The idea of the legal protection of national minorities has gained new impetus after the transformations in Central and Eastern Europe. The most widely adopted approaches have been those based on multilateral or bilateral agreements within the framework of public international law and those based on national legal norms regarding minorities in the respective countries as laid down in constitutions and national acts. Several new member states of the European Union (EU) have implemented strategies and laws on the rights of ethnic minorities living on their territories.

A rather different approach involves legal measures of kin-states who commit themselves to the protection of members of kin minorities.

---

3 A kin-state can be defined as a country in which significant political actors, usually representatives of the state, have an avowed commitment to the well-being of citizens of other states on the basis of perceived kinship. See: Konrad Huber and Robert W. Mickey, ‘Defining the kin-state: An Analysis of its Role and Prescriptions for Moderating its Impact’ in Arie Bloed and Pieter van Dijk (eds.), Protection of Minority Rights Through Bilateral Treaties: The Case of Central and Eastern Europe (The Hague, 1999), p. 22.
living in other countries. This approach has been the subject of much attention after the adoption of the so-called Status Law in Hungary in 2001. Keeping the focus on Central and Eastern Europe, kin-state/kin-minority legislation takes the form of acts which provide for preferential treatment of co-ethnic minorities in third countries by their kin-state (e.g. Bulgaria, Hungary, Romania, Slovakia and Slovenia) or a ‘national responsibility clause’ in the constitution (e.g. Albania, Croatia, Hungary, Macedonia, Poland, Romania, Slovakia, and Slovenia).

Thus, legal provisions on the support of co-national minorities in other states appear to be an unexceptional phenomenon in Europe rather than a unique Hungarian case. Bearing in mind the more general phenomenon of kin-state/kin-minority relationships, I will call this ‘transnational minority protection’, which in turn yields ‘transnational minority law’. Many of the countries which have adopted transnational


8 Article 8(1) Albanian Constitution; Article 10 Croatian Constitution; Article 6(3) Hungarian Constitution; Article 49(1) Macedonian Constitution; Article 6(2) Polish Constitution; Article 7 Romanian Constitution; Article 7a Slovak Constitution (amended in 2001); Article 5 Slovenian Constitution; Article 12 Ukrainian Constitution.
minority law are members, or are on their way to becoming members, of the European Union. This paper gives an overview of transnational minority law in Central and Eastern Europe with special consideration to European Community Law.9

I. Transnational Minority Law: Towards a Definition

Today the term ‘transnational’ is widely used in law10 as well as in economics and other social sciences.11 In the legal literature, the meaning of the term depends on the specific field of law in which it is used. Generally speaking, it describes legal relations which cross the territorial boundaries of a state. It is precisely this cross-boundary effect, based on the fact that the respective rules concern citizens of other states without resettling in the state of legislation, which is one of the striking aspects of the legal provisions of a kin-state for ‘her’ kin minorities in other states. Thus the term ‘transnational’ can be used to characterize kin-state/kin-minority legislation.12

---

9 A closer investigation is being undertaken in the current PhD project of the author.
Transnational minority law, as I suggest here, is different from national minority law and international minority law. The term national minority law is used to describe domestic laws relating to citizens of the implementing state belonging to an ethnic or national minority living on the territory of this state, while the term international minority law refers to public international law concerning minorities based on multilateral or bilateral agreements between states. There are provisions in international and regional documents which recognise the right to establish and maintain free and peaceful contacts across frontiers, but these documents are either not legally binding\textsuperscript{13} or provide merely that there should be no interference with that right, as is the case in the Framework Convention for the Protection of National Minorities adopted by the Council of Europe in 1995.\textsuperscript{14} States are, however, not bound to implement kin-state/kin-minority legislation. Seen in this setting, transnational minority law is domestic law. Yet there is another feature of transnational minority law which also distinguishes it from national minority law: Rules of transnational minority law do not produce benefits for the citizens of the state implementing the law, but rather for citizens of other states.

II. Transnational Minority Law in Central and Eastern Europe: Some Similarities and Differences\textsuperscript{15}

As already indicated, there are several constitutions in Central and Eastern Europe which contain a ‘national responsibility clause’. In some cases, the constitutional norm has found its concrete form in domestic laws, while in other cases there exists only a constitutional law which is not further specified by individual laws. Two main features can be observed: beneficiaries of both constitutional norms and norms in individual laws are the members of the respective kin minority living outside the


\textsuperscript{15} For a more detailed investigation, see for example: Iván Halász in this volume.
transitional borders and the beneficiaries do not have the citizenship of the state implementing the law.

