Conditionality and its misfits
Non-discrimination and minority protection in the EU enlargement process

Guido Schwellnus
Institute of European Studies
Queen’s University of Belfast
14 Lennoxvale
Belfast BT7 1NN
Northern Ireland/UK
g.schwellnus@qub.ac.uk

1st Draft
March 2002
Please do not cite without permission

Introduction

This paper addresses variation among applicant countries with regard to institutional adaptation of norms included in the EU’s policy of conditionality. It argues that the Union’s reactive approach together with ill-defined accession criteria can lead to institution building in the applicant states not compatible with EU norms and rules. The paper aims at reversing two shortcomings in recent research on enlargement: First, it counters omitted variable bias by highlighting the importance of intersubjective meaning when assessing the impact of norms in different contexts. Second, it addresses case selection bias by including cases that are often treated as unproblematic. To that end, it examines the implementation of minority protection in four applicant countries: Romania, Slovakia, Hungary and Poland, before analyzing the Polish case more in-depth.

The paper proceeds in three steps: First, it starts with the observation that two different norms exist to ensure minority protection: general non-discrimination and special minority rights, either in individual or collective form. While non-discrimination has developed into a well-established EU standard, special minority rights are neither embedded in the *acquis communautaire* nor a common practice shared by the member states. Nonetheless, the EU insisted in the Copenhagen criteria on minority protection that – although not well defined – clearly called for measures beyond general non-discrimination. This raises the question how the membership conditions are implemented in the CEECs, and to what extent the EU, other international organizations such as the OSCE and the Council of Europe, or internal factors account for the institution building in the applicant countries.

Second, the paper sketches the implementation of non-discrimination and minority rights legislation in four applicant countries: Romania, Slovakia, Hungary and Poland. The EU has addressed Romania and Slovakia as “problematic cases” with regard to minority protection. Both have, after governmental shifts towards democratic and pro-European parties, introduced individual minority protection and have initiated comprehensive anti-discrimination laws, after the EU has addressed the issue as a matter of minority protection, especially with regard to the situation of Roma. Hungary and Poland, on the other hand, were assessed as fulfilling the political criteria throughout the accession process. Whereas both have developed significant and partially collective minority rights provisions without
considerable EU pressure, anti-discrimination legislation is largely missing, leaving these countries still out of line with the EU acquis.

Third, the paper conducts an in-depth case study of Poland, tracing the drafting process of the Constitution as well as the work on the Draft Law on National and Ethnic Minorities and the ratification of the Council of Europe’s Framework Convention on the Protection of National Minorities, with a view to establishing the determining factors of the domestic construction of the minority norm, putting special emphasis on the deliberation over different minority concepts, the use and effect of European norms and EU conditionality in the process, and the role of legal advisors forming an epistemic community to help bring the Polish legislation in line with European norms.

**Eastern Enlargement as Socialization – Three Omissions**

In recent years, EU enlargement has become a new research area for IR theorists concerned with the role of norms in international relations. After initially addressing the question of why the EU (as well as other Western organizations) decided to enlarge towards the East and finding that liberal democratic norms constituting the collective identity of the Western community were a key variable in explaining the outcome,¹ the focus has now shifted to questions about how the EU exerts “governance by enlargement”² in non-member states. Aiming to explain how the EU creates governance beyond its current membership, understood as a process of generating compliance with the EU’s rule system, research on enlargement has been linked to the wider agenda of international norm compliance and socialization.³ The literature suffers, however, from three omissions, which will be addressed in this paper: the meaning of the norms in question has not been problematized, the role of specialists in the process of domestic norm construction and interpretation has not been addressed sufficiently, and the focus has so far been exclusively on “problematic” countries, missing the effects of conditionality on advanced applicants.

² Schimmelfennig and Wolf 2000. See also Friis and Murphy 1999; Iankova 2000; Wiener 2000.
The forgotten meaning: construction, contestation and interpretation of norms

Starting from the assumption that international socialization is “the process by which states internalize norms originating elsewhere in the international system”, socialization studies typically assume a sharp distinction and structural asymmetry between norm-makers and norm-takers (Schimmelfennig 1994; 2000). Since the focus is on the process of norm transfer, the norms itself are considered to be pre-given and stable. Applied to EU enlargement, this view appears to be reinforced by the structural conditions of this particular socialization process, most notably by three characteristics: the material superiority of the West, allowing its organizations to insist on pre-determined, non-negotiable accession criteria; the normative hegemony of Western norms, to which no legitimate alternative exists; and the ability of the Western community to provide authoritative interpretations of these norms. Consequently, EU enlargement is conceptualized as a transfer of pre-determined, non-negotiable rules and norms based on a policy of conditionality or “reactive reinforcement”.

While this view seems to capture well the approach taken by the EU, the assumption that the accession criteria are clearly defined, stable and common knowledge shared by all actors involved is problematic (Shannon 2000, 297), for it fails to account for variation in the meaning of norms. This can be referred to as an “ontologization of norms, i.e. the assumption that, once a norm is identified, its meaning is no longer in question.” Although norms might be consensually shared, they often allow for differing interpretations or are contested in their meaning (Katzenstein 1993, 286). Thus, the transfer of norms can lead to cross-national variation, because “the common imposition of a set of rules will lead to widely divergent outcomes in societies with different institutional arrangements.” Under such circumstances, the mediation of meaning through communication (Wiener 2001a, 91ff) between the European and the domestic level of applicant states becomes crucial. Moreover, in the absence of clear definitions, demands, teaching efforts or templates given by the EU, the

---

4 Alderson 2001, 417. For a similar definition see Schimmelfennig 2000.
5 Two main reasons can be identified: First, the primary intention is to show that and how “norms matter”. Therefore it seems natural to focus on well established, strong and well defined norms rather than on weak or contested ones, for they are likely to have the stronger impact (Legro 1997, 34f). Second, this impact is mostly conceptualized as being causal, rendering the norm an independent or intervening variable that has to be kept constant (Checkel 2001b, 11).
6 Engert et al. 2001; Schimmelfennig 2000; Checkel 2000b.
7 Wiener 2000, 13.
focus shifts to the question, whether and how norms that resonate with the European level are constructed at the domestic level of the applicant states.

This argument may be countered by stating that the EU remains in control through its ability to interpret the accession rules authoritatively and thereby fix their meaning (Barnett and Finnemore 1999), and keeping criteria vague and extending them successively only enhances the Western bargaining power. While this is true in principle, this potential has to be actually realized to be effective. In other words, whether in advance or during the process, the EU has to confront the applicant states with explicit demands, concrete solutions or specific models to emulate. However, studies in various fields have shown that especially when it comes to the fundamental political criteria, the EU has been rather reluctant to promote specific models and does not offer clear and unambiguous templates due to its internal diversity.\(^9\) Additionally, conditionality is a rather blunt weapon, which can be used primarily to punish major deviations, while “it is not a precise instrument that can target complex changes in institutional frameworks.”\(^10\) The power of interpreting the accession criteria rather freely might therefore be a powerful tool when it comes to deciding actual accession; its influence is nonetheless highly compromised in producing norm-compliance and convergence among the applicant countries.

\textit{The forgotten pathway: epistemic communities and socialization}

The mechanisms or pathways, through which norms are transferred from the European level to applicant countries, can be roughly categorized along two dimensions: first, whether they follow a top-down or a bottom-up logic, and second, whether they are based on rationalist/instrumentalist or on more sociological/constructivist arguments. Top-down processes include from a rationalist perspective the reaction of governments in applicant states to external incentives, be they material or social (Engert et al. 2001; Kelley 2000), while constructivists stress normative persuasion (Checkel 1997; 2001b) or imitation (Kyvelidis 2000) at the elite level.

Bottom-up processes rest on societal pressure and mobilization. In rationalist accounts, the salience of Western norms in the societies of applicant states is transformed into compliance

\(^10\) Grabbe 2001, 1020.
at the elite level via interest group pressure and elections. Constructivist authors also stress the importance of strategic action in bottom-up mobilization processes, but focus on “norm entrepreneurs” (Finnemore 1996a; Finnemore and Sikkink 1998) or “advocacy coalition networks” (Keck and Sikkink 1998) acting out of principled commitment rather than for instrumental reasons. When norms are unclear or contested, and when the mediation and interpretation of meaning rather than the mobilization against reluctant state elites is needed, transnational actors might predominantly play another role in the socialization process, namely as knowledge-based “epistemic communities”. While this mechanism has been introduced to socialization studies (Schimmelfennig 1994, 344), it has so far not been systematically applied to enlargement. Rather than mobilizing against norm-breaching governments, legal specialists, often based at domestic and transnational NGOs are actively included in the domestic process of norm construction, since they can provide the expertise to interpret European norms.

