's *aquis communautaire*. Whether the EU already has the necessary tools to handle minority-related issues, or at least enshrined the basic principles (norms and institutional mechanisms) promoting either a multicultural or deliberative minority protection approach, shall be dealt with by answering the question of how the EU's policy on the protection of minorities is composed in the absence of an 'EU Minority Rights Aquis'. Since especially the most recent enlargement process to CEE has helped focus the EU's attention on minority issues, an analysis of the Copenhagen Criteria's content and scope seems a natural starting point in search for an answer to this question. The internal institutionalisation and external promotion of minority related issues by the EU will thus be examined, with special focus on the eventual conceptual tensions between the articulation of minority protection norms in the different contexts.

The enlargement and the Copenhagen Criteria

The Copenhagen criteria have been widely viewed as constituting a successful incentive structure and a sanctioning mechanism for the EU in the promotion of the respect and protection of minorities. During the enlargement process and as part of Agenda 2000, 'Opinions' on progress towards accession to the EU for each of the ten candidate countries were adopted. The 'Opinions', which became the main instrument for monitoring the enlargement process later turned into annual Regular Reports. The aim

of these was to spell out how each candidate country was fulfilling the Copenhagen criteria, including the ‘respect and protection of minorities’ (European Commission 2002:5). The DG Enlargement further elaborated guidelines for drafting the Regular Reports. These set down rules and procedures such as “which sources should be consulted, how horizontal co-ordination of texts should be implemented” (Heidbreder and Carrasco 2003:32) as well as outlining how the involvement of major international organisations must be taken in consideration. Also built-in were specific checklists that defined how the accession criteria are to be operationalised.

In addition to relating the issue of minority protection to European standards established by ECHR and FCNM, the checklist stated that the following issues were to be included in a Regular Report; “ratification of major internal conventions, introduction of anti-discrimination legislation, establishment and functioning of an ombudsman office with general competencies, the application of human/civil and political rights and special minority rights, as well as an account of the specific situation in the countries” (ibid), e.g. the situation of Roma.

When dealing with policies of minority protection the Regular Reports’ emphasis have thus been on acknowledging the existence of formal measures rather than the evaluation of implementation. The Reports track and note the adoption and change of laws they see as critical for minority protection (principally on citizenship, naturalisation procedures, language rights and electoral laws), the establishment of institutions that manage minority issues (whether within government ministries, in parliaments or at the local government level) and the launch of government programs to address minority needs.

At its December 1999 summit in Tampere, the European Council’s Working Group on Enlargement (COCEN) further adopted a set of “EU Guiding Principles for Improving the Situation of the Roma”. This document advises governments to establish advisory bodies with Romani participation, and calls for employment of Roma within government institutions that deal with Romani issues. Candidate countries are additionally encouraged to earmark support to Roma communities as well as increase the participation of NGOs in programming. Funding priorities are discussed in the context of the frequent contacts the European Commission maintains with numerous Roma

organisations. Where Roma advisers in the national administrations and governmental structures in charge of Roma or minority issues exist, they are regularly contacted with regard to PHARE programming in favour of the Roma. Representatives of Roma organisations are also involved in evaluation committees.

A supranational approach

During the enlargement process, with the introduction of the Copenhagen Criteria, the issue of minority protection has raised issues circulating around the notion of 'multi-level governance' (Toggenburg 2003:274), prompting with this an understanding of the EU's identity as supranational, i.e. tied up with prompting reflexivity and suggesting alternative settlements within the national arena. As a supranational institution the EU focuses inevitably on the levels of closure within the national settlement. For the supra- in supranationalism inherently points to the limits and exclusion within the national settlements, both in their technical capacities and their legitimacy. Yet, conversely the national element in supranationalism points to the inherent multilevel, composite nature of the arrangement.

Supranationalism may be a force that can prompt new institutional arrangements and values within the national settlement, it loses its qualities (and its legitimacy) if it tries, however, to supplant this national space.

(Chalmers 2001:243)

The fact that the EU's minority policy during the enlargement process explicitly endorses the European minority protection standard of both the CoE and the OSCE further strengthens the understanding of the EU as a supranational polity as new forms of recognition have been encouraged first and foremost *within* the boundaries of the nation state.

A multicultural approach?

The new member states have been encouraged by the EU to introduce affirmative minority protection into their legal orders, and the enlargement process has with this primarily prompted a multicultural, though frail, understanding of minority protection, especially within the candidate countries. Concerning the Roma this manifests itself on a political level in the growing number of Roma-programmes, institutions and legal entitlements stemming from the concept of minority rights (Kovats 2002:3). In most

CEECs, the Roma have been granted the right to be recognised as either a national or ethnic minority (Guy 2001:14). The CEECs have with this endorsed, or at least acquiesced in, politics that institutionalise national and ethnic identities within the state, standards which they will be obliged to uphold after joining the EU.

Romania introduced for example an ambitious 'Roma Strategy' in 2001 designed to increase Roma employment opportunities while at the same time significantly improving Roma access to public services, including education and healthcare. In accordance with the Strategy, experts on Roma affairs have been appointed to advise country prefects, while a total of 42 local Roma offices have been instituted across the country (European Commission 2002). At the national level, fifteen commissions have been established to develop sectoral strategies for tackling a wide range of problems affecting the Roma, including unemployment. Beginning in 1995, the Hungarian government adopted a similar series of decrees intended to tackle some of the worst socio-economic problems experienced by the Roma. These legal measures, meant to tackle the multiple roots of Roma disadvantage and under-achievement, lay down a series of objectives for government departments concerned with education, employment, housing, health and social affairs. Hungary's progressive and innovative minority rights regime, introduced in the 1993 'Minorities act'³⁴, further allows the country's minorities, including the Roma, to form national and local self-governing councils. Hungary has with this gone much further in the codification of collective minority rights than any other country in the region. The creation of these self-governing bodies constitute a radical initiative in constitutional terms, allowing national and ethnic minorities a degree of autonomy in cultural and educational affairs and embodying the still controversial principle of collective rights. These legal changes clearly illustrate Hungary's determination to pursue a policy reflecting 'cultural differentiation'.

The EU is in both the case of Romania and Hungary seen as successfully having influenced the candidate states in accordance with the Copenhagen Criteria, Hungary even more so being accepted as a member state in 2004. That Romania was not accepted as a member state in 2004, indicates that Romania still has to improve its compliance with the Copenhagen Criteria, including the political ones. But how effective have the Copenhagen Criteria

³⁴ Act LXXVII on the Rights of National and Ethnic Minorities (1993)

and their various related conditions and incentives actually been, and do they mount to a coherent multicultural “European” policy on protecting minorities?

Although the Roma face similar conditions of marginalisation throughout the candidate countries, the development so far, reveals less of a convergence in the CEECs’ policies towards the Roma than might have been expected (Deets 2003:30). The lack of a coherent EU minority policy during enlargement in addition to the fact that the EU’s own commitment to minority protection in accordance with the Copenhagen Criteria is insufficiently well-developed and inconsistently applied, are given as reasons for the divergent practices in the candidate countries (OSI 2002:17). Peter Vermeersch (2002) argues that although the EU’s Copenhagen Criteria have stimulated certain domestic legal and institutional changes in the CEECs, this external pressure has not been perceived by Roma activists as a clear point of support for the recognition of their cultural identity and subsequent political mobilisation. He relates the limitations of the Copenhagen Criteria to a number of circumstances; most importantly the fact that the EU has imposed requirements on candidate states which it does not demand from current member states.

Unclear double standards

Compared to membership criteria relating to other areas of the *aquis*, the EU’s own mechanisms for enforcing and monitoring compliance on minority protection in the candidate countries were weakly developed. Though enlargement was a policy task allocated to the Commission, requiring it to handle the negotiations and to monitor and report on the fulfilment of the accession criteria, the EU has in part relied on proxies (primarily external bodies such as the CoE, OSCE and NGOs) to perform the monitoring functions concerning ‘protection of and respect for minorities’ (Huges and Sasse 2003:12). The EU’s approach to minority protection can therefore not be separated from that of the CoE and the OSCE (Amato and Batt 1999:39).

These organizations have established legal standards for minority protection and institutional structures for monitoring minority protection, most importantly the Framework Convention on the Protection of National Minorities (FCNM) and the European Charter of Regional and Minority Languages (ECRML), both established by the CoE. Especially the ratification

of the FCNM was put forward as an important requirement to the fulfilment of the Copenhagen Criteria and hence accession. More controversial though was also putting forward the proposals of Recommendation 1201³⁵, adopted by the Parliamentary Assembly of the CoE in 1993, as a standard to which the applicant countries were to be held. The latter, though not binding, recommends that collective rights be recognised, while the Framework Convention safeguards the individual rights of persons belonging to minority groups. Further, norms developed by the OSCE and the High Commissioner on National Minorities (HCNM), which often invoke international standards, but follow a case-by-case approach aimed at crisis prevention³⁶, have been made use of by EU institutions as the EU has “in effect delegated to the HCNM the task of judging whether central and east European countries have ‘done enough’ in terms of minority rights” (Kymlicka 2001:375).

But these legal frameworks governing the protection of minorities do not provide universally valid and clear standards as they contain few concrete prescriptions to be monitored or enforced and have not been unanimously endorsed. The FCNM has not been ratified by all member states of the Council of Europe, among them five EU member states³⁷. The EU’s role in promoting ratification of the FCNM among EU accession states therefore reveals double standards since some existing EU countries have themselves failed to ratify and implement the Convention which forms the only legally binding treaty specifically to protect minorities. The ECRML has found even less support among member states³⁸. The EU’s external promotion of collective minority rights also declined during the accession process as

³⁵ In the mid-1990s, the CoE considered adding a protocol on minority rights to the European Convention on Human Rights attempting with this to create an international recognised right explicitly around the idea of minority autonomy and political access. Adding this protocol known as Recommendation 1201, would be quite significant as individuals could then sue states before the European Court on Human Rights for the violence of these rights. The most controversial of the provisions was Article 11, which guaranteed minorities “the right to have at their disposal appropriate local or autonomous authorities or to have a special status”.

³⁶ See Bruis 2003; Hughes and Sasse 2003; Kymlicka 2001.

³⁷ France has not even signed the Convention, whilst Belgium, Greece, the Netherlands and Luxembourg have signed, but not ratified the Convention. Denmark and, to a lesser extent, Germany have ratified the Convention but entered declarations limiting the potential beneficiaries of the FCNM.

³⁸ Belgium, Greece, Ireland and Portugal have not signed the Charter. France, Italy and Luxembourg have not ratified the Charter.

Recommendation 1201 was rejected as an additional protocol to the ECHR precisely because it includes collective minority provisions in the form of territorial autonomy (Wiener and Schwellnus 2004:14).

Contrast between the internal and external application of the minority protection norm by the EU has led to accusations of an inconsistent minority policy, as reflected by statements such as the EU's "...concern for minorities is primarily an export product and not one for domestic consumption" (de Witte 2002:139). Matching the pattern of behaviour in EU member states, the CEECs have therefore drawn selectively from European and international standards for minority protection. Some authors argue that precisely because of the EU's large margin of interpretation and evaluation conditionality has probably pushed countries much further in reforming and adopting new institutions than they would have done had there been a more detailed set of conditions (Vermeersch 2004:8).