This first feature can be found in two general approaches: limiting the beneficiaries to the members of a kin minority in the neighbouring states\textsuperscript{16} or embracing all persons of the same ethnic origin without this geographic limitation.\textsuperscript{17} This is provided for in the wording of the constitution,\textsuperscript{18} in the interpretation of the constitution,\textsuperscript{19} or in individual domestic laws.\textsuperscript{20} The other common feature of transnational minority law is that the co-ethnics must not have the citizenship of the state adopting the legislation on kin minorities.\textsuperscript{21} In some cases there are special documents verifying that an individual belongs to the respective kin minority.\textsuperscript{22} For the kin-state, it serves as a proof of entitlement to the benefits provided for in the respective laws without substituting an identity document in the sense of an identity card issued by the authorities of the home state or a passport\textsuperscript{23} or even granting status as a national.\textsuperscript{24} Furthermore, the European Commission for Democracy through Law (Venice Commission) emphasises that documents of belonging to a certain kin minority should be proof enough of entitlement to the services provided for under a specified law or regulation.\textsuperscript{25} For the holders of such certificates, these are not just a pre-condition for receiving the benefits provided for in the legislation, but they also often have important symbolic value, signifying

\textsuperscript{16} Article 1(1) Hungarian Law; Chapter 1, I Slovene Resolution.
\textsuperscript{17} Article 1 Bulgarian Law; Article I §1–2 Slovak Law; Article 1 Romanian Law; Article 6(3) Hungarian Constitution.
\textsuperscript{18} Article 5 Slovene Constitution.
\textsuperscript{19} Article 8 Albanian Constitution.
\textsuperscript{20} Article 3 Bulgarian Law; Article I §4 Slovak Law; Article 19–22 Hungarian Law.
\textsuperscript{21} In the Bulgarian Law there are some norms which apply to Bulgarian nationals too: Article 6(1), 9(1), 10(1), 11(1), 12(1) Bulgarian Law.
\textsuperscript{22} Article 3 Bulgarian Law; Article I §4 Slovak Law; Article 19–22 Hungarian Law.
the belonging to an ethnic group that has not been forgotten by the kin-state.26

As regards the benefits provided for in the various laws, there are a variety of different regulations: norms on entry and residence, access to the labour market, social rights including benefits in the use of public transport, or support of media. The Slovak law even provides for access to citizenship for outstanding personality reasons.27 Norms on entry and residence mostly refer to the general rules without conferring special rights on members of kin minorities.28 Access to the labour market is sometimes simplified by easier conditions for receiving a work permit29 or indeed by removing this requirement altogether.30 Both Slovak and Hungarian laws provide for reduced prices in public transport31 or even free transport under certain circumstances.32 Some benefits are only found in individual laws, for example the equal treatment members of kin minorities and nationals regarding the acquisition of property.33

The most important area of transnational minority law concerns the cultural and educational sector. There are rules on access to public cultural institutions and libraries34 and on the integration into cultural programmes run by the kin-state.35 In the educational sector, there are rules on the right to primary, secondary, and higher education in the kin-state,36 financial

27 Article I §6(1) Slovak Law.
28 Article 15(1) Bulgarian Law, Article I §5(1), (2) Slovak Law. The amended Hungarian Law of 2003 does not provide for 'most favoured treatment possible with regard to the entry and stay on its territory' as Article 3 Hungarian Law of 2001 did.
29 Article 7 Bulgarian Law, Article 15 Hungarian Law (2001) has been amended to provide for derogations from general rules only by treaties, Article 15 Hungarian Law (2003).
30 Article I §6(1)(b) Slovak Law.
31 Article I §6(3)(a) Slovak Law; Article 8(3) Hungarian Law.
32 Article I §6(3)(b) Slovak Law; Article 8(2) Hungarian Law.
33 Article 8(1) Bulgarian Law.
34 Article 4 Hungarian Law.
35 Chapter 4, V(2) Slovene Resolution.
36 Article 9, 10(1) Bulgarian Law; Article 7 Romanian Law; Article I §6(1)(a) Slovak Law, Chapter IV, III(1) Slovene Resolution; Article 9 Hungarian Law.
support in higher education in the kin-state, 37 additional training of teaching staff, 38 and the supply of textbooks. 39