Furthermore, epistemic communities do not only help applicant countries interpret European norms, but also provide the EU Commission with the relevant information for its assessments of the progress made by the applicant states. Thus, the interpretative process works in both directions, so that epistemic communities can act as the crucial mediating link between the EU and the applicants, when it comes to constructing domestic norms resonant with the EU context. However, the influence of epistemic communities relies on favorable domestic conditions: experts depend on the demand for expertise on European norms by political elites as a precondition for even being included in the process. Nevertheless, these actors can prove crucial to overcome uncertainty in the absence of clear obligations and models.

The forgotten countries: problematizing “unproblematic” cases

One reason for the absence of epistemic communities in the enlargement literature so far is a bias in the case selection, triggered by neglecting variations in the meaning of norms.

13 Although the focus here is on domestic and transnational NGOs, international organizations such as the Council of Europe and the OSCE can also function as epistemic communities. Such a view therefore rejects the idea that EU membership incentives and CE or OSCE persuasion attempts are competing socialization mechanisms (Checkel 2001b; Engert et al. 2001; Kelley 2000): they are complementary and mutually dependent. For the role of the OSCE High Commissioner on Minorities as a “mediator” giving “expert advice” see Ratner 2000; cf. Engert et al. 2001, 24.
Typically, case studies examine cases with “mixed” conditions, i.e. countries in which conditionality or persuasion by Western organizations can make a difference, but which also have problematic domestic conditions and at least initially do not comply with the norms in question. The aim is to explicate, through which mechanisms and under which conditions socialization is effective and a change in the norm-violating behavior is achieved. The front-runners among the applicant countries, on the other hand, with their clearly pro-Western attitudes embedded in both elites and society are viewed to undergo a quite smooth and theoretically less interesting process of self-socialization, so that conditionality as well as persuasion is largely redundant (Schimmelfennig 2000, 133; Checkel 2000b, 16).

Such a case selection is reasonable, if norms can be understood as pre-defined and commonly known, and the focus is on switching behavior from non-compliance to compliance. However, the inclusion of meaning as a variable under the conditions of ill-defined accession criteria and reactive reinforcement leads to a different conclusion, since “problematic” countries are under much more adaptational pressure and more likely to be directly addressed by Western organizations, confronted with specific demands, and offered definitive solutions than “unproblematic” countries, which are perceived (and perceive themselves) as largely fulfilling the criteria and therefore have much more leeway in developing their own interpretation of norms.

In effect, the selection of “problematic” cases in a way partially creates one of the preconditions for the studies: clear and explicit demands for the compliance with a norm (or an interpretation of a norm) or the adoption of specific measures. The conditions highlighted in this paper, on the other hand, are more likely to be found in “unproblematic” cases. In extreme cases, the outcome might be the paradoxical situation that the EU’s approach to enlargement by reactive reinforcement can lead to institution building in the more advanced applicants not in line with EU rules and norms, or at least greater difficulties in aligning their institutions and laws to the EU.

In sum, this paper proposes three main arguments: First, variation, interpretation and contestation of meaning is an important, yet largely neglected variable for studying the socialization of EU applicants to European norms, especially given the reactive approach of the EU. Second, these conditions highlight the domestic construction of the meaning of

14 Schimmelfennig 2000, 134; Engert et al. 2001; Kelley 2000; see also Risse et al. 1999.
European norms in the applicant countries and the influence of epistemic communities in establishing such meaning. Third, these conditions and processes are more likely to be found in advanced candidate countries, which have so far been treated as largely unproblematic.

Non-Discrimination and Minority Rights in the Enlargement Process

The norms scrutinized in this paper regard the protection of minorities, which has acquired an immensely important role in the Union’s external relations after the end of the Cold War, where it was included in the guidelines for the recognition of new states after the break-up of Yugoslavia, the second wave of Europe Agreements with Central- and Eastern European Countries and the Stability Pact for South-eastern Europe, and most significantly the political accession criteria spelled out at the Copenhagen European Council in 1993.

In order to include meaning as a variable into the analysis, one has to go beyond treating the protection of minorities as one single, clear-cut norm, compliance with which can be measured along the lines of “yes/no” or “more/less”, and include different concepts that can be invoked as a means to protect minorities. For analytical reasons, this paper distinguishes between non-discrimination, especially on racial and ethnic grounds, and special minority rights, which can be further differentiated in individual and collective minority rights.

It has to be stressed, however, that these concepts are not mutually exclusive, but overlap and form endpoints on a continuum. Only a formal reading of non-discrimination precludes any special minority rights, while a more substantive interpretation focusing on de facto equality can accommodate positive measures in favor of minorities. Furthermore, both principles can be seen as complementary to accomplish a comprehensive protection of minorities.¹⁵ Still, a tension can be assumed between the ideal-typical concepts of liberal-individualist non-discrimination and positive minority protection based on collective rights, so that actors clearly favoring one concept can be expected to be reluctant or negligent to develop norms according to the other concept.

Non-discrimination

Non-discrimination is a cornerstone of predominantly liberal human rights instruments, most notably the Council of Europe’s European Convention on Human Rights (ECHR) and the United Nations’ International Covenant on Civil and Political Rights (CCPR). Article 14 ECHR contains a general non-discrimination clause, also aimed at national minorities: “The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.” The CCPR also contains a general non-discrimination clause in Article 26, but adds a specific provision on national minorities in Article 27: “In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of the group, to enjoy their own culture, to profess and practice their own religion, or to use their own language.” Both formulations under certain circumstances allow, but do not require positive state support for minorities.

Non-discrimination also can be regarded a well-established norm at the EU level. Its development started when the European Court of Justice (ECJ) established a competence for human rights issues within its case law, which was codified in the Maastricht Treaty with the introduction of Article 6/2 TEU. Since the Amsterdam Treaty, the non-discrimination framework has been expanded to include ethnic and racial discrimination: Article 13 TEC 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”. On this basis a Framework Directive on equal treatment in employment and occupation (Directive 16 ECHR Art. 14, cit. in Ghandhi 2000, 196. This provision is accessory and only to be invoked in combination with another provision of the Convention. Recently, however, Protocol 12 has been adopted (although it is not yet in force) which elevates the formulation of Article 14 to a generally valid non-discrimination clause. 17 CCPR Art. 27, cit. in Ghandhi 2000, 70.
18 Blumenwitz and Pallek 2000, 49; De Witte 2000, 10.
21 Art. 6, §2 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”.
and, more significantly, a Directive on the prohibition of discrimination on the basis of racial or ethnic origin (Directive 2000/43/EC) was adopted. Following international standards and the ECJ rulings regarding “affirmative action” in the field of gender discrimination, the directives contain a provision that allows for “measures intended to prevent or compensate for disadvantages suffered by a group of persons of a particular racial or ethnic origin”. This is also reflected by ECJ rulings which acknowledged that the “the protection of (...) a minority may constitute a legitimate aim”, which therefore does not in itself run contrary to the non-discrimination principle. Finally, the Charter of Fundamental Rights includes belonging to a national minority to the non-discrimination list, thus closely resembling the subsumption of minorities under the general non-discrimination principle in the ECHR.

The link between minority protection and non-discrimination can also be seen in the EU report on human rights 1999, which includes the formulation that “[c]ompliance with the principle of non-discrimination is an important element in the EU enlargement process. The European Council in 1993 included in the Copenhagen criteria that membership requires that the candidate country has established respect for and protection of minorities.” Moreover, within the enlargement context minority rights are framed as an integral part of EU norms in general and the fight against racism in particular. The EU-Commission’s communication on countering racism, xenophobia and anti-Semitism in the candidate countries stated with reference to the normative foundations of the EU laid down in Article 6 TEC: “The rejection of racism, xenophobia and anti-Semitism is an integral element of these rights. (...) The concept of respect for and protection of minorities constitutes a key element of combating...
racism and xenophobia in the candidate countries.” Thus, a clear connection was constructed between the fundamental rights shared by all Member States and constituting the normative basis of the Union, and the minority norm in the accession criteria.

In sum, non-discrimination is clearly and increasingly established within the EU *acquis communautaire*, and developing non-discrimination legislation in line with the *acquis* is a clear and well-defined obligation for applicant countries, not least as part of their efforts to comply with the minority norm, as constant reference to the discrimination of Roma in the Commission reports shows. It is also a clear and stable international and regional human rights norm. While interpretation of this norm is possible between a formal and a substantive reading of non-discrimination, with the latter one admitting positive measures in favor of disadvantaged persons in order to guarantee *de facto* equality, the authoritative interpretations of documents and courts in EU, Council of Europe and UN all have come to accept, but not demand such positive measures.