Divergent EU practice and ambiguous international standards make it difficult to identify a coherent European minority protection policy (Hughes and Sasse 2003:2). While EU member states have, as mentioned, supported far-reaching resolutions on minority protection within forums such as CSCE/OSCE and the CoE, and with this demanded a multicultural minority protection policy from the candidate states as a prerequisite for admission to the Union, the internal EU policy has been accused of mainly being one of rhetorical character. That minority policy has been brought back into the European political speech during the accession process has to this date further not been reflected in explicit EU minority rights, in the form of a 'minority aquis', governing either member states or the EU as a whole. Protection of minorities remains a contested norm that is not shared universally and is consequently "susceptible to a wide range of interpretations" (Wiener and Schwellnus 2004:13).

A security-based approach

The provenance of the EU's concern over minorities seems further to lie not with conflicts on EU territory that have led to serious political violence, as seen in Corsica, the Basque region or Northern Ireland, but fundamentally with ethnic conflicts in the Balkans and Central Europe (Vermeersch 2002). Many western governments, international institutions and NGOs have encouraged the CEECs to adopt generous minority policies in the name of

ethnic reconciliation. This was also an important feature of the impact exerted by the EU on domestic interethnic politics in accession countries, i.e. the relations between political actors representing ethnic minorities and majorities. In relation to the Roma, the EU and international organisations have further been prompted by highly publicised waves of Roma refugees seeking asylum in the West;

This movement provided a political imperative in existing Member States to press for improvements in the situation of Roma in Central and Eastern Europe, and for measures to “combat asylum abuse”.

(European Commission 2004a:15)

But as mentioned, the Commission has taken constitutional provisions and common law of the candidate countries as points of reference to define their policy and to assess whether accession countries fulfil the ‘minority criterion’ or protect national minorities effectively. These points of reference and the political positions derived from them make sense individually, but do not add up to a coherent policy. Though relying on domestic law and bilateral agreements is advantageous as it enables the EU institutions to focus their policy on the specific local situation, it risks that the parameters of the situation determine the standards, i.e. the normative assumptions, underlying EU policies;

By linking their evaluation to the domestic context, EU institutions tend to replace a justice-based assessment with a security-based approach aiming at a consensual conflict settlement.

(Brusis 2003:5)

Further whereas domestic political conflicts over the use of the minority language, minority education or culture are noted with concern in the Regular Reports, the absence or resolution of major disputes is evaluated positively and represents an indicator of compliance with the accession criteria. But although

...positive developments in many areas of public policy that relate to minorities are recorded... the previous Reports had not specified any problems in this area. Thus, there is an absence of continuity and coherence in the EU’s monitoring mechanism as the Reports are characterised by ad hocism.

(Huges and Sasse 2003:12)

With this the minority criterion has remained ill-defined, failing to develop a clear and common standard for all applicant states. In addition, there are some indications that candidate state governments have viewed their efforts to demonstrate compliance with the political criteria instrumentally, rather than as a genuine and permanent commitment (OSI 2002:17). Roma activists suspect that the candidate countries concern for developing minority policies is related more to enhancing the countries' standing in the international community than remedying domestic social marginalisation (Veermersch 2002:3).

It is also argued that the Roma are at the heart of many EU discourses on minorities because as a non-territorial and politically marginalised minority, they are a politically less sensitive group to focus on by comparison with territorial and politically mobilised minorities, such as for example Hungarians in Slovakia and Romania. But despite the EU's sustained concentration on the Roma issue in the Regular Reports, none of the strategies or state bodies set up to deal with this minority effected any substantive change in their political, social and economic marginalisation over time. Being a politically less sensitive group to focus on, the Roma's claims have traditionally been ignored. The Roma do not threaten international order and the fact that they can not rely on a 'mother-country' for protection lowers the risk of any Roma-involved ethnic conflict developing into war between one or more states. Following the security based approach this fact seems to have lowered the will to resolve the 'Roma-problem' even though much attention has been given to it in the Regular Reports. Indeed, the Roma question "is the most indicative of the limitations of the EU's monitoring mechanism and the lack of a correlation between the Reports and an improvement in minority protection or their integration" (Hughes and Sasse 2003:26).

The EU as a prompter of universal human rights

Though the EU minority policy during enlargement may have been brought about by a logic of consequences, hence its following 'securisation', Ulrich Sedelmeier (2003) argues the EU's eastern enlargement has contributed to the formation of an EU collective identity as a promoter and protector of universal human rights and democracy. The enlargement policy practice has thus causal impact on further development of a European minority policy as an independent variable that affects EU identity. An argumentative logic is created that strengthens the advocates of particular minority policy options

and initiatives that can be legitimatised with reference to this particular identity. The EU's identity is here understood as limiting the realm of feasible policy options (including non-action) to those that are in accordance with universal human rights as well as reducing the ground for self-interested objection against particular policy initiatives. But the enlargement process has, as we saw, rather prompted a multicultural, though frail, understanding of minority issues where these issues are furthermore to be dealt with within a supranational context. Minority protection is here constrained by the boundaries of the nation state and looses with this its universal character understood within the framework of human rights. There thus seems to be tension between the universal collective identity Sedelmeier prescribes and the particular implementation of minority protection during enlargement. This perceived tension may be misleading though, if it is so that the *right to cultural identity* is considered to be a universal human right, a certain 'added value' promoted during enlargement, as well as important to the concept of democracy. The question then becomes whose cultural identity is actually protected within the EU's *aquis*? And are all the necessary implications that follow a multicultural approach as discussed in the previous chapter furthermore institutionalised as a coherent EU minority policy now that ten of the candidate countries are member states?

Post-accession minority policy

The Amsterdam Treaty transposed all the Copenhagen criteria, except the one concerning minority protection, into Primary law, leaving it adopted only in the conclusions of the European Council, thus implying that it is not legally binding. Among the political accession criteria

...the insistence on genuine minority protection is clearly the odd one out. Respect for democracy, the rule of law and human rights have been recognised as fundamental values of the European Union's internal development and for the purpose of its enlargement, whereas minority protection is only mentioned in the latter context.

(de Witte 2002:143)

Hence the question whether 'respect for and protection of minorities' is part of the *aquis* or not, should indeed be raised (Toggenburg 2000:18). If it is so that the Commission does not have any power to influence minority policies post-accession, the 'respect for and protection of minorities' risks being

treated as a requirement for EU accession rather than a necessary long-term condition of membership. It is feared that the absence of European-wide systematic monitoring of government policies and practices towards minorities and the fact that the Copenhagen Criteria do not apply to existing member states, is likely to further undermine post-enlargement attempts to continue protecting minorities.

But while the candidates' interest in EU membership counts as a strong motivation for compliance, to be sure, ultimately, compliance performance depends on the perception of a legitimate procedure, that is, on the principle of 'right process' (Wiener and Schweltnus 2004:1). It must therefore not only be made clear whether compliance with the Copenhagen Criteria is more than a condition for entry in it being an unambiguous condition of membership, but also what kind of minority policy the Copenhagen Criteria are meant to reflect. As the states in Eastern Europe continue to address minority issues, now as member states, it is thus important to differentiate the practices required to protect rights and the policies necessary to promote a coherent minority protection policy.

In an indirect sense the Copenhagen criteria might be seen as legally binding for member states in as far as it reflects already existing law. If no legal Community standard is identified however, the standard applied in the course of Eastern enlargement has to be of a more or less political nature. The content of the norms relating to minority protection within the existing normative framework of the EU can be related to both the principle of cultural diversity, implying '*recognition*', and the non-discrimination principle. Following the conceptual framework of norm resonance, EU minority policy will therefore be analysed with reference to the development of these two norms, which were also both included in the accession criteria of the EU.

The principle of cultural diversity

In the pre-Maastricht period, the issue of minority protection was mainly restricted to an interest of the European Parliament (EP) in the linguistic heritage of minorities. They have adopted several resolutions and based these and their funding for minority-favouring institutions on the argument of supporting cultural diversity. Though EP resolutions are without judicial consequence, the EP has contributed to the development of a set of

transnational norms in the field of language policy. The Afré Resolution³⁹ requested that national, regional and local authorities allow and promote the instruction of regional languages and cultures in official curricula from nursery school up to university level. Almost unanimously, the EP adopted the Killilea Resolution⁴⁰ on linguistic and cultural minorities, urging member states to support the ECRML of the CoE. It also further specified that all these recommendations should also be applied to non-territorial autochthonous minorities (expressly mentioning the Roma) that do not jeopardise the territorial integrity or public order of the member states. The EP has in light of these resolutions asked the Commission to define a minority or regional language⁴¹ and several times pointed out that EU member state governments and the European Commission should propose some concrete directives for the conservation and promotion of regional or minority languages and cultures of the EU⁴².

Article 151 TEU, which states that the Community contributes to the “flowering of the cultures of member states, while respecting their national and regional diversity” and should “take cultural aspects into account...in particular in order to respect and promote the diversity of its cultures” provides a legitimate basis for further development of EU action in support of minority cultures. Article 22 of the Charter of Fundamental Rights restates the commitment that “the Union shall respect cultural, religious and linguistic diversity”, thus considering diversity as a constitutional principle. Calls on the European Council and the European Commission to continue their support for and encouragement of European organizations representing linguistic communities, particularly the European Bureau for Lesser Used Languages (EBLUL)⁴³, where put forward by the EP in the European Year of

³⁹ The Afré Resolution was prepared by Mr Gaetano Afré, adopted by the EP on 16 October 1981, and proposes a Community Charter of Regional Languages and Cultures and on a Charter of Rights of Ethnic Minorities.

⁴⁰ Resolution on linguistic minorities in the European Community adopted by the European Parliament on 9 February 1994 (A3-0042/94).

⁴¹ European Parliament resolution with recommendations to the Commission on European regional and lesser-used languages – the languages of minorities in the EU – in the context of enlargement and cultural diversity (2003/2057).

⁴² Initial request being in a Resolution prepared by Mr. Willy Kuijpers, adopted by the European Parliament on 30 October 1987, on the languages and cultures of regional and ethnic minorities in the European Community.

⁴³ The EBLUL is an independent organisation. Its members are volunteer associations and institutions active in the promotion of minority languages throughout the EU. The Bureau’s

Languages (2001), stressing its importance in relation to Article 22 in the Charter⁴⁴.

Deep diversity of nation-states

Protection of culture, languages and identity are thus prominent notions in the daily debates on constitutional law and politics of the EU. But in these EU discourses these notions, and the related concept of cultural diversity, seem to refer mainly to the national level, the threatened or protected people not being ethnic or linguistic minorities but the member states themselves;

In the EU context it is for the member states to fear that they could – en route to an uncontrolled integration process towards an ‘ever closer Union’ – lose their identity.