Although members of kin minorities benefit from the support granted by transnational minority law predominantly on the territory of their respective kin-state, they may also do so in their home state, as in the case with educational grants. 40 More than just the place of enjoying the (financial) support was at stake when the Hungarian Status Law of 2001 provided for a constitutive role for the organisations of Hungarians abroad in issuing the ‘Certificate of Hungarian Nationality’. The quasi-administrative function of these organisations 41 was one reason for the heated debate on the extraterritorial effect of the law. 42 This discussion is mainly a topic of public international law and so will not be further discussed in this paper. However, the Venice Commission analysed the framework of the norms and principles of public international law 43 and stressed the principles of territorial sovereignty of states, pacta sunt servanda, friendly neighbourly relations, and respect for human rights and fundamental freedoms as well as the principle of non-discrimination for the implementation of transnational minority law.

### III. Transnational Minority Law and European Community Law

The treaties adopted by the EU member states do not provide for legislation in the field of minority law. 44 The member states are the main

---

37 Chapter 4, III(4) Slovene Resolution; Article 13 Hungarian Law.
38 Chapter 4, III(1) Slovene Resolution; Article 11 Hungarian Law.
39 Article 11 Bulgarian Law; Chapter IV, III(1) Slovene Resolution.
40 Article 14 Hungarian Law.
41 On this topic, see: Herbert Küpper, ‘Hungary’s Controversial Status Law’ in Kántor et al. (eds.), op. cit., p. 324.
42 On this topic, see for example: Fernand de Varennes, ‘An Analysis of the “Act on Hungarians Living in Neighbouring Countries” and the Validity of Measures Protecting and Promoting the Culture and Identity of Minorities Outside Hungary’ in Kántor et al. (eds.), op. cit., p. 411.
44 On this issue, see for example: Giuliano Amato and Judy Batt, ‘Minority Rights and EU
actors in this field. This does not mean, however, that Community law is irrelevant for transnational minority protection. According to the case-law of the European Court of Justice (ECJ), even in situations within the competence of the member states, Community law can set certain limits as to the exercise of this competence.45

In most cases, beneficiaries of kin-state/kin-minority legislation cross the territorial borders of a state in order to receive the benefits granted. Therefore, transnational minority law has, by very definition, an inter-state effect. A person who is both a member of a kin minority and an EU citizen and also enjoys the benefits granted by transnational minority law in a kin-state that is also an EU member is treated differently to other EU citizens by that member state.46 Thus the question arises whether this different treatment is compatible with Community law.47


46 In the European Union of now 25 Member States, the situation in which both the kin minority’s home state and kin-state are EU members prevails. This will be even more true in an EU of 27 or more members.

It should be recalled that the free movement rights and the Citizenship of the Union as provided for by the EC Treaty simplify relationships between the members of kin minorities and kin-states without including special legislation on the preferential treatment of kin minorities. Access to cultural institutions, such as museums or libraries, books and journals of the kin-state, cross-boundary access to television programmes or the possibilities created by the free movement of persons all make it easier for the kin to maintain the contacts by including them within the area of application of the EC Treaty which puts them on an equal footing with other EU citizens.

1. Article 12 EC Treaty

The question of preferential treatment of co-ethnics goes beyond the question of equal treatment as provided for in the provisions of free movement of goods, persons, and services. It is questionable whether the preferential treatment of co-ethnics infringes on the principle of non-discrimination. Enshrining one of the basic principles of Community law is Article 12 EC Treaty, which prohibits discrimination on the grounds of nationality. Taking Article 12 EC Treaty as a standard, it has to be borne in mind that it can generally only be applied autonomously in situations in which other, more specific, prohibitions of discrimination in the EC Treaty are not applicable. For the purposes of this paper, Article 12 EC Treaty can still serve as the standard, since it is not—in contrast with the fundamental freedoms of the EC Treaty—limited to certain sectors of economic life, but rather it is valid for the complete scope of the EC Treaty. It serves as a bolster in situations in which the EC Treaty does not provide for a more specific prohibition on discrimination. Even if specific non-discrimination norms are applicable, e.g. the freedom to provide services as regards access to cultural institutions, the basis of these norms is the principle of non-discrimination on grounds of nationality. Moreover, the scope of Article 12 EC Treaty has been

Article 27(2) Hungarian Law provides for application of the law in accordance with the *acquis communautaire* of the European Union.

