5th Warsaw Seminar on Human Rights

Warsaw, 29 September – 1 October 2011

Warsaw 2011

Welcome Addresses

Jacek Czaputowicz
Director of the National School of Public Administration

Excellencies,

Ladies and Gentlemen,

I have the honor and pleasure to open the Warsaw Seminar on Human Rights. Let me firstly welcome the Government agents, representatives of the Council of Europe, the European Court of Human Rights, the European Union, Organization for Security and Cooperation in Europe, representatives of non-governmental organizations, academics, scholars and other experts in the field of human rights.

This is already the fifth Warsaw Seminar on Human Rights. This year it has a special character, as it also falls within the first Polish Presidency of the Council of the European Union.

During the next two days you will have a unique possibility to exchange views on the most important issues related to the future reform of the Strasbourg system and its relation to the European Union system.

The Seminar is divided into four thematic panels. First panel is devoted to national minorities in the light of the implications of the Lisbon Treaty. The aim of the panel is to undertake the discussion on further activities of the European Union pertaining to the national minorities issues.

In the second panel, devoted to the rights of elderly persons, the keynote speech will be held by the special guest of the fifth Warsaw Seminar – the Commissioner for Human Rights of the Council of Europe, Mr. Thomas Hammarberg. I hope that this panel will constitute a promising point of departure for further debate on this issue at the European level, especially that on 14 September 2011 the European Parliament and the Council decided that the year 2012 will be European Year for Active Aging and Solidarity between Generations.

In the third panel you will take a look at the problematic relation between the freedom of expression and the right to respect for private life. In this part our attention will be also focused on the question of freedom of speech in the Internet and the approaches to the criminal sanctions for defamatory statements.

The fourth panel is the follow-up to the last year's Warsaw Seminar discussion on current issues related to the European Convention on Human Rights System. This year, you will have an opportunity to discuss some concrete aspects of the Strasbourg system, such as an idea of a general domestic remedy or the role of the Government Agents. Within this panel, you will also be able to discuss the current state of the reform of the Strasbourg system after the Interlaken and Izmir Declarations and the challenges to its future.

Concluding my welcome speech, I would like to mention some words about the National School of Public Administration. It has been founded after the fall of the Socialist system with a view to train competent, politically neutral civil servants, capable of being held to account for all matters conferred upon them. The program of the National School of Public Administration also includes the training on human rights standards. In this context, allow me to thank Mr. Jakub Wołąsiewicz, Government Agent of Poland, the inventor of the idea of Warsaw Seminars on Human Rights, who also trains our students on human rights.

I believe that the tradition of Warsaw Seminars will contribute to the development of the European Human Rights protection system. I wish you a productive discussion and a pleasant stay in Warsaw.

Thank you.

Maciej Szpunar
Deputy Minister of Foreign Affairs

Ladies and Gentlemen,

It is my great pleasure to welcome you at the Warsaw Seminar, organized by the Ministry of Foreign Affairs for the fifth time already. I have been closely following the dynamic development of this event, which year after year has been attracting more and more distinguished experts and academics. This edition of the Seminar is especially significant as it is organized under the auspices of Poland's first EU Presidency. Therefore, this year we will have the chance to discuss topics which do not focus solely on the Council of Europe's activities, but also relate to EU policies and regulations. In particular, we have decided to draw the participants' attention to such subjects as the protection of national minorities in the light of the Treaty of Lisbon, the rights of elderly persons in Europe, freedom of expression and respect of privacy, and finally, the challenges facing the reform of the European Convention system.

One major challenge to the Strasbourg system will inevitably be caused by the historic process leading to the accession of the European Union to the Convention on Human Rights and Fundamental Freedoms. The process provides us with a unique opportunity to observe how the Council of Europe and the European Union are becoming intertwined in a pan-European human rights protection system. I would like to devote my presentation to this new cooperation between the two organizations.

It seems appropriate to start by asking why EU accession to the Convention is necessary. The development of the European Union and its gradual shift from a strictly economic dimension towards a more individual-oriented approach has resulted in an extension of its competences, which also covers the area of human rights. It should be noted that EU regulations and decisions remain outside the competence of human rights monitoring bodies. Such a lacuna weakens the European standards of judicial human rights protection, developed in order to protect human beings from the arbitrary legislation and administration of public authorities. Since the Union has acquired powers that can directly or indirectly affect the rights and freedoms of individuals, it was indispensable to subject it to the most developed and effective human rights protection system – the Strasbourg system. Thereby, EU accession to the Convention was envisaged in order to satisfy the requirement inherited from Roman law and formulated in Latin phrase: '*ubi ius, ibi remedium*' ('where there is a right, there is a remedy').

We should expect that the accession will have far-reaching political and practical implications for increasing the level of European human rights protection, as well as for strengthening the key role of the Convention system in Europe. Simultaneously, it will enhance the credibility of the European Union towards its Member States and external partners, showing its real involvement in respecting fundamental rights and freedoms.

The process of the EU's accession and future membership in the Convention system also constitutes an absorbing topic and challenge for lawyers. As the Under-Secretary of State responsible for legal and treaty issues and the Government Plenipotentiary for Proceedings before the Court of Justice of the European Union, I could not omit this aspect of the accession. How to ensure the EU's legal autonomy, as safeguarded by the Court of Justice, after subjecting the Union to the Strasbourg control mechanism? How to develop a mechanism guaranteeing that future complaints to the European Court of Human Rights will be correctly addressed against one or more Member States and/or the Union? We should also start considering the accession's possible negative effects, such as its potential impact on the excessive length of proceedings before the European Court. These and other issues constitute fascinating dilemmas for both EU lawyers and those specializing in human rights, and will have to be solved in the near future.

An important stage of the Accession Agreement was reached in June 2011 with the completion of the work of the CDDH-EU expert group. However, equally interesting phases of this process are still ahead of us, especially those involving the political debates on the draft. In the run-up to work on the draft Accession Agreement, to begin in October this year, it is worth mentioning the very upbeat comment of the CoE Secretary General, Mr Jagland, spelt out at the Madrid Conference in February 2010: *'With the Lisbon Treaty and Protocol 14, this is no longer the question of "if" it is only a question of "when". The accession will be demanding and will require a good deal of effort. But where there is a will there is a way.'*

The draft Accession Agreement guarantees the rights of individuals prescribed by the Convention and safeguards the specific characteristics of both the Strasbourg system and the EU legal order. It introduces several innovative mechanisms, such as the co-respondent mechanism and the prior involvement of the Court of Justice, aimed at facilitating the smooth operation of the European Court of Human Rights and adjusting the Convention system to its functioning in the new configuration. Moreover, the draft also envisages the principle of equal rights of all parties to the Convention, grants the Union voting rights in the process of supervising the execution of judgments in the Committee of Ministers and entitles the Union to appoint its own judge.

Simultaneously, internal regulations, which the EU will have to adopt in view of the accession to regulate its participation in proceedings before the European Court of Human Rights, are still being discussed at the EU level. This is a key phase for the EU, since only the adoption of properly drafted internal rules will safeguard the timely and efficient fulfillment of EU obligations stemming from its future membership in the Convention system. This is especially important for us since, as the Presidency, we have the unique opportunity to not only participate in the process, but also to influence it. From our side, let me assure you that Poland will strive to ensure effective and

productive work on the EU's internal regulations which will further guarantee the smooth functioning of the Strasbourg system and the rights and freedoms of EU citizens.

Thank you for your attention.

Panel One

National Minority Issues in the European Union. Stocktaking and Post-Lisbon Challenges
in cooperation with the European Union
Agency for Fundamental Rights

Rapporteur: Dr. Tawhida Ahmed
University of Reading

Part One
Institutional Dimension

Moderator: Prof. Florence Benoit-Rohmer
Secretary General of the European Inter-University Centre
for Human Rights and Democratisation (EIUC), Venice

The Legal Bases for the Activities of the European Union concerning National Minorities

Dr. Csaba Pákozdi[1]
Head of Minority Law Department
Ministry of Foreign Affairs of Hungary

Bálint Ódor[2]
Deputy State Secretary for European Union Affairs
Ministry of Foreign Affairs of Hungary

1. The first steps towards a legal framework

As the initial goal of the European integration was to create an economic community, human rights issues and, within these, the protection of national minorities appeared in the first three decades mainly on the agenda of the political organs of the Community. From the '80s, the members of the European Parliament urged the incorporation of the legal protection of national minorities in the framework of European integration. Among several initiatives and rapports, the *"Resolution on a Community charter of regional languages and cultures and on a charter of rights of ethnic minorities"* is to be mentioned first. The rapport and the Resolution was prepared by the Italian MEP Mr Gaetano Arfé and adopted by the European Parliament on 16 October 1981. The Resolution contained almost all the main concerns of present-day minority assertions, like the collective approach to minority protection, (the Resolution mentions minority groups), the legitimacy of autonomy, which *"must not be regarded as an alternative to the integration of peoples and different traditions, but as means of themselves guiding the process necessary for increasing intercommunication or the preservation of their cultural and linguistic heritage"*[3]. The European Parliament has considered *"that linguistic and cultural heritage cannot be safeguarded unless the right conditions are created for their cultural and economic development"*[4].

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[2] ÓDOR, Bálint: Deputy State Secretary for European Union Affairs, Ministry of Foreign Affairs, Hungary.
[3] Resolution on a Community charter of regional languages and cultures and on a charter of rights of ethnic minorities. Resolution prepared by Mr Gaetano Arfé and adopted by the European Parliament on 16 October 1981.
[4] *ib.*

However, the legal bases for minority protection appeared gradually in the European *acquis*, particularly as a result of the 1993 Maastricht Treaty, which accentuated the cultural diversity of the Member States (Art. 167 TFEU). On 9 February 1994 the European Parliament adopted Resolution (A3-0042/94) on Linguistic Minorities in the European Community, on the basis of the rapport of the Finnish MP Mark Killilea.[5]

At the time of the enlargement of the EU towards Central and Eastern Europe, respecting the rights of national minorities appeared among the accession criteria of the new Member States. The Copenhagen accession criteria referred to the obligation of *"respect and protection of minorities"*. [6] Moreover, the reports and resolutions concerning the "readiness", or "progress" towards the accession of several Central and Eastern European states, contained explicit references to measures to be taken for compliance with the prescribed criteria -sometimes by pointing out the minorities - such as the assurance of equality before the law, the termination of discrimination and segregation,[7] the adoption of an Act on minorities, the respect of subsidiarity and cultural autonomy or the assurance of higher education for minorities by means of an appropriate financial background.[8]

The Treaty of Maastricht can be considered as a milestone in the field of the protection of human rights, Article F (later Article 6) of the Treaty on European Union incorporated in the *acquis* the obligation of the Union to respect fundamental rights, as ***general principles of Community Law*.**[9]

The Treaty of Amsterdam created a new paragraph 1 to Article F (and transformed the Article's number to Article 6), which states the following: *" The Union* ***is founded on*** *the principles of liberty, democracy,* ***respect for human rights and fundamental freedoms****, and the rule of law,* ***principles which are common to the Member States****."*

2. The appearance of minority protection at the level of the primary sources of European Law

The first appearance of the protection of national minorities (persons belonging to minorities) in the primary sources of the Law of the European Union is the entry into force of its last modification, the Treaty of Lisbon. The Treaty created a new Article 2, according to which *"The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for*

[5] TOGGENBURG, Gabriel N.: *Az Európai Unió kisebbségpolitikája: Befejezetlen színdarab három felvonásban.* in: TABAJDI, Csaba (ed.): Az Európai Kisebbségekért. EU-Ground, 2009, p. 95.

[6] European Council in Copenhagen 21-22 June 1993, Conclusions of the Presidency. Nr: 180/1/93

[7] Regular report from the Commission on Hungary's progress towards accession. http://ec.europa.eu/enlargement/archives/pdf/key_documents/1998/hungary_en.pdf

[8] European Parliament Resolution on the extent of Romania's readiness for accession to the European Union. http://www.europarl.europa.eu/sides/getDoc.do?type=TA&reference=P6-TA-2005-0531&language=EN&ring=A6-2005-0344

[9] Article F para. 2 (later Article 6) *"The Union* ***shall respect fundamental rights****, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms signed in Rome on 4 November 1950 and* ***as they result from the constitutional traditions common to the Member States, as general principles of Community law."***

*human rights, including the **rights of persons belonging to minorities**. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail."* Moreover, the Treaty of Lisbon goes further than the Treaty of Maastricht concerning the ***respect*** of fundamental rights, as general principles of Community law, the new Article 6, Section(?paragraph) 3, stipulates, that *"fundamental rights (...) shall **constitute** general principles of the Union's law"*[10].

During the European Council in December 2000 the Charter of Fundamental Rights of the European Union was adopted, which has been integrated into the draft Constitution, but till the coming into force of the Treaty of Lisbon in 2009, has remained a political declaration. Article 2 integrates the Charter also into the primary sources of European Law, which *„ shall have the same legal value as the Treaties."*

3. The impact of the Treaty of Lisbon on the legal framework of the EU concerning national minorities

The sustained legislative work entails changes in the minority protection toolbox as well. The framework of a comprehensive human rights protection regime has already been established as a result of the follow-up of the dispositions agreed in the preparatory stage of the Constitutional Treaty, or the Lisbon Treaty respectively.

The reference made in the Lisbon Treaty to persons belonging to minorities may add a new dimension to minority protection, however, this reference to minorities, often regarded as a breakthrough, has so far not given a boost to launch new procedures with the aim of creating, in the long term, a solid basis for an EU-wide minority protection system.

We can conclude, that there is still no homogeneous EU legal system in the field of minority protection. There has been no real deliberation among EU-27 or a smaller circle of Member States on whether an EU-level minority protection policy is needed.

The above statement applies also to the structure, co-operation and effective co-ordination of the activity of the institutions operating in this field. The recognition of the status of national minorities, the issue of autonomy remained the exclusive competence of the Member States. In this regard, Article 4 (2)[11] of the Lisbon Treaty constituted a reaffirmation thereof.

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[10] "***Fundamental rights**, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms **and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union's law.**"*

[11] TEU Article 4 (2): *„The Union shall respect the equality of Member States before the Treaties as well as their national identities, 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…"*.

Provisions in the Lisbon Treaty relevant to minority protection – Prevention and sanctuary mechanisms related to the values of the EU

The achievement of the representation of minority rights in the primary sources of EU law may be considered the most important negotiation result in the preparatory stage of the Constitutional Treaty, or the Lisbon Treaty respectively. The Hungarian delegates to the European Convention charged with the drafting of the Constitutional Treaty, proposed in autumn 2002, to formulate in the Treaty the protection of rights of national minorities in a way that ensures that the individual states be required to meet the 1993 Copenhagen criteria even after accession. At the 2003/2004 Intergovernmental Conference, two months after the kick-off day, Italy, the holder of the EU Presidency at that time, put forward to the Member States a package of proposals containing the Hungarian motion as well. The Hungarian initiative underwent two modifications before its final adoption. The Presidency maintained the formula of "persons belonging to minorities" instead of "minority rights", on the one hand, and rejected the "national and ethnic" attribute, thereby extending the scope of protection to all minorities.

Later on, the Lisbon Treaty took over unchanged the above novelty of the Constitutional Treaty in a way that a new article was created and the former article on the principles was abolished. The new Article 2 of the TEU marks a huge step in the effort to make the Member States and EU institutions pay more attention to the guaranteeing of the exercise of the rights of minorities living EU Member States. The values of the EU, including the respect for the rights of "persons belonging to minorities", are general values to be respected by both the Member States and the EU. The provision may serve as a legal basis for the EU and its institutions to be active in the above-mentioned matters, in spite of the fact that no provision of the Lisbon Treaty confers to EU institutions the right to make law in the field of minority protection.

In case there is a clear risk of a serious breach of the values referred to in Article 2 of the TEU, Member States may have recourse to the so-called prevention mechanism, and when the existence of a serious and persistent breach thereof is established, the so-called sanctuary mechanism may be launched, as set forth by Article 7 of the TEU.

In case the European Council, acting by unanimity, after obtaining the consent of the European Parliament, determines the existence of a serious and persistent breach by a Member State of fundamental values, the Council may decide to suspend certain rights deriving from the application of the Treaties to the Member State in question, including the voting rights of the representative of the government of that Member State in the Council.

The enlargement process

Another reason for attributing such an importance to Article 2 is that the protection of "persons belonging to minorities" became a precondition of EU accession pursuant to Article 49 of the TEU: „Any European State which respects the values referred to in Article 2 and is committed to promoting them may apply to become a member of the Union."

One of the Copenhagen criteria adopted in 1993 made the protection of minorities a precondition for accession. However, three differences are to be emphasized. The Lisbon Treaty created a legally binding obligation for countries with a view to EU accession by referring to the respecting of the values of the European Union, among which figures the notion of „persons belonging to minorities". The Copenhagen criteria were outlined in the Presidency conclusions of the European Council (of 22-23 June 1993), accordingly, they can be interpreted in a way that a strong political commitment was made without the expressed intention to confer legal force on the agreed requirements. Still, the importance thereof should not be underestimated taking into consideration the importance the Commission attaches to minority protection in its annual reports on enlargement matters. The second difference lies in the drafting of the Copenhagen criteria as they undoubtedly imply the requirement to guarantee the possibility of exercising minority rights in a collective way. As agreed on the 1993 Copenhagen Summit, the „(….)stability of institutions guaranteeing democracy, the rule of law, human rights and respect for and protection of minorities (…)" is expected. In addition, the interpretation of the reference made in Article 2 of the TEU turned out to be the subject of debates as the notion is often explained in a way that rules out the possibility of interpreting minority rights as collective rights. It may be clarified in the coming years whether the protection of the rights of persons belonging to minorities within the European Law can be interpreted as that of the community regrouping persons belonging to the same national minority. The opinion of the Court of Justice of the European Union may give guidance in this regard.

As for the enlargement process, it is worth mentioning that as the Western Balkans region is getting closer to EU membership the continuously improving accession perspectives will draw a growing attention to national minorities and the importance of their treatment free of discrimination. Even in the final stage of the accession negotiations with Croatia the adoption of internal regulations related to national minority communities, , in a way that these are in line with the values of the EU, was an expectation of high importance. Even more attention will be focussed on the above requirement in case of Serbia, Montenegro and the Former Yugoslavian Republic of Macedonia. That minority related matters are adequately settled and the framework necessary for peaceful coexistence is ensured are fundamental preconditions when it comes to the approach to European structures and the consolidation of constitutionality in its European sense. Article 2 shall be subject to examination in the context of enlargement, as well.

In the context of the enlargement process a beam of light might be shed on the statement, according to which the Union is not restricted to act in favour of or pay attention to the protection of minorities while making law. The EU may do so even in its bilateral relations by consequently calling on its partners to account for the enforcement of European values. The Union may act in order to ensure that the internal law of Member States and candidate countries does not contain any dispositions which are contradictory to European values or discriminatory against minorities.

The prohibition of discrimination

In addition to the primary source of law normative as regards discrimination on grounds of nationality (Part Two of the Treaty on the Functioning of the EU), several secondary legislative acts adopted with a view to enforce the equal treatment are worth attention, as well. For instance the

2000/78/EC directive in the field of employment and the 2004/113/EC directive on the access to internal market services. Directive 2000/43/EC prohibits any direct or indirect discrimination based on racial or ethnic origin. This directive calls on Member States to put into effect the principles of equal treatment, determines the notion of discrimination and outlines the principles of combating discrimination. The above legislative act, pursuant to Article 3 (1) thereof, shall apply in relation to: „ (a) conditions for access to employment, to self-employment and to occupation, including selection criteria and recruitment conditions, whatever the branch of activity and at all levels of the professional hierarchy, including promotion; (b) access to all types and to all levels of vocational guidance, vocational training, advanced vocational training and retraining, including practical work experience; (c) employment and working conditions, including dismissals and pay; (d) membership of and involvement in an organisation of workers or employers, or any organisation whose members carry on a particular profession, including the benefits provided for by such organisations; (e) social protection, including social security and healthcare; (f) social advantages; (g) education; (h) access to and supply of goods and services which are available to the public, including housing."

Article 5 of the race directive is of paramount importance, as it expressly recognises the possibility and importance of positive discrimination meaning that an individual or a group of people may be favoured/compensated with a view to ensuring full equality. However, the directive does not contain any provisions for making it legally binding for the Member States to act in such a way. Attention should be devoted to the 10-year review of the directive expected to take place in 2012-2013.

The development of the fundamental rights protection regime of the EU

The European Commission adopted, on 19 October 2010, a strategy aimed at ensuring the effective implementation of the Charter of Fundamental Rights of the European Union. The Commission mapped, in the document, the opportunities for the realisation of the above objective with a view to making the Union exemplary in this respect. The toolbox contains the guarantees for respecting fundamental rights, the improvement of the knowledge and consciousness of citizens and the monitoring of progress, which comprises the continuous evaluation of the implementation of the Charter as well as the keeping of the issue on the agenda, without prejudice to the EU's limits of powers in this field.

The Commission published its first such comprehensive report in March 2011, which was an overview of the 2010 implementation of the Charter of Fundamental Rights. Hungary, then holder of the EU Presidency, initiated to put the report on the agenda of the Council, hold a discussion thereon and draw the attention to the progress made by the Council in the field of fundamental rights since the entry into force of the Lisbon Treaty. The ministers in charge of EU affairs of the Member States adopted, on 23 May 2011, the "Council conclusions on the Council's actions and initiatives for the implementation of the Charter of Fundamental rights of the European Union", which marks a milestone in the field of minority protection as these conclusions are the first to make a reference to the rights of national minorities.

The text adopted unanimously is also important because Member States are now expected to devote more attention to the subject and the implementation of the Charter, on the one hand, and because

Member States made clear, in a new and reinforced way, that they condemn any kind of discrimination based on membership of national minority, on the other hand. In addition, the Council underlined the importance of the safeguard of cultural, religious and linguistic diversity. From the point of view of keeping the fundamental rights issue on the agenda it seems essential to create a tradition, on the basis of the HU PRES initiative, of putting the issue on the Council agenda and forming its opinion on the basis of the annual fundamental rights report of the European Commission.

4. Tendencies concerning the secondary sources of EU Law

In addition to the above-listed concrete legal provisions, I have to refer to the presence of aspects related to the protection of linguistic minorities in the activities of the EU Committee of the Regions (CoR), and I also have to mention the efforts made by the Committee to promote and protect regional or minority languages in Europe. Although not compulsory, the opinions drawn up by this advisory and consultative body of the EU, representing local and regional authorities, contribute to the safeguarding and promoting of minority languages.

I would like to make reference in this regard to one of its recent opinions adopted by the 91st plenary session held between 30 June – 1 July 2011, - namely the "***Opinion on Protecting and Developing Historical Linguistic Minorities under the Lisbon Treaty*".** [12]

In this opinion the CoR emphasised the positive effects of minority languages and linguistic diversity, and underlined the growing awareness of this issue in Europe. According to the Opinion, the CoR is "*an assembly where best practices in safeguarding and promoting minority languages, and more broadly, the culture of each linguistic minority as an expression of Europe's cultural pluralism can be collated and disseminated, to the benefit of all the historical linguistic minorities.*[13]"

The Committee called on the European "*Commission and the Council to take more account of the need for a specific policy on linguistic minorities that is adequately funded and underpinned by a firmer legal basis.*[14]**"**

As a general comment, the CoR stated "*first and foremost that the European Union has a wealth of historical linguistic and national minorities (also referred to as indigenous or traditional) who speak languages other than those of the state to which they belong*[15]*,* and also pointed out that the local and regional governments in the EU Member States, in accordance with the principle of subsidiarity play an increasing role in promoting this cultural and linguistic diversity. The CoR noted the progressive enhancement in the past decades of the legal instruments that safeguard and develop these minority languages through international law, emphasised the key role played by the Council of Europe in this field, first of all through its two basic legal instruments: the *European Charter for Regional or*

[12] published in the Official Journal of the EU under 2011/C 259/06.
[13] Opinion 2011/C 259/06 para. 3.
[14] Idem, para. 4.
[15] Idem, General comments item 1.

Minority Languages and the *Framework Convention for the Protection of National Minorities*, and also mentioned a recent resolution in this matter adopted by the Congress for Local or Regional Authorities of the Council of Europe entitled *Minority languages – an asset for regional development.*[16]

The evolution of the Community law (the *Lisbon Treaty* and the *Charter of Fundamental Rights*) is also to be underlined in this regard. However, in spite of the legal developments which provide for greater protection of linguistic minorities, in the opinion of the Committee these do not yet constitute for the Commission a sufficient legal basis to ensure specific budget headings for historical linguistic minorities.

In addition to the need for a firmer legal basis, the CoR recommended a number of measures: among others it urged the European Commission to continue supporting the teaching of languages, particularly minority or regional ones; it called on the Community authorities to promote the use of these languages in direct contacts between the European institutions and the general public; it recommended that minority or regional languages become an integral part of EU policies, programmes and cross-cutting priorities. The last recommendation is addressed to Member States, which have a key role to play in language policy, and which are invited to show sensitivity to the linguistic diversity and take the approach of developing their historical linguistic communities.

