Transnational Minority Protection in Central and Eastern Europe and European Community Law

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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[1] and laws on the rights of ethnic minorities living on their territories.[2]

A rather different approach involves legal measures of kin-states[3] who commit themselves to the protection of members of kin minorities[4]

[1] See for example: 'Strategy of the Government of the Slovak Republic for the Solution of the Problems of the Roma National Minority and the Set of Measures for its Implementation' <http://www.government.gov.sk/INFOSERVIS/DOKUMENTY/ROMSTRAT/en_romstrategia.shtml>, accessed 24 November 2004.

[2] Act LXXVII of 1993 on the rights of national and ethnic minorities as last amended by the Act CXIV of 2005 on the elections of the minorities' self-government representatives and on the amendment of certain acts concerning the national and ethnic minorities, *Magyar Közlöny: a Magyar Köztársaság Hivatalos Lapja* 2005/141 (26 October 2005), p. 7724.

[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.

[4] Kin minorities can be defined as persons belonging to the national communities of the kin-states (not in the meaning of citizenship), who are citizens of other countries ('the home-states'). See: 'Report on the Preferential Treatment of National Minorities by Their Kin-state', adopted by the European Commission for Democracy Through Law (Venice Commission) at its 48th Plenary Meeting, Venice, 19–20 October 2001, CDL-INF (2001)

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.[5] 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)[6] or a 'national responsibility clause'[7] in the constitution (e.g. Albania, Croatia, Hungary, Macedonia, Poland, Romania, Slovakia, and Slovenia).[8]

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

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19, in European Commission for Democracy Through Law (ed.), *The Protection of National Minorities by Their Kin-state* (Science and Technique of Democracy no. 32; Strasbourg, 2002). Also available in English at <http://www.venice.coe.int/docs/2001/CDL-INF(2001)019-e.asp>, accessed 23 January 2006.

[5] Act LXII of 2001 on Hungarians living in neighbouring states, as amended by the Act LVII of 2003 on amendments of the Act LXII of 2001, *Magyar Közlöny: a Magyar Köztársaság Hivatalos Lapja* 2003/84 (15 July 2003), p. 6696 (hereafter: the Hungarian Law).

[6] Law for Bulgarians living outside the Republic of Bulgaria, *Dăržaven Vestnik* 30 (11 April 2001), p. 2 (hereafter: the Bulgarian Law); Law regarding the support granted to the Romanian communities from all over the world, *Monitorul Oficial*, Part I, 265 (16 July 1998), p. 2 (hereafter: the Romanian Law); Law on Expatriate Slovaks and changing and complementing some laws, *Zbierka zákonov* 30–70 (12 March 1997), (hereafter: the Slovak Law); Resolution on the position of autochthonous Slovene minorities in neighbouring countries and the related tasks of State and other institutions in the Republic of Slovenia, *Uradni list* 35–2280/1996 (5 July 1996) (hereafter: the Slovenian Resolution) <www.venice.coe.int/site/dynamics/N_Subject_ef.asp?T=13&L=E>, accessed 24 November 2004.

[7] On this topic, see: Iván Halász and Balázs Majtényi, 'Constitutional Regulation in Europe on the Status of Minorities Living Abroad', *Minorities Research* 4 (2002), pp. 135–144; *idem* and Balázs Vizi, 'A New Regime of Minority Protection? Preferential Treatment of Kin minorities under National and International Law' in Zoltán Kántor et al. (eds.), *The Hungarian Status Law: Nation Building and/or Minority Protection* (Slavic Eurasian Studies no. 4; Sapporo, 2004), pp. 328–349.

[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 law[10] 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]

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[9] A closer investigation is being undertaken in the current PhD project of the author.

[10] Examples from German legal literature: Matthias Herdegen, *Völkerrecht* (Munich, 2002), p. 7; Joachim Becker, 'Der transnationale Verwaltungsakt', *Deutsches Verwaltungsblatt* 116 (2001), pp. 855–866; Christine E. Linke, in *Europäisches Internationales Verwaltungsrecht* (Frankfurt am Main, 2001), p. 33; Martin Böse, 'Das Prinzip der gegenseitigen Anerkennung in der transnationalen Strafrechtspflege der EU: Die Verkehrsfähigkeit strafgerichtlicher Entscheidungen' in Carsten Momsen, René Bloy and Peter Rackow (eds.), *Fragmentarisches Strafrecht: Beiträge zum Strafrecht, Strafprozessrecht und zur Strafrechtsvergleichung* (Frankfurt am Main, 2003), p. 233; Otto Lagodny, 'Viele Strafgewalten und nur ein transnationales ne-bis-in-idem?' in Andreas Donatsch (ed.), *Strafrecht, Strafprozessrecht und Menschenrechte: Festschrift für Stefan Trechsel zum 65. Geburtstag* (Zurich, 2002), pp. 253–267.