48 Articles 19(1), 28, 39, 43, 49, 59, 75(1), 90(1) EC.


Although not explicit, it is widely acknowledged that Article 12 EC Treaty is directed at both the member states and Community institutions.\footnote{P.J.G. Kapteyn and P. VerLoren van Themaat, Introduction to the Law of the European Communities: from Maastricht to Amsterdam (London, 1998), p. 172.} Thus, EU members must respect the basic legal principles enshrined in Article 12 EC Treaty. The preferential treatment of co-ethnics by some member states therefore could have a discriminatory effect in the sense of Article 12 EC Treaty.

The form of discrimination prohibited by Article 12 EC Treaty is that which is based on nationality. It requires that persons in a situation governed by Community law be placed on a completely equal footing with nationals of all other member states.\footnote{Case C–186/87, Cowan, [1989] ECR 195, paragraph 10.} Looking at kin-state/kin-minority legislation in the Community legal framework, there are mainly three groups of interest, each of which is treated differently: members of the kin minority who are the beneficiaries of the laws, citizens of the state implementing the transnational minority laws, and citizens of the home states of the kin minorities not belonging to this group and thus not being embraced by the preferential treatment.\footnote{In the Bulgarian Law there are some norms which apply to Bulgarian nationals too: Article 6(1), 9(1), 10(1), 11(1), 12(1) Bulgarian Law.} As regards the citizens of the implementing member states, Article 12 EC Treaty would not cover the situation of worse treatment of a member state’s own nationals (so-called reverse discrimination), but instead this has to be dealt with by national constitutional law.\footnote{Therefore this question will not be further discussed here. See for example: Astrid Epiney, Umgekehrte Diskriminierungen: Zulässigkeit und Grenzen der discrimination à rebours nach europäischem Gemeinschaftsrecht und nationalem Verfassungsrecht (Cologne, 1995).} As regards the majority of citizens of other member states, they are excluded from the transnational minority law’s benefits...
and thus treated differently from the citizens of the very same state who are members of a certain kin minority. However, the peculiarity of transnational minority law is not the link of preferential treatment to a certain nationality, but to the same ethnic group as the majority ethnic group in the kin-state. Kin-states do not grant the preferential treatment on grounds of nationality, but rather on grounds of ethnic origin. Thus, the criterion of differentiation is not the nationality, but the membership of an ethnic group. Hence there is no direct discrimination on grounds of nationality.

The wording of Article 12 EC Treaty refers to any discrimination on the ground of nationality. Thus, the ECJ has ruled that Article 12 EC Treaty does not only forbid direct discrimination based on nationality, but also forms of indirect discrimination (i.e. situations in which the application of a criteria other than nationality leads to the same result as the discrimination on grounds of nationality). The most frequent examples of this kind of indirect discrimination are the criteria of national qualifications, residence, and language requirements. Therefore, the question arises of whether differential treatment on grounds of ethnic origin leads to the same result as differentiation on grounds of nationality. The result of the different treatment in transnational minority law is that only the co-ethnic group of nationals of other states is in a position to enjoy the benefits of the respective laws. Other citizens of the same state and the nationals of their own state are not in this position. The vast majority of the citizens in other states are not members of a kin minority of a certain kin-state. According to ECJ case-law, a provision of national law must be regarded as indirectly discriminatory if it is intrinsically

---

liable to affect migrant workers more than national workers and if there is a consequent risk that it will place the former at a particular disadvantage. Yet in order to be treated as discriminatory, it is not necessary for the contested measure to treat all the nationals of a state in an advantageous manner or to treat all the nationals of other member states in a disadvantageous manner. Thus, singling out a specific group of nationals of a state does not prevent the measure from having a possible discriminatory effect in the sense of Article 12 EC Treaty. Based on this reasoning it seems possible to hold measures of transnational minority law as capable of having indirect discriminatory effect. Nevertheless, there may not necessarily be an infringement of Article 12 EC Treaty since a contested measure may be objectively justified, a matter which will be discussed later.