Beside the acts and documents mentioned, the work of experts is also worth mentioning in the activity for a deeper minority protection: proposals, declarations are made, which reflect the opinion and recommendations of European lawyers, minority researchers, politicians, and representatives of non-governmental organisations. Among these, the conference on 30 and 31 January 2004 organised by the European Commission and the European Academy Bolzano (EURAC) is outstanding, where the Bolzano Declaration on the minority protection in the enlarged European Union was proclaimed. The aim of this declaration is „to address how the importance of the integration and protection of minorities (which are acknowledged at the political level) could be transformed into concrete legal instruments inside the framework of the newly enlarged and re-designed European Union." (...) „Though neutral in its opinion, the declaration highlights what is politically and legally possible within existing policy and demonstrates how the protection of minorities can be strengthened in a consistent manner."

[16] Resolution 301 (2010).

Jurisprudence of the Court of Justice of the EU on National Minorities and Related Issues

Prof. Anna Wyrozumska
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Forty-five million people (9%) in the EU belong to one of many national minorities. The existing national minorities are recognized by the Member States and they may be regarded as minorities within the EU. But EU law only incorporates such a recognition. There is no EU concept of national minority[17] or positive minority protection through granting and guaranteeing specific rights to persons belonging to national minorities. There is also no common concept of national or ethnic minority among Member States. Member States have still different attitudes, some of them not even recognise any national minority and not all of them are parties to the Council's of Europe Framework Convention for the Protection of National Minorities of 1 February 1995.[18]

The European Union is an international organization based on the principle of conferred powers. Many minorities concerns fall outside the competence of EU law. At the moment there is no EU law on the protection of minorities. According to some authors the specific protection of minorities contravenes the general principle of EU law on non-discrimination and therefore, as an exception it has to be specified in the primary law.[19] The example is Protocol No 3 on the Sami people attached to the Accession Treaty of i.a Sweden and Finland recognizing the obligations and commitments of Sweden and Finland with regard to the Sami people under national and international law. Article 1 of the Protocol provides that "Notwithstanding the provisions of the EC Treaty, exclusive rights to reindeer husbandry within traditional Sami areas may be granted to the Sami people." This exception

[17] See I. Pospíšil, "The Protection of National Minorities and the Concept of Minority in the EU Law", A Paper to be presented at the ECPR 3rd Pan-European Conference, Bilgi University, Istanbul, 21 – 23 September 2006, at http://www.jhubc.it/ecpr-istanbul/virtualpaperroom/008.pdf, accessed 15 November 2011, point 4.
[18] Belgium, Greece, Luxemburg and France are not the parties, France has not even signed the Framework Convention. The Convention contains no definition of the notion of 'national minority'. Its explanatory report mentions that it was decided to adopt a pragmatic approach, based on the recognition that at that stage it was impossible to arrive at a definition capable of mustering the general support of all Council of Europe member States. On general overview and bibliography see e.g. R. Hofmann, Minorities, European Protection, Max Planck Encyclopaedia of International Law (MEPiL), electronic version.
[19] I. Pospíšil, op. cit., point 3.

may extend to any other specific rights for the Sami people formulated in the future, if such rights are connected with the protection of traditional life of Sami people (Article 2).[20]

Nevertheless, EU law may impact on minorities protection[21]. Under the Lisbon Treaty minorities (the term is broader, encompassing not only national minorities) are for the first time mentioned in the EU primary law, that is in Article 2 TEU and Article 21 of the Charter of Fundamental Rights of the European Union. Article 2 TEU emphasis the values on which the Union is founded and enumerates the respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. The provision further adds that these values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail.

Additionally the Charter which is legally binding since the entry into force of the Lisbon Treaty (Article 6 para 1 TEU), clearly prohibits in Article 21 any discrimination based i.a. on a ground of membership of a national minority. However, the scope of the provision must be read together with the horizontal clauses of the Charter. The most important limiting clause in Article 51 para 1 specifies that the provisions of the Charter apply to the EU but to the Member States 'only when they are implementing Union law'. It is also worth to mention Article 3 TUE which reassures that the EU shall respect its rich cultural and linguistic diversity, and shall ensure that Europe's cultural heritage is safeguarded and enhanced, Article 4 TUE on the protection of Member States identity and Article 22 of the Charter obligating the Union to respect for cultural, religious and linguistic diversity. The concepts of cultural and linguistic diversity are undoubtedly closely related to the of protection of national minorities.[22] There are also many instruments of secondary law which may serve to protect rights of national minorities, as e.g. Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin or Directive 2000/78/EC of 27 November 2000, establishing a general framework for equal treatment in employment and occupation.

It is not the main objective of EU law to protect minorities, however, EU law has to pay due regard to the rights of minorities and under different EU competences it may accommodate their interests. There is vast case law of the Court of Justice of the European Union (CJEU) interpreting EU acts which have relevance to minorities. But the rights of minorities are protected mostly as fundamental rights, so under the same conditions applicable to all fundamental rights recognized by the EU.

20 Documents concerning the Accession of the Republic of Austria, the Kingdom of Sweden, the Republic of Finland and the Kingdom of Norway to the European Union, OJ C 241, 29 August 1994.

[21] See T. Ahmed, "The Impact of EU Law on Minority Rights", 2011 (on Sami rights see p. 142 et seqs.); K. Topidi, "EU law, Minorities and Enlargement", 2010, especially p. 63 et seqs.; G. N. Toggenburg, "The Treaty of Lisbon: Any News for the Protection of Minorities?", at http://www.fuen.org/media/78.pdf, accessed 15 November 2011; G. Pentassuglia, "The EU and the Protection of Minorities: The Case of Eastern Europe", *European Journal of International Law* (2001) vol. 12, no 1, p. 3-38; T. H. Malloy, "National Minority 'Regions' in the Enlarged European Union: Mobilizing for Third Level Politics?", European Center of Minority Issues, *Working Paper* # 24, July 2005;
D. Šmihula, "National Minorities in the Law of the EC/EU", *Romanian Journal of European Affairs*, Vol. 8, No. 3, September 2008, available at: http://ssrn.com/abstract=1282031; D. Kochenov, "A Summary of Contradictions: An Outline of the EU's Main Internal and External Approaches to Ethnic Minority Protection",
Boston College International and Comparative Law Review, 2008, Vol. 31, Issue 1, Article 2.

[22] See A. von Bogdandy, "The European Union as Situation, Executive, and Promoter of the International Law of Cultural Diversity – Elements of a Beautiful Friendship", *Jean Monnet Working Paper* 13/07, p. 15 et seq.

Protecting fundamental rights the CJEU respects the rights enshrined in the ECHR (Article 6 para 3) and pays due regard to the European Court of Human Rights (ECtHR) standards relating to those rights. The Court takes also guidelines from other international treaties for the protection of human rights on which the Member States have collaborated or of which they are signatories[23]. It is thus necessary to mention that under the ECHR there is no common general standard on protection of minorities. The ECtHR in 2001 in *Chapman v. the United Kingdom* noticed only an emerging international consensus amongst the contracting states of the Council of Europe recognising the special needs of minorities and an obligation to protect their security, identity and lifestyle, in particular in the Framework Convention, not only for the purpose of safeguarding the interests of the minorities themselves but to preserve a cultural diversity of value to the whole community. However, the Court further held that it was not persuaded that the consensus was sufficiently concrete for it to derive any guidance as to the conduct of or standards which contracting states consider desirable in any particular situation.[24]

Similarly to EU law, many minorities' protection issues fall outside the ECHR, neither as individual rights, including economic and social rights, nor an aspect of Article 14 protection. Article 14 ECHR enumerates 'association with a national minority' as a prohibited ground of discrimination, but the Convention provides only partial and indirect obligations in favour of minorities.[25] "Harris, O`Boyle and Warbrick Law of the European Convention on Human Rights" rightly observes that states may insist or have even a duty to insist that minorities respect the rights of others guaranteed by the Convention[26]. The Convention guarantees rather individual rights then group rights. The most important rights to minorities are election rights, freedom of expression, assembly, association and religion.[27] On the other hand minorities could be protected by positive obligations for states requiring that individual members of a minority may enjoy their rights effectively, eg. in matters of religion, education or right to respect for Article 8 rights. But it has to be remembered the difficulties in proving the existence of such obligations and the necessity to balance all the interests at stake.

[23] Case 44/79 Liselotte Hauer v. Land Rheinland-Pfalz [1979] ECR 3727, para 15.
[24] *Chapman v. the United Kingdom*, Application No. 27238/95, judgement of 18 January 2001, paras. 93-94.
[25] D.J. Harris et al., "Harris, O`Boyle and Warbrick Law of the European Convention on Human Rights", 2nd ed., 2009, p. 600 et seqs., 706 et seqs.
[26] D.J. Harris et al., op. cit. p. 602.
[27] The judgment of 17 February 2004 in *Gorzelik and others v. Poland* case (Application No. 44158/98) is a good example of the recognition of such rights. The Court underlined that "While in the context of Article 11 the Court has often referred to the essential role played by political parties in ensuring pluralism and democracy, associations formed for other purposes, including those protecting cultural or spiritual heritage, pursuing various socio-economic aims, proclaiming or teaching religion, seeking an ethnic identity or asserting a minority consciousness, are also important to the proper functioning of democracy. For pluralism is also built on the genuine recognition of, and respect for, diversity and the dynamics of cultural traditions, ethnic and cultural identities, religious beliefs, artistic, literary and socio-economic ideas and concepts. The harmonious interaction of persons and groups with varied identities is essential for achieving social cohesion. It is only natural that, where a civil society is functioning in a healthy manner, the participation of citizens in the democratic process is to a large extent achieved through belonging to associations in which they may integrate with each other and pursue collectively common objectives. The Court recognises that freedom of association is particularly important for persons belonging to minorities, including national and ethnic minorities, and that, as laid down in the Preamble to the Council of Europe's Framework Convention, "a pluralist and genuinely democratic society should not only respect the ethnic, cultural, linguistic and religious identity of each person belonging to a national minority, but also create appropriate conditions enabling them to express, preserve and develop this identity". Indeed, forming an association in order to express and promote its identity may be instrumental in helping a minority to preserve and uphold its rights. (paras 92-93).

The result does not necessarily have to be advantageous to a person belonging to minority. *Chapman* case is a good example. Sally Chapman purchased a piece of land with the intention of living on it in a caravan. She was not only refused permission to live on the land but also obliged to leave it. She claimed her rights under the ECHR had been violated, including Article 8 (right to respect for private and family life) and Article 14 (violation of prohibition of discrimination on the ground of race). She was supported in the ECtHR by the European Roma Rights Centre (intervening as a third party in the written procedure). The Center referred to international standards regarding the special needs of minorities and other information concerning the position of Roma (i.e. accommodation and general living conditions). The Court held that there was no violation of the Convention. The majority accepted that there has been an interference with the enjoyment of a home, as well as with private and family life since what was in issue was a traditional way of life. This way of living includes not only the right to have a certain kind of home but also the right to maintain identity as a Gypsy and lead a life in accordance with that tradition. The Court held that Article 8 implied positive state obligations to facilitate the Gypsy way of life. However, in the present case, the Court found the interference 'necessary in a democratic society', since the land inhabited by the Gypsy family was the subject of environmental protection and therefore a wide margin of discretion was to be accorded to national authorities in planning issues. An emerging international consensus recognizing the special needs of minorities was not found sufficiently concrete by the Court as to provide guidance for state conduct. The prohibition of discrimination was likewise not violated since any differences in treatment arose on the basis of legitimate aims and any discrimination was proportionate to those aims and had reasonable and objective justification. The Court ruled by a majority of 10 to 7. Seven judges were of the opinion that a sufficient consensus for protection of minorities existed and also that the absence of an alternative suitable caravan site for Mrs. Chapman required that the margin of appreciation be more strictly interpreted.

Also the other examples of the cases dealing with minority rights (however, as *Chapman* case, not exactly national minorities rights), especially in the sphere of religious rights, shows that there are often other interests at stake equally protected by the Convention. The ECtHR in *Ahmad v. UK* [28] held that the UK is not in breach of Article 9 by failing to allow a Muslim school teacher time off to attend Friday prayers. The Court found it to be of significance that the applicant had signed an employment contract which he knew conflicted with his religious requirements. Similarly, careful consideration of different aspects of wearing religious dress in the workplace led the ECtHR to accord the state a wide margin of appreciation. The Court focused on the need to protect two important principles: secularism and equality. In general, wearing religious dress can be denied in public employment and education institutions in order to protect the rights of others to gender equality and secularism, and to protect the public order by curbing the rise of religious fundamentalism[29]. The judgments of the ECtHR, especially those on religious dress, were highly criticized. T. Ahmed even concludes that "the current European consensus against wearing of religious attire in schools and public employment operates against the right to preserve one's identity."[30] The right is of great importance for the protection of minorities.

[28] *Ahmad v. UK (1982), Application No. 8160/78.*
[29] *Lucia Dahlab v. Switzerland* (2001), Application No 42393/98; *Dogru v. France* (2008), Application No. 27058/05.
[30] See e.g. T. Ahmed, op. cit., p. 144.

Getting back to the CJEU, it is necessary to emphasis that the Court is respecting the rights enshrined in the ECHR (vide Article 6 TEU) and has proved in its jurisprudence that it follows the case law of the ECtHR. One can expect that the Court will guarantee the protection of the rights of persons belonging to national minorities on the same level as the ECtHR. The CJEU has shown as well the high deference to the Member States which are willing to provide greater protection for certain human rights that lack a common European denominator[31]. There is vast case law of the Court which, however indirectly, may be of some value for the protection of the rights of persons belonging to national minorities. The cases show eg. that the Court is respecting cultural or religious diversity, like Sunday trading cases: *148/88 Torfaen BC v. BeQ plc*[32], 155/80 *Oebel*[33], C-402/92 *Tankstation* (closing hours of the shops)[34], 130/75 *Prais v. Council*[35] (general principle of non-discrimination including non-discrimination on the ground of religion), C-379/87 *Groener*[36] (principle of non-discrimination on the ground of language), C-303/06 *Coleman*[37], C-13/05 *Chacon Navas*[38], C-267/06 *Tadao Maruko*[39], C-144/04 *Mangold*[40], C-54/07 *Firma Feryn*[41] (cases on interpretation of EU Anti-Discrimination Directives 2000/43, 2000/78).

Let us look at least at two of these cases. They seem to be a good illustration of the Court reasoning. *Groener* case concerned a Dutch national who had been working in Ireland in a state educational institute part time as an art teacher. After two years, she applied for a permanent position in the same institution. Part of the requirement for the position was success in an Irish-language exam. Ms. Groener failed this exam and did not get the position. Success in the exam was a requirement for both national and non-nationals and Irish classes were provided for all of the applicants for the position. Groener had asked the Minister for Education for the requirement to be waived but this request was refused. She argued that the Irish exam was contrary to the right of free movement of workers. The Court held that the Treaty does not prohibit the adoption of a policy for the protection and promotion of a language of a Member State which is both the national language and the first official language. However, the implementation of such a policy must not encroach upon a fundamental freedom such as that of the free movement of workers. Therefore, the requirements deriving from measures intended to implement such a policy must not in any circumstances be disproportionate in relation to the aim pursued and the manner in which they are applied must not bring about discrimination against nationals of other Member States.

In case C-54/07 *Firma Feryn* the Court was answering the question submitted by the Belgian court concerning the interpretation of the Council Directive 2000/43/EC implementing the principle of equal treatment between persons irrespective of racial or ethnic origin. A Belgian body designated,

[31] C-36/02 *Omega* [2004] ECR I-09609.
[32] *C- 148/88 Torfaen Borough Council v. B & Q [1989] E.C.R. 3865.*
[33] 155/80 *Oebel* [1981] ECR 1993. The Court held that national rules governing hours of work, delivery and sale in the bread and confectionary industry constitute a legitimate part of economic and social policy, which is a matter for Member States, consistent with the objectives of public interest pursued by the treaty.
[34] C-402/92 *Criminal proceedings against Tankstation 't Heukske vof and J. B. E. Boermans* [1994] I-02199.
[35] 130/75 *Prais v. EC Council* [1976] ECR 1589.
[36] C-379/87 *Groener v. Minister of Education and City of Dublin Vocational Education Committee* [1989] ECR 3967.
[37] C-303/06 *Coleman v. Attridge Law* [2008] ECR I-05603.
[38] C-13/05 *Chacón Navas v. Eurest Colectividades SA* [2006] ECR 1-6467.
[39] C-267/06 *Tadao Maruko v Versorgungsanstalt der deutschen Bühnen* [2008] ECR I-1757.
[40] C-144/04 *Werner Mangold v. Rüdiger Helm* [2005] ECR I-9981.
[41] C-54/07 *Firma Feryn NV* [2008] ECR I-5187.

pursuant to Article 13 of the Directive, to promote equal treatment, applied to the Belgian labour courts for a finding that Feryn, which specialises in the sale and installation of up-and-over and sectional doors, applied a discriminatory recruitment policy. The body mentioned above was acting on the basis of the public statements of the director of Feryn to the effect that his undertaking was looking to recruit fitters, but that it could not employ 'immigrants' because its customers were reluctant to give them access to their private residences for the period of the works. The Court gave the EU Anti-Discrimination Directive a broad interpretation: an employer who declares publicly that it will not recruit employees of a certain ethnic or racial origin (it could be as well a person belonging to national minority), something which is clearly likely to strongly dissuade certain candidates from submitting their applications, and accordingly, to hinder their access to the labour market, constitutes direct discrimination in respect of recruitment within the meaning of Directive 2000/43.

The problem is that there is no specific case law of the CJEU on national minorities. Only few cases touch indirectly the issue. They show clearly that national (or ethnocultural) minorities are not and cannot be at the moment treated under EU law as privileged group possessing exclusive rights. On the contrary the specific protection of minorities may sometimes contradict the non-discrimination principle and have to be balanced against other fundamental rights of the EU law, especially free movement rights. It does not mean, however, that minorities are not protected by national law or by international law.

Case 137/84 *Mutsch v. Public Prosecutors Office* is one of the earliest cases concerning national minority rights. Mr Mutsch was a Luxemburg national who resided in Belgium in Saint Vith, a German speaking municipality. In a course of criminal proceedings held against him in Belgian court he requested the use of German language according to a special law that guaranteed this specific linguistic right to the German minority traditionally settled in the area of Liège. During the proceedings before the CJEU the Italian government argued that national provisions adopted for the benefit of an officially recognized minority can only concern persons belonging to that minority and residing in the area where that minority is established[42].This argument was rejected by the CJEU. On the contrary the Court extended the rights at issue to apply as well to the nationals of the other Member States if they exercise their free movement rights. The Court ruled that the principle of free movement of workers as laid down in, at that time, Article 48 of the Treaty and the Council Regulation No. 1612/68 requires that a worker who is a national of one Member State and habitually resides in another Member State be entitled to require that criminal proceedings against him takes place in a language other than the language normally used in proceedings before the court which tries him if workers who are nationals of the host Member State have that right in the same circumstances.

This kind of reasoning is confirmed by the later case C-274/96 *Bickel and Franz*. The case concerned the right of two German speakers of Austrian and German nationalities to have criminal proceedings in Italy conducted in German as was allowed for the German speaking minority in Bolzano. Mr Bickel was a lorry driver from Austria charged with driving in Bolzano while under the influence of alcohol and Mr Franz, a German tourist who was found to be in possession of a type of knife that was prohibited. Both of them were exercising they free movement rights under the EC Treaty. The

[42] 137/84 *Ministère Public v. Mutsch* [1985] ECR 2681, para 9.

CJEU referring to para. 11 of *Mutsch* judgment clearly acknowledged the significance of the protection of the linguistic rights and privileges of individuals in the context of a Community based on the principles of freedom of movement for persons and freedom of establishment[43].

The issue of the minority protection was obviously considered by the Court. During the proceedings the Italian government, similarly to *Mutsch* case, strongly argued that the domestic rules were designed to recognise the ethnic and cultural identity of persons belonging to the protected minority living in the province. The only nationals upon whom the right in question is conferred are those who are both residents of the Province of Bolzano and members of its German-speaking community. Accordingly, the right of that protected minority to the use of its own language need not be extended to nationals of other Member States who are present, occasionally and temporarily, in that region, since provision has been made to enable such persons to exercise the rights of the defence adequately, even where they have no knowledge of the official language of the host State. The Court relied on the prohibition of 'any discrimination on grounds of nationality', at that time Article 6 of the Treaty. In the opinion of the Court the provision requires that persons in a situation governed by Community law be placed entirely on an equal footing with nationals of the Member State. Hence, a rule which makes the right, in a defined area, to have proceedings conducted in the language of the person concerned conditional on residency, runs counter to the principle of non-discrimination on the ground of nationality. However, for the first time in its jurisprudence, the Court observed that the protection of a minority may constitute a legitimate aim, but then went on to state that this aim would not be undermined if the rules were extended to cover German speaking nationals of other Member States exercising their right to freedom of movement. An additional important argument held by the Court in favour of the defendants was that the courts concerned were in a position to conduct proceedings in German without additional complication or costs.

Summing up, in both judgments the CJEU stated that the purpose of the measures that aim the specific protection of minority settled in a specific area, cannot justify the different treatment between persons belonging to the minority and other persons who are not members of this minority but share the same linguistic characteristics.

The issue of specific rights of national minorities was dealt also by the CJEU in case C-281/98 *Angonese*. The case concerned Bolzano again and the local law aiming at the protection of the minority, however, this aspect was not mentioned. Mr Angonese, an Italian national whose mother tongue is German and who is resident in the province of Bolzano, went to study in Austria. Later on he applied to take part in a competition for a post with a private banking undertaking in Bolzano. One of the conditions for entry to the competition was possession of a certificate of bilingualism (in Italian and German) which used to be required in the province of Bolzano for access to the managerial career in the public service. This certificate was issued only after an examination that was held in Bolzano. Mr Angonese contested the requirement. The Court found the requirement of a certain level of linguistic knowledge legitimate. But the fact that it is impossible to submit proof of the required linguistic knowledge by any other means, in particular by equivalent qualifications obtained in other Member States, considered disproportionate in relation to the aim in view and

[43] C-274/96 *Bickel and Franz* [1998] ECR I-7637, para. 13.

constituting discrimination on grounds of nationality.[44] Indirectly the Court seems to accept that language requirements provided for by domestic law in order to protect and promote the distinct identity of national minorities are compatible with EU law.

It can be concluded from *Angonese* that the Member States must take into account the principles of EU law when drafting or interpreting the provisions concerning their minorities. When there is a clash between national rules and EU law the national court has a duty to enforce EU law. Furthermore, minority protection involves (positive) discrimination based on the principle of equality. This may imply a violation of the principle of non-discrimination even if the CJEU recognised in *Bickel and Franz* that the protection of national minority may constitute a legitimate aim of domestic legislation as concerns the proportionality test under EU law.

In the recent judgment of 12 May 2011 in case C-391/09 *Malgožata Runevič-Vardyn, Łukasz Paweł Wardyn v. Vilniaus miesto savivaldybės administracija* the CJEU dealt with transliteration of names in minority language. The Court had previously adjudicated on the transliteration of names in C-168/91 *Konstantinidis* case[45]. The case concerned a Greek national working in Germany who wished his names to be transcribed in Roman characters as 'Christos Konstantinidis', instead of transliteration used by German authorities 'Christos Konstadinidis' or 'Hrestos Konstantinides', on the ground that such a spelling indicates as accurately as possible to German speakers the correct pronunciation of his name in Greek. The Court held that generally Member State which uses the Roman alphabet may transcribe a Greek name in Roman characters in its registers of civil status. Where it undertakes such transcription, it is for that State to adopt legislative or administrative measures laying down the detailed rules for such transcription, in accordance with the prescriptions of any international conventions relating to civil status to which it is a party. Such rules are to be regarded as incompatible with at that time Article 52 of the Treaty only in so far as their application causes a Greek national such a degree of inconvenience as in fact to interfere with his freedom to exercise the right of establishment enshrined in that provision. Such interference occurs if a Greek national is obliged by the legislation of the State in which he is established to use, in the pursuit of his occupation, a spelling of his name derived from the transliteration used in the registers of civil status if that spelling is such as to modify its pronunciation, with the risk that potential clients may confuse him with other persons. In *Konstantinidis* the Court avoided any general statements as to the existence of the right to dignity, personal identity or name, issues developed in the opinion of the Advocate General and focused on the concerns of the freedom of establishment.

The judgment in *Wardyn* case is much more elaborated, however, it only mentions that Mrs Runevič-Vardyn, a Lithuanian national, belongs to the Polish minority in Lithuania. As required by Lithuanian law Mrs Runevič-Vardyn`s birth certificates and her passport showed her forename and surname registered in their Lithuanian form, namely as 'Malgožata Runevič'. In Polish her name is Małgorzata Runiewicz-Wardyn. In 2007, after living and working in Poland for some time, she married, in Vilnius, a Polish national, Mr Łukasz Paweł Wardyn. On the marriage certificate, which was issued by the Vilnius Civil Registry Division, 'Łukasz Paweł Wardyn' is transcribed as 'Lukasz

[44] C-281/98 *Roman Angonese v. Cassa di Risparmio di Bolzano SpA*, [2000] ECR 1-4139, para 44.
[45] C-168/91 *Konstantinidis* [1993] ECR-I-1191, see also C-148/02 *Carlos Garcia Avello v. Etat Belge* [2003] ECR I-11613; C-353/06 *Grunkin and Paul*, judgement of 14 October 2008.