[11] See for example: Rainer Bauböck, *Transnational Citizenship* (Aldershot, 1994); Brian Bercusson, 'Labour Regulation in a Transnational Economy', *Maastricht Journal of European and Comparative Law* 6 (1999), pp. 244–270; Louise Shelley, 'Transnational Organized Crime', *Maastricht Journal of European and Comparative Law* 7 (2000), pp. 35–50; Michael Stewart, 'The Hungarian Status Law: A New European Form of Transnational Politics?', *Diaspora* 12 (2003), pp. 67–101, *idem* in Kántor et al. (eds.), *op. cit.*, pp. 120–151; Steven Vertovec, 'Transnationalism and Identity', *Journal of Ethnic and Migration Studies* 27 (2001), p. 573.

[12] Another suggested term is diaspora law. See: Judit Tóth, 'Legal Regulations Regarding Hungarian Diaspora', *Regio* (2000), pp. 37–64.

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[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.[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[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

[13] Article 2(5) UN Declaration on the Rights of Persons belonging to National or Ethnic, Religious and Linguistic Minorities G.A. res. 47/135, 47 U.N. GAOR Supp. (no. 49) at 210, U.N. Doc. A/47/49 (1992); Article 32.4 Document of the Copenhagen Meeting of the Conference on the Human Dimension of the CSCE, *Human Rights Law Journal* 11 (1990), pp. 232–346.

[14] Article 17(1) of the Framework Convention for the Protection of National Minorities, *Human Rights Law Journal* 16 (1995), pp. 98–115.

[15] For a more detailed investigation, see for example: Iván Halász in this volume.

territorial 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[16] or embracing all persons of the same ethnic origin without this geographic limitation.[17] This is provided for in the wording of the constitution,[18] in the interpretation of the constitution,[19] or in individual domestic laws.[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.[21] In some cases there are special documents verifying that an individual belongs to the respective kin minority.[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[23] or even granting status as a national.[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.[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

[16] Article 1(1) Hungarian Law; Chapter 1, I Slovene Resolution.
[17] Article 1 Bulgarian Law; Article I §1–2 Slovak Law; Article 1 Romanian Law; Article 6(3) Hungarian Constitution.
[18] Article 5 Slovene Constitution.
[19] Article 8 Albanian Constitution.
[20] Article 3 Bulgarian Law; Article I §4 Slovak Law; Article 19–22 Hungarian Law.
[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.
[22] Article 3 Bulgarian Law; Article I §4 Slovak Law; Article 19–22 Hungarian Law.
[23] On the Hungarian Law, see: Kinga Gál, 'The Hungarian Legislation on Hungarians Living in Neighbouring Countries' in European Commission for Democracy through Law (ed.), *op. cit.*, p. 171; idem in Kántor et al. (eds.), *op. cit.*, p. 406.
[24] Marten Breuer, 'The Act on Hungarians Living in Neighbouring Countries Challenging Hungary's Obligations under Public International Law and European Community Law', *Zeitschrift für Europarechtliche Studien* 37 (2002), p. 278.
[25] 'Report on the preferential treatment of national minorities by their kin-state', in European Commission for Democracy through Law (ed.), *op. cit.*, p. 38.

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 permit[29] or indeed by removing this requirement altogether.[30] Both Slovak and Hungarian laws provide for reduced prices in public transport[31] 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 libraries[34] 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

[26] For an example for this view see: Paszkál Kiss, Monika Somogyi, Zsuzsanna Pohl, 'Lay People's Views on Europe and the Nation: The Case of Hungary' (RSCAS/EURONAT, 2003) <http://www.iue.it/RSCAS/Research/EURONAT/200405Rep.H.EURONAT.pdf>, accessed 25 November 2004. For a more critical view, see: Jon E. Fox, 'National Identities on the Move: Transylvanian Hungarian Labour Migrants in Hungary', *Journal of Ethnic and Migration Studies* 29:3 (2003), pp. 449–466.