2. General Principle of Equal Treatment

If one does not choose to follow this approach, Community law offers an approach which goes beyond discrimination on the grounds of nationality. The general principle of equal treatment requires that comparable situations are not to be treated differently and different situations not to be treated alike, and this has been developed by the ECJ as an unwritten legal principle of Community law. Article II-80 of the Treaty establishing a Constitution for Europe, which is not in force yet, expressly provides for equality before the law. According to ECJ case-law, member states are bound by human rights in the Community legal order when they act for or on behalf of the Community and implement Community law (agency

63 After the rejection of the Constitutional Treaty by both the French and the Dutch electorates in 2005 the enforcement of the Constitution remains open for the time being.
situation\textsuperscript{65}) and when members rely on a derogation to the fundamental freedoms as provided for in the EC Treaty\textsuperscript{66} (derogation situation). How far the member states are bound by Community human rights is controversial\textsuperscript{67} but shall not be discussed here since for the purposes of this paper it seems enough to state that even if the member states were bound in all of their actions by Community human rights, including the general principle of equality, there still remains the option of an objective justification for different treatment, as will be discussed later.

3. Article 13 EC Treaty and the so-called Race Directive

Introduced by the Treaty of Amsterdam, Article 13 EC Treaty lists a number of prohibited grounds for differential treatment. One of them is discrimination based on racial or ethnic origin. This, however, is the criterion used by provisions of transnational minority law.\textsuperscript{68}

Article 13 EC Treaty is widely understood as not having a direct effect, but rather as serving as a legal basis for the Community to take concrete action against the forms of discrimination listed in the norm.\textsuperscript{69}


\textsuperscript{68} Article 1(1) of the Hungarian Law (2003) provides: ‘This Act shall apply to persons declaring themselves to be of Hungarian ethnic origin […]’. Article 2 Bulgarian Law provides for persons who have ‘at least one antecedent of Bulgarian origin’. Article I §2(2) of the Slovak Law refers to Slovak origin, defining it in Article I §2(3) as ‘direct ancestors up to the third generation’ that had Slovak nationality.

Thus it is not possible to base a claim directly on Article 13 EC Treaty. However, on the basis of Article 13 EC Treaty, the Council of Ministers has adopted two directives that had to be implemented by member states by July 2003 and December 2003 respectively: the so-called Race Directive 2000/43/EC and the so-called Framework Directive 2000/78/EC. Member states’ legislation therefore has to be in line with these two directives. The scope of the Framework Directive does not cover discrimination on grounds of ethnic origin, but the Race Directive lays down a framework for combating discrimination on the grounds of race and ethnic origin. As already mentioned, transnational minority law expressly links certain benefits to a certain ethnic origin. Thus the Race Directive seems to be applicable to transnational minority protection. Without going into detail, it is interesting to note that while Article 5 of the Race Directive provides for positive action on the part of the member states, the same article also limits such action to ‘specific measures to prevent or compensate for disadvantages linked to racial or ethnic origin’. It seems questionable whether these reasons are given in the special situation of kin-state/kin-minority relationships as the aim of transnational minority law seems to be improve the economic situation of kin minorities and to foster their ties with their kin-state. It therefore seems debatable whether Article 5 of the Race Directive can be applied to transnational minority law.


In the Preamble to the Hungarian Law one of the aims reads as follows: ‘In order to ensure the well being of Hungarians living in neighbouring States in their home states, to promote their ties with Hungary, to support their Hungarian identity and their links to the Hungarian cultural heritage as expression of their belonging to the Hungarian nation’.

4. Justification

Independent from the legal standards discussed above, even a measure capable of having discriminatory effect can be objectively justified by a legitimate aim if the means of achieving that aim are appropriate and necessary. There are two legitimate aims which are worthy of consideration here: first, minority protection, and second, respect for the identity of the member states as provided for in Article 6 Treaty on European Union (TEU) and their national and regional diversity as provided for in Article 151(4) EC Treaty.

In Case C–274/96, Bickel and Franz, the European Court of Justice held that the protection of a minority may constitute a legitimate aim within the framework of the Community legal order.\(^{75}\) This appears to be consequent reasoning, since the EU itself included minority protection in the Copenhagen criteria,\(^{76}\) although not expressly in Article 6 TEU. It is disputable whether or not minority protection is also a legal criterion of Article 6 TEU since the wording repeats the Copenhagen Criteria but does not include minority protection.\(^{77}\) Still, it might well be argued that—at least in the sense of non-discrimination—minority protection is part of the protection of human rights as referred to in Article 6 TEU. In some secondary legislation, this link is expressed in the wording of substantive law.\(^{78}\) Moreover, member states are bound by international treaties, e.g. the Framework Convention for the Protection of National Minorities.\(^{79}\)


\(^{78}\) Council Regulation (EC) 975/1999 of 29 April 1999 laying down the requirements for the implementation of development cooperation operations which contribute to the general objective of developing and consolidating democracy and the rule of law and to that of respecting human rights and fundamental freedoms, Official Journal L 120 (8 May 1999), p. 1. Article 2 no. 1(d) presents minority protection as part of the protection of human rights.