Pawel Wardyn' – the Lithuanian spelling rules being used without diacritical modifications. His wife's name appears in the form 'Malgožata Runevič-Vardyn' - indicating that only Lithuanian characters, which do not include the letter 'W', were used, including for the addition of her husband's surname to her own surname. They submitted requests to the Vilnius Civil Registry Division for their forename and surname to be changed in their civil acts to Polish transcription. After their requests were rejected their complained to the Lithuanian court relying on the Directive 2000/43 and the Treaties.

The Court of Justice stated, first of all, that the Racial Equality Directive did not apply to Mr and Mrs Wardyn's situation because the scope of that directive does not cover national rules governing the manner in which surnames and forenames are to be entered on certificates of civil status. In that regard, although the directive does indeed make general reference to access to and supply of goods and services which are available to the public, it cannot be held that such national rules come within the concept of a 'service' within the terms of the directive. Then the Court referred to articles 18 and 21 TFEU (the right to move and reside freely in the territory of the Member States and a prohibition of any discrimination on grounds of nationality) invoked by applicants. Both of the applicants in the main proceedings, as citizens of the Union, have exercised their freedom to move and reside in Member States other than their Member States of origin. They live in Belgium.

We will confine ourselves only to main aspects of the case. It has, however, to be mentioned that the transcription of names of the citizens belonging to Polish minority in Lithuania is a very sensitive issue, being for many years the topic of difficult diplomatic negotiations between both governments. Under Article 14 of the Polish-Lithuanian Treaty on Friendly Relations and Good Neighborhood of 1994[46] the persons belonging to national minority have the right to use their surnames and names in the language of national minority, the detailed rules on transcription were to be agreed in a special agreement. Up till now there is no such agreement and Lithuanian law protects official national language. Both States are also the parties to the Framework Convention. Under its Article 11 "the Parties undertake to recognise that every person belonging to a national minority has the right to use his or her surname (patronym) and first names in the minority language and the right to official recognition of them, according to modalities provided for in their legal system." Nevertheless, the CJEU avoided to tackle the issue of minority protection leaving the solution to the Lithuanian court and, on the contrary, underlining the right of Lithuania to protect its national language. The Court held i.a. that only if it is established that the refusal to amend the joint surname of the couple in the main proceedings, who are citizens of the Union, causes serious inconvenience to them and/or their family, at administrative, professional and private levels, it will be for the national court to decide whether such refusal reflects a fair balance between the interests in issue, that is to say, on the one hand, the right of the applicants in the main proceedings to respect for their private and family life and, on the other hand, the legitimate protection by the Member State concerned of its official national language and its traditions.

The Court further noticed that under the fourth subparagraph of Article 3 para 3 TEU and Article 22 of the Charter, the Union must respect its rich cultural and linguistic diversity. Article 4 para 2 TEU

[46] Traktat między Rzeczpospolitą Polską a Republiką Litewską o przyjaznych stosunkach i dobrosąsiedzkiej współpracy of 26 April 1994 (Polish Official Journal 1995.15.71).

provides that the Union must also respect the national identity of its Member States, which includes protection of a State's official national language. It follows that the objective pursued by national rules designed to protect the official national language by imposing the rules which govern the spelling of that language, constitutes, in principle, a legitimate objective capable of justifying restrictions on the rights of freedom of movement and residence provided for in Article 21 TFEU and may be taken into account when legitimate interests are weighed against the rights conferred by EU law. Measures which restrict a fundamental freedom, such as that provided for in Article 21 TFEU, may, however, be justified by objective considerations only if they are necessary for the protection of the interests which they are intended to secure and only in so far as those objectives cannot be attained by less restrictive measures.

Conclusions

What is the lesson from the above mentioned cases, especially *Wardyn* case? It seems that they show that the main actor responsible for the protection of national minority rights is still a State. National minorities are recognised and protected first of all by Member States` law including international agreements binding upon them. The Court has however no competence to adjudicate whether a Member State complies with its international obligations. And even if the rights of minorities are in question the CJEU have to balance all the interests at stake and take into account the rights of the Member States or of the other parties. The protection of national minority may constitute a legitimate aim of domestic legislation as concerns the proportionality test under EU law. On the other hand, Member States must take into account the principles of EU law when drafting and interpreting the legal provisions, not only those concerning their minorities. Minority protection involves (positive) discrimination based on the principle of equality, this may imply a violation of the principle of non-discrimination and cause the expansion of some specific rights of minorities, e.g. linguistic rights of minorities, on other groups (as shown e.g. in *Bickel and Franz).*

The Lisbon Treaty seems to bring more legal opportunities for minorities. Article 2 TUE could be seen as a big step forward, minorities are recognised in EU primary law. *Wardyn* judgment of 2011 shows that this will rather not lead to radically new thinking and recognition of so far unrecognised rights of minorities. Without EU competences in that area, the CJEU itself will not be able to establish a standard of minority protection. The Court will rather follow the ECHR standard. Thus the EU accession to the ECHR may strengthen the protection of individual rights of the persons belonging to national minorities.

The Council of Europe Framework Convention for the Protection of National Minorities and the Protection of Minority Rights in the European Union

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Introduction

I am very glad to be able to attend this seminar and to speak about minority protection in Europe[48] on behalf of the Advisory Committee on the Framework Convention for the Protection of National Minorities of the Council of Europe (FCNM). We very much welcome this special emphasis put by the Polish Presidency of the European Union (EU) on minority rights.

Indeed, I think that time has come to engage in a more intensive debate on closer interaction and cooperation between the Council of Europe and the EU, and possibly other actors such as, e.g., the office of the High Commissioner on National Minorities of the Organisation for Security and Cooperation in Europe (OSCE), on minority issues. Minority issues are of course not more important now for Europe than they have been in the past, and particularly in the 1990's when a number of European States decided to draft the FCNM.

Notwithstanding considerable efforts made by all actors concerned, in particular by the monitoring bodies established under the FCNM, the Advisory Committee and the Committee of Ministers, many of the issues which were at stake during that time, still remain most relevant. To name but a few: Under which conditions is a group of persons to be considered a „national minority" for the purposes of the FCNM? What is the exact scope of the „positive measures" to be taken under Article 4 (2) FCNM? How best to promote effective equality and tolerance? Which are best practices in order to preserve and promote the distinct identity of national minorities? What is the exact scope of media,

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[48] See generally Rainer Hofmann, „Minorities, European Protection", in: R. Wolfrum (ed.), Max Planck Encyclopedia of Public International Law (Oxford: Oxford University Press 2008), available at http://mpepil.com/

linguistic and educational rights enshrined in the FCNM? How can the rights to effective participation in public life as well as in economic, cultural and social life life best be implemented?

Moreover, new issues are arising that require increased synergies between all actors concerned and a more consistent approach at paneuropean level. These new issues include the situation of Roma and their migration into and within the European Union,[49] heighthened levels of xenophobia and nationalism in wide parts of Europe, as well as increasing questioning from the side of governments and society stakeholders alike on the issue of applicable standards to the situation of the so-called 'new minorities' resulting from recent immigration.

Additionally, tensions between neighbouring countries, including EU Member States, on minority-related issues continue to exist and are sometimes dealt with on a bilateral basis, rather than at multilateral level, which results in persons belonging to the minorities concerned being sometimes taken „hostage" of bilateral political issues.

As European integration is advancing, the EU has been developing new tools, enabling it better to apprehend minority issues.[50] At the same time, more than 10 years of monitoring of the implementation of the FCNM allowed the Council of Europe to establish high standards of protection of persons belonging to national minorities and to identify best practices in this field.

1. The Council of Europe Framework Convention for the Protection of National Minorities and the Protection of Minority Rights in the European Union

Let me start this brief presentation by reminding us that both organisations obviously share the same core values of democracy, the rule of law and the protection of human rights, of which minority rights form an integral part, as is clearly recognised in both Article 1 FCNM and Article 2 of the Treaty Establishing the European Union (TEU).[51] The FCNM was established precisely with the aim of anchoring minority rights into the European system of protection of human rights and to ensure that minority issues be dealt with as part of European intergovernmental cooperation on human rights, and not only as part of bilateral relations between neighbouring states. As a result, the FCNM has also become a tool to identify and address, at an early stage, signs of interethnic tensions and conflicts – although, strictly speaking, conflict prevention as such remains the primary responsibility of the OSCE High Commissioner on Human Rights.

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[49] See, e.g., the *Strasbourg Declaration on Roma*, adopted by the Council of Europe High Level Meeting on Roma (20 October 2010), available at https://wcd.coe.int/ViewDoc.jsp?id=1691607&Site=CM; the EU Council *Conclusions on an EU Framework for National Roma Integration Strategies up to 2020*, adopted in Brussels on 19 May 2011, available at http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/lsa/122100.pdf; and the European Commission against Racism and Intolerance (ECRI) General Policy Recommendation N° 13 on Combating Anti-Gypsyism and Discrimination against Roma, adopted on 24 June 2011, available at http://www.coe.int/t/dghl/monitoring/ecri/activities/GPR/EN/Recommendation_N13/e-RPG%2013%20-%20A4.pdf

[50] See Csaba Pákozdi, „Legal Bases for the Activities of the European Union in the Field of National Minorities" (in this book); and Gulara Guliyeva, „The EU and the Protection of Minority Rights" (in this book).

[51] See Krzysztof Drzewicki, „Implications of the Lisbon Treaty upon Minority Policy of the European Union" (in this book).

Actual and potential relevance of the FCNM for minority-related policies of the EU

Since the entry into force of the FCNM in 1998, the „framework" provisions contained therein have been „filled" with increasingly concrete standards and guarantees, as developed by the Advisory Committee through its country-by-country monitoring work. These elaborated standards of minority protection are widely perceived as „soft law", that has developed around the programmatic provisions of the FCNM. As of now, they seem to have different relevance as concerns the external relations of the EU, on the one hand, and its internal policies, on the other hand.

The FCNM and external relations of the EU

These standards are of clear relevance for the external relations of the EU. Firstly, and most importantly, as the situation of national minorities constitutes one of the so-called *Copenhagen criteria* of 1993 applied in the screening-process preceding the accession of new Member States to the EU, ratification of the FCNM and the level of implementation of these „soft law" provisions have been and are being used as benchmarking for EU accession.[52] The European Commission is closely cooperating with the Council of Europe in monitoring the implementation of these standards in candidate countries.

Secondly, it should be mentioned that this is also the case for countries which are involved in the EU Neighbouring Policy, such as Armenia, Azerbaijan, and Georgia, as well as Moldova and Ukraine. This increasingly effective cooperation over the last few years has made it possible for recommendations issued by the Council of Europe monitoring bodies and the European Commission to be more consistent and mutually reinforcing.

The FCNM and internal policies of the EU

As concerns the potential relevance of FCNM standards for the internal policies of the EU, it must be recalled at the outset that in its Member States, the situation concerning the applicability of the FCNM is contrasted: whereas all of the Member States which acceded to the EU after 1989, are parties to the FCNM, some of the founding members of this organisation have still not signed or ratified it. This is the case for Belgium, France, and Luxembourg; moreover, Greece has not yet ratified the FCNM. Additionally, States that became members of the EU before the adoption, in 1993, of the above-mentioned *Copenhagen criteria* or the entry into force of the FCNM in 1998, were not required to pay particular attention to the situation of persons belonging to national minorities and the need to ensure full respect for their rights as part of their accession process. Consequently, different requirements regarding the protection of minority rights as well as, in practice, various levels of minority protection, are currently in place within the EU Member States.

Despite these discrepancies, the EU has in the last decade further reinforced its action in the field of minority-related human rights and acquired new tools to deal with the various dimensions of human rights protection: based on the previous Article 13 of the Treaty establishing the European Communities (TEC) – now Article 19 of the Treaty on the Functioning of the European Union

[52] See Kyriaki Topidi, „Minority Issues and the EU Experience with Enlargement" (in this book).

(TFEU) - the EU Directives against discrimination adopted in 2000[53] have been instrumental in stepping up the fight against all forms of discrimination, including based on ethnic origin. Moreover, the Lisbon Treaty has not only strengthened the fight against all forms of discrimination, including based on ethnic origin, by making it part, in Article 10 TFEU, of the „provisions having general application" but also formally recognised, in the already mentioned Article 2 TEU, respect for minority rights as one of the core principles underlying the EU; furthermore, and quite importantly, through Article 21 of the Charter for Fundamental Rights, the term „national minority"is now fully part of EU primary law. Additionally, the Fundamental Rights Agency of the EU is becoming a benchmark institution on the wider European level in terms of research and surveying of societal developments, among others the socio-economic situation of minorities, and perceived and actual levels of discrimination against them.[54]

In view of all these developments, the challenge is now for the EU to develop guidance for States Parties on what is to be considered discrimination based on membership of a national minority and on minority protection as a whole. The reports to be prepared by the European Commission on the state of human rights in the European Union could usefully contribute to this goal.

In this context, the future interpretation of Article 21 of the Charter, in conjunction with Articles 10 and 19 TFEU, might be of crucial importance in overcoming what is widely perceived as the major obstacle for the EU to pursue, in its internal policies and legislation, an active approach towards the preservation and promotion of the rights of persons belonging to national minorities: the absence of a provision in EU primary law conferring the appropriate competences on the EU. As EU law has always been and continues to be based on the legal principles of conferral and subsidiarity, as is now clearly established in Article 5 TEU and further detailed in Articles 2-6 TFEU, there is a need for such a provision. And indeed: at first sight, there is no such provision. But I think it is worth while reflecting on whether an – admittedly creative – interpretation of the applicable provisions on non-discrimination, taking into account both equality and the protection of the rights of persons belonging to national minorities, in particular in light of Article 2 TEU and Article 21 of the Charter, as underlying principles of EU law, would result in assuming the existence of such a provision conferring appropriate powers: If non-discrimination, or rather equality, is not understood as a merely formal concept, but as a principle including substantive aspects, then, I propose, it might indeed be argued[55] that there is, already under existing EU primary law, namely Articles 10 and 19 TFEU, a competence to engage in legislation providing for positive measures, as under Article 4 (2) FCNM, including in fields such as linguistic, educational and participatory rights.[56] In any case, this might be an avenue for further progress.

[53] Council Directives 43/2000/EC and 78/2000/EC.

[54] See Gabriel N. Toggenburg,*Exploring the Fundament of a new Agent in the Field of Rights Protection: The F(undamental) R(ights) A(gency)*, in EYMI European Yearbook on Minority Issues 2010, Brill, pp. 603-631.

[55] See Gabriel N. Toggenburg, „*The European Union vís-à-vís minorities: a play in three parts and an open end*, in Csaba Tabajdi (ed), Pro Minoritate Europae - Minorities of Europe Unite, 2009 (study book for the 25th anniversary of the Minorities-Intergroup of the European Parliament), pp. 162-205, at 176.

[56] On this issue see Allan Rosas/ Lorna Armati, *EU Constitutional Law*, Oxford and Portland: Hart Publishing 2010, 159.

The potential functions of FCNM standards within EU law

Finally, I should like us to look at the (potential) functions of FCNM standards within EU law. As there is, for quite a foreseeable future, no indication that the EU might ratify and accede to the FCNM as it most probably will do as regards the European Convention on Human Rights (ECHR), the FCNM standards will not become, as such, an integral part of EU law.[57] In the absence of such a process, FCNM standards will remain what they already are today: a source of inspiration for minority-related activities of the EU.

The truly interesting question is however , whether the FCNM standards might be considered as general principles of EU law. In a recent report on the protection of minorities after the entry into force of the Lisbon Treaty, the FRA alluded to this fact by expressing the expectation that „[i]n the future, the CJEU, the institution having competence to interpret the EU Treaties, might provide some guidance in this regard ... [a]s the the notion of 'national minority' has become a term of EU primary law" ...[and since] ... common principles of EU law can de drawn from international conventions that have not been ratified by all the Member States" .[58]

General principles of EU law[59] are, as they have been established by the European Court of Justice, now the Court of Justice of the European Union (ECJ), an (unwritten) source of (primary) EU law. This idea might be traced back to the „principes génèraux de droit" which form part of the constitutional law of France (and, *mutatis mutandis*, also of other EU Member States such as Italy and Spain) and are explicitly referred to in Article 340 (2) TFEU which links the non-contractual liability of the EU to „the general principles of law common to the laws of Member States". General principles of EU law are in some way „judge-made law" as it is the ECJ which identifies and declares them to have this legal rank of being part of EU primary law. According to the jurisprudence of the ECJ, they can be derived from various sources: most important are the treaties themselves and the legal systems of the Member States including those international treaties to which Member States are Parties.

Among the general principles of EU law derived from the treaties themselves, mention should be made of the prohibition of discrimination based on nationality between EU citizens, now enshrined in Article 18 TFEU. The prime examples for general principles based on the legal orders of Member States are human rights, as now reflected in Article 6 (3) TEU, and structural principles like the rule of law with its sub-prinicples such as legal certainty and proportionality. Important for our question is the above mentioned fact that, when the ECJ looks to national law for inspiration, it is not necessary that the principle should be accepted by the legal systems of *all* Member States. It is considered to be sufficient if the principle at stake is accepted by the legal systems of most Member States, or appears to be in conformity with a trend in Member States developing towards it.[60] This seems to indicate a certain development compared to the approach followed by the ECJ in the early

[57] Critical e.g. Gabriel N. Toggenburg, Minority Protection in a Supranational Context: Limits and Opportunities, in Toggenburg (ed.), *Minority Protection and the enlarged European Union: The way forward*, LGI Books, Budapest, 2004, pp. 1-36, at 15 and 16.
[58] FRA, *Respect for and protection of persons belonging to minorities. 2008-2010*, Luxembourg 2011, at p. 20.
[59] For the following see, e.g., T.C. Hartley, *The Foundations of European Union Law*, Oxford: Oxford University Press 7th edition 2010, 141 *et seq*.
[60] *Id*., 142.

1970s when it first declared human rights to constitute general principles of (then) European Community law based on the constitutional traditions common to the (then six) Member States and their membership in the ECHR: the judgements in *Stauder*[61] and *Internationale Handelsgesellschaft* [62] referred solely to the constitutional traditions – only after the entry into force of the ECHR for France (the last European Communities Member State to ratify that treaty) on 3 May 1974, the ECJ included, in its judgement in *Nold*[63], rendered on 14 May 1974, the reference to international treaties as a source of general principles of (European Communities) law.

The present approach, i.e. recognition as general principle of EU law if the principle in question forms part of the law of most Member States, including by its membership to a pertinent international treaty, might overcome the fact that Belgium, France, Greece and Luxembourg have not yet ratified the FCNM – and at least France continues to remain fundamentally opposed to the very concept of national minorities, at least as regards her internal legal order. If one adds to this present approach the general reference to the rights of persons belonging to minorities in Article 2 TEU, one might indeed argue that the standards developed under the FCNM constitute such general principles of EU law. Still, I must admit that I remain unconvinced that the ECJ would be prepared to recognize as general principles of EU law standards developed under an international treaty which is not in force for four EU Member States and which protects a concept which is considered by France as being absolutely incompatible with its understanding of *égalité* as a most fundamental principle of her constitutional order.

Minority Rights and the jurisprudence of the Court of Justice of the European Union

Following the recent developments just mentioned, the Court of Justice of the European Union (ECJ) has also had to pay increased attention to issues connected with minority rights.[64]

Within the framework of this contribution, it is not possible to review the line of judgements starting with *Bickel and Franz*[65] over *Angonese*[66] to the most recent judgment of 12 May 2011 on the case of *Malgožata Runevič-Vardyn* and *Łukasz Paweł Wardyn*[67]. In the end, the Court held that national

[61] *Stauder* (Case 29/69) [1969] ECR 419.
[62] *Internationale Handelsgesellschaft* (Case 11/70) [1970] ECR 1125.
[63] *Nold* (Case 4/73) [1974]ECR 491.
[64] See Anna Wyrozumska, "Jurisprudence of the Court of Justice of the EU on National Minority and Related Issues" (in this book); for a discussion of the early jurisprudence see Rainer Hofmann, „National Minorities and European Community Law", Baltic Yearbook of International Law, Volume 2 (2002), 159-174.
[65] *Bickel and Franz* (Case C-274/96) [1998] ECR I-7637.
[66] *Angonese* (Case C-281/98) [2000] ECR I-4139.
[67] *Runevič-Vardyn and Wardyn* (Case C-391/09) judgment of 12 May 2011, not yet reported in the official collection of decisons. The major rulings of the Court are as follows:
1.National rules which provide that a person's surnames and forenames may be entered on the certificates of civil status of that State only in a form which complies with the rules governing the spelling of the official national language relate to a situation which does not come within the scope of Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin;
2. Article 21 TFEU must be interpreted as:
– not precluding the competent authorities of a Member State from refusing, pursuant to national rules which provide that a person's surnames and forenames may be entered on the certificates of civil status of that State only in a form which complies with the rules governing the spelling of the official national language, to amend, on the birth certificate and marriage certificate of one of its nationals, the surname and forename of that person in accordance with the spelling rules of another Member State;

(Lithuanian) rules concerning the spelling of surnames and forenames – in the present case of a lady, a Lithuanian citizen belonging to the Polish minority in Lithuania, and her husband, a Polish citizen – in certficites of cibil status of that State do not fall within the scope of application of Directive 200/43/EC and do not constitute a violation of the freedom of movement of Union citizens as enshrined in Article 21 TFEU.

This judgment clearly shows that, at least as long as the understanding of the notion of 'equality' as presently prevailing in the jurisprudence of the ECJ remains unchanged, its tools to deal with such issues of fundamental concern for persons belonging to national minorities are so far limited to the principle of non-discrimination, which, as this case clearly shows, does not provide a sufficient response to some of the challenges in the field of minority rights. As you are no doubt aware, the essential point of departure for elaborating the FCNM was that existing non-discrimination instruments were not sufficient to ensure adequate protection of minority rights and that there was a need for additional tools.

The situation under the FCNM is, as you are well aware, fundamentally different: Article 11(1) FCNM provided for the recognition of the right of every person belonging to a national minority to use his or her forenames and surenames in the minority language. I think it is no surprise that the relevant legislation in Lithuania, as interpreted by the Lithuanian Constitutional Court has also been dealt with during the monitoring of Lithuania under the FCNM. In its second Opinion on Lithuania, adopted on 28 February 2008, the Advisory Committee called upon the authorities „to ensure that the future law [which had been under discussion since 2005] will fully reflect the principle laid down in Article 11 and thus be able to meet the concerns of national minorities."[68]

Regrettably, as appears from Lithuania's third State Report submitted on 21 September 2011, noch such law has been adopted. The *Seimas* is presently discussing a draft law which would, as a follow-up to a decision by the Constitutional Court rendered in 2009, allow for the entry into Lithuanian passports and other identity documents, the name of a person written in non-Lithuanian characters, in addition to the entry of such name written in Lithuanian characters. It is made clear, however, that only the latter way of spelling would be considered as the official form whereas the former way of spelling would constitute „additional information" only.[69]

– not precluding the competent authorities of a Member State from refusing, in circumstances such as those at issue in the main proceedings and pursuant to those same rules, to amend the joint surname of a married couple who are citizens of the Union, as it appears on the certificates of civil status issued by the Member State of origin of one of those citizens, in a form which complies with the spelling rules of that latter State, on condition that that refusal does not give rise, for those Union citizens, to serious inconvenience at administrative, professional and private levels, this being a matter which it is for the national court to decide. If that proves to be the case, it is also for that court to determine whether the refusal to make the amendment is necessary for the protection of the interests which the national rules are designed to secure and is proportionate to the legitimate aim pursued;

– not precluding the competent authorities of a Member State from refusing, in circumstances such as those at issue in the main proceedings and pursuant to those same rules, to amend the marriage certificate of a citizen of the Union who is a national of another Member State in such a way that the forenames of that citizen are entered on that certificate with diacritical marks as they were entered on the certificates of civil status issued by his Member State of origin and in a form which complies with the rules governing the spelling of the official national language of that latter State.

[68] See para. 108 of the Second Opinion on Lithuania, available at http://www.coe.int/t/dghl/monitoring/minorities/3_FCNMdocs/PDF_2nd_OP_Lithuania_en.pdf.

[69] See pp. 64 *et seq.* of the Third State Report of Lithuania, available at http://www.coe.int/t/dghl/monitoring/minorities/3_FCNMdocs/PDF_3rd_SR_Lithuania_en.pdf.