[27] Article I §6(1)(c) 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.
[43] 'Report on the preferential treatment' op. cit., pp. 15–42. For a comment on the Report, see for example: László Sólyom, 'What Did the Venice Commission Actually Say?' in Kántor et al. (eds.), *op. cit.*, pp. 365–370.
[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]

Enlargement to the East', RSC Policy Paper 98/5 (1998); Bruno de Witte, 'Politics Versus Law in the EU's Approach to Ethnic Minorities', EUI-RSCAS Working Papers 2000/4 (2000); Gaetano Pentasugglia, 'The EU and the Protection of Minorities: The Case of Eastern Europe', *European Journal of International Law* 12 (2001), pp. 3–38; Kristin Henrard, 'The Impact of the Enlargement Process on the Development of a Minority Protection Policy within the EU: Another Aspect of Responsibility/Burden Sharing?', *Maastricht Journal of European and Comparative Law* (9) 2002, pp. 357–391; Frédéric Van den Berghe, 'The European Union and the Protection of Minorities: How Real is the Alleged Double Standard?', *Yearbook of European Law* 22 (2003), pp. 155–202; Antje Wiener and Guido Schwellnus, 'Contested Norms in the Process of EU Enlargement: Non-Discrimination and Minority Rights', *Constitutionalism Web-Papers (ConWEB)* (2) 2004 <http://www.qub.ac.uk/schools/SchoolofPoliticsInternationalStudies/FileStore/ConWEBFiles/Filetoupload,5307,en.pdf>, accessed 25 November 2004.

[45] As regards the law of civil procedure: Case C–122/96, Saldanha, [1997] ECR I–5325, paragraph 19; Case C–323/95, Hayes, [1997] ECR I–1711, paragraph 13. As regards the law of criminal procedure: Case C–274/96, Bickel and Franz, [1998] ECR I–7637, paragraph 17; Case 186/87, Cowan, [1989] ECR 195, paragraph 19.

[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.

[47] This issue was touched upon by the Commission of the European Communities 2001 Regular Report on Hungary's progress towards accession, Brussels, 13.11.2001 SEC (2001) 1748, pp. 22, 91 <http://europa.eu.int/comm/enlargement/report2001/hu_en.pdf>, accessed 24 November 2004, and in its 2002 Regular Report on Hungary's progress towards accession, Brussels, 9.10.2002 SEC (2002) 1404, pp. 30, 122, 131 <http://europa.eu.int/comm/enlargement/report2002/hu_en.pdf>, accessed 24 November 2004 and in its Comprehensive Monitoring Report on Hungary's Preparation for Membership, Brussels, 05.11.2003 SEC (2003) 1205, pp. 51–52 <http://europa.eu.int/comm/enlargement/report_2003/pdf/cmr_hu_final.pdf>, accessed 24 November 2004.

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[48] 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.[49] 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.

[49] Case C–336/96, Gilly, [1998] ECR I–2793, paragraph 37; Case C–379/92, Peralta, [1994] ECR I–3453, paragraph 18; Case C–18/93, Corsica Ferries Italia, [1994] ECR I–1783, paragraph 19; Case C–305/87, Commission v Greece, [1989] ECR 1461, paragraph 13.

recently extended by a number of judgments of the ECJ which, based on Articles 12 and 18 EC Treaty, extend the scope of non-discrimination based on nationality to every EU citizen.[50]

Although not explicit, it is widely acknowledged that Article 12 EC Treaty is directed at both the member states and Community institutions.[51] 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.[52] 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.[53] 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.[54] As regards the majority of citizens of other member states, they are excluded from the transnational minority law's benefits

[50] Case C–86/96, Martinez Sala, [1998] ECR I–2691; Case C–274/96, Bickel and Franz, [1998] ECR I–7637; Case C–184/99, Grzelczyk, [2001] ECR I–6193; Case C–224/98, D'Hoop, [2002] ECR I–6191, paragraph 28; Case C–148/02, Garcia Avello, [2003] ECR I–11613, paragraphs 22, 23; Case C–224/02, Pusa, [2004] ECR I–5763, paragraph 16. More restrictive in Case C–348/96, Calfa, [1999] ECR I–11 and Case C–378/97, Wijsenbeek, [1999] ECR I–6207.

[51] 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.

[52] Case C–186/87, Cowan, [1989] ECR 195, paragraph 10.

[53] 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.

[54] 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).

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).[55] The most frequent examples of this kind of indirect discrimination are the criteria of national qualifications,[56] residence,[57] and language requirements.[58] 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

[55] Case C–224/00, Commission v Italy [2002] ECR I–2965, paragraph 15; Case C–274/96, Bickel und Franz, [1998] ECR I–7637, paragraph 26; Case C–29/95, Pastoors und Trans-Cap, [1997] ECR I–285, paragraph 16.