(Toggenburg 2003:274)

Article 151 par. 1 TEU calls on the EC to “contribute to the flowering of the cultures of the member states” while only “respecting” the existing degree of “their national and regional diversity”. The wording of the impact-clause in par. 4 does not even refer to the regional level. When at the end of the 1980s the EU launched a number of policies aimed at creating a European identity, the member states responded by incorporating into the Maastricht Treaty a clause stating that the Union should respect the member states’ respective national identities (art F (1)). Indeed, as ‘masters of the Treaties’, they could introduce clauses which aimed at protecting their ‘national identity’ (Article 6 par. 3 TEU⁴⁵) and stressed the importance of, as mentioned, foremost national diversity in Europe (Art. 151 TEU). Therefore, the position member states take towards diversity *within* their territory “is in its core an expression of their national identity, and as such not only protected by the identity clause in Article 6 par. 3, but also by the very notion of ‘European diversity’

purpose is to promote and defend the autochthonous regional or minority languages of the countries of the EU and the linguistic rights of those who speak these languages. Although EBLUL can be viewed to have minimal impact, a picture which is reinforced by the lack of financial resources available for regional and minority languages, their discourse, together with resolutions of the EP on minority languages, could over time provide new possibilities for minority languages (Broderstad 2000:246).

⁴⁴ European Parliament resolution on regional and lesser-used European languages, December 13, 2001.

⁴⁵ Art. 6 par. 3 reads as follows: “The Union shall respect the national identities of its Member States.”

itself' (Toggenburg 2003:278). These reactions, along with the introduction of the principle of subsidiarity (Article 5 TEU) and the rejection of the word 'federal', revealed that many member states saw the creation of a European identity as a potential threat to their own national identities and their citizens' loyalties (Jiménez et al 2004:2).

The extension of EU activity into the minority rights field would therefore be likely to encounter stiff resistance on the part of member states, making it difficult for the international community to devise norms beyond non-discrimination in this area (Deets 2003:44). Indeed there is a strong argument for leaving member states to devise their own minority policies according to the principle of subsidiarity and recognising diversity as the key to effective and locally acceptable solutions. Such a perception sees any future engagement of the Union in the area of regional diversity as being under the construction caveats of the member states who themselves define their internal degree of diversity. Minority protection is with this framed as the responsibility of sovereigns, i.e. the member states are not required by the EU to behave in any particular way towards their internal minority communities. The Roma could thus not expect any considerable change, or compensation for the lack of state efforts, as a result of the CEECs entry into the EU because democratic processes are with this understanding of the EU limited to the borders of the nation-state, and the public is fragmented into national units.

The non-discrimination principle

Non-discrimination has been a fundamental principle within the EU, in the form of gender equality⁴⁶ and the abolition of discrimination on the basis of nationality between member states⁴⁷. The Amsterdam Treaty's anti-discrimination commitment justifies EU-level action in the field of minority protection. Here the non-discrimination principle was more directly related to minority issues by it being expanded to include ethnic and racial discrimination as Article 13 enables the Community to

...take appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation.

⁴⁶ Council Directive 76/207/EEC of 9 February 1976, Art 141 TEU

⁴⁷ Art 12 TEU

The Charter of Fundamental Rights Article 21 further adds “belonging to a national minority” to the list of criteria of which discrimination is forbidden⁴⁸.

The construction of a link between minority protection and the combat against racism and xenophobia was institutionalised within the EU with the establishment of a European Monitoring Centre on Racism and Xenophobia (EUMC), soon to be converted into EU Human Rights Agency. Their aim is to re-enforce the non-discrimination principle as articulated in Article 13 TEU and Article 21 of the Charter. Combating racism and discrimination against minorities was further a thematic and funding priority for the European Initiative for Democracy and Human Rights (EIDHR), during the years 2002 to 2004 and an Action Programme to combat discrimination, running from 2001 to 2006, supports projects aimed at preventing and combating discrimination on a number of grounds, including racial or ethnic origin and religion and belief.

The Framework Directive on the prohibition of discrimination on the basis of racial or ethnic origin⁴⁹ (the so-called ‘Race Equality Directive’) was proposed by the Commission as part of its ‘Article 13 package’ and later adopted by the Council. The same goes for the Framework Directive on equal treatment in employment and occupation⁵⁰. The ‘Race Equality Directive’ has a wide scope, including employment, training, social protection (social security and healthcare), social advantages, education and access to goods and services including housing. In addition it applies a very extensive interpretation of discrimination, since it prohibits direct and indirect discrimination, including ‘harassment’⁵¹. Persons who believe they are victims of discrimination are also granted access to administrative or judicial procedures to defend their rights and in order to strengthen the position of

⁴⁸ Art 21: ‘Any discrimination based on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, member of a national minority, property, birth, disability, age or sexual orientation shall be prohibited.’

⁴⁹ Council Directive 2000/43/EC of 29 June 2000

⁵⁰ Council Directive 2000/78/EC of 27 November 2000

⁵¹ According to Art 2 (3) of the Directive, harassment will be considered as discrimination “when an unwanted conduct related to racial and ethnic origin takes place with purpose of or effect of violating the dignity of a person and of creating an intimidating, hostile, degrading, humiliating or offensive environment”.

victims the Directive shifts the burden of proof to the respondents if the defendant can provide evidence that there has been discrimination. Further, the Directive requires positive action in that the member states have to designate a body for the promotion of equal treatment of all persons, irrespective of racial or ethnic origin. This body has to, among other things, provide assistance to victims of discrimination. Cases of discriminatory behaviour by private parties also become constructed as cases of regulatory failure whose causal effects lie, in part at least, in inadequate state resources, management or political will. Article 7 TEU further opens for the use of sanctions against member states that do not comply with EU law, including non-discrimination legislation⁵².

The non-discrimination principle can with this be regarded as a “reasonably clear and well-established norm at the EU level” (Wiener and Schwellnus 2004:12) and if there is any movement towards an EU standard for minorities, it is argued that it can only be traced to very recent developments grounded on non-discrimination legislation rather than the principle of cultural diversity. The Union is in this case forced to promote respect for minorities in candidate countries using only the legal tools of non-discrimination;

...in advocating diversity and tolerance in an enlarging Europe, the EU is restricted to promoting legal instruments whose main import is the denial of intolerance rather than the engendering of diversity. It seems the EU is developing pan-European anti-discrimination law rather than ‘minority rights’.
(Stepanek 2002:3)

Ensuring equal opportunities

The amendment and creation of domestic legislation to meet the requirements of the anti-discrimination race and employment directives could for example sustain the momentum of minority protection. The emphasis here is on reducing disadvantage and ensuring equal opportunities rather than

⁵² It does not seem likely though that this article will be used when dealing with Roma-related issues as the situation of the Roma is bad in all member countries. But as the absence of sanctioning reactions may be taken as an indicator of behavioural compliance and thus an effective EU policy the former mentioned fact risks that Roma-issues remain undealt with. It has though also been argued that it might be better for the Roma to not be excluded from the Union.

promoting ethnic differences. Accordingly, building on ECJ rulings on ‘affirmative action’ in the field of gender discrimination, both the ‘Race Equality Directive’ and the Framework Directive on equal treatment in employment and occupation contain a provision allowing for “measures intended to prevent or compensate for disadvantages suffered by a group of persons of a particular racial or ethnic origin”⁵³. This is also reflected in ECJ rulings acknowledging that the “protection of...a minority may constitute a legitimate aim”⁵⁴ of national policy and therefore “does not itself run afoul of the non-discrimination principle” (Wiener and Schwellnus 2004:11). Affirmative action is in this way understood as a temporary measure and is justified on the grounds that historical discrimination has created a pattern within which the unfavoured struggle at a disadvantage. Minority protection would thus not amount to privileges of any sort but would, on the contrary, concern rights that put members of minorities in a substantively equal position as the rest of the population. An obligation to introduce positive discrimination could, though, for the time being, only be accepted if one was prepared to apply soft law documents as points of reference for the interpretation of EU human rights standards.

European citizenship and the Charter of Fundamental Rights

While national identities were largely constructed during specific historical, socio-economic and political circumstances of the era of nation-state building, European identity is still under construction involving, and presupposing the existence of national identities without replacing them (Jiménez et al 2004:4). Access to EU citizenship comes via nationality of a member state as the Union’s members variously define it. Citizenship of the EU is therefore in institutional terms de facto differentiated, as it is based on the particular rules of incorporation that each state has established (Fossum 2004:32). To that extent EU citizenship, as minority protection in accordance with standards developed by the CoE, remains an intergovernmental arrangement, involving the reciprocal granting of certain rights to nationals of the member states. But EU citizenship has also “a supra- and transnational dimension” (Bellamy 2000:93) because European law protects the rights that accompany it and the European Court of Justice can produce changes to national law in order to accommodate them. A Europeanization process of national citizenship norms takes therefore place.

⁵³ Council Directive 2000/43/EC, § 17

⁵⁴ Case C-274/96 Binckel/Franz [1998] ECR I-7637: § 12

EU citizenship further allows citizens to move freely within the union and hence fosters a transnational identity.

Habermas (1998) goes even further though, as he sees the EU citizenship's (and the rights that accompany it) framing within the universalistic language of rights as pointing towards a *post-national* conception of citizenship. European and national identities are here not understood as competitive, but complementary (Peters 2004:76). The Charter of Fundamental Rights institutionalises human rights beyond the nation state and is in light of this an important step in the process of institutionalising a cosmopolitan order where violations of human rights can be perused as criminal offences according to legal procedures (Eriksen 2002:32).

The Charter contains provisions on civil, political, social and economic rights. Put together these are intended to ensure the dignity of the person, to safeguard essential freedoms, to provide a European citizenship, to ensure equality, to foster solidarity and to provide for justice. Explicit minority rights were put onto the agenda of the Draft Charter of Fundamental Rights and several proposals were aimed at the introduction of a minority-paragraph in the Charter. Among the submitting bodies strongly urging for a separate minority clause to be included in the document, were EU institutions like the EP and the Committee of Regions, the Parliamentary Assembly of the Council of Europe, and NGOs related to minority rights and minority language protection (Schwellnus 2001:7). But the final outcome of the Charter addresses the minority issue only within the context of non-discrimination. On the whole the Charter embraces the liberal individualist norms that also permeate the aquis and the development of a codified group-specific approach to rights within the EU seems with this highly unlikely in the near future (Hughes and Sasse 2003:12). The normative framework of the EU, including the Charter, thus confronts and challenges with this the deep diversity required for the fulfilment of the Roma collective goal of recognition as a nation (without a state).

Rather than entrenching and solidifying national collective identities, the institutional structure associated with the EU increasingly challenges national auto-recognition, i.e. the taken-for-grantedness of the national point of view. National modes of recognition are in other words more frequently challenged and compelled to come up with justifications.

(Fossum 2004:42)

A multicultural or deliberative minority policy?