*Special minority rights*

By contrast, special minority rights have to be regarded a contested norm that is not consensually shared throughout Europe, despite considerable attempts of all major international organizations (UN, OSCE, Council of Europe) to develop a minority standard, and is susceptible to a wide range of interpretations, especially between individual and collective understandings of the norm. On the one hand, minority rights have after 1989 firmly been placed within the realm of human rights, by accepting that “respect for the rights of persons belonging to national minorities as part of universally recognized human rights is an essential factor for peace, justice, stability and democracy in the participating states”, and it was agreed that “[i]ssues concerning national minorities as well as compliance with international obligations concerning the rights of persons belonging to them, are matters of legitimate international concern and consequently do not constitute exclusively an internal affair of the respective State.” On the other hand, the realization of the importance of minority protection for international peace and stability has led to a renewed interest in the

---

development of collective minority rights, which are especially endorsed by some Central and Eastern European countries, most notably Hungary, but is rejected not only by CEECs facing minority problems, but also by liberal Western states, above all France.

The emerging activity to find international solutions together with the diversity of attitudes towards minority after 1989, particularly after the breakup of Yugoslavia, has led to a variety of instruments developed by international organizations. These documents include the UN “Declaration of Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities”\(^{33}\), the CSCE Copenhagen Document\(^{34}\) and the Council of Europe’s “Framework Convention on the Protection of National Minorities”\(^{35}\) (the only legally binding treaty among these instruments), and the Recommendation 1201 of its Parliamentary Assembly.\(^{36}\) Furthermore, the Central European Initiative (CEI), a loose association of mostly Central and Eastern European countries, has developed its own political minority instrument.\(^{37}\)

Some allusions to collective rights to preserve the existence and identity of national minorities are included in the CSCE Copenhagen Document, which notes that “the participating states will protect the ethnic, cultural, linguistic and religious identity of national minorities and create conditions for the promotion of this identity.”\(^{38}\) A stronger version of collective minority protection, including claims to territorial autonomy is included in Recommendation 1201 of the Parliamentary Assembly of the Council of Europe. However, since the provisions of the CSCE Copenhagen Document are unspecific and only politically binding, and the adoption of Recommendation 1201 as an additional protocol to the ECHR was rejected by the Council of Ministers because of its collective content, it can be concluded that collective minority rights are not an established international or European norm, while the most widely shared European norm beyond non-discrimination is embodied in the “positive individualist” (Lodzinski 1999) approach – i.e. the granting of cultural rights and positive state support to individuals belonging to national minorities – taken by the Council of Europe’s Framework

---

\(^{33}\) UN Doc. A/RES/47/135.  
\(^{34}\) Cit. in Bloed 1993.  
Convention, which seems to codify the highest achievable standard shared by at least the majority of European countries.\(^{39}\)

The diversity of minority protection models is also reflected in the EU and its member states and has by no means been solved by the inclusion of minority rights in the accession criteria. First, there is “a sharp contrast between the common regime of protection of fundamental rights (where there is considerable similitude between Western European countries) and the special case of minority rights which are still very much an idiosyncratic feature of certain countries or parts of countries”.\(^{40}\) Consequently, the EU has neither developed a minority standard beyond the principle of non-discrimination within the internal \textit{acquis communautaire}, nor do the member states subscribe to a single European standard. Second, the minority criterion remained ill-defined throughout the process, failing to develop even a clear and common standard for all the applicant states.

While in the first years after the introduction of the Copenhagen criteria the EU provided no clear interpretation of the norm at all, and in specific cases referred to various documents and recommendations by the Council of Europe and the OSCE, the Agenda 2000 specifies the minority standard expected to be fulfilled by the applicant states by pointing out that

“[a] number of texts governing the protection of national minorities have been adopted by the Council of Europe, in particular the Framework Convention for the Protection of National Minorities and recommendation 1201 adopted by the Parliamentary Assembly of the Council of Europe in 1993. The latter, though not binding, recommends that collective rights be recognized, while the Framework Convention safeguards the individual rights of persons belonging to minority groups.”\(^{41}\)

Subsequently, the Commission has developed in its annual reports a very broad understanding of minority protection, which was not defined by a single standard or a specific minority rights instrument. However, these developments did not lead to a unified minority standard, since it combined very different minority protection models, and was not applied to all candidate countries in the same way. For example, the importance of adherence to the collective minority provisions of Recommendation 1201 were highlighted in some cases, like

\(^{39}\) Cf. Blumenwitz and Pallek 2000, 45.

\(^{40}\) De Witte 2000, 8 [emphasis in original].

\(^{41}\) European Commission: \textit{Agenda 2000: For a stronger and wider Union}, COM(97) 2000 Vol. 1, 44.
Romania and Slovakia, while it was neglected in others, like Poland. So, in addition to the “double standard” problem between the internal and the external acquis with regard to minority protection (Amato and Batt 1998; De Witte 2000), the norms promoted also varied with the applicant countries, leaving the CEECs hardly with any clear obligation apart from the specific measures explicitly mentioned by the EU in the reports, accession partnerships, or other documents and statements.

While it could be argued that this incoherence leads to an overall lack of legitimacy of the minority norm in the enlargement process and therefore a lower “compliance pull” in comparison to the well established non-discrimination principle,42 the argument put forward here is that since “the EU’s condition on minority protection is open to variable interpretation and creates uncertainty over which commitments central European states still have to make in order to safeguard their accession procedures”,43 the EU’s policy of conditionality and reactive reinforcement combined with ill-defined and inconsistently applied criteria can lead to divergence among candidate countries and between the EU and candidate countries, even if it is effective and leads to the implementation of minority rights in the CEE states. The focus is not so much on whether conditionality succeeds, but on the effects on the domestic construction of minority norms.

**Problem Kids vs. Front-Runners: Romania, Slovakia, Hungary and Poland**

The following section sets out to give an overview of the implementation of non-discrimination and special minority rights in four applicant countries, based on the Commission’s assessments and NGO reports in order to provide a rough correlational accord, not a fully fledged comparative analysis. While Romania and Slovakia represent problematic cases with regard to minority protection, which have been put under both international pressure and concrete EU conditionality to comply with both norms, these issues have hardly been addressed with regard to the front-runner states Hungary and Poland, which have been assessed as fulfilling the political criteria throughout the accession process.

Therefore, the expectation is that at least potentially and dependent on domestic conditions, the advanced candidates show greater variation in the implementation of European standards

---

42 Franck 1990; cf. also Legro 1997. Other authors have, however, stressed the positive effects of “soft”, flexible and unprecise norms to ensure compliance: see Abbott and Snidal 2000; Chayes and Chayes 1993; 1995.
on non-discrimination and minority rights. It would thus, unlike theories stressing general norm-consistency and legitimacy, not necessarily expect that the non-discrimination norm in all cases fares better than the minority norm. It would also, unlike the existing socialization literature, not predict that the front-runners in both categories outrun the problematic cases in a pre-determined equilibrium outcome.

The Problem Kids: Romania and Slovakia

Romania and Slovakia display largely similar conditions with regard to non-discrimination and minority protection in the context of EU enlargement: Both countries have similar minority situations, with minorities constituting roughly 10 percent of the population and consisting mainly of territorially concentrated, well-organized and supported Hungarians on the one hand and dispersed, socially excluded and discriminated Roma on the other. In both countries EU membership has a high salience in society. After extended periods of authoritarian and nationalist rule, both countries were frequent targets of international organizations such as the Council of Europe and the OSCE High Commissioner on National Minorities with regard to their human and minority rights records, and in both cases explicit recommendations were often directly linked to membership incentives. Eventually, both countries were excluded from the first round of CEE countries opening accession talks with the EU, but “membership incentives contributed to positive changes in both Slovakia and Romania after the change of governments”\textsuperscript{44}, which replaced nationalist and authoritarian elites with democratic and pro-Western parties and the inclusion of parties representing the Hungarian minority, which was in both cases viewed as a signal towards the EU.

While the introduction of minority protection in both cases can be directly related to EU demands and incentives (Engert et al. 2001; Kelley 2000; Ram 2001; Vermeersch 2002), international pressure and conditionality failed, however, to induce a collective minority standard against the strong resistance of both countries. First, Romania’s and Slovakia’s accession to the Council of Europe was directly linked to the acceptance of Recommendation 1201, which was also included in bilateral treaties with Hungary each country signed, again

\textsuperscript{43} Vermeersch 2002, 86.
\textsuperscript{44} For a list of the issues including the involvement of IOs and the application of pressure and incentives cf. Kelley 2000.
\textsuperscript{45} Kelley 2000, 21.
under international pressure and EU conditionality, but both countries rejected the notion of collective rights and autonomy included in the document, Slovakia by issuing a unilateral explanatory note, Romania by insisting on an additional footnote to be included in the treaty. This re-interpretation was criticized by the Western organizations and by Hungary and the Hungarian minorities themselves, it could, however, be justified on the basis of the existing European standard as represented by the Framework Convention and was finally accepted.