As the Advisory Committee will now commence its third monitoring cycle on Lithuania, I should to stress that I would be surprised if this issue would not constitute one of the major points of concern but would like to refrain from any further specific comment on this issue. However, I should like to refer to two findings of the Advisory Committee concerning Article 11 FCNM and the issue of names: Firstly, in its first Opinion on the Slovak Republic, adopted on 2 September 2000, the Advisory Committee referred to „disturbing reports suggesting that the Slovak form of a surname is still imposed on women belonging to national minorities". It called on the Government to „review this situation and to take measures against the imposition of the Slovak form of surnames and to ensure that such practices are not allowed."[70] In its second Opinion on the Slovak Republic, adopted on 28 May 2005, the Advisory Committee noted that it had not received any such reports[71] which seems to indicate that the problem had been solved. Secondly, it its third Opinion on Germany, adopted on 27 May 2010, the Advisory Committee reported that German law does not allow for the addition of the suffix –owa to the name of a female person belonging to the Sorbian minority in official documents. It considered „this situation not in line with Article 11 FCNM" and recommended an amendment to the applicable law.[72] This position was shared by the Committee of Ministers in its Resolution on Germany, adopted on 15 June 2011, when it called on Germany „to take the necessary steps to bring German legislation concerning the changes of minority names fully in conformity with Article 11 FCNM".

The potential effects of the accession of the European Union to the European Convention on Human Rights

The forthcoming accession of the EU to the ECHR should also contribute to developing further common standards of protection of minority rights. The European Court of Human Rights (EctHR) has indeed in the last decade considerably developed its case-law on minority-related issues, often using as a basis for its judgments findings contained in the Opinions of the Advisory Committee and in the corresponding resolutions of the Committee of Ministers.

In the framework of this contribution, it is not possible to deal extensively with the minority-related jurisprudence of the EctHR. Suffice to mention that it seems that the Court has come quite a long way from its first judgements in the British Traveller Cases[73] where it held that the traditional life-style of a group of persons is, in principle, protected under Article 8 ECHR, over *Gorzelik v Poland* to the more recent cases concerning discrimination of Roma pupils in accessing schools.

In its landmark decision in the *Gorzelik v Poland* Case[74], the ECtHR accorded to national authorities a considerable margin of appreciation as concerns the recognition, under domestic law, of a group of

[70] Para. 37 of the first Opinion on the Slovak Republic, available at http://www.coe.int/t/dghl/monitoring/minorities/3_FCNMdocs/PDF_1st_OP_SlovakRepublic_en.pdf
[71] See para. 91 of the Second Opinion on the Slovak Republic, available at http://www.coe.int/t/dghl/monitoring/minorities/3_FCNMdocs/PDF_2nd_OP_SlovakRepublic_en.pdf
[72] See paras. 128-9 of the Third Opinion on Germany, available at http://www.coe.int/t/dghl/monitoring/minorities/3_FCNMdocs/PDF_3nd_OP_Germany_en.pdf
[73] ECtHR *Buckley v United Kingdom*, Judgment of 25 September 1996, RJD 1996-IV; and *Chapman v United Kingdom*, Judgment of 18 January 2001, RJD 2001-I.
[74] ECtHR *Gorzelik v Poland*, Judgment of 17 February 2004, RJD 2004-I.

persons as a (national) minority and focused its control on the possible arbitrariness of the decision at issue. A similar approach had been taken by the monitoring bodies under the FCNM which also accorded the States Parties a wide margin of appreciation which, however, must be exercised in such a way as to exclude any arbitrary or unjustified distinctions between different groups claiming to constitute national minorities for the purposes of the FCNM.

Moreover, as regards freedom of religion, the ECtHR ruled that the refusal of State authorities to register the church of a national minority might amount to a violation of Article 9 ECHR.[75] The ECtHR also made it clear that activities of political organizations aiming at the promotion of the distinct identity of minorities do not *per se* constitute a threat to national security and, therefore, must not be prohibited unless there are additional reasons such as indications that such aims shall be achieved by non-democratic means.[76]

The decisive step in the jurisprudence of the ECtHR relating to the rights of persons belonging to national minorities was, however, made when it ruled in *D.H. v Czech Republic*, partly based on findings of the Advisory Committee, that the high number of Roma pupils placed in special schools indicated discriminatory policies (indirect discrimination) as it was out of proportion to their representation in the local communities concerned; consequently the ECtHR held that there had been a violation of Article14 ECHR in conjunction with Article 2 of Protocol N° 1.[77] This jurisprudence was confirmed in *Oršus v Croatia*.[78]

To conclude this section, I should just like point to the possibility that national legislation such as the one dealt with by the ECJ in the above-discussed *Runevič-Vardyn and Wardyn* case might well be considered by the ECtHR as a violation of Article 8 ECHR.

The Framework Convention for the Protection of National Minorities and the European Union Stockholm Programme

Finally, I should like to refer briefly to the recently initiated EU Stockholm Programme[79] which amongst others also aims at improving integration of immigrants and asylum seekers. While such persons do not belong to autochthonous or traditional minorities and are, therefore, by many actors not considered as being protected under the FCNM Convention, I should like to stress that Article 6 FCNM obliges States Parties to take effective measures to promote mutual respect and understanding among all persons living on their territory and to combat discrimination, hostility or violence as a result of their ethnic, cultural, linguistic or religious identity. This, I think , is one more area where the experiences of the monitoring bodies under the FCNM and the standards developed by them are of obvious relevance for the EU and the future implementation of the Stockholm Programme.

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[75] ECtHR, *Metropolitan Church v Moldova*, Judgment of 13 December 2001, RJD 2001-XII

[76] See ECtHR, *United Communist Party v Turkey*, Judgment of 30 January 1998, RJD 1998-I; ECtHR, *Sidiropoulos v Greece*, Judgment of 10 July 1998, RJD 1998-IV; and ECtHR, *Stankov and the United Macedonian Organisation Ilinden v Bulgaria*, Judgment of 2 October 2001, RJD 2001-IX.

[77] ECtHR, *D.H. and Others v Czech Republic* [GC], Judgment of 13 November 2007, RJD 2007-IV.

[78] ECtHR, *Oršus v Croatia* [GC], Judgment of 16 March 2010.

[79] The Stockholm Programme was adopted by the European Council on 9 December 2009 and is available at http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2010:115:0001:0038:en.PDF.

2. Concluding Remarks

To conclude, what we need is to ensure that consistent standards in the field of rights of persons belonging to national minorities are applied in EU Member States as well as neighbouring States, covering the membership of the Council of Europe (and possibly beyond, the FCNM being an open-treaty). These standards should also be the highest possible ones. Therefore, it is of utmost importance to explore further ways of articulating the work carried out by the Council of Europe under the FCNM and the EU action on human and minority rights. The Memorandum of Understanding signed in 2007 by the EU and the Council of Europe has paved the way for increased cooperation in this area. It is maybe timely to consider further forms of cooperation in this context.

With this aim in mind, I would like to take this opportunity to invite representatives of the European Commission to take part in an exchange of views with the Advisory Committee on the issues dealt with today on the occasion of one of the Advisory Committee forthcoming plenary sessions. I look forward to engaging further in this debate in the future with all the relevant partners.

The Lisbon Treaty: a rich cocktail served in an only half-full glass

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I was asked to report on what the Treaty of Lisbon has to offer to minorities, or to persons belonging to minorities. I guess that this should include an evaluation, whether these Lisbon-induced changes are unexpectedly positive, satisfactory or a disappointment. But such an assessment substantially depends on which role one wants (or even expects) the EU to play in the context of minority protection and is therefore rather subjective. An alternative is to look at the Treaty of Lisbon as a cocktail glass. A glass that is neither full, nor empty, containing three different sorts of ingredients: consolidating elements, evolutionary elements and entirely new elements.

1. Consolidating elements making existing values more explicit

Starting with the consolidating elements, one can immediately point to the new language of the Treaty of Lisbon. What was previously acknowledged is made explicit by the treaty. :[81] "*respect for human rights, including the rights of persons belonging to minorities*" is a value on which "*the Union is founded*". The new Article 2 of the Treaty on European Union (TEU) provides evidence that this value is "*common to the Member States in a society in which pluralism, non-discrimination, tolerance […] prevail*".[82] The treaty stresses the value of diversity also in the context of the general objectives of the Union: the latter shall "*respect its rich cultural and linguistic diversity, and shall ensure that Europe's cultural heritage is safeguarded and enhanced*" (Article 3 Paragraph 3 TEU). The fact that the term "minorities" is mentioned for the first time in EU Primary law, reminds us that

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[81] On various occasions, the Commission underlined that "*the rights of minorities are among the principles which are common to the Member States, as listed in Article 6(1) of the Treaty on European Union (TEU)*". See reply to the written question E-1227/02, in OJ 2002 C 309, p. 100. The Council stated, for instance, that the protection of persons belonging to minorities is covered by the non-discrimination clause in Article 13 EC. See Council of the European Union, EU Annual Report on Human Rights 2003, Brussels, 3 January 2004, p. 22.

[82] See Art. 2 TEU.

what is referred to as "diversity" in the treaty can be both diversity *between* and diversity *within* Member States.[83] In fact, the new treaty language gives an example of how Member States can express their commitment to their internal diversity. For the first time, the treaty explicitly mentions that Member States can translate the Treaties into additional languages "*that enjoy official status in all or part of their territory*" and register a certified copy in these languages with the archives of the Council.[84] Once it entered into force, the Charter became a legally binding part of EU Primary law which also has implications for the diversity commitment of the European Union: Article 21 of the Charter explicitly underlines that discrimination on grounds such as ethnicity, language, religion or the like is prohibited, while Article 22 emphasises that the "*Union shall respect cultural, religious and linguistic diversity"*. Even if the unwritten general principles of EU law principle might already have covered this legal reality, the new treaty language provides for a substantially increased transparency and clarity in this regard.

2. Evolutionary elements making the EU's diversity commitment operational

Apart from these consolidating changes brought about in the treaty language, the treaty also provides for more operational innovations. This is especially true for the area of anti-discrimination where the Treaty of Lisbon renders the above mentioned 'revamped' diversity commitment operational. In Article 10 of the Treaty on the Functioning of the European Union (the former EC Treaty; hereafter TFEU), the EU is set under an obligation to "*combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation*" not only in the context of its anti-discrimination policy but whenever "*defining and implementing [any] of its policies and activities*".[85] This newly introduced horizontal obligation goes further than the – now legally binding – Article 21 of the Charter. In the latter provision, the Charter merely *prohibits* the Union to discriminate on the grounds of "*ethnic origin*", "*language*", "*religion*", "*membership of a national minority*", "*disability*" or "*sexual orientation*". The new horizontal clause[86], however, *enables* and, at the same time, *obliges* the Union to actively "*combat*" discrimination in all circumstances. Thereby, the clause calls for an active engagement for more equality rather than a mere avoidance of discrimination.[87]

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[83] In this context, compare with Art. 167 TFEU (the former Art. 151 EC Treaty). For a discussion of the notion of 'diversity' see G. N. Toggenburg, The Debate on European Values and the Case of Cultural Diversity, European Diversity and Autonomy Papers (EDAP), No. 1, 2004, available at: http://www.eurac.edu/documents/edap/2004_edap01.pdf and A. von Bogdandy, The European Union as Situation, Executive, and Promoter of the International Law of Cultural Diversity – Elements of a Beautiful Friendship, The Jean Monnet Working Papers, No. 13, 2007, available at: http://centers.law.nyu.edu/jeanmonnet/papers/07/071301.html.

[84] See Article 55 Para 2 TEU. Despite the restrictive wording of Para. 2 in the Declaration on Article 55(2) of the TEU, there seems to be no legal argument that could prevent a Member State to translate the Treaties and register the translation at any point of time it should wish to do so.

[85] The EU's anti-discrimination policy is enshrined in Art. 19 TFEU (the former Art. 13 TEC).
Compare in this context also Article 9 TFEU. The latter provision obliges the Union to take various 'requirements' including "*the fight against social exclusion*" into account when "*defining and implementing its policies and activities*". In the context of the Union's overall objectives Article 3 TEU declares that the Union "*shall combat social exclusion and discrimination, and shall promote social justice and protection*", "*promote […] social cohesion*" and "*respect its rich cultural and linguistic diversity*".

[87] This is evidenced by the fact that the new horizontal clause is based on the wording of the enabling competence base, as now enshrined in Article 19 TFEU (the former Article 13 TEC) and not on the merely prohibitive clause in Article 21 of the Charter of Fundamental Rights.

Whether, and to which degree, this new horizontal clause enshrines an "embryonic positive duty" to introduce measures of affirmative action aimed at the provision of substantial equality is too early to tell.[88] What can be said is that the new horizontal obligation has the potential to play a relevant role with regard to the direction, content and equality driven creativity of Union legislation (and consequently national legislation when implementing Union legislation). Most importantly, as argued by the former Spanish, Belgium and Hungarian Trio-Presidency in the context of the Roma, Article 19 of the TFEU provides a clear cut normative backbone for a consequent mainstreaming approach across a variety of policy areas.

In fact, the treaty presents an explicit example and obligation where diversity has to be taken into account. The treaty puts an unprecedented emphasis on services of general economic interest by inviting Parliament and Council in Article 16 of the TFEU to establish principles and conditions to provide such services. The "Protocol on Services of General Interest" underlines that the shared values of the European Union regarding services of general economic interest include in particular "*the differences in the needs and preferences of users that may result from different geographical, social or cultural situations*" as well as "*equal treatment and the promotion of universal access and user of rights*".[89] These statements can form a solid basis for taking the specific needs of persons belonging to minorities into account, especially linguistic minorities,without imposing a disproportionate burden on the service providers, whether public or private. This would contribute to social cohesion and prevent the risk of discrimination in the organisation of services of general economic interest.[90] In fact, the Parliament had stipulated in the context of reforming the Equality Directives that "*service providers make adjustments and provide special treatment to ensure that members of minority groups that are experiencing inequality can access and benefit from the services provided"*.[91]

3. New Elements opening unprecedented avenues

The Treaty of Lisbon does indeed also provide for new policy possibilities. For instance Article 79 TFEU allows for EU integration policies vis-à-vis migrants. In this context, it is important to underline that such legislation defining "*the rights of third-country nationals residing legally in a Member State, including the conditions governing freedom of movement and of residence in other Member States*"[92] or EU measures providing "*incentives and support for the action of Member States with a view to promoting the integration of third-country nationals residing legally in their*

[88] Compare J. Shaw, 'Mainstreaming Equality and Diversity in the European Union', Current Legal Problems, Vol. 58, 2005, pp. 255-312.
[89] See Art. 1 of Protocol No 26 (protocols have the same legal value like the Treaties). Compare also to Art. 36 Charter of Fundamental Rights.
[90] See the EU Network of Independent Experts on Fundamental Rights (CFR-CDF), Thematic Comment No. 3: The Protection of Minorities in the European Union, April 2005, p. 44, available at: http://ec.europa.eu/justice_home/cfr_cdf/doc/thematic_comments_2005_en.pdf.
[91] See European Parliament resolution of 20 May 2008 on progress made in equal opportunities and non-discrimination in the EU (the transposition of Directives 2000/43/EC and 2000/78/EC), OJ 2009 C 279 E, paragraph 43, p. 23-30.
[92] See Art. 79 Para. 2 lit. b) TFEU.

territories"[93] are to be adopted under the ordinary legislative procedure. According to the Treaty of Lisbon and its revamped decision-making rules, this means that the Parliament is granted full codecision powers and the Council decides by qualified majority voting.[94]

In the context of national minorities, such an operational policy provision is missing. So whereas the term "national minorities" for the first time in the history of the EU becomes a legally binding EU term[95], this innovation in terms and value commitment is not operationalized by a respective policy provision. By focusing on 'persons belonging to' minorities[96] (including persons belonging to national minorities)[97] rather than on 'minorities' themselves, the Treaty of Lisbon and the Charter of Fundamental Rights help prevent a misunderstanding, namely that the recognition of minorities would automatically go hand-in-hand with a necessity to accept and introduce group rights. The wording of the Lisbon Treaty makes the concerns of the EU clear: the individual right to equality of all persons that might due to their individual situation, such as their age or disability, or their membership in an ethnic, national, linguistic or religious minority, face special threats or have special needs.

It is important to underline that despite the fact that the Treaty of Lisbon does not introduce a new provision allowing the Union to develop an overarching policy in the field, it does introduce other innovations that can offer entirely new avenues. For instance the new obligation for the EU to accede to the ECHR can be expected to augment access to justice within the European Union. This is here of relevance since it is widely recognised that the ECHR can also be used to defend certain minority rights.[98] A second example is the new instrument of the European Citizen Initiative, that could also be used for proposals relevant to minority groups.[99] According to Article 11, Paragraph 4 of the TEU, not less than one million citizens who are nationals "*of a significant*[100] *number of Member States*" may take the initiative of "*inviting the European Commission, within the framework of its powers, to submit any appropriate proposal on matters where citizens consider that a legal act of the Union is required for the purpose of implementing the Treaties*".

[93] See Art. 79 Para. 4 TFEU (no harmonisation is possible under this article). See also Art. 153 Para. 1 lit. g) TFEU.
[94] See Art. 294 TFEU. However, not all of the relevant policy areas allow for qualified majority voting in the Council. Most prominently, in the above discussed Article 19 Para 1 TFEU (the former Article 13 TEC) the EU anti-discrimination policy still calls on the Council to act unanimously when introducing legislative action combating discrimination. However, just like the former Art. 13 Para 2 TEC, the new Art. 19 Para 2 TFEU does allow for codecision and qualified majority voting when the Union is not issuing harmonising legislation but only supporting action taken by Member States.
[95] See Art. 21 ChFR.
[96] Art. 2 TEU.
[97] Art. 21 ChFR.
[98] See Art. 6 TEU. The relevance of the case law of the Strasbourg Court overseeing the ECHR is regularly reported on in the European Yearbook on Minority Issues.
[99] Hungarian minority groups seem to brainstorm on launching an European Citizen Initiative on minority issues. See Izsák Balázs, '*Cohesion policy and national regions; the aspects of citizens' initiative in Szeklerland*', available online at http://izsakbalazs.blogspot.com/p/cohesion-policy-and-national-regions.html.
[100] According to Art. 7of the regulation No 211/2011 of 16 February 2011on the citizens' initiative, this number equals to at least one quarter of Member States, thus currently at least 7 Member States.

4. What are the implications for the EU's judiciary?

The Court of Justice has accepted– long before 'minorities' became a term of EU primary law – that the protection of (national) minorities is a "*legitimate aim*" of the Member States and their policies.[101] Eventually, such a legitimate aim might even provide justification for national systems of minority protection to restrict EU-law driven Common market mechanisms, as long as such restrictions are proportional. In the area of language policies the Court made clear that EU law does not prohibit the adoption of a policy for the "*protection and promotion of a language*". However, the implementation of such a policy "*must not encroach upon a fundamental freedom such as that of the free movement of workers. Therefore, the requirements deriving from measures intended to implement such a policy must not in any circumstance be disproportionate in relation to the aim pursued, and the manner in which they are applied must not bring about discrimination against nationals of other member states*".[102] This provides the Member States with a certain leeway when protecting their minorities. However, it remains unclear how far this leeway reaches since it is a fact that so far EU law – if compared for instance with developments under international law – subscribes to a rather formal reading of the principle of equality.

And the doubts do not stop here. Admittedly, with the Lisbon Treaty's entry into force the EU institutions and the Member States "*when they are implementing Union law*"[103] are explicitly precluded from discriminating against persons belonging to linguistic, ethnic and religious minorities or on the basis of the "*membership of a national minority*". However, it is for instance not entirely clear when in a concrete case, a measure would be considered as discriminatory on the basis of membership to a national minority. Against this background one may doubt, whether the value of respecting the rights "*the rights of persons belonging to minorities*" as now enshrined in Article 2 of the TEU is so crystal-clear that "*Member States can discern the obligations resulting there from*".[104]
In the future, the EJC as the institution competent for the interpretation of the EU treaties might provide some guidance in this regard. As the notion of 'national minority' has become a term of EU primary law through Article 21 of the Charter of Fundamental Rights, it is possible that certain FCNM principles may provide inspiration for the EU context. Given that the Council of Europe's FCNM has been ratified by 23 out of 27 EU Member States, corresponding to 85 per cent, the EJC would be free to use this instrument as a source of inspiration if it is called to interpret the more concrete implications and reach of the rather general statement that the *"rights of persons belonging to minorities"* is a value *"the Union is founded on"* (Article 2 TEU as amended by the Treaty of Lisbon). Both the ECJ case law[105] and academic literature[106] acknowledge that common principles of

[101] See ECJ, case C-274/96, Bickel and Franz, judgement of 24 November 1998, paragraph 29, available online at: http://curia.eu.int/en/content/juris/index_form.htm.
[102] See ECJ, case C-379/87, Groener, judgement of 28 November 1989, paragraph 19, available online at: http://curia.eu.int/en/content/juris/index_form.htm.
[103] Art. 41 Para. 1 Charter of Fundamental Rights.
[104] The Presidium of the European Convention drafting the constitutional treaty – the forerunner of the Lisbon treaty - advocated to have in Article 2 only a very short value provision representing "*a hard core of values meeting two criteria at once: on the one hand, they must be so fundamental that they lie at the very heart of a peaceful society practicing tolerance, justice and solidarity; on the other hand, they must have a clear non-controversial legal basis so that the Member States can discern the obligations resulting therefrom which are [in accordance with Article 7 TEU] subject to sanction[s]"*.. See See Annex 2 of CONV 528/03 as of 6 February 2003, 11.
[105] The Court "draws inspiration from… the guidelines supplied by international treaties for protection on which member states have collaborated or to which they are signatories", see ECJ, Opinion 2/94 – Accession to the European

EU law can also be drawn from international conventions that have not been ratified by all the Member States.

5. What are the implications for the EU's legislator

The treaties, as reformed by the Lisbon Treaty, do not provide for a new legislative competence specifically designed for protecting minorities.[107] In this sense Post-Lisbon equals to Pre-Lisbon: the Union holds no overall legislative competence to rule on the protection of (national) minorities. However, the innovations described above – especially in the area of discrimination - clearly emphasise the fact that the EU is equipped with "*constitutional resources*" that allow to develop EU secondary law in a way that respects and protects persons belonging to minorities.[108] Admittedly, since the new mainstreaming obligation builds on the enabling provision in Article 19 of the TFEU and not the prohibitive provision in Article 21 of the Charter, it does not cover discrimination on the grounds of language and membership of a national minority.[109] Nevertheless, the legislator can deal with a variety of issues that are of obvious relevance to persons belonging to (national) minorities. In this regard, the 2005 European Parliament resolution on the protection of minorities and anti-discrimination emphasised various competence bases in the EU treaties – including provisions in the area of anti-discrimination, culture, education, research, employment, judicial cooperation, free movement and the common market. All of these proposals could be used for future minority-driven legislative initiatives, thereby strengthening the respective articles in the FCNM.[110] The idea of such an enhanced 'inter-organisational' cooperation between the EU and the Council of Europe was not only advanced by legal experts[111], but also corresponds to the agreement reached by the Heads of States of the Council of Europe in Warsaw in 2005. According to Guideline 5 on legal cooperation, greater complementarity between legal texts of the European Union and the Council of Europe can

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Convention on Human Rights, ECR I-1759 (1789), paragraph 33. For a more recent example, see the Court's judgement of 18 December 2007 in C-341/05, paragraph 90.

[106] See in detail F. Hoffmeister, 'Monitoring Minority Rights in the enlarged European Union', in G. N. Toggenburg (ed.), Minority protection and the enlarged European Union: the way forward, Budapest 2004, pp. 85-106, at 90-93, available online at: http://lgi.osi.hu/publications/2004/261/Minority-Protection-and-the-Enlarged-EU.pdf.

[107] It is recalled that according to the principle of conferral, competences not conferred upon the Union in the Treaties remain with the Member States (Art. 5 Para. 2 TEU).

[108] This is well established among legal scholars (see, for instance, B. de Witte, 'The constitutional resources for an EU minority policies', in G. N. Toggenburg, Minority Protection and the enlarged European Union: the way forward, Budapest 2004, pp. 109-124, at p. 111) as well as politics (see, for instance, the European Parliament Resolution on the protection of minorities and anti-discrimination policies in an enlarged Europe, in OJ 2006 C 124, p. 405, esp. at Para. 49, available online at http://www.europarl.europa.eu/sides/getDoc.do?type=TA&language=EN&reference=P6-TA-2005-0228).

[109] This asymmetry is, however, not new but rather inherited from the pre-Lisbon era: linguistic discrimination and discrimination on the grounds of membership of a national minority were supposedly already prohibited by the general principle of equality; yet, the EU had no explicit competence to actively combat these forms of discrimination via Article 13 TEC.

[110] See the European Parliament resolution on the protection of minorities and anti-discrimination policies in an enlarged Europe, OJ 2006 C 124, p. 405, in particular paragraph 49 lit. a) – h), available online at: http://www.europarl.europa.eu/sides/getDoc.do?type=TA&language=EN&reference=P6-TA-2005-0228.