Despite single commitments and activities it would be possible to conclude that a multicultural minority protection, which has always been considered as not completely covered by concepts such as democracy, rule of law, protection of human rights and fundamental freedoms, is not yet part of the *aquis*, and that there with this is no constitutive resonance for minority protection understood in accordance with the multicultural approach. Minority protection in the EU has typically been understood as an elaboration of the rights granted individuals embedded in a framework that respects human rights. Although the original treaties of the EU did not contain human rights provisions, the European Court of Justice (ECJ) experienced a competence for human rights issues within case law⁵⁵ which was later codified in the Maastricht Treaty with the introduction of Article 6(2) of the TEU;

The Union shall respect fundamental rights, as guaranteed by the European Convention on Human Rights and Fundamental Freedoms...and as they result from the constitutional traditions common to the Member States, as general principles of community law.

Whereas various examples reveal that there are strong EU expressions in favour of recognition of the cultural identity of minorities inside the Communitarian system (especially within the EP), the measures undertaken are still limited to the non-legally binding resolutions and financial support for concrete measures and projects. Cultural recognition of minorities has hardly played a role in the internal development of the *acquis communautaire*, though it did seem to play an important role in the enlargement process. Further, no internal minority rights *aquis* has been developed within the EU, nor do member states subscribe to a single European standard⁵⁶.

Some believe however that two factors – growing migration and diversity within the EU, and enlargement to the East – will render inevitable the elaboration of a more concrete EU framework on minority protection and

⁵⁵ At least within the scope of community law.

⁵⁶ See Amoto and Batt 1998; De Witte 2002, Pentassuglia 2001; Schwellnus 2001; Toggenburg 2000

that further EU integration has the potential to stimulate continued legislative adjustments to enhance a multicultural minority protection.

...it is worth pausing to note that the structures of the European Union render it more receptive to the claims of multiculturalism than traditional national models. It is, first, a political settlement that recognizes its cognitive and coercive limits more explicitly than nation-states...which at a foundational level perceives both political and legal authority as plural, contingent, interdependent, and contested.

(Chalmers 2001:231)

We could for example witness a further development of the cultural diversity principle as expressed in Article 151 TEU and Article 22 of the Charter. Though these instruments introduced at EU level do not concentrate on the protection of minorities in the stricter sense, the recognition of minorities' cultural identity in the EU will in part depend on the outcome of the diversity-unity debate in Europe surrounding these articles. It is, according to the multicultural approach, in the interest of minorities to use and strengthen 'carrier concepts' such as cultural diversity, regional autonomy or linguistic diversity within the legal set-up of the Union.

A discursive analysis of norm contestation and meaning...demonstrates that norm contestation is an ongoing process i.e. it is not limited to the construction of international and European norms prior to their respective application in the EU's policy of conditionality or to the process of compliance and domestic rule adoption on the part of the applicant states during the conditionality phase. The story does not end once the accession conditions are fulfilled, or at the moment of full membership.

(Wiener and Schwellnus 2004:30)

The cultural diversity principle may thus be seen as providing "a legitimate basis for supporting action for minorities, specifically in the field of the protection of regional and minority languages" (Schwellnus 2001:20). Further, as human rights values are common to all Member States according to Art. 6 TEU, any difference as to the legally binding standards of minority protection will be contrary to the idea of a legal community. When searching for the common standard of minority protection by means of comparative law, the ECJ will be confronted with an impressive number of national legal orders providing for permanent affirmative action. National constitutional doctrines

will of course have to take on board the Court of Justice's interpretations, but the Court of Justice will also have to be sensitive to existing doctrines and debates within the member-states (Chalmers 2001:194).

The manifestation of the minority protection norm in the CEECs is remarkably radical when compared with internal EU policies, indicating that the EU norms, such as those expressed in for example the Copenhagen Criteria, are more than merely regulative. This may further imply that for example Hungarian minority policy is an integral part of the European minority rights regime and thus able to redefine the expectations of EU protection for Roma. The EU would in this case be what one calls 'rhetorically entrapped' (Schimmelfennig 2001:73, Risse and Sikink 1999:28) in its collective statements during the accession process and the enlargement could thus function as a catalyst for an emerging multicultural standard of minority protection within the EU structures.

The 'right' minority policy

The behavioural obligations entailed in the EU's minority policy, though based on respect for human rights and democratic principles, are with this arguably rather diffuse. Wiener and Schwellnus (2004) proclaim therefore that contestation over norm meaning highlights not only the importance of norm resonance but also that of domestic norm construction in the process of norm diffusion and an "agency-oriented, dynamic and interactive element" (ibid:6) should with this be included in a discursive analysis of norm contestation and meaning. To explain the emergence of new norms as well as the transposition of international norms into domestic contexts, scholars have therefore begun to study the actions of 'norm entrepreneurs'. Agents actively promoting norms (international organisations, national representatives, advocacy coalition networks, epistemic communities) perform an important function as catalysts or mediators of meaning⁵⁷. The role given to the criterion of minority protection will according to this perspective primarily depend on the political constellation dominating the respective phase of Eastern enlargement. With this it is argued that in political terms it seems quite impossible for the EU to take essential retrograde steps as it has already

⁵⁷ For a general discussion of the literature on norms in IR including arguments about resonance see Finnemore and Sikink 1998.

devoted significant attention to its new approach during enlargement towards minorities (Toggenburg 2000:13).

Within the scope of this thesis I am not concerned with the validity of this claim, nor will I further explore what possible norm constructions different 'norm entrepreneurs' are likely to promote. I will rather normatively assess the contested norms of recognition and non-discrimination. As *minority protection* has proven to be a rather diffuse norm, a scope for interpretation and argumentation about what the 'right' course of action might be in a particular situation is created (Sedelmeier 2003:12). Hence norm-guided behaviour might not only result 'spontaneously' from a 'logic of appropriateness'. Instead, it might be the result of two other mechanisms that emphasise the importance of deliberation for actors' behaviour: the 'logic of communication',⁵⁸ or a process of 'rhetorical action'.⁵⁹

Within the context of the EU's minority policy it is, as argued in this chapter, not possible to determine whether the development is heading towards 'cultural differentiation' or 'cosmopolitan incorporation' using only the tools of constitutive theory. By addressing the necessary, though not sufficient preconditions that make action possible, constitutive theory can only provide explanations of how certain kinds of behaviour are made possible, or even probable, and why (Scwellnus 2001:15). It can therefore only establish the scope of available arguments by marking what counts as a plausible argument within the given context. The norm of minority protection is as mentioned not only contested within political normative theory, but also within the constitutive structures of the EU. There is no well established 'logic of appropriate action' making it able to clearly identify which theoretical concepts are linked, or tied together as necessary companions, to the norm of minority protection within the EU. Whether the Roma can expect 'cultural differentiation' and the following deep diversity it would require, or rather a deliberative 'cosmopolitan incorporation' of minorities within the EU becomes with this not only a matter of contextual rationality, but also one subjected to moral argumentation. A normative assessment of the multicultural and deliberative conception of minority protection is therefore needed. Liberal theory provides the framework within which this assessment

⁵⁸ See Eriksen and Weigaard 1999

⁵⁹ See Schimmelfennig 2001

will take place and serves thus as a standard against which the implications of 'non-discrimination' and 'recognition' for the EU will be weighed.

Chapter 5

Normative assessment; the 'right' minority policy

Introduction

Based on the understanding that integration (as opposed to exclusion or assimilation) is in the best interest of both majority and minority populations, the multicultural and deliberative conceptions of minority protection and citizenship will be assessed with explicit attention to the EU and the situation of the Roma. A critical question is what type of minority policy the EU requires in normative terms, and further how amendable this approach is to address Roma claims of both non-discrimination and recognition as a non-territorial nation as advocated by the RNC and IRU.

The viability of the multicultural and deliberative theoretical proposals will be examined by discussing the characteristics of ethnicity, political participation, political autonomy, and concerns for social and political unity in the EU, viability referring with this to both normative status and empirical relevance. The purpose of this assessment is to offer a contribution to the breaching of the gap between normative standards and principles on the one hand and empirical realities on the other. This will lead to a conclusion which diverges from the multicultural approach, and it is suggested the deliberative approach may solve some of the dilemmas created by both formal 'non-discrimination' and 'recognition' for the achievement of justice.

The dichotomy, often made for the sake of convenience, between human rights and minority rights may be misleading if it hinders the fact that a genuine measure of protection for minority interests can be brought about simply by applying and creatively interpreting the fundamental rights granted to all.

(de Witte 2002:144)

A multicultural minority policy

Cultural differentiation

In political systems based on 'recognition' group affiliation will as discussed in chapter 3 determine the legal power distribution to a large degree. Recognizing and treating members of some groups as equals requires, according to this view, that public institutions acknowledge rather than ignore cultural particularities. In addition to personal cultural rights designed to protect the members of minority cultures from discrimination multiculturalists advocate corporate cultural rights that seek to guarantee the long-term survival of a particular culture and identity. When discussing EU-Roma relation it is possible to conceptualise the Roma as either a minority 'within' the EU or a minority 'of the EU'⁶⁰. Only by recognising the Roma as a minority 'of' the EU, will their claim to recognition as a 'non-territorial nation' be met.

A minority 'within' the EU

EU's minority policy during the enlargement process explicitly endorsed the European minority protection standard of both the CoE and the OSCE. Within these frameworks new forms of recognition have been encouraged first and foremost *within* the boundaries of the nation state. This approach was also further stressed as important in the European Commissions report on the situation of Roma in an enlarged EU (2004a). The fact that the EU's minority policy explicitly endorsed these standards illustrates however perhaps the most striking example of the 'conceptual double standard' concerning minorities. The FCNM has, for example, mainly defined minority protection as a task states should fulfil, not as a set of subjective rights national minorities

⁶⁰ Toggenburg (2003) tries to identify the true EU minorities and distinguishes between minorities 'within' the EU, i.e. within the member states, and 'of' the EU, i.e. at EU level.

or individuals belonging to national minorities can claim. That is, it accepts a standard which includes or, at least tolerates a restriction to nation state citizens (Wiener and Schwellnus 2004:34). With this the rules on the acquisition of nationality become relevant because the admission to minority rights, in contrast to human rights, is made dependent on having the nationality of the country concerned (de Witte 2002:147).

Linking national citizenship, or even long-term residence, to the enjoyment of minority status under the FCNM has particular and possibly unique implications for the Roma. Not only do Roma related issues go to the heart of the meaning of the state in many East European nation states which are often defined in ethnic terms, but also unlike most other minority populations in Europe, the Roma are a non-territorial minority who traditionally enjoyed a nomadic way of life. Historically, the Roma have migrated from one country to another in an effort to flee persecution or in search of improved economic opportunities. Although the overwhelming majority of Europe's Roma have been sedentarised, voluntarily or otherwise, it is clear that the gadjé notions such as 'borders' or even 'states' do not have the same meaning for many Roma⁶¹. The Roma have thus experienced difficulties in framing themselves as a *national* minority because their 'homeland' is both 'everywhere' and 'nowhere'. Prominent migratory patterns and an apparent readiness to move on remain conspicuous features of Roma communities today and represent an important aspect of Roma culture and identity (Pogany 1999:163). So

⁶¹ In extreme cases, Roma lack citizenship, and the worrying phenomenon of statelessness has arisen among Roma in some countries. In the context of the break-up of Czechoslovakia in 1993, for example, rather than making Czech citizenship available to all former Czechoslovak citizens, the Czech Act on citizenship awarded citizenship to those who had Czech, as opposed to Slovak republic citizenship, a previously meaningless administrative designation provided under the 1969 law. Those former Czechoslovak citizens who had not been automatically awarded citizenship were entitled to apply for it, but were required to meet the conditions that they had been permanent residents of the Czech Republic for at least two years and that they had not been sentenced for a crime in the previous years. As a result of the Act, thousands of people found themselves officially ineligible for Czech citizenship either as a result of a criminal record or because their real residence was not matched by official residence documentation. The vast majority of those excluded from Czech citizenship were Roma, and indeed many commented that the law was designed precisely for the purpose of trying to force Roma in the Czech Republic to go to Slovakia (European Commission 2004a:32).