In the end, domestic factors decided the minority concept applied. This is most visible in the Romanian case, where “the treatment of individuals rather than groups as the subject of minority rights legislation has been fairly consistent over the past decade”\(^\text{46}\), which can be explained by Constitutional preoccupations – based on the French model – and concerns about secessionist tendencies of the Hungarian minority. The latter factor also holds true in the Slovakian case. Still, the measures taken by Romania and Slovakia were in line with European norms and were positively assessed in the Commission reports.

In addition to special minority rights, the EU has also and increasingly addressed the issue of discrimination, especially with regard to the Roma. With regard to Romania, the 2000 report of the Commission concluded that “the treatment of minorities in Romania is mixed. The lack of progress with regard to tackling discrimination against the Roma is a subject which has been raised in previous regular reports but which has still not been adequately addressed. On the other hand, a series of progressive initiatives have greatly improved the treatment of other minorities.”\(^\text{47}\) Thus, the EU explicitly spelled out non-discrimination as a missing element in the Romanian minority protection system.

Romania responded to this assessment with the adoption of an Ordinance on the Prevention and Punishment of All Forms of Discrimination in November 2000, which “gives Romania the most comprehensive anti-discrimination framework among EU candidate countries”\(^\text{48}\), which includes many (but not all) aspects of the EU’s directive against racial discrimination and has been praised as a major development in the 2001 Commission report.\(^\text{49}\) Likewise, Slovakia has initiated the drafting of anti-discrimination legislation, after the issue was constantly and specifically addressed, confirming that “combating racial discrimination is

\(^{46}\) Horvath and Scacco 2001, 253.
\(^{48}\) Minority Protection in Romania. Report by the Open Society Institute, Budapest 2001, 393.
both a ‘prominent element of the political acquis in the EU’ and an element of the legislative acquis.” In effect, the explicit demand for anti-discrimination measures as a means to minority protection induced legislation that put Romania and Slovakia well ahead of much further advanced applicant states in this particular field. These developments, however, are also consistent with both countries’ domestic preoccupation with individual, not collective minority rights.

The Front-Runners: Hungary and Poland

The Hungarian minority rights system is unique in Europe, since it is the only minority protection system based primarily on collective rights. Guaranteed by the Constitution and centered on the Minority Act of 1993, it was well developed before the minority criterion in the EU accession acquis was formulated. Hungary has long been a promoter of minority rights and was in fact among the main driving forces to put minority protection on the international agenda after 1989. However, given the predominantly liberal-individualist character of the current European and global human rights standard, as well as the strong opposition against collective minority rights among some European countries, the Hungarian concept is not reflected in European norms.

Two main reasons account for the uniqueness of the Hungarian approach to minorities: First, the specific minority situation. Not only the mere existence of large external minorities, i.e. fellow-Hungarians constituting minorities in neighboring countries, together with a rather low percentage of internal minorities (Bartsch 1995; Preece 1998), but also the fact that the external minorities are predominantly concentrated territorially, while the internal minorities are dispersed, well integrated and to a large extent assimilated (Krizsan 2000, 247), amount to a strong incentive to promote collective rights. Second, the system is based on an intellectual tradition centered around the concept of “personal autonomy”, which was first proposed by Karl Renner as a model for the Austro-Hungarian empire and subsequently developed by Hungarian scholars (Ibid., 250ff). Thus, it is clearly domestic reasons, not European norms that were the driving forces behind the development of the Hungarian minority system.

However, as the level of minority protection in Hungary is perceived to go beyond European standards, this was praised, not criticized in the EU assessments.

Such a judgment is, however, not unproblematic, since the minority rights standard achieved by Hungary stands in stark contrast to its record on non-discrimination. The Hungarian Constitution includes a general non-discrimination clause, and several laws feature anti-discrimination clauses, but a general anti-discrimination law does not exist and, apart from being scattered, “Hungary’s anti-discrimination legal framework is largely inoperative.” The issue of discrimination, specifically with regard to the Roma population, has been repeatedly addressed by the Commission beginning with the initial accession opinion and throughout the annual reports. Furthermore, countering Roma discrimination has been included in the accession partnership.

These demands have not, however, been transposed into anti-discrimination legislation. Although a draft has been proposed by the Ombudsman for Minorities, the Minister of Justice in 2000 explicitly rejected the introduction of legislation in this field. Rather, the external pressure to implement anti-discrimination measures seems to have been “overruled” by the positive assessment of the minority system, so that demands on countering Roma discrimination have at least initially been re-interpreted and “diverted” into measures within the collective minority protection system. This was reinforced by the Commissions judgment that, despite the obvious legal shortcomings, Hungary had fulfilled its short-term priorities on the issue. Only in 2001 a committee was established to review existing legislation on the issue. Still, Hungary is lagging behind Romania and Slovakia with regard to the introduction of anti-discrimination laws.

The Polish record on non-discrimination legislation is even worse than the Hungarian. It is described as being “minimal” and falling “far below the requirements of the EU Race Equality Directive.” The Constitution includes only a very generic non-discrimination clause, and simple legislation, especially on racial discrimination is virtually absent. Still,

---

56 “Art. 32: 1. All persons are equal before the law. All have the right to equal treatment by the public authorities. 2. Nobody shall be discriminated against in political, social or economic life for any reason whatsoever.”
this issue has not raised much concern in the assessments by the EU Commission. The 2000 report contains only the lapidary statement (which finds itself in most of the other applicants assessments as well) that “[l]egislation transposing the EC directive based on Article 13 relative to discrimination on the grounds of race or ethnic origin have to be introduced and implemented”\textsuperscript{57} and in 2001 the report notes similarly unspectacular that “the transposition of this principle, including the anti-discrimination \textit{acquis}, has been limited.”\textsuperscript{58} Significantly, despite the legal shortcomings, the issue of non-discrimination was not connected to minority issues, especially the situation of Roma, which, contrary to the other cases, “has not been a focal point in Poland’s EU accession negotiations.”\textsuperscript{59} Ultimately, the low adaptational pressure on Poland in the non-discrimination area has contributed to the neglect of the issue in Polish domestic legislation.

In principle, these conditions also apply to the development of special minority rights, so that, like in the Hungarian case, at least the possibility of a unique solution and gross deviation from concepts established at the European level can be expected. Unlike in Hungary, Romania and Slovakia, however, no clear national preference for a specific minority model can be deduced. First, after an initial phase of mobilization, when the non-recognition of minorities from the communist era was lifted (Lodzinski 1999, 3), minorities remain a marginal political factor. This excludes both bottom-up mobilization and possible secession as a dominant factor. Second, unlike in the Hungarian case, the external minorities do not benefit extensively from collective international minority standards. Third, external demands by both international organizations and kin states of minorities, especially Germany, were fulfilled early on through bilateral treaties (Czaplinski 1998; Gal 1999) and legislative measures with regard to preferential representation and education. Throughout the accession process, the Commission considered the minority criterion fulfilled by Poland.\textsuperscript{60}

Given these unclear domestic conditions and the absence of explicit external pressure, since the initially established minority protection measures were judged to be sufficient, it comes as


\textsuperscript{59} Minority Protection in Poland. Report by the Open Society Institute, Budapest 2001, 345.

\textsuperscript{60} Cf. \textit{Commission Opinion on Poland’s Application for Membership of the European Union}. Brussels, 1997 and the subsequent annual reports.
no surprise that the further development of Polish minority legislation was slow and its meaning contested, although a principle consensus on the need of minority protection emerged quite quickly. Especially the of a minority law (which is still unfinished) and the ratification of the Council of Europe’s Framework Convention (which was signed in 1995 but only ratified in 2000) were lengthy processes, although this was hardly mentioned in the EU assessments: The Commission report stated as late as 2000 that “Poland has ratified the major Human Rights conventions with the exception of the Council of Europe Framework Convention on the protection of National Minorities (...) and has an established track record of providing appropriate international and constitutional legal safeguards for human rights and protection of minorities”.\textsuperscript{61} confirming that, unlike in the cases considered more problematic, the Commission did not put much emphasis on the recognition of international instruments.