[111] See G. N. Toggenburg, A Remaining Share or a New Part? The Union's Role vis-à-vis Minorities After the Enlargement Decade, European University Institute (EUI) Working Paper 2006/5, pp. 23-25, available online at: http://cadmus.eui.eu/dspace/bitstream/1814/4428/1/LAW per cent202006.15.pdf . With regard to the FCNM, see O. de Schutter, The Framework Convention on the Protection of National Minorities and the Law of the European Union, CRIDHO Working Paper 2006/1, available online at: http://cridho.cpdr.ucl.ac.be/documents/Working.Papers/CRIDHO.WP.2006.011.pdf.

be achieved by striving to transpose those aspects of Council of Europe Conventions into European Union Law where the Union holds respective competences.[112]

Conclusion

In conclusion, one can say that the Treaty of Lisbon puts persons belonging to minorities in an unprecedented prominent position. The fact that also persons belonging to national minorities are now referred to in the Charter (that is in Primary law)[113] is a timely clarification that the Union is concerned with persons belonging to minorities not only in the context of the Copenhagen criteria (thus in the context of its enlargement policy), but also in the framework of the vast variety of its internal policies. This insight will help doing away with the impression that, from an EU-perspective, the protection of persons belonging to such minorities would be "*an export article and not one for domestic consumption*".[114] At the same time the legal resources for protecting minorities were not substantially increased by the Treaty. But the new diversity-commitment will have to be taken into account by the judiciary and the legislator in a plethora of contexts. In that sense the Lisbon Cocktail is served in a glass that is more half-full than half-empty.

[112] See the 10 Guidelines on the relations between the Council of Europe and the European. Union, adopted as part of an Action Plan in the Third Summit of the Council of Europe in Warsaw, 16 – 17 May 2005, available online at: http://www.coe.int/t/dcr/summit/20050517_plan_action_en.asp.

[113] It goes underlined that the "legal value" of the Charter of Fundamental Rights is "the same" as the legal value of the TEU and TFEU (see Art. 6 Para 1 TEU) and consequently forms part of Primary law even if not being an integral part of the treaty texts.

[114] B. de Witte, Politics versus Law in the EU's Approach to Ethnic Minorities, EUI Working Paper, RSC No. 2000/4, p. 3. For almost two decades, the EU mainly made its "respect for and the protection of minorities" explicit vis-à-vis candidate countries through the so called Copenhagen conditions. See Presidency Conclusions, Copenhagen European Council, 21-22 June 1993, Para. 7(A iii).

Discussion

Opening Remarks

Krzysztof Drzewicki
Good morning, my name is Krzysztof Drzewicki. I am responsible for this panel. May I start by inviting to approach the table our panelists of the first panel and moderator of its session - Professor Florence Benoit-Rohmer. Take your sits, please. Let me also give you a few pieces of information as a guide to the way in which we are going to proceed. First of all, I would like to say that moderators in both panels will introduce to their themes, lead the discussion and try to share with us some their fresh impressions, reflections and conclusions. But for concluding the whole debate of panels 1 and 2 we are lucky to have with us Dr Tawhida Ahmed, who has accepted the responsibility and thus a lot of work to be a rapporteur for both panels under the heading of minority issues in the European Union. Then, after the presentations, we will have discussion, coffee break and we can continue with another panel. Since we are running out of time I urgently give the floor to Professor Florence Benoit-Rohmer. The floor is yours.

Introduction of Part One

Florence Benoit-Rohmer
Thanks a lot, I am really, really honored to be here with you this morning to talk about this difficult and sensitive question of national minorities. You know that all the 27 EU Member States have difficulties with minorities, even if some countries, like mine [France] claims that we do not have any minorities. We do not know what it really means. So it is really a fundamental question in Europe. And I think it is difficult to say that we made a lot of progress on this fundamental question. Before the entry into force of Lisbon Treaty, we did not have, within the EU law, a provision which was aimed at protecting national minorities. In fact, national minorities were mostly referred to by the EU in its enlargement policies. The EU asked the candidates to fulfill some criteria, criteria which were in the Copenhagen Presidency Conclusions of 1993. Candidate states had to achieve to be the states, which are stable, and which would protect democracy, the rule of law, and rights of national minorities. So within the EU, I mean before the Lisbon Treaty, it was an objective of the EU to protect minorities.

But in Europe we have other institutions, which work for that. In the Council of Europe we have this fantastic treaty – the Framework Convention for the Protection of National Minorities, which is the first legally binding instrument aiming at protecting national minorities. In the EU now we also have had a kind of timid experience of the EU Court of Justice, which in some, in a few, very few cases dealt with the matter concerning minorities. Then, EU also has the Fundamental Rights Agency

(*European Union Agency for Fundamental Rights*). This new Agency deals with the question of minorities. We know that in the annual framework programme of the Agency the question of national minorities has a very prominent position. The Fundamental Rights Agency did work a lot on the question of Roma (Romani, Gypsies) and a lot on the question of national minorities. So together, in this panel, we are going to look at the stocktaking, the way how institutions have up to now dealt with the question of national minorities. I am going to give the floor first to Dr Csaba Pakozdi, I am sorry for the pronunciation of your name. You are working in the minority field, because you are the Head of Department of Minority Law, a department at the Ministry for Foreign Affairs in Hungary, and you also teach on these issues. So please, take the floor.

Florence Benoit-Rohmer (comment after 1st panelist, C. Pakozdi)

Thanks a lot Dr Pakozdi for this overview of the EU legislation in the field of minorities which, as you said, is not a homogenous EU legislation in the field. We had two-speed Europe: the old one was not obliged to protect minorities and new members which have to protect minorities. And you also insist on the new Article 2 of Treaty on European Union (post-Lisbon consolidated version), you also insist on the EU Charter and I would put my all hope in the Charter of Fundamental Rights. I would not put my hope in Article 22 of the Charter, because it just refers to cultural, linguistic and religious diversities and some countries did not want to talk about national minorities. After the Lisbon Treaty we use this terminology of diversity, but in fact this Article could protect minorities. But I think the most important is Article 21 of the Charter which indicates that any discrimination on the grounds like membership of national minorities shall be prohibited and I think that is one legally binding provision which could be used by the Court of Justice to protect minorities and I think that is one of the most important provisions of the Charter. So it is in the context of the Court of Justice I am going to give the floor to Professor Anna Wyrozumska. I am not able to spell your name correctly, and I apologise for it. Professor Wyrozumska is teaching at the University of Łódź. Now, please, take the floor.

Professor Florence Benoit-Rohmer (comment after 2nd panelist, A. Wyrozumska)

Thank you, professor. You have explained a set of very complex things and in very clear way. So thanks a lot. I was also wondering if the accession of the European Union to the European Convention on Human Rights will change the situation. This is an important question for the future. I also think that I am not sure whether case law of the Court of Justice in Luxembourg will change so many things on national minorities. The only principle which the Court can use is the principle of non-discrimination and I am not sure that it will potentially change a lot of things. When we are talking about the European Convention I was also wondering, while listening to you, if the Framework Convention on National Minorities could influence the case law of the Court in Strasbourg. Why not? I was reading once a very important report of the Fundamental Rights Agency, and one question was put in the report as follows: could Framework Convention be a source of inspiration for general principles of EU law? You know that general principles of EU law are binding on the states, are binding within EU law. That is important question. Report does not answer this question but, professor Rainer Hofmann, maybe you would answer this question. Professor Hofmann, you are so well-known because you have written so many books, articles and other

literature. You also have been privileged twice to be the president of the Advisory Committee of the Framework Convention for the Protection of National Minorities. Please, you have the floor.

Florence Benoit-Rohmer (comment after 3rd panelist, R. Hofmann)
Thanks a lot Professor Hofmann for this overview of the questions of national minorities. The last but not least – Dr Gabriel Toggenburg, who is project manager in the Fundamental Rights Agency, will talk about what the Agency is doing in the field of national minorities.

Florence Benoit-Rohmer (comment after 4th panelist, G. Toggenburg)
Thanks a lot. Now, I open the discussion, we have fifteen to twenty minutes for discussion. I have already one person, who asked for the floor, but maybe I am going to take three questions and then we will see if we have some other questions. So three questions, I have already one here. Dr Jan Mincewicz, would you like to be the first one to ask the question?

Discussion

Gabriel Jan Mincewicz
Ladies and gentleman, I am representing Polish national minority in Lithuania. It will not be possible to explain our entire situation. I shall refer only to the new Education Law in Lithuania. This new Education Law is a discriminating law.

For centuries citizens of Polish nationality living in the territory of Vilnius region have always had schools in their own native language, and where all subjects were taught in the native Polish language (except for foreign languages and Lithuanian – the state language in Lithuania). Even over seventy years of the Soviet times there were no attempts to liquidate the Polish schools or to convert them into Russian schools. However, this year, a new Education Law came into force, which is oriented against the schools of ethnic minorities. This Law actually liquidates the schools of ethnic minorities in Lithuania.

All the schools of ethnic minorities are forcibly converted into Lithuanian schools, where only several subjects are still allowed to be taught in their own native languages. This Law brutally breaches the Lithuanian-Polish Agreement ratified by Lithuania in 1994. Its Articles 14 and 15 clearly establish the right of Lithuanian Poles to learn all subjects in the native language until finishing the secondary schools. The new Law breaches the Framework Convention for the Protection of National Minorities (Arts. 14 and 22) and the European Union provision that the conditions of ethnic minorities may not be worsened.

This discriminating Education Law also contains a provision on the establishment of Lithuanian schools in rural areas at the expense of other nationality schools. In the small country, in which there is too little children for two schools (Lithuanian and Polish), the Law allows only for the establishment of Lithuanian schools, even in regions where there is much more Polish than Lithuanian children. In this way about a half of Polish secondary schools will be liquidated.

The new Law introduces also the uniform and identical General Certificate of Secondary Education Exam of Lithuanian language for all students, even those who have been studying for 10 years under different programmes. The society of ethnic minorities protested against the adoption of this Law by collecting over 60 thousand signatures. Several protest actions were held in front of the President's Office and the Ministry of Education. On 23 September, one week ago, about ten thousand of protesting participants gathered at the *Seimas* [Parliament of Lithuania]. School students strike was held. From the 1 September 2011 the civic disobedience campaign is continued in schools at the demand of parents and school students, and consequently the discriminating provisions of the new Education Law are not implemented…

Florence Benoit-Rohmer
Dr Mincewicz, please, I need to ask you to go faster…

Jan Mincewicz
…and the subjects are further taught in the native language. The discriminating provisions of the Law are even not talked about and discussed with the representatives of ethnic minorities. Anti-Polish policy is conducted by brutal bulldozer measures, as if Lithuania were not a rule of law state of the European Union. Thank you.

Florence Benoit-Rohmer
OK, thanks a lot. And second question. Yes, please. Could you introduce yourself?

Andrzej Rzepliński
Thank you. I am Andrzej Rzepliński from the Constitutional Court of Poland and Warsaw University. Listening to our morning panelists, they concentrated in fact on minority rights and minority positions. Professor Wyrozumska mentioned an individual as a subject of those rights, while referring in few words to judgment of the Luxembourg Court. In my former almost 30 years experience as a human rights defender, I had cases when I was engaged in conflicts within the same minority between an individual and minority leader. The latter are usually people with strong personality who want to keep control over "their" people. Meanwhile, in constitutional regulations on national minorities position of individual member of the minority are preferred. As in the Polish Constitution we read: "[...] citizens belonging to national or ethnic minorities [...]". The reason is that an individual could be forced to be subordinated to some behavior. Some minority persons prefer to be alone also from his/her minority group. It does not often mean that he or she wants to lose his/her national or ethnic identity. Such people just do not want to be involved in the life of their own minority.

And my other impression was that when Professor Wyrozumska referred to the position and interests of majority she used a term "state identity" or "national identity". I wish to add that in last years another term is quite popular in constitutional courts in Europe: "constitutional identity". My questions are, what is your opinion, what is protected in European Union law, what is more important in that law: a person, an individual human being belonging to national minority, or a national minority as a group and to what extent we can accept exposure of individual members of

those minority groups to the pressure from those leaders usually having no democratic legitimacy of the power.

Florence Benoit-Rohmer
Thanks a lot, more questions?

Piotr Turek
Thank you, my name is Piotr Turek, I am a prosecutor. I have a brief question particularly to Professor Hoffman. What is, in your opinion, the legal value and practical importance of the Strasbourg Declaration on Roma of 2010? Thank you.

Florence Benoit-Rohmer
Thank you, thanks for the all questions, we start replies with Professor Hoffman.

Rainer Hoffman
I think that I should briefly refer and respond to the description by the Deputy Mayor of the Vilnius District on the introduction into force of the new Lithuanian law on education. Obviously, I cannot say anything specific on that because we are waiting for the examination of third Lithuanian state report and we will be dealing with that issue of course in the context of that report and the opinion to be issued. The issue of this law has to be seen within general trend in the post-Soviet states, if you want to call it like that, to attempt at strengthening the state language. It is not only in post-Soviet states. If you go to Catalonia you have the same development. The state authorities are making efforts to strengthen the state language and that very often goes to the detriment of minority languages. We have similar events which also cause serious problems in Estonia, Latvia, or recently in Slovakia.

So the main point I think is that under the Framework Convention we have always recognized legitimate for a state to aim at strengthening the state language. Then, a good lawyer would say 'but'. This must not go towards disproportionate detriment of the minority language but to striking a fair balance. That is a procedural aspect. This is very important that the minority representatives are duly engaged in the process which leads to strengthening their participation. That is usually something which is missing.

We have the impression that in many of the cases I was examining, the decision was taken by the state government without listening, without giving representatives of the minority a word to say. That is the procedural aspect. That is relatively easy to be achieved. It is much more difficult to find appropriate solution when you have to say to what extent are minorities to be entitled to have instruction in their mother tongue. In Europe we have a proportion usually between 70% of teaching in state language and to 30% in mother tongue. I am afraid that Article 14, as mentioned by the gentleman, is not as clearly worded and is not as clearly interpreted and valid as representatives of the minorities obviously would like it to be. I think the case raises many issues and I of course cannot comment on whether it is problematic under the Lithuanian-Polish Agreement on good neighborly relations from 1993.

Well, the last question, which addressed to me, was on the legal relevance of the Strasbourg declaration. It is obvious that it is not a binding instrument, it is not a treaty. I would consider it as a political instrument indicating the will to pursue a certain policy but nothing binding. I mean the very best you could call it 'soft law' which comes in with the general policy goals of the countries involved. I think that answers your question, I hope.

Anna Wyrozumska

I will answer Professor Rzepliński's question or at least I will try to do so. The question is rather difficult but it goes deeply into the essence of the problem. In my opinion the rights we were discussing, the rights of minorities are highly sensitive for the Member States. In fact both the European Court of Human Rights and the Court of Justice of the European Union, they seem rather to favor the interests of the Member States. They consider the general interests to prevail over the rights of individuals in many cases but obviously they consider the concrete situation under the principle of proportionality. In *Wardyn* case the problem was of the protection of the language, the right of Lithuania to protect national language, or to protect state identity through the language. The Court of Justice found that this is a legitimate aim. Thus an individual right could be taken into account only if the wrong transcription of the name will cause serious inconvenience for individual. You could see that the same appears in the reasoning of the Strasbourg Court in *Chapman* case. There was a gypsy family who bought a land and on this land they wanted to live in the caravan, to preserve their specific style of life. They were forbidden on the ground of protection of environment. The issue was whether the European Convention could preserve this style of living or not. The Court considered the environmental protection as a legitimate aim. The state can develop the law in that respect. Individuals failed as they had to move from this land.

In Hungarian case, *Daroczy* case, the issue was the proper transcription of the name. According to Hungarian law a woman was obliged to add additional part to her name. She used for 50 years only the short name of her family name. The answer of the Court was that the state could impose such law but in her specific case it causes extremely serious inconvenience. The Court used the proportionality test to come to that finding. One have to look at the general interest in each individual case in which the proportionality test could or has to be applied. Sometimes it is difficult task to determine whether general interest or individual interest should prevail, and also a lot depends on judges.

Gabriel Toggenburg

On the question whether European Union law follows a group rights based or an individual rights based approach it might be useful to read Article 2 after it was amended by the Treaty of Lisbon. It says that the Union is founded on the values of respect for human rights, including rights of 'persons belonging to minorities'. So just taking the text, there are two readings to that. We could say that this is about human rights, and that people belonging to minorities are not excluded from this category since also their human rights are respected. But this is of course less convincing since it does not add anything and therefore I think it must be a bit more.

The rights of persons belonging to minorities must be something different than the other human rights of people belonging to the majorities and again there are two readings: is this now about group rights or about specific individual rights, and I would say it is the second reading. I mean definitely it

is not about group rights because otherwise the mothers and the fathers of the Treaty would have said 'rights of minorities', so we are talking about individuals but whenever you belong to a minority your special situation should be taken into account. So we are back to antidiscrimination but this does not mean that this is not attractive because what you get out of antidiscrimination depends on your reading of the very notion of equality. If equality is read as substantial equality than indeed we are talking about much more than just prohibiting discrimination.

Furthermore, I think we should also avoid a misleading, simplifying presumption of division of task. Sometimes people say that the EU should deal with ethnic minorities whereas the Council of Europe is responsible for national minorities. This is simplistic. The European Union does not address specific groups but rather different situations and rights. In fact, in many areas of life of a person belonging to national minorities EU law has something to say be it in the area of employment, social inclusion, free movement or other policy fields. In other areas like constitutional engineering, so whether not a Member State provides autonomy, whether not a Member State provides for bilingual place signs, whether or not a Member State provides for mother tongue education at secondary level there the European Union has nothing to say. So the picture is quite complex and does not lend itself to oversimplifications. In fact, this beautifully reflects the reality of an interacting system of multilevel governance where states themselves are "integrated" and where the integration of minorities faces different layers of governance that all have something to offer.

Csaba Pakozdi

Thank you. I would like to clarify the question concerning group and individual rights as we have started to speak about it. It is true that the European Union's law is concentrating on individuals but there are several state practices, which are, which can be completely different.
For example, there are states which are recognizing collective rights and their regulations are compatible with international law. There are different state practices. It has to be stated that several states are considering minority rights as individual rights, but there are other practices and other solutions for minority protection. For example, one of them is to recognize group rights. This is a possibility and it cannot be stated that this is unlawful. At the end, I think both ways can lead to a good practice of the protection of minorities or can lead to a solution of the problems of the minorities. A state can ensure autonomy, for example, on the basis of group rights but this is also possible on the basis of the territorial administrative system, without mentioning any group or individual rights. So it is important that European law is dealing with individual rights but there are also different solutions. Thank you.

Florence Benoit-Rohmer
Thanks a lot. I think that the word I heard here frequently is 'potential'. It has been said that jurisprudence of the Court of the Luxembourg is full of potentials, the EU legislation is full of potentials, etc. The whole EU law is full of potentials. At the same time I have heard that it is fantastic that we have non-discrimination principle, and let us fight against discrimination in the EU law. But this tool is not enough. And then I have heard something about group rights, collective rights but it is really a sensitive question because nobody insists on that problem. So we do not exactly know what is the limit of the protection of national minority? Is it only individualized?

You have the principle of non-discrimination in Article 21 of the Charter for Fundamental Rights. You have the EU jurisprudence and Court of Strasbourg jurisprudence. As soon as we want to go a little bit further a question is asked about it as a political question. It is a question of political will, so I am waiting for this will to pursue protection of national minorities. Thanks a lot, I think we have coffee time, we deserved this pause.

Part Two
Functional Approach

Moderator: Dr. Ilze Brands Kehris
Director of the Office of the OSCE
High Commissioner on National Minorities

Implications of the Lisbon Treaty upon Minority Issues in the European Union

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Introduction

In its evolution towards an '*ever closer union*', to resort to a lofty statement of the 1992 Maastricht Treaty, the European Union reached yet further stage with the adoption on 13 December 2007 of the Treaty of Lisbon Amending the Treaty on European Union and the Treaty Establishing the European Community (the so-called Lisbon Reform Treaty). In force since 1 December 2009, Lisbon Treaty has become a success story for fundamental rights, human rights and citizens' rights, including minority rights. This conclusion can be inferred from at least three main developments.

One is an upgrading of the Charter of Fundamental Rights of the European Union which was granted "*the same legal value as the Treaties*" under Article 6 para. 1 of the Consolidated Version of the Treaty on European Union (TEU). Second has been the inclusion of certain new human rights provisions, notably those on accession of EU to the ECHR (Art. 6 para. 2 TUE). And third innovation has been the inclusion of minority rights provision into a specific content of Article 2 TUE.[116]

The latter development has a potential of generating far-reaching implications for designing and pursuing more active national minority policies and for the protection the rights of persons belonging to national minorities. It is submitted that the distinction between minority policy and minority rights

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[116] For more on the position and status of fundamental rights and human rights in EU see A. Rosas and L. Armati, *EU Constitutional Law. An Introduction*, Oxford and Portland, Oregon: Hart Publishing, 2010, pp. 143-162.

approach is equally useful and valid in the activities of the European Union as it has traditionally been applied by European states and numerous international organisations.[117]

The aim of this paper is to contribute to identifying possible implications of Lisbon Treaty for minority policy and minority rights within the European Union itself, its member states as well as for such other international institutions as the Council of Europe (CoE), the United Nations (UN) and the Organization for Security and Co-operation in Europe (OSCE) and notably its High Commissioner on National Minorities (HCNM).[118]

1. Background of Minority Clauses in the Lisbon Treaty

Prior to the adoption of Lisbon Treaty two major European instruments were silent on the protection of minorities. The first was the Charter of Fundamental Rights of the European Union which had been adopted by the European Council in Nice on 7 December 2000 and adapted in Strasbourg on 12 December 2007. The EU Charter did not provide for any autonomous provision on minority rights. It did however mention a minority clause - "*membership of a national minority*" - among several grounds upon which any discrimination shall be prohibited (Art. 21 para. 1 of the EU Charter).[119] Furthermore, it contains a significant minority-relevant provision in Article 22 which provides that the "*Union shall respect cultural, religious and linguistic diversity*".

The second instrument which initially ignored the minority-rights perspective was the draft European Constitution of 10 July 2003. Only 'last resort' attempts, among others intervention by the OSCE HCNM, appeared to be instrumental in preventing a 'great failure'. After the thorny process of the final negotiation and endorsement of the draft Treaty establishing a Constitution for Europe during the Intergovernmental Conference a minority rights provision was eventually inserted therein on 18 June 2004. The draft Treaty was signed by the Heads of State or Government of 25 European Union member States and three candidate countries at a solemn ceremony on 29 October 2004 in Rome.[120]

The whole effort invested in introducing a minority rights provision into the European constitutional framework was nearly rendered futile after France and the Netherlands rejected the European Constitution in their *referenda* in 2005. Subsequent EU Chairmanships, notably the German, French

[117] Its best reflection is Article 1 of the Council of Europe's Framework Convention for the Protection of National Minorities which provides that "*The protection of national minorities and of the rights and freedoms of persons belonging to those minorities forms an integral part of the international protection of human rights* [...]."

[118] For more on their mandate and activities in the field of minority rights see K. Drzewicki, "Minority Protection within the OSCE", in *Managing Diversity. Protection of Minorities in International Law*, ed. by D. Thürer and Z. Kędzia, Zürich-Basel-Geneva: Schultens Juristiche Medien AG, 2009, pp. 99-131.

[119] One must however recall that Article 21 para. 1 of the EU Charter of Fundamental Rights of the European Union is solely relevant from the perspective of non-discrimination which, as such, constitutes one of the approaches to promoting and protecting the rights of persons belonging to national minorities. For years the EC/EU believed that minority protection was regulated by the general prohibition of discrimination – see C. Pákozdy, 'Tendencies of Minority Protection in the Law of the European Union', in *Miskolc Journal of International Law*, 2008, vol. 5, no. 1, p. 41.

[120] A history of integrating a national minority provision into the Treaty establishing a Constitution for Europe underwent extreme stages from rejection up to acceptance. For more on this history see K. Drzewicki, 'A Constitution for Europe: Enshrining Minority Rights. Words Can Make Worlds of a Difference', in *OSCE Magazine*, 2005, vol. II, no. 1 (March), pp. 19-21 and K. Drzewicki and V. de Graaf, 'The Activities of the OSCE High Commissioner on National Minorities: July 2004 – June 2005', in *European Yearbook of Minority Issues*, 2004/5, vol. 4, pp. 598-600.

and Portuguese, succeeded, however, in re-launching the constitutional debate and revived the draft European Constitution under the guise of a less complex and more streamlined body of fundamental rules in the Treaty of Lisbon.[121]

All in all, those were the developments which had paved the way for the subsequent maintaining or the transfer of the minority rights provision from the 2004 European Constitution into the Lisbon Treaty. As a result Article I-2 of the draft Constitution for Europe, dealing with the values of the Union, was reformulated by inserting after "*respect for human rights*" the following additional wording: "*including the rights of persons belonging to minorities*". On its part, the Lisbon Treaty inserted 'Article 1 a' into the TEU which repeats the provision of Article I-2 of the 2004 Treaty Establishing a Constitution for Europe, thus the formulation that embraces the minority clause. With such a normative content the Reform Treaty brought about a new legal status for minority rights within the EU legal order. It remains to be seen how this new legal situation can generate the formation of a new stage in dealing with minority issues.

2. Virtues of Article 2

The Consolidated Version of the Treaty on European Union (TEU) integrated the provision on minority rights as its Article 2.
Article 2 TEU sets forth:

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

In attempt at identifying possible implications one must examine the content of the provision of Article 2. Its pervading role is to define the values upon which the Union is founded. It is among these values that a clause on "*human rights, including the rights of persons belonging to minorities*" has been placed. There is altogether a handful of important conclusions that can be construed from the content of Article 2 alone and its interpretation in conjunction with other provisions of the Treaty on European Union.