...the potential political reverberations in the CEECs, where the domestic consensus on minority protection is often fragile, could have strong negative consequences, since it could affect the willingness of national authorities to grant or uphold far-reaching rights to minorities, when the minority can be enlarged, so to speak, by migration.

(Wiener and Schweltnus 2004:34)

A minority 'of the EU

It has not been easy for Roma to replace a stigmatised identity with the political identity of a clearly defined ethnic group on a certain territory (Vermeersch 2002). Recommendation 1203 of the CoE therefore stated that the Roma do not fit into the definition of *national minority*, and should rather be referred to as a 'non-territorial' minority. Adherents of the transnational-minority approach draw their constituency partly from the inequities of the present treatment of national minorities, which confers more rights and resources on Romani "nationals" who enjoy citizenship rights and the following consequences for Romani migrants, asylum seekers, refugees, and stateless persons. They also argue that the 'national minority' approach reinforces the fragmentation of the Romani population in a given state because, as mentioned, within this approach the legal provisions granted by minority laws are strictly limited to those members who are citizens of the respective states and are not extended to members of that group who are migrants. They point to the very different situation of Romani individuals, families, and groups who are not protected by the rights offered to citizens of the state, even though they have lived in the same territory sometimes for generations and even though their children were born there.

...in sociological or anthropological terms talk of a Roma 'national identity' remains premature. However, in political and legal terms the notion of a Roma 'nation' is undoubtedly a valuable tool for securing enhanced recognition of, and provision for, Europe's Roma peoples. The concept of a Roma 'nation' is also a useful means of promoting cohesion amongst the often fractured Roma communities which exist at the present time and of encouraging greater pride and self-worth amongst the Roma in general. The obvious artificiality of the concept of a Roma 'nation' in no way detracts from its potential usefulness, or from the possibility that it may become a reality at some point in the future.

(Pogany 1999:158)

But an argument against the Roma claim to be recognised as a nation, albeit on a very different level, is that the idea of legal recognition as a ‘European minority’ does not fit the concepts and language of present-day international and EU legal frameworks. These frameworks promote as mentioned new forms of recognition *within* the boundaries of the nation state. The proposed special status of a transnational, non-territorial minority is thus rejected because it faces the danger that such a special status “could lead to something less than the protection afforded to national minorities by single states” (Meyer 2001:298). It raises the question of loyalties and rights that would transcend those conferred by citizenship in a nation state and would inevitably lead individuals to experience conflicting loyalties and interests. More importantly, it could also invite discrimination by the state against those who could be seen as not being fully part of it. The EU can further hardly serve as a valid parameter for identifying a minority as there is no such thing as a dominant ‘rest of the EU population’ (Toggenburg 2003:278). In numerical terms the total Roma population of about 8 million would for example be much larger than that of many present member states⁶². Another serious problem is raised by the concept of the Romani Diaspora itself. It does not only go beyond the borders of the enlarged EU, but also beyond the borderlines of Europe, since Romani communities are found in the Middle East, Central Asia, both Americas and Australia.

The multicultural approach requires that it is possible to identify the relevant groups, and also identify who belongs to which group, so that it is possible to decide who the legitimate subjects of group-differentiated rights are. Difficulties arise though when trying to identify what kind of minority the Roma should be considered as in the context of a multicultural approach to minority protection within the EU. While an understanding of the Roma as a minority ‘within’ the EU clearly ignores important aspects of Romani culture and for that reason can not be considered compatible with a legitimate multicultural approach, recognition as a non-territorial nation seem difficult for reasons discussed in the previous chapter. The objections raised to what seems to have been the approach during the enlargement process, i.e. an understanding of the Roma as a minority ‘within’ the EU, do not project a viable alternative in empirical terms. The notion of a guaranteed right to

⁶² An understanding of the Roma as a sociological, or negative, minority will later be discussed within the assessment of a deliberative minority approach in this chapter. Sociological minorities refer to the situation of marginalisation and discrimination.

group representation does not only imply that groups can be readily identified, as it also requires that they have a stable membership and are sufficiently homogeneous to be able to formulate a group response. Questions like who gets to say what the authentic Roma contribution might be and how to account for shifts in the composition of the group and in its interests therefore become important. In the case of the Roma these questions become problematic since the intellectual and essentially gadjo (i.e. non-Roma) abstraction 'a Roma nation' has little meaning, as yet, for the great mass of the Roma for whom identity is still defined much more narrowly and traditionally (Pogany 1999:157). The increasing use, in academic and other public discourse, of the universal appellation 'Roma' can with this be understood as reflecting a politically driven aspiration to create a single identity for these communities, creating a 'nation', or as Nicolae Gheorghe, Head of the OSCE's Contact point for Roma and Sinti Issues, puts it, 'ethno-genesis', rather than reflecting an extant reality (Kovats 2002). It will further be argued, though, that even if the Roma were an easily identifiable group, the multicultural approach still faces normative difficulties related to essentialism, divisibility and arbitrary subjectivism.

Essentialism

The multicultural approach has been criticised for "essentialising pre-political entities" (Galgenkamp 1996) and of having a static view of culture⁶³. During enlargement many EU discourses on Roma related issues reflected such an essentialist understanding of Roma identity; what Katrin Simhandl calls an "unspoken assumption of 'Roma' as an essentialist category" (2004:4). Multiculturalists are accused of not taking into account the ontological assumption that the social and cognitive world is not externally and objectively given, but constructed in a process of human interaction. An essentialist understanding of Roma culture and identity renders therefore the institutionalisation of a cleavage between Roma and non-Roma politics in accordance with the multicultural approach problematic, not only because it ignores the diversity of Roma interests, but also because it may lead to a very limited and static interpretation of Roma interests.

A system which guarantees oppressed groups the right to representation would hardly encourage them to recognize the contextual nature and fluidity of their

⁶³ Without any further discussion, I use a broad, dynamic, nonhomogenous, anthropological understanding of culture which includes cognitive and normative patterns.

boundaries; on the contrary, it would be in the group's interest to remain distinct and to attempt to build loyal membership.

(Baumeister 2000:60)

As identity formation is a dynamic process continually being remade and established through social interaction, cultural identity may go unprotected not only as a consequence of some atavistic failure of political will or legal misapplication, but also as a result of the evolutionary and unstable nature of this process. It seems therefore difficult to describe the concept of cultural identity and its dynamic character in legal terms⁶⁴. And if it is as Morag Patrick (2000:34) asserts that “for the liberal, the test of the legitimacy of any demand for recognition is whether it can be given institutional form and enforcement as a right, or at least be assimilated to a right”, recognition of cultural identity in accordance with the multicultural approach does not seem possible within a liberal framework. Kymlicka has furthermore been criticised of making the mistake of rather uncritically jumping from the empirical to a normative level, committing with this a ‘realistic fallacy’;

Although distinct societal cultures may be distinguished...this empirical statement does not automatically imply that more far-reaching statement that normative value should be attached to the existence of these cultures, in the sense that special rights should be ascribed to them.

(Galgenkamp 1996:47)

Divisibility

Whilst emphasising Roma ethnic difference may help create a degree of inter-Roma solidarity, it can also, as mentioned, erect barriers to solidarity between Roma and non-Roma, as well as providing intellectual justification for exclusion and segregation. The worry thus goes beyond the familiar concerns about essentialism as group representation may also be divisive. Though the urge to accommodate cultural diversity within liberal democracies expresses a healthy concern for egalitarian citizenship in pluralistic societies, it is argued that recognition risks reinforcing differences between communities and thus may undermine attempts to develop a shared culture and overarching political identity. The emphasis on common cultural

⁶⁴ See Henrard (2000) for a discussion of possible developments of a right to cultural identity.

identity as the glue of a democracy makes it impossible to theorize democracy at a level which transcends national and linguistic boundaries (Held 1995). A separate agenda and path of development for Roma politics may therefore not only disconnect Roma people and their concerns from the wider political scene, but also create difficulties for the construction of a constituent 'European people' by "displacing efforts to guide individuals' commitments toward the values that make democratic community possible" (Williams 2004:1).

The EU needs to reject the simplistic conception of the European Roma policy paradigm and appreciate that its own acceptance and the construction of a European identity will not be served by promoting "Roma" as a symbol of Europeanization, but by demonstrating its capacity to enable societies to overcome domestic divisions and enjoy prosperity and social cohesion.

(Kovats 2001a:7)

An approach to justice in plural societies must not make it difficult for different ethnic groups to co-exist within the polity. As articulated by Taylor, 'deep diversity' is not necessarily particularly well placed to promote dialogue and mutual adaptation. Since 'deep diversity' divides jurisdiction into separate and quite self-contained units it allows groups to accumulate authority over all aspects of members' behaviour relating to its area of jurisdiction. This may well as mentioned encourage groups to exacerbate their differences rather than seek mutual adaptation (Baumeister 2003:408). Further

...[m]ajority decisions that also bind the minority will be accepted by the latter only if the members of the defeated group can hope to gain the majority in another occasion. In representative democracies this is possible only if group-affiliations (e.g. ethnic, religious, economic) are not so dominant that they determine the votes of the group members in decisions on all matters. If they are so dominant we have a strictly segmented society which will not be democratically viable. So what matters is not "homogeneity" but the absence of fixed segmentation – the two are not identical.

(Peters 2004:77)

Arbitrary subjectivism

Kymlicka's wish-argument has limited value in a normative analysis of minority protection, though the subjective wish of peoples is important to

political practice. Political outcomes within a democracy do not always have to meet all initial preferences, though they should all be heard. In other words “it is one thing to assert competing conceptions of the good within a society. It is quite another to suggest that those competing conceptions of the good should always be respected” (Galgenkamp 1996:49). The wish-argument is in addition at odds with an important liberal distinction between choices and circumstances. A liberal approach will only support compensating people who suffer from disadvantages in social environment or natural endowment, i.e. differences due to circumstances, not differences due to choices. Williams (1996:100) further argues that we can not make the subjective experience of injury the basis for political action because the moral uncertainty that can surround group claims based on subjective experience renders those claims vulnerable to dismissal by persons reluctant to respect them. It is only in the light of the *connection* between contemporary inequality and past discrimination that considerations of justice provide strong grounds for the special recognition of certain social groups. Kovats (2001a) emphasises with this that the EU must not be seduced by the romantic abstraction of a mythical European Roma ‘nation’, but must base its activities on the objective analysis of political conditions.