On the other hand, Poland’s approach taken in the emerging minority protection system is normally described as following the principle of “positive support and protection of individual rights of persons belonging to minorities (positive individual approach ). (...) This methodology is based on OSCE and Council of Europe standards.”\textsuperscript{62} Given the possibility of divergent developments in the absence of clear adaptational pressures as showed in the non-discrimination case, this raises the question of how this resonance between Polish and European norms was created.

\textbf{Contested Meanings, Epistemic Communities and Domestic Construction of Norms: Tracing the Development of Minority Rights in Poland}

If the lack of adaptational pressure on advanced applicant countries enhances the role of domestic influences and highlights the possibility of enhanced variation when confronted with unclear European norms, the actual process, by which the “self socialization” of Poland to adopt minority rights consistent with European standards occurred, has to be addressed, instead of simply assuming a pre-determined structural equilibrium. To that end, the following case study conducts a detailed process-tracing of the development of minority norms in Poland, based on a qualitative content analysis of draft and final documents as well


\textsuperscript{62} Lodzinski 1999, 1; cf. also Bajda et al. 2001, 211.

The Constitution

The first, most profound legal issue with regard to minority rights in Poland was the inclusion of a minority article in the Polish constitution. Since the Round Table had produced only an interim solution based on amendments of the communist 1952 constitution, a consensus emerged rapidly that a new and coherent constitutional framework was inevitable. With regard to the situation of national minorities, this meant in particular that their status was still circumscribed by a rigid non-discrimination clause, which, taken at face value, prohibited any form of minority protection by the means of positive measures. After the first elections both chambers of the Polish parliament, the Sejm, in which still 65% of the seats had been reserved for the communists and the block parties, and the completely free elected and to 99% Solidarity dominated Senate set up constitutional committees. The draft constitutions elaborated by these two bodies in 1991 both contained special clauses regarding minorities.

While the Draft developed by the Constitutional Committee of the Sejm combined a general individual right to maintain the ethnic and national identity with the instruction to the legislature to provide simple legislation that ensures the identity of minorities, which was formulated in collective terms, so that the deduction is possible that the demanded minority law should also include group rights, the minority protection article according to the draft developed by the Constitutional Committee of the Senate used an entirely collective

63 “Art. 81: 1. Citizens of the Republic of Poland, irrespective of nationality, race, or religion, shall enjoy equal rights in all fields of public, political, economic, social, and cultural life. Infringement of this principle by any direct or indirect privileges or restrictions of rights by reference to nationality, race, or religion shall be punishable.” Poland – Constitution 1952 (Extracts), http://www.uni-wuerzburg.de/law/p101000_.html.

64 Mohlek 1994, 24. This argument was used – if unsuccessfully – in 1992 by the radical-liberal Janusz Korwin-Mikke (Union of Real Politics) in an attempt to block preferential treatment of minorities in the electoral system (ibid., 24f).

65 “Art. 15: 1. Everyone has the right to preserve his/her national and ethnic identity. 2. Statute guarantees to national and ethnic minorities the rights to enable these minorities to preserve their distinctive character.” Hofmann 1992, 50; Mohlek 1994, 62; Kallas 1995, 179.

formulation.\textsuperscript{67} Although the formulations of single constitutional articles are normally too general to deduce a certain concept,\textsuperscript{68} it still seems reasonable to hypothesize, judging from these first drafts, that the initial position in the debate over a minority clause to be included in a new Polish Constitution was at least partially based on a collective understanding of minority rights.

By 1994 all major political parties had brought forward their propositions for a new Polish constitution. All of the proposals included a paragraph ensuring equality before the law, while almost all additionally provided a non-discrimination clause in different variations as well as a special article regarding the protection of minorities. The minority provisions reflected not only the work of the Senate and Sejm committees, but also different conceptions of minority protection, especially between individual and collective approaches.\textsuperscript{69}

The only draft that did not include any special minority clause was that of the liberal Democratic Union (UD). In accordance with the liberal individualist character of the overall document, only a detailed non-discrimination article was put forward.\textsuperscript{70} An almost equally individualist approach was taken in the Presidential draft, which featured as the fundamental rights section a Charter of Rights and Freedoms, which had been elaborated by the Helsinki Committee on the initiative of President Walesa. In the absence of a separate minority clause, Art. 4/2 states that “[n]obody is to be discriminated against on the grounds of sex, religious confession or its absence, opinion, national or social origin, association with a national minority, birth, race, language, property, health, disability or for any other reason”, while Art. 13/2 contains the personal right to respect and identity protection and the prohibition of forced assimilation of minorities.\textsuperscript{71}

The draft proposed by the Peasant Party (PSL) together with the leftist Labor Union (UP) and the German minority restated the formulation used in the 1991 Sejm draft, which meant that

\textsuperscript{67} “Art. 14: The Republic of Poland shall guarantee to national or linguistic minorities the right to preserve and develop their own culture, language, customs and tradition. It shall also guarantee the right to set up their own educational, religious and cultural institutions as well as to participate in making decisions concerning the recognition and protection of their cultural identity.” Chrusciak 1997, czesc I [part I], 141f [my translation]. Hofmann 1992, 50f; Mohlek 1994, 62; Kallas 1995, 179.

\textsuperscript{68} Brunner 1999, 44.

\textsuperscript{69} Kallas 1995, 189.

\textsuperscript{70} “Art. 13: 1. All citizens are equal before the law. 2. Nobody can be discriminated against on the ground of gender, race, nationality or ethnic origin, language, religious confession or its absence, opinion, birth, social origin, property, illness or lack of ability, or for any other reason.” Chrusciak 1997, czesc I [part I], 267 [my translation].

\textsuperscript{71} Chrusciak 1997, czesc I [part I], 75; Mohlek 1994, 63; Kallas 1995, 182.
an while a non-discrimination clause was missing, provisions regarding minorities consisted of an individual and rather general identity clause, combined with the outlook on a minority law, which was eventually to include collective rights. Additionally, Art. 18/3 of this draft stated that “[t]he rights and freedoms determined by the majority cannot infringe on the rights of minorities.”

The other drafts showed more or less resemblance to the formulation of the 1991 Senate draft and therefore a collective approach. Among those were the proposal handed in by the Solidarity trade union (NSZZ Solidarnosc) as a “citizen project”, the draft presented by the post-communist Alliance of the Democratic Left (SLD), which added a second paragraph regarding the free choice of minority members to reveal and develop their identity, and – in a reduced form that left out the provision granting minorities a right to co-decision – a proposal of the right-winged Centrum Alliance (PC), which was then incorporated in a joint proposal of the “Alliance for Poland” (Przymierze dla Polskie), constituted by several right-winged groups such as the PC and the ZChN.

In conclusion, the minority provisions included in the draft constitutions of the political parties can be divided in two major categories: Liberal proposals such as those of the UD and President Walesa (which, as a reminder, had been prepared by a human rights NGO), focus on individual non-discrimination and contain no or only weak minority clauses. The majority of proposals both from the left (SLD) and the right (Solidarity, PC and Porozumienie dla Polski) quote the collective formulation of the Senate draft. Partially collective is the PSL/UP draft, which relies on the rather vague hybrid formulation of the Sejm draft and features the reference to simple legislation – a fact that was given great importance by the minorities themselves.

72 Chrusciak 1997, czesc I [part I], 190 [my translation]; Mohlek 1994, 63.
73 Ibid., 191 [my translation]; Kallas 1995, 190.
74 “Art. 17: The Republic of Poland shall guarantee to national and ethnic minorities the right to preserve and develop their own culture, language, customs and tradition. It shall also guarantee the right to set up their own educational, religious and cultural institutions as well as to participate in making decisions concerning the recognition and protection of their cultural identity”. Chrusciak 1997, czesc I [part I], 298 [my translation]; Mohlek 1994, 65.
75 “Art.14: 2. Everyone can freely choose to reveal his/her association with a religious, ethnic or national minority and develop its specific culture, tradition and customs.” Chrusciak 1997, czesc I [part I], 94 [my translation]; Mohlek 1994, 64.
76 Chrusciak 1997, czesc I [part I], 334.
77 “Art. 13: The Republic of Poland shall guarantee to national and linguistic minorities the right to preserve and develop their own culture, language, customs and tradition. It shall also guarantee the right to set up their own educational, religious and cultural institutions.” Chrusciak 1997, czesc I [part I], 359 [my translation].
Although these initial positions of the most important political forces seem to indicate a clear dichotomy between liberal individualist approaches, which omit or downplay special minority rights on the one hand, and positive minority provisions based on a collective approach on the other, a third option was developed within the Sejm committee on National and Ethnic Minorities, which resembled the “positive individualist” approach emerging a The Sejm committee, which was occupied with the formulation of minority provisions in the Constitution as well as in simple legislation since it was established in 1989, initially based its work on Art. 14 of the Senate draft. After consultation with two legal specialists, the committee agreed on a slightly, but fundamentally changed article. The version adopted and submitted to the Sejm on 1st September 1992 proposed to add a third paragraph to the still existing Article concerning non-discrimination in the 1952 Constitution, in which the collective formulation of the Senate draft was replaced by an individual formula.  