[56] Case C–340/89, Vlassopoulou, [1991] ECR I–2357, paragraph 15.

[57] Article 12 EC: Case C–274/96, Bickel und Franz, [1998] ECR I–7637, paragraph 26; Case C–29/95, Pastoors und Trans-Cap, [1997] ECR I–285, paragraph 16; Article 39 EC: Case 152/73, Sotgiu, [1974] ECR 153, paragraph 11; Case C–279/93, Schumacker, [1995] ECR I–225, paragraph 28; Case 350/96, Clean Car, [1998] ECR I–2521, paragraph 29; Article 43 EC: Case 3/88, Commission v Italy, [1989] ECR 4035, paragraph 8; Article 49 EC: Case C–388/01, Commission v Italy, [2003] ECR 721, paragraph 14; Case C–224/97, Ciola, [1999] ECR I–2517, paragraph 14.

[58] Article 39 EC: Joined Cases C–259/91, 331/91, 332/91, Allué II, [1993] ECR I–4309, paragraph 11.

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.[59] 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.[60] 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.[61] Article II-80 of the Treaty establishing a Constitution for Europe,[62] which is not in force yet,[63] 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[64] (agency

[59] Case C–237/94, O´Flynn, [1996] ECR I–2617, paragraph 20.
[60] Case C–388/01, Commission v. Italy, [2003] ECR I–721, paragraph 14; Case C–281/98, Angonese, [2000] ECR I–4139, paragraph 14.
[61] See: Case 29/69, Stauder, [1969] ECR 419, paragraph 7; Case 11/70, Internationale Handelsgesellschaft, [1970] ECR 1125, paragraph 4; Case 4/73, Nold, [1974] ECR 491, paragraph 13; Case 44/79, Hauer, [1979] ECR 3727, paragraph 15. More recently: Case C–292/97, Karlsson, [2000] ECR I–2737, paragraph 39.
[62] Treaty establishing a Constitution for Europe, Conference of the Representatives of the Governments of the Member States, CIG 87/2/04 REV 2 <http://europa.eu.int/constitution/download/part_II_EN.pdf>, accessed 2 February 2006.
[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.
[64] Joined Cases 201/85 and 202/85, Klensch, [1986] ECR 3477; Case 5/88, Wachauf, [1989] ECR 2609.

situation[65]) and when members rely on a derogation to the fundamental freedoms as provided for in the EC Treaty[66] (derogation situation). How far the member states are bound by Community human rights is controversial[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.[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.[69]

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[65] J.H.H. Weiler and Sybilla C. Fries, 'A Human Rights Policy for the European Community and Union: The Question of Competences' in Philip Alston (ed.), *The EU and Human Rights* (Oxford, 1999), p. 161.

[66] Case C–260/89, ERT, [1991] ECR I–2925; Case C–112/00, Schmidberger, [2003] ECR I–5659.

[67] The Convention on the Charter of Fundamental Rights arguably submits a more restrictive approach. See: Martin Borowsky's commentary on Article 51 of the Charter of Fundamental Rights of the European Union, in: Jürgen Meyer (ed.), *Kommentar zur Charta der Grundrechte der Europäischen Union* (Baden-Baden, 2003), pp. 560–577.

[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.

[69] See for example: Case C–249/96, Grant, [1998] ECR I–621, paragraph 31, 48; Guido Schwellnus, 'Much ado about nothing?—Minority Protection and the EU Charter of Fundamental Rights', *Constitutionalism Web-Papers (ConWEB)* 5 (2001) <http://www.qub.ac.uk/schools/SchoolofPoliticsInternationalStudies/FileStore/ConWEBFiles/Filetoupload,5323,en.pdf>, accessed 24 November 2004; Mark Bell, 'The New Article 13 EC Treaty: A Sound Basis for European Anti-Discrimination Law?', *Maastricht Journal of European and Comparative Law* 6 (1999), pp. 5–24; *idem*, *Anti-Discrimination Law and the European Union* (Oxford, 2002); Gabriel N. Toggenburg, 'A Rough Orientation Through a Delicate Relationship: The European Union's Endeavours for (its) Minorities', *European Integration online Papers (EioP)* 4:16 (2000) <http://eiop.or.at/eiop

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 [70] and the so-called Framework Directive 2000/78/EC.[71] 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.[72] 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.[73] It therefore seems debatable whether Article 5 of the Race Directive can be applied to transnational minority law.[74]

/texte/2000-016a.htm>, accessed 24 November 2004; *idem*, 'The Race Directive: A New Dimension in the Fight against Ethnic Discrimination in Europe', *European Yearbook of Minority Issues* 1 (2001/02), pp. 231–244; Van den Berghe, op. cit., pp. 170–175.