The more multiculturalist writings move from arguing certain minority policies are not inherently unjust to arguing that policies to protect cultural communities are inherently just, the more problematic they have become from a liberal perspective. At the heart of this contention lies the multiculturalist approach’s communitarian philosophical foundation for minority protection. The arguments of multiculturalism remain as we have seen problematic from a liberal perspective for several reasons, but the most troublesome issue is maybe why ethnic minorities have rights while minorities conceived any other way (such as those based on religion, sexual orientation, political ideology or disability) do not. Arrangements that guarantee representation or give autonomy to certain identities and not others strike at the heart of the values of liberal individualism and often prompt lingering resentment among not only members of the ethnic majority, but also minorities who do not receive the same treatment. Increasing assertiveness of national minorities will for example highlight the unequal predicament of third-country nationals resident in EU member states. With regard to gays and lesbians, religious minorities, people with disabilities, and other non-ethnic minorities, the explicit argument is that the state can be

neutral with these groups in a way it cannot be with national minorities. The implicit argument is that these categories do not generate the same kind of meaningful cultural communities, and therefore are not entitled to protection.

The assumption, though, that everybody behind a veil of ignorance would choose to protect ethnic identity, and only ethnic identity, is simply not sustainable.

(Deets 2003:32)

One solution to this problem would be to grant collective rights to a wider range of groups, or at least to all identity-generating groups. But if a community is granted rights, there must be ways to regulate definitions of the community, representation of the community, and entrance into and exit from the community. It is not clear that this can be done within a liberal theory, particularly one that acknowledges the right of individuals to choose their community. Liberals will also further argue that it becomes important to reflect on contemporary policy formulation and to what extent 'ethnicisation' is a substitute for talking about social issues. A central concern is that too much emphasis on the 'politics of recognition' could undermine our capacity as a society to achieve a 'politics of redistribution' (Barry 2001). For if it is as multiculturalist theorists sustain that solidarity requires communitarian politics, and if communitarian politics can only operate at the local level, then we will be unable to deal with the most serious issues of injustice in modern democracies, including the one relating to Roma marginalisation.

We may be able to sustain redistribution within local communities or neighbourhoods that share a conception of the good, but the most urgent injustices require redistribution across communities.

(Kymlicka 2001:268)

The other solution would be to grant rights only to individuals. This position would acknowledge that national and ethnic cultures are neither necessary ingredients for the democratic process nor central to liberal theory. Such a conception is not compatible with the multicultural approach to minority issues and a deliberative approach is proposed instead.

A deliberative minority policy

A post-national order

A basic requirement for a just minority policy within the deliberative approach is the need for a dialogue within a common democratic constitution. To promote an intercultural dialogue, institutional mechanisms, that facilitate exchange between minority and majority and actively encourage reflection upon existing practices, need to be developed (Baumeister 2003:408). But even though

...a commitment to a discursive account of validity is obviously a promising starting point for an argument in favour of group participation in politics...this commitment clearly underdetermines questions of concrete institutional set-up.

(De Greiff 2000:406)

and therefore still leaves open the issue of how we should think about this in the context of a modern, complex democracy.

Much could be said about this new deliberative model of democracy. In particular what are the appropriate forums of deliberation? At what levels should these forums exist – local, national, or supranational? How do we ensure that all groups and views are adequately represented in these forums?

(Kymlicka 2002:292)

From what has been discussed though it is obvious that the Roma challenge is not a matter that can be confined to or understood merely as a matter between an individual state and 'its' Roma minority. The challenges that minority issues, especially Roma-related ones, pose to the existing arrangements necessitate therefore the lifting of this "dialogue above the context of the nation-state, and the taken-for-grantedness of the concepts and principles associated with the nation-state" (Broderstad 2000:234). Even if the Roma thus far have no political rights or representation at the EU level, compared to representation at the level of the nation-state, the prospect of the EU as a post-national unit with more inclusive conceptions of identity and citizenship could become an important integrative force.

The integration process is based upon non-arbitrary norm-enforcement in which the same obligations are conferred upon all. This has unifying consequences as law is a medium for stabilising behavioural expectations.

(Eriksen 2003:3)

Deliberation at the EU level may thus contribute to generate and cement a sense of obligation towards the requirement of intercultural evaluation which commits each party not only to press its claims but to evaluate its own practices in light of the claims of the other.

A citizenship based polity

Habermas (1998) sees the EU citizenship's (and the rights that accompany it) framing within the universalistic language of rights as pointing towards a *post-national* conception of citizenship. Because the liberal principles of 'liberty, democracy, respect for human rights and fundamental freedoms and the rule of law' are 'principles which are common to the member states' (TA F1), the EU's simultaneous respect for both 'fundamental rights' (TA F2) and 'the national identities of the member states' (TA F3) is assumed not to create tensions (Bellamy 2000:99). Within the EU it ought to be possible to sort out conflicts between the latter within the context of agreed procedures and norms stemming from the former. This thesis has been put forward most forcefully by Habermas via his use of the concept of a 'constitutional patriotism'. The dynamic aspect of European citizenship, being extended in every Treaty change and co-evolving with national developments, is furthermore "held to be reflecting an ongoing process of establishing a more open, just and democratic community of citizens" (Eriksen 2004:15). With such an understanding of the EU citizenship and the EU as an evolving post-national order, it becomes obvious that the emergent European polity can only rest on a shared commitment to rules and procedures perceived as fair and efficient, on the principle of toleration and institutional guarantees of respect for diversity, i.e. non-discrimination.

The logic of democratic procedure and respect for human rights "requires the steady abandonment of a naturalistically constructed population" (Pensky 2000:67). Non-discrimination is therefore an approach with no legal-institutional distinctions attached to the ethnic (race, descent, nationality, language, and religion) affiliation of citizens. On this view, our freedom and equality as citizens refer only to our common characteristics – our universal

needs, regardless of our particular cultural identities, for 'primary goods' such as income, health care, education, religious freedom, freedom of conscience, speech, press, association, due process, the right to vote and the right to hold public office. The form of government that emerges from the human rights instrument is liberal in character in that democracy is defined and structured within the limits established by individual human rights norms. The non-discrimination principle can be understood to both protect and enable the universal ideal of autonomy and has been described as 'the ground level of the equality principle', focusing on in abstracto equal treatment, i.e. formal equality (Henrard 2000:59).

Damian Chalmers (2001:196-198) further argues that the deontological status given to individual choice and autonomy by the non-discrimination principle pushes for the non-discrimination principle to be regulated at a cosmopolitan level. The promotion of non-discrimination as a general human right is applicable to all persons, in contrast to specific minority rights that, as we saw, can be restricted to national citizens. The implications of the non-discrimination principle's territorial reach thus results in it being something that precedes and transcends any territorial, administrative action. Moreover, local action can always be constructed as something which potentially restricts and threatens individual choice. This leads to arguments for regulation of the regulators through the creation of new more cosmopolitan layers of government which will assess the extent to which the formers' behaviour restricts choice.

The universalistic value orientations required by the constitutional state thus develop according to a logic that invariably brings them into conflict with the particularistic, substantive form of identity required by adherence to a specific nation or national tradition. But 'constitutional patriotism' as developed by Habermas depends on a normative distinction between national identity as a primary disabling condition for cosmopolitan democracy and cosmopolitan forms of solidarity generally, on the one side, and cultural identity as an enabling condition for subjects accommodating themselves to democratic procedures in plural states on the other. It can be argued however that 'cultural identity' is "just as constructed, just as artificial, and indeed just as contingent on the shifting political currents tending towards a globalisation of politics" (Pensky 2000:68) as 'national identity' is believed to be. The implied particularism and arbitrary limitations on democratic solidarity of cultural

specificity should with this be criticised in the same way as national identity is.

...the political accommodation that Habermas would require of all cultural groups can only be achieved insofar as those groups are capable of adopting a de-centered, reflective attitude toward their own beliefs and practices – no matter how foundational those beliefs and practices may be.

(Pensky 2000:71)

Political accommodation, in other words, provides individuals with context-transcendent criteria for the evaluation of traditional contexts that make a claim to holism, i.e. political accommodation entails cultural accommodation.

A negative minority

Regardless of how we theorise about the issue, though, it is a matter of fact that group membership is politically relevant and that the relevance of such membership is by no way cashed in uniformly; in some cases membership is accompanied by privileges, in others by huge burdens. The consequence of membership in a marginalised ascriptive group for individual identity and agency are somewhat different from those of membership in non-marginalised groups or cultural communities; whereas the meaning of membership in the latter is defined from within the group's own history and values, the meaning of membership in a marginalised group is also (and sometimes only) defined from without (Williams 1996:96);

The various communities casually identified as 'Gypsies' or 'Roma' by the outside world have never conceived of themselves as belonging collectively to a single, let alone 'national', group. In the view of the diversity of communities involved, only one thing could be said to unite them – the fact that they 'look the same' or 'seem the same', to those who are labelling them.

(Pogany 1999:154)

Focusing on the elimination of discrimination and disrespect reinforces the formal equality of all. Avishai Margalit (1996) advocates with this for the negative recognition of cultural identity through the elimination of all forms of humiliation. According to Margalit the advantage of eliminating disrespect over the positive confirmation of respect is based on the cognitive assumption that it is easier to identify humiliating difference than respectful treatment. To

gain respect is a goal that cannot be reached directly; it is rather a product of certain actions and should therefore be seen as a by-product of general behaviour towards people. Only through indirect policies can certain values such as tolerance, equality and respect be reached, while non-humiliation, or non-discrimination, can be reached immediately. The deliberative defence of the non-discrimination principle as best suited to accommodate difference reflects the idea of protecting and promoting cultural and ethnic identities indirectly, through especially the promotion and protection of existing human rights. This could be characterised as a 'negative' variant of the theory of the recognition of cultural differences.

In defining minorities, there may be said to be two fundamental types: 'positive' (organic/voluntary) minorities which are constituted of associates for the purpose of pursuing a shared ideal or life plan which differs from those of the majority, and 'negative', or sociological, (non-organic/involuntary) minorities which are constituted of associates for the purpose of defining themselves against discriminatory treatment or other violations of human rights and, as such, seek to obtain fairness in their overall treatment and thus enjoyment of freedom. Negative minorities seek to achieve with this only the fundamental equality they have unjustly been denied and the cohesion of negative minorities typically dissipates once equality has been achieved because no other 'positive' basis of association functions to bind the group (Packer 1996:124). Within the deliberative approach there is no valid argument for providing minorities special attention based on merely substantive, positive claims to recognition aimed at protecting 'cultural difference'. Deliberative theory only supports mechanisms of group representation intended as corrections to distorted communication, meaning that it does not support such measures simply for the sake of recognising cultural diversity. Experience of the structural constraints, that is, 'political difference' is thus the only legitimate argument for providing minorities with special attention. This in turn limits the scope of minority protection to what is termed negative minorities. It may be argued that 'negative' associations should in no way be considered 'minorities' (in respect to the content of 'recognition') since they are constituted ultimately on the basis of violation of human rights. But, as mentioned, membership in a marginalised ascriptive minority group is politically relevant, and a distinction between what can be termed ethnic "difference" and ethnic "inequality" therefore becomes important.