After all the propositions were submitted, an expert gremium was assigned the task to develop a unified document building on the different constitutional drafts, with alternative options for the articles where necessary. As the first version of this unified document was presented on the 20th January 1995, the minority clause was represented with a single version, which represented an individualized version of the Senate draft, closely resembling the work of the Sejm Committee on National and Ethnic Minorities:

“Art. 23: The Republic of Poland shall guarantee Polish citizens belonging to national minorities the right to preserve and develop their own culture, language, customs and tradition. It shall also guarantee the right to set up their own educational, religious and cultural institutions as well as to participate in making decisions concerning the recognition and protection of their cultural identity.”

When the article was discussed at the session of the Constitutional Committee of the National Assembly on the 7th March 1995, the major alternative to the individualized form of the article was thrown into the debate by Senator Piotr Andrzejewski of the Solidarity Trade Union (NSZZ-Solidarnosc), who insisted that group rights also had to be addressed and

78 “Art. 81: 3. The Republic of Poland shall guarantee Polish citizens belonging to national minorities the right to preserve and develop their own culture, language, customs and tradition. It shall also guarantee the right to set up their own educational, religious and cultural institutions as well as to participate in making decisions concerning the recognition and protection of their cultural identity.” Kallas 1995, 180 [my translation].

79 Tkaczynski and Vogel 1997, 170f.
pointed to the fact that the draft forwarded by his party (the “citizen project”) “stands on the basis of the protection of minority rights also as group rights.” This view was supported by Senator Alicia Grzeskowiak (NSZZ-Solidarnosc), who proposed the original version elaborated by the Senate.

The strongest opposition to a collective formulation of the minority article was voiced by former prime minister and minority specialist Hanna Suchocka of the liberal Freedom Union (UW), who stated that “we cannot include into the Constitution rights in collective form, because we would entangle ourselves in problems that are extremely difficult to resolve. We know from our history that the granting of group rights and their inclusion in state laws led to nationality conflicts instead of resolving problems.” She therefore concluded: “I am against all formulations of Art. 23 that propose the protection of group rights in the Constitution of the Republic of Poland.”

Czeslaw Sleziak of the SLD also favored an individualized article, despite the originally collective formulation used in the draft developed by his party. His justification was based on the concern that “in the doctrine of international law there exists a consensus that of all human rights only the right to self-determination is a collective right.” As explanation for his proposal he also invoked international and European standards such as the UN’s CCPR, the documents of the CSCE and – as the latest document – the Council of Europe’s Framework Convention on National Minorities, which Poland had just signed, as examples for individual formulations of minority rights and models for a constitutional provision.

The arguments in favor of an individualist approach were backed by the contributions of several legal experts. Prof. Leszek Wisniewski stressed that “in international law it is consciously avoided to grant minority groups separate rights,” whereas Andrzej Rzeplinski, member of the Helsinki Committee and legal advisor to President Walesa stated that “rights of persons belonging to national minorities are individual rights, which are executed collectively.”

---

80 Chrusciak 1997, czesc II [part II], 11f [my translation]
81 Piotr Andriejewski, in: Komisja Konstytucyjna II/14 (07.03.1995), 62 of 109 [my translation].
83 Hanna Suchocka, in: Komisja Konstytucyjna II/14 (07.03.1995), 69f of 109 [my translation].
84 Ibid, 70 of 109.
85 Czeslaw Sleziak, in: Komisja Konstytucyjna II/14 (07.03.1995), 66 of 109 [my translation].
86 Leszek Wisniewski, in: Komisja Konstytucyjna II/14 (07.03.1995), 72 of 109 [my translation].
87 Andrzej Rzeplinski, in: Komisja Konstytucyjna II/14 (07.03.1995), 72 of 109 [my translation].
The influence of the experts can best be shown in the statements of Henryk Kroll. When he proposed the draft of the Committee on National and Ethnic Minorities, he stressed that “[it] is clear that when we talk about minority rights we mean individual rights of minorities.”\textsuperscript{88} However, when confronted with the alternative proposed by Andrzejewski, he seemed no longer convinced. Although he contended that “basically there is only one group right – the right to self-determination”, he went on that “in international treaties we find the formulation: ‘they have the right individually and in community with other members of their group’. This is not only about individual human rights. Tradition and culture can be enjoyed individually, but it is better achieved in community with others. As I already said, I am not a competent person in these matters, and I would rather like to follow the experts. [But] I support the article proposed by Senator P. Andrzejewski, which in general mentions minorities and not citizens.”\textsuperscript{89}

Given the weakness of the post-Solidarity right in Parliament and the dominance of SLD and PSL, nationalist voices were virtually absent from the debate, and he collective rights based proposal of the “citizen project” had no real chance to be adopted.\textsuperscript{90} In the end, the version adopted resembled the version included in the original unified text, which was only slightly revised. Jerzy Szteliga (SLD) presented the outcome at the session of the Sejm Committee on National and Ethnic Minorities on the 5th October 1995:

“The Republic of Poland shall guarantee Polish citizens belonging to national minorities the right to preserve and develop their own culture, language, customs and tradition. It shall also guarantee the right to set up their own educational and cultural institutions and institutions serving the protection of their religious identity, as well as to participate in making decisions concerning the recognition and protection of their cultural identity.”\textsuperscript{91}

He went on that “this article has been adopted unanimously. All the indications are that it will be kept, and this will be the key to the European Union.”\textsuperscript{92} This is one rare occasion where the accession criteria are invoked, and it seems to point at the mere existence of a minority clause in the Constitution – which was not disputed – rather than to this particular formulation.

\textsuperscript{88} Henryk Kroll, in: Komisja Konstytucyjna II/14 (07.03.1995), 61 of 109 [my translation].
\textsuperscript{89} Ibid., 71 of 109 [my translation].
\textsuperscript{90} The elections of 1993 had kicked almost all right-winged parties out of the Parliament, and the NSZZ-Solidarnosc of Andrzejewski was only represented in the Senate, not the Sejm.
\textsuperscript{91} Jerzy Szteliga, in: Komisja Mniejszosci II/32, 3 of 26 [my translation]. See also Chrusciak 1997, czesc II [part II], 151f.
\textsuperscript{92} Ibid. [my translation].
However, one can still assume that there was a certain “background knowledge” that it was necessary to include minority rights in the Constitution in order to be admitted to the EU.

The unified document adopted by the Constitutional Committee of the National Assembly was edited in summer 1996 by another specialist gremium and a subcommittee of the National Assembly.\(^{93}\) In the process both the minority article underwent some minor changes until the final adoption of the Constitution on the 2nd April 1997. The final version reads:

“Art. 35:  
1. The Republic of Poland ensures Polish citizens belonging to national and ethnic minorities the freedom to maintain and develop their own language, to maintain customs and traditions, and to develop their own culture.

2. National and ethnic minorities have the right to establish educational and cultural institutions designed to protect their religious identity, as well as to participate in the resolution of matters connected with their cultural identity.”\(^{94}\)

All commentators agree that the “protection of minority rights prescribed by this article goes beyond general principles of equality and non-discrimination of citizens as embodied in the old (communist) Constitution of 1952”,\(^{95}\) and the achievement was recognized in the Commission Opinion on Poland’s accession.\(^{96}\) Although the re-introduction of a collective formulation in the second paragraph which led some foreign scholars to conclude that the Constitution provides minority protection in both individual and collective terms,\(^{97}\) the dominant interpretation in Poland is that Art. 35 upholds “an individualized approach to the protection of minorities by using a phrase ‘Polish citizens belonging to national or ethnic minorities’, which is consistent with the currently existing international standards”,\(^{98}\) especially with the approach taken by the Council of Europe’s Framework Convention.

The Draft Law on Minorities

The second and most controversial issue was and still is the drafting of a law on minorities, which is still in the legislative process after several failed attempts and years of preparation.