[70] Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, *Official Journal L 180* (19 July 2000), p. 22.

[71] Council Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation, *Official Journal L 303* (2 December 2000), p. 16.

[72] Article 1 of the Council Directive 2000/43/EC.

[73] 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'.

[74] Breuer, op. cit., p. 280 rejects the application of Article 5. Renate Weber on the other hand questions discrimination in the sense of the Directive. See: Renate Weber, 'The Kin-state and Its Minorities: Which European Standards? The Hungarian Status Law: Its Antecedents and Consequences' in Kántor et al. (eds.), *op. cit.*, p. 353.

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]

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[75] Case C–274/96, Bickel and Franz, [1998] ECR I–7637, paragraph 29.

[76] Accession Criteria for membership of the European Union as adopted by the Copenhagen European Council, 21 and 22 June 1993, Presidency Conclusions, SN 180/1/93 REV 1, at 7.A.(iii) <http://ue.eu.int/ueDocs/cms_Data/docs/pressData/en/ec/72921.pdf>, accessed 24 November 2004.

[77] Manfred Nowak, 'Human Rights "Conditionality" in Relation to Entry to, and Full Participation in, the EU' in Philip Alston (ed.), *op. cit.*, p. 692; Toggenburg, op. cit.; Peter Hilpold, 'Minderheiten im Unionsrecht', *Archiv des Völkerrechts* 39 (2001), pp. 432–471.

[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

[80] Cf. for example: Commission of the European Communities 2002 Regular Report on Latvia's progress towards accession, Brussels, 9.10.2002 SEC (2002) 1405, p. 30 <http://europa.eu.int/comm/enlargement/report2002/lv_en.pdf>, accessed 24 November 2004.

[81] Conference on Security and Co-operation in Europe, Final Act, *International Legal Materials* 14 (1975), p. 1292.

[82] Charter of Paris for a New Europe, *Human Rights Law Journal* 11 (1990), pp. 379–389.

[83] Frank Hoffmeister, 'Monitoring Minority Rights in the Enlarged European Union' in Gabriel N. Toggenburg (ed.), *Minority Protection and The Enlarged European Union: The Way Forward* (Budapest, 2004), pp. 85–106; *idem*, 'Changing requirements for membership' in Andrea Ott and Claudia Inglis, *Handbook on European Enlargement: A Commentary on the Enlargement Process* (The Hague, 2002), pp. 90–102.

[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 combated 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

völkerrechtlicher Aspekte (Vienna, 2001), p. 1.

[86] Case C–473/93, Commission v Luxembourg, [1996] ECR I–3207, paragraph 35. See also: Case 379/87, Groener, [1989] ECR 3967, paragraph 18.

[87] Thus following the Final Report of the Working Group V of the Convention, CONV 375/1/02 REV 1, pp. 10–12 <http://register.consilium.eu.int/pdf/en/02/cv00/00375-r1en2.pdf>, accessed 24 November 2004.

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

[88] Treaty establishing a Constitution for Europe, op. cit. <http://europa.eu.int/constitution /download/part_I_EN.pdf>, accessed 2 February 2006.
[89] Ulrich R. Haltern, 'Europäischer Kulturkampf—Zur Wahrung "nationaler Identität" im Unions-Vertrag', *Der Staat* 37 (1998), pp. 591–623, at p. 619.
[90] Wolfgang Graf Vitzthum, 'Die Identität Europas', *Europarecht* 37 (2002), p. 5.
[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

[92] Ibid. p. 619; Peter Badura, 'Die föderative Verfassung der Europäischen Union' in Karl-Hermann Kästner (ed.), *Festschrift für Martin Heckel zum siebzigsten Geburtstag* (Tübingen, 1999), p. 704.

[93] Case 41/74, Van Duyn, [1974] ECR 1337, paragraph 18/19; Case C–36/02, Omega [2004] ECR I–9609, paragraph 38.

[94] See only some of the recent examples in the case-law of the ECJ: Case C–319/03, Briheche, [2004] ECR I–8807, paragraph 24; Joined Cases C–184/02 and C–223/02, Spain and Finland v European Parliament and Council of the European Union, [2004] ECR I–7789, paragraph 57; Joined Cases C–27/00 and C–122/00, Omega Air and Others, [2002] ECR I–2569, paragraph 62.

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.[95] 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.