Ethnic inequalities develop and exist when imagined or real ethnic differences are used as criteria or markers to exploit, oppress, discriminate or exclude people.
(Bader 1997:790)

The Roma are in accordance with the deliberative approach to be understood within such a context; they are a negative minority experiencing systemic discrimination that warrants special measures. These measures will, as discussed in chapter 3, be temporary in nature and are not meant to institutionalise ethnic differences at the political level. Such an understanding of the Roma concurs with the evolving post-national development of the EU. That the enlargement process has by some candidate countries and Roma political elites been seen as reinforcing a multicultural minority policy which prompts culturally differentiated membership can therefore be understood as an unintended consequence simply reflecting a 'neglect of semantic details' (Sedelmeier 2003:15). The overarching presence and legitimacy of the discourses on minorities during the enlargement, partly created by its 'securitisation', falsely related the term 'minority protection' used in the Copenhagen Criteria to what has been identified as positive minorities. In many of the EU discourses during enlargement the conceptualisation of the Roma as a 'minority' prevailed thus over other alternative ones such as for example a 'disadvantaged group'.

Citizenship qualification

Deliberative theory offers an attractive starting point for arguments in defence of group representation, not just because of its insistence on the importance of participation, but primarily, because of its insistence on conditions of openness and symmetry, and its emphasis on 'voice' rather than 'vote'. Effective progress on minority problems through dialogue presupposes, however, that minorities possess the resources and capabilities to formulate and voice their demands effectively.

Where this is not the case, where a minority is dispersed among several member states – both of which apply to the Roma – joint action is called for, and there would appear to be a role for the EU in support of initiatives by member states and NGOs.

(Amato and Batt 1999:42)

Even if the civil rights of the Roma are constitutionally guaranteed in most member states, they nevertheless face de facto discrimination and inequality. The experience so far suggests that legal frameworks guaranteeing human rights are a necessary but insufficient precondition for sustainable integration of marginalised minorities. Without development opportunities, legal rights remain hollow (Ivanov 2002). But despite it still being the case that “for many Roma it is their problems of low income, poor health and housing which are most politically salient rather than formal issues of equality or non-discrimination” (Gheorghe and Acton 1992), poverty and its consequences being among the most important systemic causes of exclusion and segregation, it remains important to bear in mind that many of the problems facing Roma have a cyclic nature; for example lower competitiveness in the labour market today is often due to discriminatory practices and limited access to education in the past and so on.

Erik O. Eriksen (1999:225) argues that securing individuals with goods and commodities in order to make them active citizens can be justified as a collective goal. Policies aimed at providing a material basis for achieving real political freedom and enabling conditions of political citizenship, i.e. public autonomy, are seen as necessary to realize democracy and full citizenship, and are therefore understood to be in the best interest of all. This is so because the quality of collective decisions is affected by the ‘quality’ of the decision makers. The unequal distribution of goods and commodities decreases the quality of citizenship, as fewer are able to participate on equal terms in the process of public deliberation. Minority protection can help to repair or restore autonomy, as they enable people to participate in a complex society. Minority policies can in principle thus be legitimated as *politics of citizenship qualification* (ibid: 226).

..given that for a deliberative democrat the legitimacy of the law is a function of its rational acceptability to all those who are affected by it, an interest in the legitimacy of the law justifies an interest in guaranteeing that the diverse social groups that are affected by legislation are adequately represented in it. The transition between the premises’ interest in individual representation and the conclusion’s defence of group representation is usually mediated not only by the familiar sorts of considerations that move us generally from direct to representative democracy, but, more specifically, by arguments concerning the de facto relevance of group labels.

(De Greiff 2000:404).

Society has for generations projected a demeaning image of the Roma, which some of the Roma have furthermore been unable to resist adopting. Their own self-depreciation, on this view, becomes one of the most potent instruments of their own oppression (Taylor 1994:34).

...health and stability of a modern democracy depends not only on the justice of its basic institutions, but also on the qualities and attitudes of its citizens; e.g. their sense of identity, and how they view potentially competing forms of national, regional, ethnic or religious identities; their ability to work together with others who are different from themselves; their desire to participate in the political process in order to promote the public good and hold political authorities accountable; their willingness to show self-restraint and exercise personal responsibility in their economic demands, and in personal choices which affect their health and the environment. As Habermas notes, 'the institutions of constitutional freedom are only worth as much as a population makes of them'.

(Kymlicka 2002:285)

Williams (2004) argues that rather than relying on a passive hope that citizens will embrace these principles, liberal democracies should actively endeavour to inculcate such commitments through processes of democratic education and suggests with this a model of citizenship as “membership in a community of shared fate”.

Here, the idea is not that membership entails a shared identity with any particular content, but comes by virtue of being entangled with others in such a way that one's future is tied to theirs...When coupled with a rudimentary conception of democratic legitimacy, that we should be able to justify our actions to those who are affected by them, the notion of a community of shared fate can yield a pragmatic conception of the boundaries of membership that is freed from the pernicious tendencies that are inherent to notions of citizenship as identity.

(Williams 2004:2)

She argues that institutional linkages, particularly those that have hitherto secured the functions of democratic self-rule and self-protection, are important sources of shared fate as well as material linkages, whether in the form of economic interdependence, environmental impact, or natural resource access and use.

Citizens of the European Union

Based on the characteristics of ethnicity, political participation, political autonomy and concerns for social and political unity in the EU it has been argued that the deliberative approach to minority protection is best suited to face the challenges European Roma face today. Because national and ethnic cultures are neither necessary ingredients for the democratic process, nor central to liberal theory, and the emergent European polity can only rest on a shared commitment to rules and procedures perceived as fair and efficient, on the principle of toleration and institutional guarantees of respect for diversity, i.e. non-discrimination, the Roma should be understood as citizens of the EU, rather than a minority 'of' or 'within' the EU. Within such a perspective the Roma claim for non-discrimination and respect of their human rights can be met. Their claim for recognition as a 'non-territorial nation' with representational rights in accordance with the multicultural approach will however be rejected on both empirical, but most importantly normative grounds.

Chapter 6

Towards cosmopolitan incorporation?

The Draft Treaty and other developments

The convention for the Future of Europe, in which candidate countries participated, did not go beyond the existing provisions of the TEU and the Charter in articulating a clearer minority protection policy in accordance with the multicultural approach, though several proposals to the Convention of Europe requested institutional arrangements guaranteeing direct involvement of minorities at the EU level⁶⁵. But the Draft Treaty establishing a Constitution for Europe contains three principles as part of the 'democratic life' of the Union that may be of great importance for politically marginalised minorities: (1) democratic equality (2) representative democracy and (3) participatory democracy. Article 44 provides:

⁶⁵ See contribution CONV 580/03 submitted to the European Convention. According to this proposal the number of representatives and their ethnic proportions would be determined by the Council by unanimous vote based on statistical information about autochthonous minorities living in Europe. Member state governments should appoint representatives to the CONEM from the members of their respective minorities, which are citizens of that state. The proportions of representatives between minorities should be determined according to the principle of positive discrimination, giving the right to each minority which amounts to 15 000 members in a state to have a representative. The number of representatives would increase by each 100 000 members of a minority group to an upper ceiling of maximum five representatives to keep the limit size of the CONEM. The proposal says that it would be desirable to set the ceiling of minority representatives at 250.

In all its activities the Union shall observe the principle of the equality of citizens. All shall receive equal attention from the Union's Institutions.

The fact that only equality of citizens is explicitly mentioned in art 44 reflects an individualistic concept of democracy (Peters 2004:43). Article 45(2) further reflects the common idea of dual legitimacy of the Union; the European citizens are directly represented at Union level in the EP, whereas member states are represented in the European Council and in the Council of Ministers. Most significant though is maybe the introduction of the principle of 'participatory democracy' which clearly reflects the ideal of deliberative democracy by giving citizens and representative associations the opportunity to make known and publicly exchange their views concerning all areas of EU action within the framework of the EU institutions themselves. The purpose of this is according to the Praesidium's comment "to provide a framework and content for the dialogue which is largely already in place between the institutions and civil society" (CONV 650/03). Article 46(4) is furthermore of great importance to minorities, especially transnational ones like the Roma, as it introduces a clause on citizens' initiative:

No less than one million citizens coming from a significant number of Member States may invite the Commission to submit any appropriate proposal on matters where citizens consider that a legal act of the Union is required for the purpose of implementing the Constitution. A European law shall determine the provisions for the specific procedures and conditions required for such a citizen's initiative.

Three other important EU-methods; the Open Method of Coordination (OMC)⁶⁶, impact assessment and mainstreaming⁶⁷, could also turn out to be of great importance for minorities in that they may improve the quality of decisions, though their democratic value is missing and they do not amount to popular rule. OMC aims at encouraging cooperation, the exchange of best practice and agreeing on common targets and guidelines for member states to compare their efforts and learn from the experience of others (Brusis

⁶⁶ The method was first applied in the 'Lisboa process' on the modernisation of social and employment policies and was extended to migration policies in 2001.

⁶⁷ Mainstreaming of for example equality is "the principle that equality be seen as an integral part of all public policymaking and implementation, rather than something separated off I a policy or institutional ghetto" (McCrudden in Shaw 2004:5).

2003:16). Impact assessment and mainstreaming are techniques involving pre-decision scrutiny of the impacts of legislation and policy decisions. When talking about recent EU efforts to improve the situation of the Roma people Odile Quintin⁶⁸, states that “mainstreaming the concerns of Roma people into all European policies is crucial”. This was also further emphasised in the European Commission’s report on the situation of the Roma in an enlarged EU;

The European Union should ensure that all policy stakeholders understand the concept of “mainstreaming” and act adequate to the level of need to ensure that all policies include Roma mainstreaming components.

(European Commission 2004a:49)

Of significance in giving impact assessment more than mere rhetorical force is the emphasis placed in the Commission’s statements about this approach on the importance of consulting with interested parties, and thus linkage with civil society and participatory democracy. It is also therefore of significance that the Draft Treaty proposes the introduction of the principle of ‘participatory democracy’ as part of the ‘democratic life’ of the Union because this transforms mainstreaming from a technocratic tool to an institutional manifestation of deliberative democracy (Shaw 2004:8). Considering the possible interaction of the mainstreaming approach and OMC the soft pressure exerted by peer reviews and the good examples of other member states could induce governments to increase their efforts to protect the equal rights of marginalised Roma communities. It is important though to note that OMC has not been formally ‘constitutionalised’ in the Draft Treaty. There was no consensus on this matter in the Convention, although it was discussed on several occasions in the Praesidium. This means that “OMC remains a very ‘flexible’ and indeed ‘open’ method, subject to political considerations above all” (Shaw 2004:34). Though methods lack as mentioned democratic value, but they may enhance the problem-solving capacity and rationality of the EU when dealing with Roma related issues and as such have epistemic value. They may hence compensate for the lack of influence, but will not substitute it.