---

\(^{93}\) Tkaczynski and Vogel 1997, 181.
\(^{95}\) Lodzinski 1999, 8.
The work on such a law dates back as far as 1989, when under the pressure of the minority groups a first draft was elaborated by a group including Hanna Suchocka. However, the text met resistance and the issue was dropped, not least with the argument that such a law was simply unnecessary, given the superiority of international law established by the Polish constitutional court.\textsuperscript{99} Instead, minority provisions were included in a variety of different laws.\textsuperscript{100}

The project of a single minority law was picked up again after the elections in 1993 by the Sejm Committee on National and Ethnic Minorities. The text, developed by specialists of the Helsinki Committee and clearly based on an individualist approach to minority rights,\textsuperscript{101} was then forwarded to a sub-committee established in January 1994 for discussion.\textsuperscript{102} However, when the sub-commission finished its work after over three years of deliberation and returned the draft law to the Minority Committee,\textsuperscript{103} the decision was taken not to forward the project to the Sejm, for it was already too late for the law to be passed during the current term, and the risk of an outright rejection was deemed to be too high in times of an electoral campaign.\textsuperscript{104}

The project was discussed after the elections between January and September 1998, under permanent involvement of Prof. Gregorz Janusz of the Helsinki Committee as a legal expert. In the discussions, two major issues arose. The first concerned the status of minority languages, since the draft included a provision that minority languages could be used as auxiliary languages. This raised the question of the relation of the draft to other laws as well as to the constitutional and international level, raised especially by Art. 27 of the new Constitution, which stated that “the official language is Polish. This provision does not infringe on the rights of national minorities, resulting from ratified international treaties.”\textsuperscript{105} Hence a debate unfolded, whether the draft minority law could include language provisions before either a new language law – which was under preparation in parallel – was passed, or the Council of Europe’s Framework Convention, as the only legally binding international minority instrument, was ratified. However, the committee decided not to wait for either of the two pending legislations,\textsuperscript{106} after another legal advisor, Prof. Wiktor Osiatynski, confirmed that “I see no tension, neither between the content of the Constitution and the

\textsuperscript{98} Ibid. The same conclusion is drawn by Bajda et al. 2001, 211.
\textsuperscript{99} Mohlek 1994, 32; Czaplinski 1999.
\textsuperscript{100} Banaszak 1999, 86. For details see also Mohlek 1994; Lodzinski 1999; Bajda et al. 2001.
Convention, nor between the Constitution and Convention on the one hand and the provisions of the project of a law on persons belonging to national or ethnic minorities on the other.”

The second issue was again the question of group rights, brought up by SLD member Jan Syczewski: “The provision of Art. 4 states that every person belonging to a minority has rights ‘individual or in community with other members of the group’. I want to raise again the issue of group rights.” Pointing to the solution in South Tyrol he asked: “Wouldn’t it be possible that the law guarantees (...) a proportional participation of minorities in the local self-governing bodies?” In reply, Prof. Janusz elaborated that “the comparison to Tyrol is not a proper one, because Tyrol has territorial autonomy (...). Nobody in Poland would promote territorial autonomy for our minorities.”

Obviously a consensus on that matter emerged in the committee after this last attempt to reintroduce collective rights. When a month later a representative of the Foreign Ministry expressed his concern that the law could threaten the territorial integrity of Poland, Henryk Kroll replied: “The legislative project regulates the individual rights of minorities, i.e. the rights of persons belonging to a minority. The risks addressed by Mr. Topa are rather connected to group rights, which are practically impossible to codify.” And when Prof. Gregorz Janusz presented an edited version of the draft, which included a change in title from “law on the rights of persons belonging to national and ethnic minorities” to “law on national and ethnic minorities” he explicitly stressed that his did not mean a shift towards collective rights, but was intended to harmonize the terminology with European standards: “Almost all European laws regarding this problem mention rights of national and ethnic minorities, not rights of persons, while it is clear that such a formulation in the title of a legislative act does not mean the introduction of any group rights”. Both statements did not trigger any reaction by other committee members. The draft law was passed on to the Sejm on the 22nd September.

101 Kallas 1995, 184. The group was comprised of Zbigniew Holda, Gregorz Janusz (who served as an advisor to the Minority Committee throughout the process), Marek Nowicki and Andrzej Rzeplinski.
102 Komisja Mniejszości II/6 (19.01.1994).
103 Komisja Mniejszości II/65 (20.05.1997).
104 Jacek Kuron, in: Komisja Mniejszości II/65 (20.05.1997).
105 Chrusciak 1997, czesc II [part II], 389 [my translation].
106 Jacek Kuron, in: Komisja Mniejszości III/11 (03.03.1998).
107 Wiktor Osiatynski, in: Komisja Mniejszości III/14 (05.05.1998) [my translation].
110 Stanislaw Topa, in: Komisja Mniejszości III/12 (17.03.1998).
111 Henryk Kroll, in: Komisja Mniejszości III/12 (17.03.1998) [my translation].
1998,\textsuperscript{113} and the first reading took place on the 18\textsuperscript{th}/19\textsuperscript{th} March 1999, after the government had issued a critical assessment, which in principle supported the project but called for changes especially regarding the financial obligations of the state.

The draft law in its final form provided a definition of minorities that closely resembled the definitions contained in two European documents, namely recommendation 1201 of the Council of Europe’s Parliamentary Assembly,\textsuperscript{114} and the CEI Instrument on National Minorities,\textsuperscript{115} which also reflect the almost consensual Polish view that persons belonging to a minority have to be Polish citizens, a view that runs contrary to the opinion held by the UN, which in its explanatory remarks on Art. 27 CCPR holds that “[j]ust as they don’t need to be nationals or citizens, they need not be permanent residents. Thus, migrant workers or even visitors (...) are entitled not to be denied the exercise of those rights.”\textsuperscript{116}

The further provisions of the draft law included both rights to ensure non-discrimination and protection from assimilation as well as a positive obligation for the state to support equal opportunities, extensive language provision including the status of minority languages as auxiliary languages, and the establishment of a representative body as an advisory organ to the prime minister in order to assure minority participation in matters concerning their identity.\textsuperscript{117} The explanatory note that accompanied the bill stressed the long tradition of Polish tolerance, claimed that “[m]any politicians in Europe consider Poland as a land that can constitute a role model for other countries in Central and Eastern Europe” and that “Poland actively participates in the support for human rights standards on the European continent.”\textsuperscript{118} It also stressed that the law “by using the construction of individual rights, the bill contains, in accordance with European standards, a catalogue of fundamental rights (Art. 4). Thereby group rights are excluded (…), although it acknowledges, in accordance with accepted standards, the realization of existing rights both individually and in community with other persons belonging to the minority.”\textsuperscript{119}

\textsuperscript{113} Komisyjny projekt ustawy o mniejszosćach narodowych i etnicznych w Rzeczpospolitej Polskiej (druk nr 616 wpłynął 22-09-1998) [Committee project of a law on national and ethnic minorities in the Republic of Poland (written matter no. 616 issued 22.09.1998)] Further cited as Projekt ustawy o mniejszościach.
\textsuperscript{114} Pan 1999, 184-186.
\textsuperscript{116} UN Commission on Human Rights 1994, §5.2.
\textsuperscript{117} Lodzinski 1999, 8f.
\textsuperscript{118} Projekt ustawy o mniejszościach, uzasadnienie [explanation], 1 [my translation].
\textsuperscript{119} Ibid., 2 [my translation].
The parliamentary discussion saw a deeply divided Sejm: while the oppositional SLD was unanimously in favor, as did the UW, the governmental AWS (a conglomerate of many centre-right post-Solidarity parties) was divided over the issue, while the PSL and the rightist groups spoke against the law. In his introduction of the project, Jacek Kuron (UW) stressed once again the individualist reading even of collectively formulated minority provisions: “In Art. 35/2 of the Constitution the rights of minorities are mentioned. The Framework Convention on National Minorities also speaks about national minorities. (...) [B]ut this in no way changes the fact that – as I said – no group rights emerge from this law.”

The arguments put forward in favor of the minority law were in most cases built on a reference to international or European standards. Henryk Kroll stressed the importance of “documents of international organizations, be they global – UN, CSCE – or European, above all the Council of Europe, which has finished its work by issuing the Framework convention. Further, when it comes to internal regulation, this refers above all to the Constitution of 1997, which contains good minority provisions, but the provisions of this Constitution have to be expanded by law.” Miroslaw Czech, an UW member belonging to the Ukrainian minority listed as one of the major elements of the minority law “the co-ordination of the legal situation of national minorities in Poland with international standards”. He also found it worth mentioning that the draft law “is the fruit of a true consensus, above all with the national minorities and the associations representing them. (...) This project has indeed been elaborated in dialogue”.