The first implication of Article 2 is its direct link with the procedure for admission of new members to European Union. According to Article 49 TEU any "*European State which respects the values referred to in Article 2 and is committed to promoting them may apply to become a member of the Union*". Thus the whole admission procedure is based upon a substantive requirement of the respect for the values listed in Article 2. It means that the achievement of at least a qualitatively decent level of respect for the values becomes an object of a profound examination before a 'green light' is given for admission of a candidate state. Consequently, due regard should be had to the respect of human and minority rights in the course of the substantive review of a candidate's legislation and practice.

[121] For more on the negotiation process see K. Drzewicki, 'National Minority Issues and the EU Reform Treaty. A Perspective of the OSCE High Commissioner on National Minorities', *Security and Human Rights*, 2008, vol. 19, no. 2, pp. 137-146.

This requirement has already played its strong role and found its reflection in progress reports about candidate states and Article 2 strengthens its legal position in primary European law.

In the context of admission of new members Article 2 brought about a more innovative implication. It actually removed from the European law its earlier distinction between candidate states and member states.[122] A candidate state was formerly under a duty to demonstrate *inter alia* their "*respect for and protection of minorities*", as was determined by the Copenhagen Council criteria of 1993.[123] Under Lisbon Treaty this requirement has now been explicitly addressed on equal footing both to member states ("*These values are common to the Member States*" – art. 2 second sentence TEU) and to candidate states (Art. 49 para. 1 TEU – respect for "*the values referred to in Article 2*").

Yet another important implication of Lisbon Treaty has been its approach to defining the rights of persons belonging to minorities as an integral part of human rights, an approach consistent with normative developments of international law of human rights. It was a laudable approach in situating the Article 2 clause on "*the rights of persons belonging to minorities*" as a part of human rights ("*including*") instead of the Copenhagen provision linking the two values by the conjunction "and" ("human rights and respect for and protection of minorities"). This arrangement actually strengthens minority protection because any vulnerable group, including minorities, can more broadly refer to and benefit from normative and implementation arrangements of more advanced system of human rights. Within the international law of human rights the rights of persons belonging to minorities constitute merely a *lex specialis* regulation as an extension to the enjoyment of all general human rights of a substantive and procedural nature.

One cannot also overlook that Lisbon Treaty approach actually improved the Copenhagen wording by shifting from "*respect for and protection of minorities*" to "*respect for human rights, **including the rights of persons belonging to minorities.***" While Copenhagen focused on minorities as groups which should be respected and protected, Article 2 explicitly referred to minority rights as the rights of persons belonging to minorities. This has commendably restored an individual dimension to minority rights and largely discarded a risk of their excessive interpretation advocating collective dimension of minority rights.

Furthermore, the values enumerated in Article 2 serve the purposes of the so-called infringement procedure under Article 7 TUE. This reference appears as a basis for determination by the Council that "*there is a clear risk of a serious breach by a Member State of the values referred to in Article 2*" as well as in case of determination by the European Council about "*the existence of a serious and persistent breach by a Member State of the values referred to in Article 2*" (Art. 7 paras. 1-2 TUE). It

[122] At a conference in Copenhagen on 5 November 2002, OSCE High Commissioner on National Minorities Rolf Ekéus stated that "standards on which the Copenhagen criteria are based should be universally applicable within and throughout the EU, in which case they should be equally - and consistently - applied to all Member States. Otherwise, the relationships between the existing and aspiring EU Member States would be unbalanced in terms of applicable standards" – available online at http:www.osce.org.

[123] On 21-22 June 1993, the European Council in Copenhagen (Conclusions of the Presidency), while recognising the right of the countries of Central and Eastern Europe to join the EU, stipulated in regard to non-economic criteria that "[M]embership requires that the candidate country has achieved stability of institutions guaranteeing democracy, the rule of law, *human rights and respect for and protection of minorities* […]." (emphasis added).

can thus be concluded that serious cases of disrespect for the rights of persons belonging to minorities may constitute a substantive ground for instituting infringement procedure.

3. Broader Implications for Minority Issues in the EU

In addition to the above mentioned background and interpretations, Article 2 may contribute to fundamental modifications of legal and political management of minority issues in the European Union. With a view to reaching a more active and global attitude by the European Union to minority issues it can be reasonably expected that an adequate infrastructure will be developed. A number of possible prerequisites might facilitate further expansion of minority issues in EU.

One is a question of maintaining flexible approach to the term 'minority'. The Lisbon Treaty follows the formulation of the Copenhagen decision in maintaining a reference to the term "minority" without any further qualifications. This flexible approach distances therefore itself from never-ending debates on the definition of minorities. It should remain a question for subsequent law-making, case law and policy-making whether a specific group or community constitutes a national, ethnic, linguistic, or religious minority and whether it is a group of traditional or recent origin.[124]

Second prerequisite is that the human and minority rights provision constitutes a part of larger list of the values which reinforce its position and provide guidelines for its implementation. What considerably strengthens a human and minority rights clause is putting it against a background of such other values as human dignity, liberty, democracy, equality and the rule of law which are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail. It can be inferred that we have to do with mutually reinforcing effects between all these values and a methodological directive of construing any specific value from Article 2 in the direct relationship to and the context of other values. For instance, identifying human and minority rights in their relationship notably to equality, the rule of law, pluralism, non-discrimination, tolerance and justice creates vast potentials for achieving what is meant by the modern concept of good governance.

Third important aspect of Article 2 TEU for developing infrastructure conducive for human and minority rights will be a binding status of the EU Charter on Fundamental Rights of the European Union. The same legal value for the Charter as the Treaties will create jointly not only a new legal framework but will open above all a vast area for feedback and synergies, including those in the field of human rights and minority rights. It is notably the case of numerous substantive and procedural links between Article 2 and relevant provisions of the EU Charter. And that is not only with the non-discrimination clause under its Article 21, but also with other provisions such as those on the rights and freedoms in the areas of personal data, expression and information, association and assembly, education, cultural, religious and linguistic diversity and others (Arts. 8, 11, 12, 14 and 22 of the EU

[124] For an account of recent debates on the definition see G. Alfredsson, 'Minorities, Indigenous and Tribal Peoples, and Peoples: Definitions of Terms as a Matter of International Law', in N. Ghanea & A. Xanthaki (eds.), *Minorities, Peoples and Self-Determination*, The Netherlands: Koninklijke Brill NV, 2005, pp. 163-172 and K. Drzewicki, "The OSCE High Commissioner on National Minorities – Confronting Traditional and Emerging Challenges", in: *OSCE and Minorities. Assessment and Prospects*, ed. by S. Parzymies, Warsaw: Wydawnictwo Naukowe SCHOLAR, 2007.

Charter). These potentials should however be seen in the context of specific limitations of the Charter as an instrument which "shall not extend in any way the competence of the Union as defined in the Treaties" (Art. 6 para. 1 TEU and similar provision in Art. 51 para. 2 of the Charter).[125] All these provisions on the scope of application of the Charter demand in themselves more precise guidance for their interpretation.

Fourth development that can be expected is a recognition and possible re-arrangement of the dual approach to the question of national minorities. The earlier approach in the EU, based predominantly on the principles of equality and non-discrimination, will need henceforth to have been supplemented by a minority-rights approach.[126] It has been a result of different constitutional traditions in Europe. There are countries which do not recognize the concept of minorities as such (e.g. France) and countries with specific definitions or concepts of national or ethnic minorities (e.g. Belgium, Greece). The equality and non-discrimination approach has been applied in a few countries only and in the Union itself as a minimum common denominator, while in the meantime the minority-rights approach prevailed in the UN, CoE and OSCE. To conclude, instead of emphasizing the differences between both approaches, the time has probably come to attempt to recognize both elements as valid, complementary and equally applicable within Union law and policy. This new legal situation may be conducive to attempting reconciliation between the two approaches.

Fifth, the new legal basis for national minority issues will reinforce the available set of remedies, including effective remedies for the protection of minority interests and claims. The latter remedies will be extended to all persons whose rights and freedoms guaranteed by the EU law have been violated (Art. 47 of the Charter). This protection will be applicable before tribunals of the Union and of the Member States, provided the case concerns the implementation of EU law (Art. 51 para. 1 of the Charter). After the envisaged accession by the European Union to the European Convention on Human Rights, recourse to the European Court of Human Rights would also be ensured.[127] The importance of this whole arrangement stemmed from an argument in favour of closing a potential gap or remedying potential inconsistencies between the European law made in Brussels and its Strasbourg counterpart.

Conclusion

The provisions of Article 2 TEU have introduced a substantial change concerning minority rights within the legal order of the European Union. The legal position of minority rights therein has been improved substantially. Article 2 plays its role not only for the needs of enlargement of the Union or infringement procedure but also as a valid statement of the values upon which the Union is founded.

[125] As to the Charter's field of application, its Art. 51 para. 1 explains that the provisions of the Charter "are addressed to the institutions, bodies, offices and agencies of the Union with due regard for the principle of subsidiarity and to the Member States only when they are implementing Union law".

[126] For more on the conceptual divergence between the two approaches characterised as 'membership-blind' (the non-discrimination approach) and 'membership-sensitive' (the minority rights approach) see J. Räikkä, 'Is a Membership-Blind Model of Justice False by Definition?', in J. Räikkä (ed.), *Do We Need Minority Rights. Conceptual Issues*, The Hague / Boston / London: Martinus Nijhoff Publishers, 1996, pp. 3-19.

[127] This has been envisaged both by Protocol No. 14 to the European Convention on Human Rights (Art. 17 para. 1) and by Article 1 para. 8 of the Lisbon Treaty (the new Art. 6 para. 2 TEU).

The list of the values constitutes a sort of reference system for a number of other provisions, procedures, assessments and other possible administrative, judicial and operational applications of Article 2. Another consequence of Article 2 is that the list of the values is applicable both to internal and external actions of the Union. To avoid criticism of hypocrisy the European Union needs to be guided by the same set of fundamental values.

As far as minority issues are concerned the explicit inclusion of "*the rights of persons belonging to minorities*" is a commendable move because above all it reaffirms their place together with human rights on the list of fundamental values. There is no doubt that minority issues together with democracy, the rule of law, human rights, non-discrimination and other values, are absolutely crucial for maintaining and strengthening stability and peace in Europe. Balkan lesson of the 1990s cannot be forgotten. The European Union of '15' has already had problems with inter-ethnic issues in some of its member states as has been illustrated by discriminative practice against Roma and Sinti communities. After 2004 virtually all the new 12 members were admitted to EU with certain accumulated and unresolved minority problems.[128] These countries brought with them inter-state tensions concerning minorities which have thus become internal matters of the European Union. Importantly, these have been disputes both between new members (e.g. Slovakia-Hungary, Lithuania-Poland or Hungary-Romania) as well as between old and new members (e.g. Austria-Slovenia). In the circumstances, a question arises whether EU is ready to face ethnic challenges, including domestic riots and disturbances, and inter-state disputes within the Union.

It is justified to conclude that the Union is better prepared to deal with minority issues on the occasion of admission procedure which allows reviewing profoundly and regularly the minority situation in a candidate state. As to its actual members, EU has not yet developed its experience with procedures for a regular assessment of minority problems. There is no need for drawing up further standards on minorities since they are quite well developed by universal and regional international law, including politically binding commitments (e.g. within the OSCE).[129] As far as implementation of minority rights is concerned the Union has already had a number of procedural arrangements in hand albeit they are rarely applied (e.g. infringement procedure). Minority considerations should become a regular part of planning, pursuing and implementing programmes and projects affecting ethnic groups in such areas as political participation, education, cultural life, use of language, access to media and others.

There is also a legitimate expectation that European Union contributes to reconciliation between two main approaches to promoting and protecting minorities while respecting national constitutional traditions: minority rights or equality and non-discrimination. EU has a unique opportunity to

[128] On 1 May 2004, the EU experienced its enlargement with the inclusion of ten states: two Mediterranean Republics (Malta and Cyprus) and eight countries from Central and Eastern Europe (the Czech Republic, Estonia, Hungary, Latvia, Lithuania, Poland, Slovakia and Slovenia). This extended the membership of the EU from 15 to 25 states, followed by the accession of Bulgaria and Romania in 2007 (27 states). Croatia is expected to become 28th member in 2012. Two further countries received candidate status to join the EU (Macedonia and Turkey), while 5 other subjects have been promised EU membership in the long run (Albania, Serbia, Montenegro, Kosovo and Bosnia and Herzegovina).

[129] More on the status of OSCE commitments in the field of the so-called human dimension see K. Drzewicki, "European Systems for the Promotion and Protection of Human Rights", in *International Protection of Human Rights: A Textbook*, ed. by C. Krause and M. Scheinin, Turku/Åbo: Åbo Akademi University Institute for Human Rights, 2009, pp. 381-390.

attempt at recognising both approaches as valid, complementary and equally applicable within the European law.

All in all, Lisbon Treaty strengthened the position minority rights on the EU agenda. Respect for minority rights has been confirmed as a duty of both candidate and actual states of the Union. Together with the other values enumerated in Article 2 minority rights call for more active approach of the European Union for their effective implementation in a co-operation with the Council of Europe and the OSCE. This demand stems largely from the situations experienced in Europe where tensions and conflicts are persistently present and mostly show their either ethnic character or inter-ethnic components. While defending the values mentioned in Article 2 TEU European Union cannot remain passive and indifferent to the experience of fragility of inter-ethnic peace and stability in Europe.

Minority Issues in Europe and the EU experience with enlargement to Central and Eastern Europe

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The EU enlargement eastwards admittedly managed to transform minority rights from historical, strategic and ideological issues to human rights ones.[131] Indeed, the issue of protecting racial and ethnic minorities has received a great deal of attention since the collapse of communism in 1989 and has contributed towards a more value-oriented approach of the Union to this area. As of 1993, it was made explicitly an accession pre-condition for EU membership through the Copenhagen criteria. These criteria formed a loose framework of action. In retrospective, implementation by candidate states in this sector was often unsatisfactory and partial. At the same time, the general vagueness of the framework was often instrumentalized by independent monitoring agencies and non-governmental organisations mainly to criticize the accession candidates and much less to spot the limited results of the EU mechanism *per se*.[132] Despite, however, the unprecedented political attention and the central position in the enlargement waves of 2004 and 2007, minority protection within the EU remains even today confusing and to some extent misunderstood.[133]

1. The Limits of EU Conditionality

Looking back and during the pre-accession process, the EU stood isolated in terms of minority norm promotion and protection, mostly due to its lack of competence on the matter. Its role in this area was nevertheless increasingly enforced as a result of expertise and enforcement drawn from the OSCE and the Council of Europe. Synergies that arose out of this interaction created a minimum level of

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[131] For a discussion of the special nature of minority issues in Central and Eastern Europe, see Pogany I., 'Minority Rights in Central and Eastern Europe: Old Dilemmas, New Solutions?', in *Minority and Group Rights in the New Millennium*, ed. by Fottrell D. and Bowring B., M. Nijhoff Publishers, London, 1999, 141-161 at p.148.

[132] For example, the work of EUMAP for the period 2001-2002 covering all candidate states to EU accession, under the auspices of the Open Society Institute is seminal in that respect. (Cf. EUMAP, *Monitoring the EU Accession Process: Minority Protection*, Open Society Institute, 2002)

[133] Carter Johnson, The Use and Abuse of Minority Rights: Assessing Past and Future EU Policies Towards Accession Countries of Central, Eastern and South-Eastern Europe, *International Journal of Minority and Group Rights*, 13: 27-51, 2006, at 27

inter-institutional norm coherence in Europe.[134] Examined, however, on a separate basis, the picture from the Union alone is different.

As the outstanding issues of minority protection in recently admitted Member States demonstrate, the results of EU conditionality in this area suggest that "in sharp contrast to the principle of non-discrimination, the EU has neither developed a minority standard (…) nor do the member states subscribe to a single European standard…"[135]. In lieu of a clearly undesired legal codification of minority protection in EU law, the Union exercised sustained pressure towards candidate states before 2004 and 2007 respectively inviting them to alter policy and legislation on minority affairs. And yet, even when states resisted that pressure or at best complied only in part,[136] they were nevertheless accepted for membership.

A detailed examination of the European Commission's Regular Reports reveals precisely the width of minority issues present in these countries.[137] The reports, however, did not systematically tackle policies, legislation or institutional structures on minority protection. As a result, it remained unclear what exactly the EU was assessing, what it was expecting and what it was aspiring to in this area.

A more classic legal approach would have involved standard-setting, implementation and settlement of eventual disputes arising out of implementation, if required. This solution became impossible insofar as there was resistance to set concrete standards for minority rights, also given the gaps in the protection shield of many 'older' Member States.

Having said that, it should not be denied that the EU was instrumental in defusing a certain number of ethnic tensions before they had time to expand, but the fact remains that minority protection was treated asymmetrically among candidate states. The 'social learning' model based on the transfer of identity and values represented in the design of the suggested reform as well as a genuine internalization of norms thus largely failed.[138] It was replaced by external incentives that eventually contributed towards the loss of credibility of the norms that the EU was trying to impose. The loss of credibility occurred in the light of a double instance: on the one hand the EU was unable to monitor comprehensively compliance and on the other hand some of the candidate states were inconsistent about applying the norm.

In the post-accession era, external incentives gradually waned as conditionality lost its momentum. In fact, the European Commission soon after the formal accession of the 2004 candidate states acknowledged the partial success of the conditionality on minority rights with specific references to

[134] Gwendolyn Sasse, 'The Council of Europe as a Norm Entrepreneur: The Political Strengths of a Weak International Institution', in …pp.171-202, at 198.
[135] Guido Schwellnus, 'Conditionality and its Misfits: Non-discrimination and minority protection in the EU enlargement process', Paper presented at the 2002 ECPR Joint Sessions, Workshop 4, Turin, March 22-27, 2002 at p.17.
[136] See for example Latvia's resistance to sign the FCNM.
[137] See for example Kyriaki Topidi, EU Law, Minorities and Enlargement, Intersentia, Antwerp, 2010.
[138] The classic distinction introduced in the work of Schimmelfennig and Sedelmeier in 2005 between the 'external incentives' model emphasizing conditionality and the 'social learning' model based on the 'logic of appropriateness' of the adopted norms in a way represents well what happened in reality and what should have happened vis-à-vis minority protection. [Cf. Schimmelfenig and Sedelmeier (eds.), Introduction: Conceptualizing the Europeanization of Central and Eastern Europe', Cornell: Cornell University Press, pp.1-28]

ethnic groups facing widespread discrimination, such as the Roma.[139] It was also openly declared that anti-discrimination remains the principal vehicle of the EU's approach to '*immigration, inclusion, integration and employment'.*[140] The Commission's 2004 Green Paper on Equality and Non-discrimination highlighted the fact that the political Copenhagen criterion had not been legally translated to any corresponding treaty provision imposing obligations to the Member States. The alternative that the Paper proposed moved in the direction of highlighting the benefits of diversity and subsequently *'guide[s] a process of change based on mutual respect between ethnic minorities, migrants and host societies'* [141] through the existing legal resources.

2. Weaknesses of the current legal framework and policy setting

Given the understanding that the current legal framework stood little chance of being reconsidered, the following distinct areas suggest possible points of inquiry as they emerged out of the EU's experience of enlargement to Central and Eastern Europe.

Legislation

The Racial Equality Directive 2000/43 still constitutes the primary expression of the Union's legal response to minority protection. Academic literature is rich on the detailed analysis of the provisions of the directive. The fact remains that the text is largely based on individual rights and litigation and places little attention to 'ensuring equal outcomes for all ethnic groups.'[142] Furthermore, it is ill-equipped to tackle other forms of cultural otherness, besides ethnic origin, by excluding religion and nationality from its remit.

While the initial *raison d'être* of the directive stems from immigration policy concerns, the Union's eastwards enlargement has altered the facts and needs of the Member-States in this area.[143] This point has been acknowledged as of 2006 by the Commission, which referred to national minorities and the Roma as target groups in its evaluation of the implementation of the directive.[144]

In terms of the material scope of the directive, it remains somehow resistant to the need for positive action. Article 5 of the directive could be indeed interpreted expansively to cover positive action but scholarship and the European institutions speculate a reading of this directive in line with that of the gender equality legislation that has turned down measures that promote preferential treatment of under-represented groups (in this case women) in employment selection.[145] Pushing in the same direction of formal equality is Article 7(2) of the same directive that denies legal standing for associations, affirming thus the individualist conception and implementation of the text.

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[139] European Commission, Green Paper: Equality and non-discrimination in an enlarged European Union, COM (2004) 379 final, Brussels, 28 May 2004.
[140] Ibid, at p.2.
[141] Ibid, at p.2.
[142] Mark Bell, Racism and Equality in the European Union, Oxford University Press, Oxford, 2008, at p.67.
[143] Ibid, at p.68.
[144] European Commission, 'The application of Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial and ethnic origin COM (2006) 643 at 3, 8.
[145] Ibid, at 7 and Bell (2008) at p.69.

In parallel, the 2008 Framework Decision on racism and xenophobia maintained the impression that the EU minority policy, with its meagre content, remained predominantly focused on anti-discrimination.[146] The Treaty of Lisbon has provided stakeholders with a more concrete perspective by including Article 10 TFEU that reads: 'In defining and implementing its policies and activities, the Union shall aim to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation.' This new horizontal obligation carries a dynamic, pro-active approach to the Union's duties and distinguishes itself from negative formulations such as the one included in Article 21 of the Charter while at the same time providing a convenient platform for policy implementation and mainstreaming.[147]

The Lisbon Treaty brings another fundamental new element in the general picture of minority protection: it provides a firm linkage with human rights values in its Article 2 TEU by declaring that "the Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail." The Treaty, however, does not provide the Union with a new legislative competence that would lead to the formation of a distinct EU policy on minority protection.
With regards to future enlargements, respect for these values remains a precondition for EU membership (Article 49 TEU) and serious breaches of them by a Member State may result in the suspension of some of its rights resulting from membership (Article 7(2) TEU).

The role of the ECJ

The role of the ECJ has traditionally been that of "upgrading European Constitutionalism"[148]. Following the last two waves of enlargement to Central and Eastern Europe, and even prior to that, it has systematised its human rights control of EU legislative acts. With the help of the changes introduced by the Lisbon Treaty, minority protection could receive in the not so distant future, some treatment by the Court with regards to the content of the right at stake.

So far, there has been little opportunity to provide substantive interpretation of the Race Directive, with the exception of the several infringement proceedings brought by the Commission against Member States on the implementation of the text.[149]

The EU's own 'Bill of Rights',[150] a concrete legally binding reality since December 2009, together with an increasingly strong fundamental rights jurisprudence, leave scope for a more detailed

[146] Council Framework Decision 2008/913/JHA of 28.11.2008 on combatting certain forms and expressions of racism and xenophobia by means of criminal law, O.J. L 328/55, 6.12.2008. The purpose of the Decision was to establish a common criminal approach towards racism and xenophobia so as to ensure that the same behavior constitutes an offence in all Member States backed by effective, proportionate and dissuasive sanctions.
[147] FRA, *Respect for and protection of persons belonging to minorities 2008-2010*, Report, Luxembourg, 2010 at p.22.
[148] Jan Klabbers, 'The European Union in the Global Constitutional mosaic', in Walker et al (eds.), *Europe's Constitutional Mosaic*, Hart Publishing, 2011, at p.299.
[149] Case C-327/04 Commission v Finland [2005] OJ C239/3; Case 320/04 Commission v Luxembourg [2005] OJ C93/2; Case C-329/04 Commission v Germany [2005] OJ C143/13; Case C-335/04 Commission v Austria [2005] OJ C171/5.
[150] Charter of Fundamental Rights of the European Union, [2007] OJ C303, 14 December 2007.

consideration of minority protection rights. To the extent that minority protection will remain in the realm of politics exclusively, it will not acquire constitutional authority despite the lessons learned from the recent enlargements.[151]

Community Programmes

Following the Community Action Programme to Combat Discrimination (2001-2006), developed as part of the package adopted to implement Article 13, the 'Progress' Programme (2007-2013)[152] took its place, conceived from a slightly different perspective. The new perspective takes account of a wider variety of groups but also places emphasis on social policy instead of the stricter anti-discrimination approach. This shift is at least in part due to the enlargement to Central and Eastern Europe that brought into the picture the complexities facing groups such as the Roma, which are substantially different from those of immigrant communities from third countries.

There are in fact indications that national minorities face significant inequalities in socio-economic outputs (e.g. labour market participation) and this prompted precisely the need to renew the direction of policy and implementation.[153] With a budget of €151 million, the strand of the programme on anti-discrimination and diversity carries forward the results of monitoring undertaken by the Commission during the pre-enlargement period with emphasis on the prevailing social situation for the groups concerned and how these conditions affect their right to equality.

Between policies that tackle exclusively non-discrimination and those that aim primarily at integration, the current balance of EU action in minority protection stands ambivalent. For example, the Open Method of Coordination (OMC) with its application on employment or social inclusion places emphasis on inequalities while policy initiatives on integration of minorities focus on non-discrimination shifting often the burden to ethnic minorities for their insufficient linguistic and educational skills or their poor living conditions.