\(^{79}\) Although not all EU Member States have ratified the Framework Convention: 20 EU Member States ratified, 3 EU Member States (Belgium, Greece, Luxembourg) signed, and France did not even sign (status on 19 February 2004).
The Framework Convention is not part of Community law, but has nevertheless served as one of the criteria for monitoring the fulfilling of the Copenhagen criteria by candidate states, a practice which has not changed since the introduction of the new Article 6 TEU. In its Regular Reports, the Commission has frequently referred to the Framework Convention. \(^{80}\) Taking into consideration that the Europe Agreements concluded since 1992 also include the respect for human rights as provided for in the 1975 Helsinki Final Act\(^ {81}\) and the Paris Charter,\(^ {82}\) a wide interpretation of Article 6(1) TEU encompassing minority rights and minority protection seems possible.\(^ {83}\) However, the uncertainty over the inclusion of minority standards in Community law might end with the enforcement of the Treaty establishing a Constitution for Europe. Article I-2 of the Constitution expressly provides for minority rights as part of human rights and thus—after its entry into force—also a legal criterion for membership of the EU as provided for in Article I-58 of the Constitution.\(^ {84}\)

Both in the ECJ case-law and international documents, the focus can be assumed to be on the domestic minority protection of minorities within one state. Therefore, it might be open to dispute whether transnational minority law, as debated in this paper, is part of minority protection in that sense at all. If we assume a definition of minority law as being a system of legal norms which aim to protect certain groups of people who differ from other groups on the basis of certain characteristics attached to them by themselves or by others,\(^ {85}\) then transnational minority law is also a kind of


\(^{84}\) On the problems of the ratification of the Constitution see footnote 62 above.

\(^{85}\) Cf. Peter Hilpold, Modernes Minderheitenrecht: eine rechtsvergleichende Untersuchung des Minderheitenrechtes in Österreich und in Italien unter besonderer Berücksichtigung
minority law. Kin-state/kin-minority legislation aims to enable kin minorities to maintain their ethnic, cultural, linguistic and religious identities. Beyond mere financial support, it is also of a symbolic nature as it aims to support the feeling of belonging to a distinct ethnic group. The danger of irredentism, which has to be borne in mind, can be combatted with legal instruments, such as the principles of sovereignty and good neighbourly relations. The idea that transnational minority law can be part of minority protection can also be based on the above mentioned international instruments: Article 2(5) UN Declaration on the Rights of Persons belonging to National or Ethnic, Religious and Linguistic Minorities; Article 32.4 Document of the Copenhagen Meeting of the Conference on the Human Rights Dimension of the OCSE; and Article 17(1) of the Framework Convention for the Protection of National Minorities. All of these provide for contact between the members of the same ethnic groups. In this way, transnational minority law can be understood as a tool of minority protection, which is an objective reason for justifying different treatment.

Article 6 TEU calls for respect for the national identity of member states as expressed in their political and constitutional foundations. A similar aim can be found in Article 151(4) EC Treaty. The ECJ has ruled that the preservation of the member states’ national identity is a legitimate aim respected by the Community legal order. In Commission v. Luxembourg, the ECJ expressly refers to the wording of Article 6(3) TEU.86 So far, there is no legal definition in Community law of what actually belongs to the national identity of the member states. Article I-5 of the Treaty establishing a Constitution for Europe aims to make Article 6(3) TEU more transparent by clarifying the essential elements of national identity.87 The formulation of Article I-5 contained within the Constitution obliges the Union to respect the national identities of member states ‘inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government. It shall respect their essential state functions, including ensuring the territorial integrity of the

---

state, maintaining law and order and safeguarding national security’. 88 The content of these fundamental structures of the member states is defined by the member states themselves. Being an EU member and thus bound by Article 49(1) and Article 6(1) TEU, the fundamental principles as enshrined in Article 6(1) TEU can be understood as being part of the national identities of the member states. In this sense, there are supranational elements in the national identity of the EU members. 89 But what about a possible transnational identity as regards the ‘national responsibility clauses’ to be found in some EU-member constitutions? As we have seen, there is more than just a single provision on that topic in the constitutions concerned. Do these clauses hint at a national identity including the co-ethnics in other member states? If so, what are the consequences of this for Community law?