⁶⁸ Directorate General for Employment, Social Affairs and Equal Opportunities, The European Commission

One should furthermore think of measures at the political level such as the introduction of a separate heading in the respective annual reports on Human Rights of the Council and the Parliament focusing exclusively on the protection of structurally marginalised minorities in the member states. Such a soft reporting of the institutions “might help overcome at least partly the vacuum left after the sudden end of the monitoring exercise carried out by the Commission over the last years vis-à-vis the applicant states in the course of the accession process” (Toggenburg 2003:280)⁶⁹. A further development and useful institution in this context would be an EU Minority Ombudsman, reporting to the European Parliament on positive experiences and ‘best practice’ among member states, as well as investigating the complaints of individuals and minorities collectively (Amoto and Batt 1999:6).

Roma participation

The minority protection framework within the deliberative approach responds to the acknowledgement that policy can be made not only legitimate, but also more effective, by including Roma within the policy-making and implementation process. The Commission (2002:8) notes however “a frequent problem...is the identification of the relevant interlocutors from the Roma communities”. A modern and democratic leadership legitimized by the constituency of a formal organization is an ideal not yet well rooted in Romani communities;

The Roma are a traditional people, whose leadership has typically been vested in informal, but powerful, extended family structures, a pattern reflecting their long-standing indifference toward public and political life and their reluctance to participate in it. While this arrangement may have been adequate in the past, it is no longer so. Rather, the relative absence of formal structures in the Romani community has been an obstacle to participation in the modern bureaucratic structures that increasingly characterize government and public administration.

(Migra and Gheorghe 1997:3)

Consequently, Romani elites are increasingly confronted with demands not only from the national and local governments of the states where they reside to demonstrate more unified leadership and more transparent representation,

⁶⁹ The recent decision by the European Parliament to reject the measure of post-accession monitoring with respect to Slovakia highlights the need to redouble efforts in this area (European Commission 2004:13).

as a condition for more efficient cooperation with the governments (PER 2001:7), organisations such as the EU voice the same request. Thus the Roma face the challenge of building formal structures of representation and participation. As it has been discussed, the inability to map the detailed contours of collective identity should not lead to the 'blindness' to the most salient claims of these communities. These salient claims should instead be valued and protected as shared political values insofar as they do not create conflicts with claims of other communities.

Recent attempts to formalise Roma representation at the European level have been made however. The European Roma and Travellers Forum, established in 2004 and given consultative status within the CoE⁷⁰, may fulfil such a role. The legal partnership agreement with the CoE will provide amongst other things for the establishment of relations with the various bodies of the CoE in the form of a hearing, participation at meetings or providing expert advice. The Forum is intended to be an autonomous body, independent of governments and inter-governmental organizations and it is encouraged to also seek consultative relations with other international institutions and organizations, as well as governments. The European Commission has so far shown a manifest interest in the creation of the Forum (European Commission 2004a:52)⁷¹. Young Roma leaders of the Roma Decade⁷² furthermore participated at the first meeting of the so called European Parliament Roma Forum (25 January 2005) organized by Katalin Levai, member of the Socialist Group at the European Parliament, and Valeriu Nikolae, director of European Roma Information Office (ERIO). This Forum addressed, amongst other topics, Roma in the media, announcing the commencement of a Pan-European Roma television station estimated to start in 2007.

⁷⁰ The idea of having a forum representing Roma communities in Europe was first introduced by Roma representatives in the early nineties. The idea took a more concrete form when in 2001 Mrs Tarja Halonen, President of Finland, in an address to the Parliamentary Assembly of the Council of Europe, proposed the setting up of some kind of a consultative assembly for the Roma on a European level.

⁷¹ Disability issues are for example mainstreamed with the Commission by The Unit for the Integration of People with Disabilities. It organises regular meetings with representatives from other DGs in the context of an Interservice Disability Group. The European Roma and Travellers Forum could function equivalently with reference to Roma related issues.

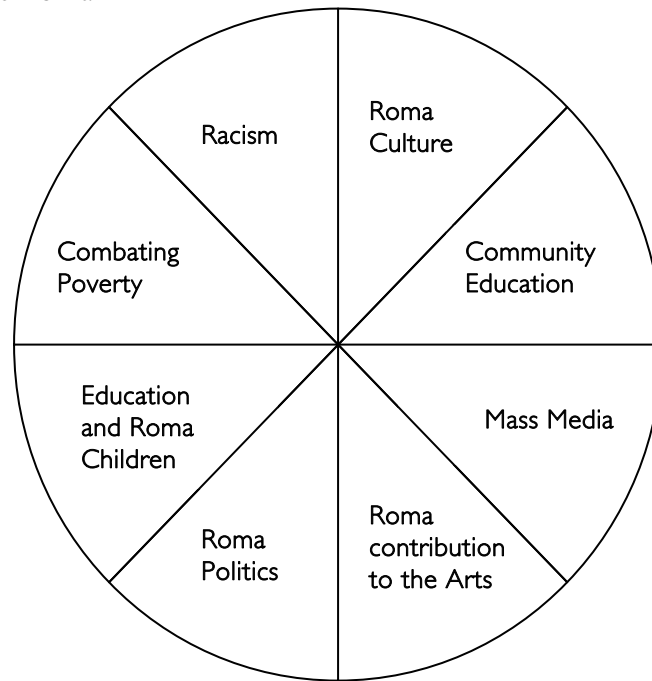
⁷² The Decade of Roma Inclusion, 2005–2015, is an initiative adopted by eight countries in Central and South eastern Europe, supported by the international community.

These forums may be a means of consolidating the different views of Roma groups into a single, majority voice. Whether their deliberations will result in the understanding and resolution of the Roma-questions on ethnic or civic terms remains to be seen. The fears of over-institutionalising Roma-EU relations and ignoring with this the existence of dissident views must however be taken seriously. A central concern will furthermore be whether such forums are able to establish relationships based on trust between Roma and gadje.

A Roma Integration Directive

Géza Ötvös' catalogue⁷³ (cited in Pogany 2004:12) of the problems facing the Roma, and of the means needed to address them, remains pragmatic.

Figure 1: Géza Ötvös' diagram depicting the principle problems of Romania's Roma



⁷³ Though he depicts the situation of Romania's Roma, the same can be said of a large majority of Europe's Roma.

So, although racism or a lack of political commitment on the part of the region's governments should not be discounted as important factors, Ötvös refuses to ascribe the problems of the Roma solely to these factors. His approach illustrates the need for a broadly-based strategy involving legislation, generous and well targeted schemes of social assistance, as well as innovative approaches in teaching. Poverty among Roma is a complex and multidimensional phenomenon related to poor health and educational status, limited chances in the labour market, discrimination, and unique aspects of Roma social organisation, which together contribute to their social exclusion. If these problems are not addressed there is a danger of Roma evolving into an ethno-class or underclass and thus perpetuating its marginality in society.

The scale of problems facing the Roma has led to a proposal that the EU adopt a 'Roma Integration Directive'. In its 'Report on the Situation of Fundamental Rights in the European Union for 2003', the EU Network of Experts in Fundamental Rights⁷⁴ recommended the adoption of a directive specifically aimed at encouraging the integration of Roma (2004b:103). The Commission's report on the situation of Roma in an enlarged EU agrees with this proposal as it believes that

...there is sufficient evidence to support the conclusions of the EU Experts...and that without such a Directive, there will not be sufficient impetus for EU Member States to integrate Roma and other groups regarded as 'Gypsies'.
(2004a:45)

But as the report further states

It should be acknowledged, however, that this proposal raises a number of legal and practical questions. Firstly, to what extent could the challenges identified be addressed by better implementation and enforcement of existing European and national anti-discrimination legislation? Secondly, is it desirable to propose or adopt legislation targeting one specific ethnic minority, as opposed to a general treatment that may benefit all minorities?
(ibid)

⁷⁴ The EU Network of Experts on Fundamental Rights was established by the European Commission at the request of the European Parliament and charged with monitoring fundamental rights in the Member States and in the Union.

As this thesis has tried to show, the answers to these questions also have an essential normative dimension. Based on a discussion of the characteristics of ethnicity, political participation, political autonomy and concerns for social and political unity in the EU, chapter 5 concluded that a further development of the deliberative model and its emphasis on cosmopolitan incorporation are central to the *desegregation* of the Roma. The answer to the first question would therefore be that the Roma challenge should be addressed by not only better implementation and enforcement of the non-discrimination principle, but also further development of European citizenship with the amendment of the Draft-Treaty. This would reinforce the prospect of the EU as a post-national polity with more inclusive conceptions of identity as well as strengthen the Charter's contribution to cosmopolitan democracy⁷⁵.

Though Roma issues, as discussed in this thesis, are complex and seem to pose unique dilemmas for the EU, the deliberative approach to minority protection requires that protection of minorities should act consistently according to "purely formal principles, rather than tailoring forms of recognition and allocating rights on a context-sensitive basis" (Pensky 2000:68). A deliberative reading of the non-discrimination principle allows, however, measures that aim for a more substantive or real equality in the sense that it does not prohibit differential treatment when it has a reasonable and objective justification. The answer to the second question must therefore be that the EU should promote a universally generalisable approach to minority related issues based on removing or compensating for undeserved or morally arbitrary disadvantage. The second question becomes with this one related to structurally disadvantaged groups, or what was identified as negative minorities in the previous chapter, a status the Roma are unfortunately not the only ones to hold.

The European Union: unity in political togetherness

Manifest expectations to the EU expressed by Roma communities during the enlargement process, as well as the EU clearly articulating aspirations to represent not only stability and prosperity, but also democratic values, confirm that the EU is at least perceived, both by itself and by its citizens, as being more than a mere intergovernmental problem-solving unit driven by interest-maximisation. This thesis has furthermore argued that in normative

⁷⁵ See Eriksen (2004) and Fossum (2003).

terms the EU requires a deliberative minority policy, and evidence that there are ‘actualities’ fostering such an approach within the EU, in empirical terms, has also been given. The EU’s status as a political entity is however contested. An issue-specific study of minority policies is not sufficient to identify in what direction the EU, as a whole, is most likely to develop, even more so when the range and depth of minority protection is still contested. The constitutive norms an EU minority policy can build upon showed that overarching conceptions of the EU coincide with both a regulatory entity based on transnational structures of governance and a rights-based post-national union. The conditions for accession reaffirm, however, the EU as a liberal democratic order and together with the amendment of the Draft-Treaty, including the Charter, they clearly have the potential of shifting the focus from the EU as a mere regulatory regime to a union of citizens built upon shared values and binding universal norms.

Minority issues, especially those related to the Roma, furthermore bring to the fore important discussions surrounding the consequences of taking cultural identity into consideration when devising just polities. It has been argued that it is crucial to secure the participation of structurally marginalised minorities, such as the Roma, as the epistemic advantage that these minorities enjoy enables their representatives to reveal aspects of institutional life in the polity that the majority would otherwise ignore, such as for example the taken-for-grantedness of the concepts and principles associated with the nation-state. Deliberation increases legitimacy therefore not only because it includes affected parties and gives them a chance to argue their case, but also because it fosters critical opposition to deficient political systems.

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