The current legal framework through its texts and roles played by institutions suffers from one additional shortcoming: it ignores the challenges that intersectionality increasingly poses. Individuals that are victims of discrimination on more than one of the prescribed grounds may encounter legislative gaps and lack of legal attention to their respective cases. This is a complication that surfaced also in part and as a result of the intensification of minority concerns in the new Member States following enlargement.

Hard Law or Soft Law?

The inherent complexity and diversity of situations, claims and needs of the different ethnic groups present in the European legal space points at the difficulty to designate one solution or one method as

[151] On the dual character of supranationalism, see Cormac Mac Amhlaigh, 'EU Constitutional Mosaic: Big or Small 'c'?', in Walker et al (eds.), *Europe's Constitutional Mosaic,* Hart Publishing, 2011, at p.33.

[152] European Parliament and Council Decision (EC) 1672/2006 establishing a Community programme for employment and social solidarity –Progress [2006] OJ L315/1.

[153] This finding is not however uncontested. See for example the report of the High Level Advisory Groups of Experts on the social integration of ethnic minorities and their full participation in the labour market, 'Ethnic minorities in the labour market –an urgent call for social inclusion' (Brussels: European Commission, 2007) at 29 that suggested the opposite.

the prevailing ones for the consideration of minority rights. Additionally, the EU has been and remains a system of multilevel governance that operates as a policy space with intertwining local, national, European and international level. In that light, the soft-law approach, introduced more vividly after enlargement, builds on the observation of the limits of hard-law and the lack of agreement of the now 27 Member States, on the most appropriate legal framework for minority protection.[154] The Lisbon Presidency Conclusions presented the Open Method of Coordination as a means of '*achieving greater convergence towards the main EU goals',*[155] without insisting on harmonisation. The OMC included guidelines combined with specific timetables for achieving goals, quantitative and qualitative indicators and benchmarks, translation of these guidelines into national and regional policies and finally monitoring, evaluation and peer review. Furthermore, the 2001 Stockholm Summit decided to extend the use of the OMC to social exclusion but with regard to social protection it was confined to '*exchanging experiences and best practices on the basis of improved information networks'* as a clearer treaty basis existed already for social exclusion.[156] Within the EU perspective, the OMC represents an evolution of practices that until recently would have been labelled 'soft law' in an attempt, to deal with new tasks in policy areas where either consensus lacks due to their political sensitivity or are not suitable to be dealt with under the classic Community method. The European Economic and Social Committee (EESC) went as far to propose the application of the OMC to "minority issues, especially the integration of Roma".[157]

Indicative of the soft law approach and its potential is the development of "The Common Basic Principles for Roma Inclusion".[158] The Council of the EU invited the Commission and the Member States to consider these principles in designing and implementing policies promoting the full inclusion of the Roma.[159] The basic principles lack, however, a legally-binding character but still constitute the most comprehensive attempt of policy formulation towards the EU's largest minority, likely to exercise influence in the design of policies with the EU and other institutions.[160] In other words, they represent a process providing a 'soft frame' for 'hard law' interventions.'[161]

Despite the open-ended shape of these initiatives, which in the aftermath of enlargement pushed the debate on what should be the most appropriate format for EU minority protection policy, it remains so that the lack of incentives to foster change appear as a limitation, particularly if EU funding mechanisms remain disconnected from effective peer reviews of these programmes.[162]

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[154] Any and all elements of minority protection from the legal point of view, that range from the question of EU competence on the matter to the content and the implementation of any such hypothetic measures are (and have been in the past) the subject of intense debate.

[155] Lisbon European Council Presidency Conclusions, 23-24 March 2000, at point 37, http://www.europarl.europa.eu/summits/lis1_en.htm .

[156] Jacobsson et al. (2000), at p.6. Stockholm European Council Presidency Conclusions, 23-24 March 2001, http://europa.eu/european-council/index_en.htm .

[157] Opinion of the EESC on the Integration of minorities-Roma, *O.J.* 2009 C27, pp.88-94.

[158] These include the following: constructive, pragmatic and non-discriminatory policies; explicit but not exclusive targeting; inter-cultural approach; aiming for the mainstream; awareness of the gender dimension; transfer of evidence-based policies; use of community instruments; involvement of regional and local authorities; involvement of regional and local authorities; involvement of civil society; active participation of the Roma.

[159] Council of the EU (2009), Note 10394/09.

[160] European Parliament, *Measures to promote the situation of Roma EU citizens in the EU,* Study , http://www.europar.eu/activities/committees/studies/download.do?language=en&file=34328 , 2010 , at p.195.

[161] Topidi (2010) ch.8 FN 41.

[162] For more on this point cf *Measures to promote the situation of Roma EU citizens in the EU,* at p.190, 2010.

Policy Reorientation and the Integrated Approach

As mentioned above, one of the clear consequences of the 2004 and 2007 enlargement waves on minority protection lies with the change in policy direction. From mono-dimensional policy initiatives that targeted anti-discrimination, there has been a call for a gradual shift towards initiatives that appear to be based on integrated measures that aim to address several discrimination grounds of concern to minority groups. This, however, does not suggest a comprehensive intersectional approach and once more the situation of the Roma in the Union highlights best the need for complementary strategies. Due to enlargement, the European Union and its Member States are today aware of the severity of the disadvantage in minority protection, baring in mind the complexities of ethnic inequality in Europe. Specifically for the Roma, the shift is even more visible as the group has been the subject of a number of specific initiatives since the completion of enlargement.

From Fundamental Rights to Social Rights?

Due to the inherent linkages between issues regarded as central to minority groups, in states now part of the EU, there is a noticeable shift towards social policy and rights, as the preferred direction of intervention. The Lisbon Treaty has precisely strengthened the commitment of the EU toward social progress and social rights.[163] Looking at the new social objectives attributed to the EU, such as the wellbeing of people, full employment and social progress, or the fight against exclusion, as well as the 'horizontal' social clause contained in Article 9 TFEU,[164] there is scope for addressing more realistically the claims of ethnic minorities of Member States. The OMC has constituted the *passerelle* instrument that allowed for a relatively smooth passage from a strict fundamental rights discourse prevalent during the pre-accession period to a wider, richer conception of minority protection.

Shortcomings related to Financial Instruments

Funding of initiatives and policies in the EU relevant to minority protection reflects to some extent and is connected to the shift towards social rights in the post-enlargement era. Thus, structural funds described as a "powerful instrument that the EU has at its disposal to promote the socio-economic situation of marginalized groups"[165] have produced limited impact due to systemic deficiencies. These are a combination of Member States structural and political constraints together with shortcomings in funding arrangements and monitoring/evaluation of the programmes at EU level.[166]

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[163] Social policy remains however a shared competence and is conferred to the Union within the context of aspects defined in Article 4(2)(b) TFEU.
[164] The clause stipulated that the EU must take into account the "requirements linked to the promotion of a high level of employment, the guarantee of adequate social protection, the fight against social exclusion, and a high level of education, training and protection of human health" in the implementation of its activities and policies.
[165] Measures…, 2010, at p.196.
[166] Ibid.

The issues of duration, territorial focus, sustainability and evaluation require further elaboration and remain open.

Monitoring and evaluation of existing instruments are a *sine qua non* condition for taking minority policy to the next step, following enlargement. Adequate policy analysis and implementation is necessary to provide impetus to existing instruments that have now moved from the abstract Commission annual progress reports to the specific initiatives of the various Community programmes. The limited systematization and reliability of current arrangements influence the concrete situation on the ground and do not allow for measurable and visible results.

3. Concluding Remarks

The experience of the enlargement to Central and Eastern Europe remains relevant precisely because it highlighted the unresolved issues of minority protection in the Union. The problems affecting national and immigrant minorities are interrelated and multi-layered.

The legal rules in place reflect one side of the matter that emphasizes the prohibition of discrimination based on ethnicity. The missing link is a more integrated approach that brings together the main policy responses towards a higher degree of effectiveness. The call for a more integrated approach remains at the same time conditioned by the 'need for differentiated approaches that take account of geographical, economic, social, cultural and legal contexts.'[167]

Despite recent legal developments, in particular the Lisbon Treaty, that indicate a persistent intention to move towards a 'fundamental rights culture', rights awareness of minority members remains weak.[168] The work of equality and social rights mechanisms is not enough to guarantee awareness that could then lead to access to rights for ethnic minorities.

The 'return to Europe' of the new Member States triggered a process of transformation affecting both the new members as well as the EU .For minority protection, conditionality that was initially presented to the candidates as a prerequisite for convergence, lost its coherence as soon as double standards emerged between what was required from new members and what was applied to old ones. Furthermore, the entire process also provoked questions as to the role of the EU in the wider human rights *status quo* in Europe. It was unclear where the Union stood in terms of human rights and minority protection: were the intentions simply to prevent future conflicts and retain a minimal and defensive role in fundamental rights protection or did the EU wish to engage in a broader reconsideration of its own human rights policy? The Union moved from the first to the second position, as negotiations progressed and as the EU continued to enlarge up to its current number of Member States

Academic scholarship has endorsed the second option of re-consideration of its human rights policy

[167] Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions, 'The social and economic integration of the Roma in Europe', COM (2010) 0133 final.

[168] FRA, The Stockholm Programme: A Chance to put fundamental rights protection in the centre of the European Agenda, at p.2, www.fra.europa.eu/fraWebsite/attachments/FRA-Comments-on-Stockholm-Programme.pdf , July 2009.

by focusing on the feasibility of the cultivation of diversity in the EU as a means to foster integration.[169] In that respect, the significance of identity and culture through the EU experience with the CEECs that prior to enlargement had an ethno-cultural definition and now is expected to be redefined as a Europeanized, post-national concept, is directly related with minorities and their rights. The ongoing constitutionalization project of the Union is expected to provide some answers in that respect together with the plans for further enlargement to the Western Balkans. What is already clear at this point, is that an exclusively rights-based approach to minority protection has been excluded. The challenge therefore remains to obtain the most efficient proportion of ingredients susceptible of bringing together the various identities and '*trajectories to modernity.*'[170]

[169] See for example, Blokker, Paul 'Cultural Diversity and Democracy in Post-Enlargement Europe', paper presented at the *Nationalism and National Identities Today: Multidisciplinary Perspectives* Conference , University of Surrey, UK, 12-13 June 2007, in file with the author.; Von Bogdandy (2007); De Witte (2007).
[170] Expression borrowed from Blokker (2007), at p.4.

The EU and the Protection of Minority Rights: A Functional Approach

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Introduction

Originally, the European Community (the EU's predecessor) did not concern itself with minority rights. In 1993, the EU made its membership conditional on respect for and protection of minorities based on the Copenhagen accession criteria.[172] This development took place in the context of the processes of democratisation in the Central and Eastern European countries and the dissolution of the Soviet Union.[173] However, EU law contained no corresponding obligation for 'old' Member States. Nevertheless, external minority conditionality led the EU to create "a higher standard for itself and growing consciousness of and commitment to the need for *self*-transformation in order to better exemplify the union of values it aspires to become."[174]

The necessity of internal minority protection in the EU has finally been addressed with the coming into force of the Lisbon Treaty.[175] Article 2 (ex-Article 6(1)) TEU now asserts that the EU is founded on *inter alia* respect for human rights, including the rights of persons belonging to minorities. In addition, Article 21(1) of the EU Charter of Fundamental Rights (CFR)[176] provides for equality and non-discrimination based on a long list of grounds, including membership of a national minority. Furthermore, Article 22 CFR stipulates that the EU will 'respect cultural, religious and linguistic diversity'. Although the provision does not explicitly refer to minorities, the protection of culture,

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[172] The accession criteria, or Copenhagen criteria, were set at the Copenhagen European Council in 1993 and further clarified at the Madrid European Council in 1995. See, Copenhagen European Council, Presidency Conclusions of 21-22 June 1993 and Madrid European Council, Presidency Conclusions of 15-16 December 1995 http://ec.europa.eu/enlargement/the-policy/conditions-for-enlargement/index en.htm.
[173] Council (EC) 'Declaration on the Guidelines on Recognition of New States in Eastern Europe and the Soviet Union' (1991) EC Bulletin 1991/12, 119.
[174] Rachel Guglielmo, "Human Rights in the Accession Process: Roma and Muslims in an Enlarging EU" in *Minority Protection and the Enlarged European Union: The Way Forward*, ed. By Gabriel Toggenburg, Budapest: OSI/LGI, 2004, 57 (emphasis in original).
[175] Consolidated versions of the Treaty on European Union and the Treaty on the Functioning of the European Union [2010] C 83/01.
[176] Charter of Fundamental Rights of the European Union [2010] C 83/391.

religion and language is central to a minority rights regime. For example, Article 27 of the International Covenant on Civil and Political Rights (ICCPR),[177] regarded as a global minimum standard of minority protection, refers to the right of minorities to enjoy their own culture, to profess and practise their own religion, and/or to use their own language. Therefore, Article 22 CFR could be of relevance to minorities.

Part 1 of this paper argues that Article 2 TEU read together with Articles 21 and 22 CFR constitute the nucleus of a minority rights regime in the EU (Sections 1.1 and 1.2). Potentially, this nucleus could be further strengthened through the general principles of EU law and the constitutional traditions common to Member States (general principles). The European Court of Justice (ECJ) develops the general principles in its jurisprudence. Currently, minority protection does not constitute a general principle of EU law, although the ECJ has occasionally acknowledged that protection of minorities is a legitimate aim of the State.[178] The paper assesses whether the EU's accession to the European Convention on Human Rights (ECHR) would have a positive impact on devising a minority rights regime in the Union (Section 1.3). Having overviewed the content and scope of Articles 2 TEU, 21 and 22 CFR and the general principles of EU law, the paper then questions whether an EU action on minority protection should go beyond the current framework. In particular, Part 2 of the paper discusses the legitimacy of EU action on minority rights and the limits imposed on the use of EU competences by the principles of subsidiarity and proportionality. Finally, Part 3 discusses the effectiveness and benefits of devising an EU regime of minority protection.

It is noteworthy from the outset that the paper does not investigate a range of other EU provisions with indirect effects on minorities, such as the Directive on Establishing a General Framework for Equal Treatment in Employment and Occupation (Employment Directive),[179] the Directive on the Equal Treatment between Persons Irrespective of Racial or Ethnic Origin (Race Directive)[180] and Article 167 of the Treaty on the Functioning of the European Union (TFEU) on culture.

1. A foundation of an EU regime of minority rights?

Exploring the potential of Article 2

Article 2 TEU states that the EU is founded on the values of *inter alia* respect for human rights, including the rights of persons belonging to minorities. The provision further stipulates that these values are common to the Member States. Unlike the Copenhagen political criteria for the EU membership, the provision does not require the existing Member States to achieve *respect for* and *protection of* minorities. Notably, the formulation in the Copenhagen criteria is more assertive than in Article 2. It requires not only 'respect', which effectively means non-interference with minority

[177] International Covenant on Civil and Political Rights, 999 UNTS 171.
[178] Case C-274/96 *Bickel and Franz* [1998] ECR I-7637; Case C-281/98 *Roman Angonese v Cassa di Risparmio di Bolzano SpA* [2000] 2 CMLR 1120.
[179] Council (EC) Directive 2000/78 establishing a general framework for equal treatment in employment and occupation [2000] OJ L303/16 (Employment Directive).
[180] Council (EC) Directive 2000/43 on equal treatment between persons irrespective of racial or ethnic origin [2000] OJ L180/22 (Race Directive).

rights, but also 'protection'. The term 'protection' often translates into some positive action where a State adopts measures safeguarding the identity of a minority group.

Furthermore, the Copenhagen criteria refer to 'minorities' without qualifying the term. This allowed the Commission to interpret the term broadly and include, for example, so-called 'new minorities', i.e. migrant workers, as well as new groups of minorities that appeared in the process of State dissolution and succession. Whether 'new' minorities should benefit from the minority rights regime available to traditional minorities has been one of the stumbling blocks in defining the term, and, therefore, the Commission's broad reading of the Copenhagen criteria is commendable.

In addition, the plural use of the term 'minorities' in the Copenhagen criteria implies that it could also include collective rights of minorities (although this is highly contested in international law). Instead, Article 2 follows the formulation in Article 27 ICCPR. The wording of Article 27 ICCPR suggests that minorities are entitled only to individual rights, which they enjoy 'in community with the other members of their group'. Such exercise of rights is not equivalent, however, to enjoying collective rights. This narrow approach may be explained by state concerns that the acquisition of collective rights may lead to claims of international legal personality by minority groups, and subsequently to self-determination and secession.[181]

By referring to *persons* belonging to minorities, Article 2 TEU follows an approach similar to Article 27 ICCPR. While individual rights of minorities are essential for their effective protection, a sole emphasis on this aspect has certain drawbacks. Thus, the individual rights approach is reactive by nature, i.e., an individual complaint is addressed *after* a violation has occurred; it may not prevent discriminatory acts from happening again.[182] Moreover, the individual rights approach may not be sufficient to protect a group from forced assimilation.[183] For example, an educational policy formulated on the basis of an individual's needs "in a climate of formal equality fails to consider the importance of cultural identity in formulating and developing personality."[184] Moreover, the interests of the majority are engrained in the fabrics of the society and state policies. Indeed, an individualist approach promotes the incorrect assumption that blindness to group difference results in homogeneous societies; in its turn, this approach may mask serious inequalities.[185] Thus, individual rights

> … cannot take into account the basic truth that minority identity can only be lived and maintained in a group. There is no point in talking Frisian or dressing in Sorb costume while sitting alone in one's room. This is unsatisfactory both for the individual and for the Frisian or Sorb community respectively. Only when Frisian is spoken or Sorb

[181] Marianne Van Den Bosch and Willem Van Genugten, "International Legal Protection of Migrant Workers, National Minorities and Indigenous Peoples – Comparing Underlying Concepts" *International Journal on Minority and Group Rights* 9 (2002), 195-233, 217.
[182] John Valentine, "Toward a Definition of National Minority", *Denver Journal of International Law and Policy* 32 (2004), 445.
[183] Jennifer Preece, "National minority rights vs. state sovereignty in Europe: changing norms in international relations?" *Nations and Nationalism* 3(3) (1997), 345-364, 352.
[184] Helen O'Nions, *Minority Rights Protection in International Law: The Roma of Europe*, Aldershot: Ashgate 2007, 266.
[185] ibid.

costume is worn in the community can it serve as an expression of the identity of a minority group.[186]

Consequently, the collective element, supplementing individual human rights, is essential for the meaningful enjoyment of minority rights, because, for example, "cultural traditions, as well as educational and religious institutions are – and can be –maintained by a community only on a collective basis."[187] Regrettably, Article 2 TEU does not follow the broader approach in the Copenhagen criteria and is limited to individual rights of minorities only.

Interestingly, Article 2 refers to 'the rights' of persons belonging to minorities. However, the TEU is silent not only on which minority rights the EU undertook to respect, but also on the competences and legal bases which could back up these good intentions. Arguably, because Article 2 follows the formulation in Article 27 ICCPR, which, for example, refers to the use of a minority language and to the practice of a minority religion, its interpretation could follow the latter provision.

Let us consider the practical implications of the ECJ's reading of Article 2 TEU in line with Article 27 ICCPR. The first example concerns the use of a minority language in another Member State. In its case law, the ECJ considered access of migrants (the so called 'new minorities') to linguistic facilities in other Member States. As at the time of these decisions there was no reference to minorities in the EU treaties, the ECJ decided these cases by relying on EU free movement regimes and citizenship rights.

Thus, in *Mutsch*,[188] a Luxembourg national residing in a German-speaking commune of Belgium claimed the right to use German in criminal proceedings. The right to use German before the authorities was a linguistic privilege granted to Belgian nationals residing in the German-speaking communes and aimed to protect the rights of minorities.[189] Advocate General Lenz argued that the fact that the advantages are designed to promote the rights of minorities does not mean that they may not apply to the nationals of other Member States, because the principle of equal treatment applies also "in areas which are not primarily governed by Community law."[190] The ECJ did not base its reasoning on minority languages *per se*; instead, it relied on the free movement of workers. In the ECJ's view, it was essential for migrant workers' integration into the host State to use their language in the criminal proceedings.[191]

Similar to *Mutsch,* the case of *Bickel and Franz*[192] concerned the choice of language in criminal proceedings in Bolzano, Italy. The applicants in this case wanted to use a minority language that was available to German-speaking nationals of Italy. Unlike *Mutsch*, Bickel and Franz were not migrant

[186] Georg Brunner and Herbert Küpper, "European Options of Autonomy: A Typology of Autonomy Models of Minority self-governance" in *Minority Governance in Europe,* ed. by Kinga Gál, Budapest: LGI Publications 2002, 18-19.
[187] Jelena Pejic, "Minority Rights in International Law" *Human Rights Quarterly* 19 (1997), 666-685.
[188] Case 137/84 *Ministere Public v Robert Heinrich Maria Mutsch* [1985] ECR 2681.
[189] Gabriel Toggenburg, "Minority Protection in a Supranational Context: Limits and Opportunities" in *Minority protection and the enlarged European Union: the way forward,* ed. by Gabriel Toggenburg, Budapest: OSI/LGI 2004, 28.
[190] Opinion of the Advocate General Lenz in *Ministere Public* (n 188), 2685 and 2686.
[191] Niamh Nic Shuibhne, *EC Law and Minority Language Policy: Culture, Citizenship and Fundamental Rights* The Hague: Kluwer Law International 2002), 79.
[192] Case C-274/96 *Bickel and Franz* [1998] ECR I-7637.

workers in the host State, but rather tourists. The ECJ tied their rights to EU citizenship and ruled that, although the protection of minorities is a legitimate aim of the State, this aim would not be "undermined if the rules in issue were extended to cover German-speaking nationals of other Member States exercising their right to freedom of movement."[193]

Were the ECJ to decide these cases by relying on Article 2 TEU, would the outcome be any different? Such a consideration would inevitably raise the issue of who is a 'minority'. The term has been defined neither in international nor European law. Furthermore, there is a certain divergence in the approaches of the United Nations (UN) and the Council of Europe (CoE) to the definition. One of the stumbling blocks in defining the concept 'minority' is whether the so-called 'new' minorities should be included. In Europe, there is a certain insistence on limiting the regime of minority protection to citizens or nationals of the State concerned only, particularly under the Framework Convention for the Protection of National Minorities (FCNM).[194] In contrast, according to the Human Rights Committee (HRC)'s generous interpretation of Article 27 ICCPR, not only is it unnecessary for minorities to be nationals or citizens, but also they need not be permanent residents: hence, "migrant workers or even visitors in a State party constituting such minorities are entitled not to be denied the exercise of those rights."[195] Consequently, if migrant workers wish to identify with a well-established pre-existing minority group in a State, those workers may "very well claim the same protection as other members of the group, for instance, in the education system."[196] Given a certain overlap in the wordings of Article 27 ICCPR and Article 2 TEU, the latter provision could also apply to 'new' minorities. The effect of such an interpretation would be a more minority-friendly jurisprudence by the ECJ which would fit in with the demands of EU law on free movement of workers and EU citizenship. Thus, the ECJ's case law may allow some migrant workers to claim special language rights in other Member States; for example, by Slovene citizens in Austria and Italy, and by Hungarian citizens in Romania and Slovakia.

Likewise, Article 2 read in conjunction with the Employment and Race Directives (on non-discrimination on the grounds of *inter alia* race, ethnic origin and religion) may offer some protection to ethnic and/or religious minorities who choose to exercise their EU free movement and citizenship rights. Let us imagine that a UK national, who is a *burqa* (head-to-toe covering) wearing Muslim, got a job in France and wants to exercise her right to free movement of workers. However, she is reluctant to move because under the 2010 French laws[197] she will not be able to wear ostensible religious dress in public spaces.

Were a preliminary reference question to come before the ECJ, what line of reasoning might the Court adopt? Arguably, the ECJ may not take lightly the fact that potentially some EU citizens, who belong to an ethnic or a religious minority, are dissuaded from exercising their free movement rights

[193] Ibid, para 29.
[194] Julie Ringelheim, "Minority Rights in a Time of Multiculturalism – the Evolving Scope of the Framework Convention on the Protection of National Minorities", *Human Rights Law Review* 10(1), 99-128, 112-117.
[195] Human Rights Committee, General Comment No 23: The rights of minorities (Art. 27) (1994), para 5.2.
[196] Martin Scheinin, "The United Nations International Covenant on Civil and Political Rights: Article 27 and Other Provisions" in *Synergies in Minority Protection: European and International Law Perspectives*, ed. by Kristin Henrard and Robert Dunbar, Cambridge: Cambridge University Press 2008, 31.
[197] Leigh Phillips, 'French National Assembly bans burqa' EU Observer 14 July 2010 http://euobserver.com/9/30477/?rk=1.

to those Member States which impose severe limitations on wearing religious dress in the public sphere. To avoid the impact of EU law, the Member State may argue that such interference can be justified under the public policy proviso.[198] The Member State involved would need to demonstrate that the adopted measure was based on an individual's personal conduct only and complied with the principle of proportionality. As to the personal conduct of the individual, it must represent a "genuine, present, and sufficiently serious threat affecting one of the fundamental interests of society."[199] By relying on this proviso, France could argue that by wishing to wear a religious dress, a worker's personal conduct represented a threat to *laïcité* (secularism) due to insufficient assimilation. However, it is unlikely that the measure satisfies the principle of proportionality, because the Member State's action should not go beyond what is necessary to achieve the legitimate aim pursued. Arguably, the 2010 total ban on wearing certain types of a religious dress in public places, such as the *burqa* and the *niqab* (a full face cover), may go beyond what is necessary to protect the fundamental interests of French society.[200]

Because the matter of religious dress is so politically sensitive in several Member States, it is hard to predict the ECJ's approach to this issue. However, if the problem were to persist and distort free movement of workers practicing minority religions to certain Member States, a combined reading of Article 2 TEU with the Employment and/or Race Directives could allow the ECJ to insist that such individuals should be treated equally with the majority and some protection of their identity was ensured.