The subject of Article 6(3) TEU is the member states as a whole. They are to remain sovereign states and are not transformed into component parts of a federation. Yet Article 6(3) TEU does not refer to federal states or regions, ethnic groups, linguistic communities or cultures. 90 The question arises whether the notion of the national identity as envisaged in Article 6(3) TEU might include a transnational dimension based on an ethnic understanding of ‘nation’ in the Eastern model rather than of a civic understanding in the Western model. 91 If the idea of the nation is perceived differently in Eastern and Western Europe, then the idea of national identity may gain new facets of interpretation as a result of the Eastern enlargement of the EU. Even assuming this, a transnational identity could only refer to a special consciousness for the peaceful contact with co-ethnics beyond the territorial borders of a state. Looking at the constitutions of the new member states, this interpretation would not seem to be absolutely off the road; yet when looking at the Constitution for Europe—in the drafting of which the new member states participated—this view is to be regarded with some scepticism. The above cited wording of Article I-5 of the Constitution seems to look at the sovereignty and the inner structure of the member states rather than at

---

91 Haltern, op. cit., p. 595.
transnational aspects of identity. It is however certain that Article 6(3) TEU does not provide for any irredentist or nationalistic understanding of identity.92

Yet even if a transnational consciousness were to be included in the definition of national identity as provided for in Article 6(3) TEU, it remains disputable whether respect for the national identities of the members states can serve as a justification for the preferential treatment of co-ethnics. Even when acknowledging national identity as a legitimate aim, the European Court of Justice continues to refer to the non-discrimination principle. Therefore, national identity as a justification is to be employed rather carefully in the case of transnational minority law. Still, particular circumstances for justification may vary from one member state to another,93 thus creating a possible starting point for a differential assessment.

The last issue to be discussed is the proportionality of measures of transnational minority law within the framework of Community law. According to the proportionality test as formulated by the ECJ, a measure is considered to be lawful if the measure in question is appropriate and necessary in order to achieve the objectives legitimately pursued by the legislation in question.94 It seems obvious that measures of transnational minority law are useful in supporting the ethnic, cultural, linguistic and religious identities of co-ethnic minorities. The core regulations of transnational minority law, support of education and culture, are especially appropriate means for the support of co-ethnics. The necessity of transnational minority law, however, may be more doubtful since the fundamental freedoms provided for by the EC Treaty provide for easier contact between the kin-state and the respective kin minorities, as already mentioned. On the other hand, there is no actual standard of minority

protection in Community law itself, thus providing member states with considerable room for action. The necessity of transnational minority law seems to be questionable when taking into consideration that most states concerned do have national legal norms recognising and implementing minority rights. On the other hand, Article 17(1) of the Framework Convention for the Protection of National Minorities provides for contact between the members of the same ethnic groups. Since the Convention delivers only a framework on minority protection, the signatories have a degree of discretion with regard to that provision. It might well be argued that transnational minority law lies within this discretion as long as the principles of international law are obeyed.

By way of conclusion, transnational minority law seems not to infringe Community law in each and every case. Still, individual norms may need to be more closely investigated in the context of Community law. Moreover, it has to be borne in mind that the support for kin minorities by transnational minority law, even in a form which would be fully in line with Community law, is capable of setting free political fears and concerns. Therefore it might be politically questionable whether this kind of support for co-ethnics is useful in an ‘ever closer Union of the people of Europe’ as provided for by Article 1(2) TEU.

95 Norms on privileged access to the labour market or the acquisition of property seem to be of special interest in this respect. Fernand de Varennes investigates the benefits and grants to minority university students in Hungary: Fernand de Varennes, ‘An Analysis of the ‘Act on Hungarians Living in neighbouring Countries’ and the Validity of Measures Protecting and Promoting the Culture and Identity of Minorities Outside Hungary’ in Kántor et al. (eds.), op. cit., pp. 411–429.