The Sejm members opposing the bill had two major arguments to back their rejection: non-discrimination and reciprocity. The clearest formulation of the individualist and formal reading of non-discrimination presented against special minority legislation was that of Ewa Sikorska-Trela (AWS): “The law has to be equal for everybody, not differentiated, so that one group of citizens has other rights than another group, because such a situation would be discriminatory. I concur with the opinion that the bill would differentiate and privilege minorities on the basis of granting them group rights, thereby violating the equality of all citizens of this country. (...) I think that [for the protection of minorities – G.S.] we do not

120 Jacek Kuron, in: Sejm III/46 (18.03.1999) [my translation].
121 Henryk Kroll, inn: in: Sejm III/46 (18.03.1999) [my translation].
122 Miroslaw Czech, in: in: Sejm III/46 (18.03.1999) [my translation].
123 Ibid.
need group or minority rights.”¹²⁴ In the same vein, Andrzej Zapalowski, speaking for the extreme rightist KPN and ROP groupings, insisted that “every Polish citizen, independent of his declared nationality, independent of his opinions or world views, has rights guaranteed in the Constitution. (...) The rights proposed in the law on national and ethnic minorities privilege the minority against the rest of the Polish citizens.”¹²⁵

Reciprocity was frequently invoked by comparing the situation of minorities in Poland, claiming that “Poland ensures a very high standard of minority rights protection”,¹²⁶ with the status of Polish nationals in other countries, complaining that “everything, what happened after 1989 from the Polish side with regard to national minorities living in Poland is sadly not reciprocated by our neighbors.”¹²⁷ Especially Germany, where Poles have no minority status, although special rights exist for other groups, was a common point of reference. Countering the pro-argument of international and European minority norms, Adam Lozinski (AWS) asked the rhetorical question: “Some of the Sejm members have mentioned European or international standards when it comes to minority rights. I would like to ask, whether it is e.g. a standard that minority schools in Poland are paid out of the state budget, while in Germany the families have to pay.”¹²⁸

Miroslaw Kuklinski, an AWS member who supported the project, was the only person to bring forward the “reversed reciprocity” argument normally associated with the existence of external minorities (especially in the Hungarian case),¹²⁹ namely that Poland could serve as a model for other countries by adopting far-reaching minority legislation.¹³⁰

The draft passed the first reading, although only by a narrow margin, and was then returned to the Committee on Minorities for further elaboration, which was not completed before the term ended. However, the project has been picked up quickly by the newly established Committee on National and Ethnic Minorities and almost directly reintroduced in the legislative process.¹³¹

¹²⁴ Ewa Sikorska-Trela, in: in: Sejm III/46 (18.03.1999) [my translation].
¹²⁵ Andrzej Zapalowski, in: in: Sejm III/46 (18.03.1999) [my translation].
¹²⁶ Marian Pilka (AWS), in: in: Sejm III/46 (18.03.1999) [my translation].
¹²⁷ Janusz Dobrosz (PSL), in: in: Sejm III/46 (18.03.1999) [my translation]. Comparable arguments were brought forward during the debate by Andrzej Zapalowski (KPN), Marian Pilka (AWS), Jan Chmielewski (AWS) and Krzysztof Anuszkiewicz (AWS).
¹²⁸ Adam Lozinski, in: in: Sejm III/46 (18.03.1999) [my translation].
¹²⁹ Preece 1998; Bartsch 1995.
¹³¹ Komisja Mniejszości IV/1 (27.11.2001).
The Ratification of the Framework Convention

The third important legal process concerns the ratification of the Council of Europe’s Framework Convention for the Protection of National Minorities. Poland signed the document on the first day it was opened for signature on 1st February 1995. Still, it was not before the 3rd December 1999 that the ratification document entered the Sejm for the first reading.\(^{132}\)

The parliamentary discussion of the Framework Convention was conducted roughly along the same lines as the minority law debate: the pro-side concentrated on stressing the coherence between existing Polish legislation and the Framework Convention, which “regulates only individual rights, not group rights, in accordance with European minority legislation”;\(^{133}\) effectively supposing that “Polish law guarantees already today the vast majority of norms and privileges postulated by the Framework Convention,”\(^{134}\) so that ratification “would be the natural consequence of the fact that Poland belongs to the group of states that favor international regulations in the field of human rights.”\(^{135}\) This suggests that “[t]he protection of national minorities is an integral part of the international protection of human rights.”\(^{136}\)

Already in the preparatory phase of the ratification bill, Wojciech Hausner (AWS) had clearly stated that a demand for reciprocity could not be justified, since the Framework Convention was a human rights instrument: “The principle of reciprocity is absolutely not a principle intended within the Convention. Countries that ratify the Convention have a direct obligation to apply the provisions, independent of whether other countries break them or not.”\(^{137}\)

However, the opponents of ratification still based their rejection on the combined arguments of non-discrimination and reciprocity. Mariusz Olszewski of the right-winged Polish Alliance (PP) is a typical example of the argumentation that “the rights are today so far-reaching, that one cannot speak of providing equality, but of privileges”, and that “the rights of national

\(^{133}\) Henryk Kroll, in: Sejm III/65 (03.12.1999) [my translation].
\(^{134}\) Jan Byra, in: in: Sejm III/65 (03.12.1999) [my translation].
\(^{136}\) Ibid.
\(^{137}\) Wojciech Hausner, in: Komisja Mniejszosci III/31 (02.03.1999) [my translation].
minorities have to be based on the principle of reciprocity – as many privileges as our fellow-
countrymen have.”  

Also, the question of EU conditionality emerged in the debate, when Tadeusz Iwinski (SLD) asked, whether there exists “a certain link with regard to the ratification in the process of negotiation with the European Union.”  

Although the government representative could not see a direct connection between ratification and EU accession she nonetheless replied: “This is undoubtedly one of the most important points, which is monitored all the time in the negotiations.”  

Ultimately, the Framework Convention was ratified on the 20th December 2000, and the Framework Convention came into force in Poland on 1st April 2001.

Conclusions

To sum up the findings of this case study, first, in accordance with the assumption that norms are not pre-given, stable and uncontested in their meaning, the debates over Polish minority legislation reveal that the seemingly dominant “positive individualist approach” was initially not the only proposed model. Especially during the earlier phases of the constitutional development, collective understandings of minority rights were voiced, they were even included in the majority of drafts. On the other hand, clear liberal proposals were also put forward, starting from general notions of non-discrimination, but soon embracing positive minority protection in an individualist formulation. In the end, a consensus emerged among the supporters of minority protection along these lines, stressing the importance of international norms within the formulation of domestic minority norms, since one of the tools used by the experts as well as pro-minority politicians as justification for their claims was the ‘fit’ between domestic Polish and international and European norms. The opponents of special minority rights, on the other hand, resorted to a formal reading of non-discrimination, which was combined with claims to reciprocity, which is incompatible with the now dominant reading of the international non-discrimination norm, which allows for positive measures. The resort to concerns about external minorities and reciprocity mainly by opponents of further
minority protection also counters the assumption hat, like in the Hungarian case, objective interests in international minority protection account for the Polish minority rights system.

Second, the role of human rights specialists and NGOs as catalysts for the formulation of a shared intersubjective meaning of the minority norm conforming to the emerging European standard has to be stressed. Particularly the Helsinki Committee, a Warsaw based, but transnationally organized human rights NGO that is acknowledged as one of the major Polish NGOs concerned with minority questions, and which is furthermore co-funded by the EU through the PHARE funds and by the Commission directly, was a key player. It is obvious that at any stage in the process of norm formulation the involvement of legal specialists resulted in a shift towards an individualized approach. The role of the Helsinki Committee can be best described as that of an “epistemic lawyer community”,142 being included in the norm building process on the basis of expertise instead of acting as a “bottom-up” pressure group.143 As such, these experts were able to provide a coherent and persuasive interpretation of the minority norm. The impact of specialists seems also to be enhanced, since they were involved mostly in the preparatory phases within closed committee sessions. In this setting, the concept favored by the specialists – the positive individualist reading of the minority norm – was not presented as one political option among others, but mostly as a scientific clarification of the meaning of the norm, whereas alternative options were discarded as impossible to implement or inconsistent with international standards.

Third, direct EU conditionality did not play a major role during the deliberations, although it can be deduced that a certain “background knowledge” about the general importance of minority protection in the accession procedure existed, providing a principle consensus across parties regarding at least an acceptable minimum standard for minorities. Nonetheless, given the lack of a coherent EU model for minority protection and the absence of a high adaptational pressure to adopt specific model, the EU option could not play a decisive role in deciding the argumentation about which approach to minority protection should be chosen. Therefore the standards formulated by other international organizations, above all the Council of Europe, had a much bigger impact on the development of an intersubjective meaning among Polish politicians in order to establish a minority norm consistent with European standards.

143 Checkel 1997; Keck and Sikkink 1998.
References