The above discussion suggests that even though Article 2 TEU is not supported by relevant competences, its combined reading with other provisions of EU law may have a positive impact on the rights of minorities in Member States, particularly if the ECJ were to interpret it in line with Article 27 ICCPR. However, such a reading of Article 2 TEU does not automatically create an EU regime of minority rights. Even though there may be positive implications for individuals belonging to some linguistic and religious minorities, the provision does not give the EU a mandate to pass acts guaranteeing the rights of persons belonging to minorities.

Charter of Fundamental Rights

Another instrument of relevance to the situation of minorities in the EU may be the CFR. Article 6(1) TEU accords to the CFR the legal status of EU primary law. Significantly, the CFR is not addressed to individuals and applies to the EU institutions when they legislate and to Member States when they implement EU law. An individual applicant may invoke the provisions of the CFR as grounds for a review to challenge an EU act which infringed upon his/her rights. Likewise, on the basis of the CFR, an individual could challenge a Member State's implementing measures of an EU act. However, applicants are not entitled to demand rights enshrined in the CFR.

[198] Article 45(3) TFEU; see also, Article 27 of Directive 2004/38 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States [2004] OJ L 158.
[199] Article 27(2) of Directive 2004/38; see also, ECJ, Case 30/77 *Bouchereau* [1977] ECR 1999.
[200] For criticism, see, Britton Davis, "Letting the Veil: France's New Crusade", *Boston College International and Comparative Law Review*, 34 (2011), 116-145.

It is noteworthy that the protection of minorities has two aspects: first, non-discrimination and equality with majorities and, second, special rights to protect the elements of their distinct identity such as language, culture and religion. These additional features do not constitute separate rights under human rights law. Rather they aim to ensure equal treatment and non-discrimination in both law and practice.[201] For example, if the official language of the State is German, all children of the 'constituent' people are entitled to mother-tongue education. To be in the same position as majorities, i.e., with access to education in their mother-tongue, speakers of other languages, such as Slovene, Croat or Hungarian, seem to need a special 'privilege'.[202] This seemingly 'additional' right, however, only aims to guarantee substantive equality, by putting majorities and minorities on an equal footing. Theoretically, the CFR incorporates both aspects of minority protection: Article 21(1) CFR deals with equality and non-discrimination, while Article 22 CFR concerns the EU's commitment to respect cultural, religious and linguistic diversity. Let us explore the impact of these provisions on the development of an EU minority rights regime.

Article 21 CFR precludes discrimination against minorities based on the membership of a national minority. Interestingly, this formulation differs from its counterpart in Article 14 ECHR which precludes discrimination on the ground of 'association with a national minority'. Whether this difference in wording creates different interpretation is not entirely clear. The explanations to the CFR clarify that in so far as Article 21 "corresponds to Article 14 of the ECHR, it applies in compliance with it."[203] They are silent, however, about the difference in wording between Article 2 TEU and Article 21 CFR. Does the reference to 'national minority' in Article 21 CFR suggest that it applies to groups different from those coming within the scope of Article 2 TEU? Since neither of these terms is defined in international or European law, the ECJ may be faced with a challenging task: to define or, at least, to distinguish these terms and the scope of their application.[204]

The explanations to the CFR also elucidate that, despite its wide reach, Article 21 does not create any power for the EU institutions to enact anti-discrimination laws protecting minorities, nor does it comprise a sweeping ban on discrimination in wide-ranging areas. Its aim is mainly to address "discriminations by the institutions and bodies of the Union themselves, when exercising powers conferred under the Treaties, and by Member States only when they are implementing Union law."[205] Accordingly, the role of Article 21 is to prevent the EU from discriminating against minorities while legislating in the areas of its competence.

As to Article 22 CFR, it commits the EU to respect linguistic, cultural and religious diversity. As with Article 21 CFR, the provision may serve as a ground to challenge an EU act or a Member State's implementing measures. Originally, proposed drafts of Article 22 CFR were intended to

[201] Gudmundur Alfredsson, "A Frame of an Incomplete Painting: Comparison of the Framework Convention for the Protection of National Minorities with International Standards and Monitoring Procedures" *International Journal on Minority and Group Rights* 7 (2000), 291, 293.
[202] Joseph Marko, "Constitutional Recognition of Ethnic Difference – Towards an Emerging European Minimum Standard?" in *The Framework Convention for the Protection of National Minorities: A Useful Pan-European Instrument?* ed. by Annelies Verstichel et al, Oxford: Intersentia 2008, 22.
[203] Explanations relating to the Charter of Fundamental Rights Explanations relating to the Charter of Fundamental Rights [2007] C303/17, 24.
[204] Gulara Guliyeva, "Defining the Indefinable: A Definition of 'Minority' in EU Law," *European Yearbook of Minority Issues*, forthcoming 2011.
[205] Explanations relating to the Charter, 24.

protect and respect the identity and the rights of minorities.[206] The final version of the provision does not, however, include such references, and represents a compromise between Member States willing to promote a coherent minority protection scheme and those opposing such a development.

Nevertheless, as it stands, the provision does not explicitly refer to minorities. As a result, there has been a lot of debate as to whether or not it applies to minorities. For example, Arzoz claims that, "Article 22 accords to persons belonging to minorities a level of protection equivalent to the one recognised by international human rights law",[207] in particular the one provided by Article 27 ICCPR. Conversely, De Witte argues that Article 22 is too vague and does not "translate easily into concrete minority protection standards".[208] Indeed, based on the respect for diversity in Article 22 CFR, it might be difficult to reconcile differences in approaches to minority protection in the constitutional traditions of Member States.[209] Nonetheless, some degree of minority protection may be read into this Article. However, the extent of such protection will depend on the ECJ's reading of the wording of Article 22. For example, the term 'respect' may be interpreted to mean non-violation of minority rights by the EU or to guarantee equal treatment of EU citizens regardless of their cultural, linguistic or religious identities; this may entail EU action that varies according to the needs of minority groups.[210] Therefore, it is not clear what degree of positive duties may be imposed on the EU institutions and Member States.

Because the EU does not have a competence to, for example, guarantee religious freedoms in its Member States[211] or impose on them obligations to provide for linguistic facilities, the role of Article 22 would be to put a restraint on EU action in the fields that might have an adverse impact on cultural, linguistic or religious diversity. Given that culture, language and religion are often defining characteristics of a 'minority', arguably, persons belonging to such groups may challenge EU acts which infringed upon their rights.

Accession to the ECHR: Taking the general principles of EU law a step further?

Similar to the CFR, the general principles of EU law may serve as a ground to challenge EU secondary legislation and Member States' implementing measures by virtue of Articles 6(3) TEU and 263 TFEU. The ECHR and the pronouncements of the European Court of Human Rights (ECtHR) have special status in EU law; the ECJ relies on them in applying the general principle of

[206] Xabier Arzoz, "Article 22 of the EU Charter" in *Respecting Linguistic Diversity in the European Union,* ed. by Xabier Arzoz, Amsterdam: John Benjamins Publishing Co 2008, 147-150; see also, Guido Schwellnus, "Reasons for Constitutionalization: Non-discrimination, Minority Rights and Social Rights in the Convention on the EU Charter of Fundamental Rights" *Journal of European Public Policy*13(8) (2006) 1265-1283, 1273-4.
[207] Arzoz, "Article 22…", 164.
[208] Bruno de Witte, "The Constitutional Resources for an EU Minority Protection Policy" in *Minority Protection and the Enlarged European Union: the Way Forward,* ed. by Gabriel Toggenburg, Budapest: OSI/LGI 2004, 115.
[209] Marko, "Constitutional Recognition…"; see also Julie Ringelheim, "Minority Protection and Constitutional Recognition of Difference: Reflections on the Diversity of European Approaches" in *The Framework Convention for the Protection of National Minorities: A Useful Pan-European Instrument?* ed. by Annelies Verstichel et al, Oxford: Intersentia 2008, 33-49.
[210] Miquel Strubell, "The Political Discourse on Multilingualism in the European Union" in *The Language Question in Europe and Diverse Societies: Political, Legal and Social Perspectives,* ed. by Dario Castiglione and Chris Longman, Oxford: Hart Publishing 2007, 158.
[211] Peter Goldsmith, "A Charter of Rights, Freedoms and Principles," *Common Market Law Review* 38 (2001), 1201-1216,1207.

respect for fundamental rights.[212] Although the ECJ has not established that non-discrimination against minorities is a general principle of EU law, such a development may take place, particularly in light of recent minority-friendly jurisprudence of the ECtHR.[213]

Furthermore, pursuant to Article 6(2) TEU the EU is in the process of negotiating its accession to the ECHR. Is there anything in this accession for minorities? One of the advantages of the EU's accession to the ECHR in general is the availability of an external judicial control of EU acts. Currently, a violation of individual rights stemming from the implementation of an EU act is often attributed to Member States and not the EU as a whole. For example, in *Bosphorus*,[214] the applicant airline company argued that, by seizing its aircraft under EC Council Regulation 990/93, Ireland violated its right to property. Having established that "the protection of fundamental rights by EC law can be considered to be … 'equivalent' … to that of the Convention system",[215] the ECtHR presumed that "actions against national measures governed by EU law would be upheld not if the measure breaches the ECHR, but only if it is 'manifestly deficient'."[216] Effectively, *Bosphorus* privileges EU secondary legislation, such as regulations, where Member States have no discretion in implementing EU law.[217] The accession of the EU to the ECHR is likely to remove this presumption. As a result, if an EU act infringes a Convention right, the ECtHR may find a violation against the EU. Such a finding may trigger the revision of EU rules which, for example, discriminate against minorities.

Overall, three issues affect the usefulness of the EU's accession to the ECHR for minorities. First, the EU's accession to the ECHR must not affect its competences or the powers of its institutions, as emphasised by Protocol 8 to the TEU and TFEU.[218] Consequently, such an accession will not affect a lack of EU competences on minority rights.

Second, the ECHR does not contain a catalogue of minority rights. Although general human rights provisions can be read in a minority-friendly fashion,[219] they do not always allow the establishment

[212] Case 29/69 *Stauder v City of Ulm* [1969] ECR 419; Case 4/73 *Nold v Commission* [1974] 291; Case 36/75 *Rutili v Minister of the Interior* [1975] ECR 1219; Case 44/79 *Hauer v Land Rheinland-Pfalz* [1979] ECR 3727; Case C-415/93 *Bosman and others* [1995] ECR I-4921; Case C-60/00 *Mary Carpenter v Secretary of State for the Home Department* [2002] ECR I-6279.

[213] *Chapman v UK* (App no 27238/95) (2001) 33 EHRR 399 (the right to an own way of life); *Sejdić and Finci v Bosnia and Herzegovina* (App no 27996/06 and 34836/06) ECHR 22 December 2009 (non-discrimination in political participation); *D H and others v the Czech Republic* (App no 57325/00) (2008) (Grand Chamber) ELR 17; *Oršuš and others v Croatia* (App no 15766/03) ECHR 16 March 2010; *Cyprus v Turkey* (App no 25781/94) (2002) 35 EHRR 30 (educational rights of minorities); Sidiropoulos and others v Greece (App no 26695/95) (1999) 27 EHRR 633 (the freedom of association to protect separate identity of a minority group). For analysis, see, Gaetano Pentassuglia, "Minority Issues as a Challenge in the European Court of Human Rights: A Comparison with the Case Law of the United Nations Human Rights Committee" *GYIL* 46 (2003) 1-52.

[214] *Bosphorus Hava Yollari Turizm ve Ticaret Anonim Sirketi v Ireland* (App No 45036/98) (2006) 42 EHRR 1.

[215] *Bosphorus*, para 165.

[216] Damian Chalmers et al, *European Union Law*, Cambridge: Cambridge University Press 2010, 261.

[217] Tobias Lock, "The ECJ and the ECtHR: The Future Relationship between the Two European Courts" The Law and Practice of International Courts and Tribunals 8 (2009) 375-398, 379. See also, *M.S.S. v Belgium and Greece* (App no. 30696/09) 21 January 2011, where the ECtHR adopted a stricter review.

[218] Protocol (No 8) Relating to Article 6(2) of the Treaty on European Union on the Accession of the Union to the European Convention on the Protection of Human Rights and Fundamental Freedoms [2010] OJ C 83/273, Article 2.

[219] See above footnote 42.

of generally applicable principles. Because the ECHR does not contain an equivalent of Article 27 ICCPR, its impact on minority rights is rather limited.

The third issue concerns the scope of the EU's accession to the ECHR, which is limited to the Convention itself and to Protocols Nos 1 and 6.[220] Thus, the EU will not accede to Protocol 12 to the ECHR on the general prohibition of non-discrimination. This lack of the EU's accession to the Protocol is compounded by a poor ratification of the instrument by the majority of Member States. As of 8 September 2011, the Protocol has been ratified by only 7 EU Member States.

Accordingly, the EU's accession to the ECHR may have limited normative impact on developing an internal EU regime of minority protection. It would, however, allow a person belonging to a minority to bring claims directly against the EU.

Overall, as EU law stands, it has some potential to contribute to minority protection. Articles 2 TEU, 21 and 22 CFR and the general principles of EU law form a foundation of a minority rights regime in the EU. In addition, the EU has a strong framework on non-discrimination and some provisions that could have limited and often indirect impact on the protection of minority rights.[221] However, to design a fully-fledged regime of minority protection, the EU must acquire the necessary competences and revise the Treaties to include a relevant legal basis. Such an attempt might be highly controversial and create political resistance from some Member States.

2. Legitimacy and Subsidiarity of EU action in the field of minority protection

The above section argued that a combined reading of Articles 2 TEU, 21 and 22 CFR with other EU rules could lay a foundation for an EU internal regime of minority protection. The question then is how far can EU action reach to protect minority rights? Under the principle of conferral, which sets the limits of EU competences, the EU can "act only within the limits of the competences conferred upon it by the Member States in the Treaties to attain the objectives set out therein. Competences not conferred upon the Union in the Treaties remain with the Member States."[222] Consequently, without Treaty revisions, the EU cannot develop a coherent system of minority protection.

Furthermore, even if the EU had a competence on minority rights, the use of this competence would be limited under the principles of subsidiarity and proportionality. These principles are enshrined in Article 5 TEU and elaborated on in Protocol (No 2) on the Application of the Principles of Subsidiarity and Proportionality. Thus, under the principle of subsidiarity, the EU can "act only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at central level or at regional and local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level."[223] Otherwise, the decisions should

[220] Draft Revised Accession Agreement, Appendix II and III of CDDH-UE (2011)10, 16 May 2011, Article 1(1).
[221] See, for example, Article 19 TFEU, Race Directive; Employment Directive; and Articles 165 and 167 TFEU.
[222] Article 5(2) TEU.
[223] Article 5(3) TEU.

be made closer to the people. Each institution of the EU is under the duty to "ensure constant respect for the principles of subsidiarity and proportionality."[224]

In addition to these general limitations imposed on the exercise of EU competences, there is a long list of provisions which curtail the EU's ability to undertake a generous interpretation of the Treaty and CFR provisions if they were to create new powers. For example, Article 51(1) CFR specifies that the provisions of the Charter are addressed to the institutions, bodies, offices and agencies of the EU with due regard to the principle of subsidiarity and to the Member States only when they are implementing EU law. As a result, the legal effects of the CFR are limited to serving as a tool for interpreting EU legislation and Member States' implementing measures and as a ground for challenging such acts. Second, Article 51(2) CFR explicitly excludes its application beyond EU powers, establishment of any new power or task for the EU, or modification of powers and tasks as defined in the Treaties. This limitation is reiterated in Article 6(1) TEU. As if these safeguard clauses were not enough, Article 52(2) CFR emphasises that rights recognised by the CFR 'shall be exercised under the conditions and within the limits defined by those Treaties.' All these provisions[225] reflect Member States' fears of creeping EU competences into areas where Member States may wish to retain their powers.[226] The ECJ is likely to take these limitations seriously, particularly in light of 'warnings' issued by some Constitutional Courts of EU Member States,[227] aiming to discourage EU encroachment upon their competences. Therefore, a coherent regime of minority rights in the EU would not be possible without further treaty amendments.

3. The Effectiveness and Benefits of an EU Regime of Minority Protection?

This section argues that were the necessary political consensus achieved, EU law contains a number of instruments and mechanisms that could lead to the establishment of an effective system of minority protection. Arguably, none of the regimes under the ICCPR and the ECHR enjoy

> the combination of regularity and frequency of monitoring, the relative degree of institutional and political closeness and trust between participating States, and the established mechanisms, institutions and array of instruments for policy coordination and mutual learning as does the European Union system.[228]

Let us consider some of the benefits offered by the EU legal system. First, a persistent breach of minority rights in a Member State may trigger the application of Article 7 (2) and (3) TEU. This provision may apply if the principles in Article 2 TEU, i.e. democracy and fundamental rights, including the rights of persons belonging to a minority, were seriously and persistently breached by a

[224] Article 1, Protocol No 2 on Subsidiarity.
[225] The application of the CFR is further limited through Protocol (No 30) on the Application of the Charter of Fundamental Rights of the European Union to Poland and to the United Kingdom. See also Declaration (No 53) by the Czech Republic on the Charter of Fundamental Rights of the European Union and Declaration (No 61) by the Republic of Poland on the Charter of Fundamental Rights of the European Union.
[226] See generally Mark Pollack, "The End of Creeping Competence? EU Policy-Making Since Maastricht" *Journal of Common Market Studies* 38 (2000), 519.
[227] See, for example, the decision of the German Constitutional Court on the Lisbon Treaty, BVerfG, 2BvE 2/08 vom 30 June 2009, Absatz-Nr. (1-421). http://www.bverfg.de/entscheidungen/es20090630_2bve000208en.html.
[228] Gráinne de Búrca, "Beyond the Charter: How Enlargement has Enlarged the Human Rights Policy of the European Union," *Fordham International Law Journal* (2004), 679-714.

Member State. In this case, recommendations may be addressed to this Member State and some of its rights might be suspended, including voting rights in the Council. However, the mechanism of Article 7 is politically sensitive and constitutes a procedure for crisis response. Although, in practice, it may be invoked as a last resort, the availability of this mechanism could deter Member States from grave violation of minority rights.

Where monitoring is concerned, the EU Fundamental Rights Agency (FRA)[229] has several major functions, namely, to collect data on fundamental rights in the EU, to produce expert opinions, and to promote dialogue with civil society to raise public awareness. The FRA's functions at present do not include monitoring Member States' compliance with human or minority rights. Were the EU to acquire a competence in minority rights, the FRA could be accorded that monitoring role.

Furthermore, the institutional and political closeness of EU Member States, based on their duty of sincere cooperation and mutual respect under Article 4(3) TEU, has proved invaluable in ensuring the effectiveness and uniform application of EU law in Member States.[230] These obligations make the EU system far more effective than those of the UN or the CoE. Therefore, if the EU had the necessary competence to protect the rights of minorities, Member States would be under a legal obligation to perform their duties in good faith. Failure of a Member State to fulfil its obligations under the treaties may result in infringement proceedings before the ECJ[231] and lead to the imposition of a penalty.[232]

As to the range of instruments and mechanisms, EU law often effectively combines hard law and soft law mechanisms.[233] For example, the Open Method of Coordination (OMC) has been used to strengthen the provisions of EU Treaties by fostering permanent dialogue and mutual learning among Member States. The OMC is a framework for the Member States that allows convergence of national policies towards the main EU goals, and the spreading of best practices amongst Member States.[234] Accordingly, it is 'soft' policy co-ordination, "whose very innovation rests in its distance from 'law' traditionally understood."[235] Convergence of policies may signify the wide identification of certain objectives, the definition of yardsticks to measure progress related to the objectives, and the creation of tools to achieve the objectives.[236] For example, if and when the EU has the competence to protect minority rights, this mechanism could be employed to further the right of minorities to access education in a minority language. Thus, best practices from other Member States

[229] Council (EC) Regulation No 168/2007 establishing a European Union Agency for Fundamental Rights [2007] OJ L 53/2.
[230] See, for example, Case C-106/89 *Marleasing Sa v La Comercial Internacional* [1990] ECR I-4135; Case C-266/03 *Commission v Luxembourg* (Inland Waterways Agreement) [2005] ECR I-4805. See also, John Temple Lang, "Developments, Issues, and New Remedies - The Duties of National Authorities and Courts under Article 10 of the EC Treaty" *Fordham International Law Journal* 27 (2004), 1904-1939.
[231] Articles 258 and 259 TFEU.
[232] Article 260 (2) and (3) TFEU.
[233] For detailed analysis see, Poul Kjaer, *Between Governing and Governance: On the Emergence, Function and Form of Europe's Post-National Constellation,* Oxford: Hart 2010.
[234] Gabriel Toggenburg, "The EU's evolving policies vis-à-vis minorities: a play in four parts and an open end", Report (FP6 project) 'Human and Minority Rights in the Life Cycle of Ethnic Conflicts' (2008), 17.
[235] Mark Dawson, "The Ambiguity of Social Europe in the Open Method of Coordination" *European Law Review* 34(1) (2009), 55-79, 56.
[236] Ulf Fredriksson, "Changes of Education Policies within the European Union in the Light of Globalisation" *European Educational Research Journal* 2(4) (2003), 522-546, 526-527.

and peer review mechanisms could induce governments to promote this right while preserving some discretion in the matter.[237] Significantly, all these mechanisms can be used only if and when the EU acquires the necessary competence.

It may be worth mentioning that the development of an EU regime of minority protection could raise various objections, such as that the EU is not a human rights organisation; it is not within its mandate to protect minority rights internally; and that such a development may lead to the substitution of CoE monitoring by EU monitoring or duplication of effort.

Arguably, these objections may be addressed if the necessary political consensus is achieved. For example, the necessity of ensuring smooth enlargement induced the EU to initiate its own monitoring process in the candidate countries under the Copenhagen criteria, despite the fact that the CoE was already involved in such protection. Aggravation of unresolved minority issues in some Member States may mobilise the necessary political will within the EU to establish internal standards on minority protection. In addition, some of the new EU member states could "tilt the balance towards pushing for minority related components to enter into the legal texts of the EU, underpinning both its internal and external policies…"[238] Closer inter-organisational cooperation with the CoE could address concerns about the duplication of effort and lead to the negotiation of the exact means of minority protection in the EU.[239]

The benefits of devising a minority rights regime in the EU could include the elimination of double standards in minority protection between existing Member States and countries aspiring to EU membership. This in turn could lead to the consistent internal and external application of yardsticks of minority protection. To address the unresolved issues post-accession, the EU could expand the powers of the FRA to monitor Member States' compliance with human rights, including the rights of persons belonging to minorities. The added value of FRA monitoring would also be apparent where existing EU rules that could contribute to minority protection, such as the Race and Employment Directives, are interpreted in a minority-friendly fashion.

Conclusion

This paper argued that Article 2 TEU read together with Articles 21 and 22 CFR comprise a foundation of an internal EU regime of minority rights. Even though Article 2 TEU is not supported by competences to allow further EU action on minority protection, this provision could have a beneficial impact on the rights of persons belonging to minorities who choose to exercise their free movement and EU citizenship rights. Furthermore, Articles 21 and 22 CFR could serve as a basis to challenge EU acts and Member States' implementing measures which infringe upon the rights of minorities. The ECJ could also strengthen the nucleus of an internal regime of minority rights by

[237] Martin Brusis, "The European Union and Interethnic Power-sharing Arrangements in Accession Countries" *Journal on Ethnopolitics and Minority Issues in Europe* 1 (2003), 16.
[238] Rainer *Hofmann* and Erik *Friberg*, "The Enlarged EU and the Council of Europe: Transfer of Standards and the Quest for Future Cooperation in Minority Protection" in *Minority Protection and the Enlarged European Union: The Way Forward,* ed. by Gabriel Toggenburg, Budapest: LGI Books 2004, 125-147, 144.
[239] Gulara Guliyeva, "Joining Forces or Reinventing the Wheel? The EU and the protection of national minorities" 17(2) (2010) *International Journal on Minority and Group Rights*, 287-305.

establishing a general principle of non-discrimination against minorities, particularly in light of the ECtHR's recent minority-friendly jurisprudence and the EU's accession to the ECHR. Despite some potential in the above-mentioned provisions, we will need to wait and see whether and how the ECJ may use them to define the role and place of minority rights in EU law.

These developments, however, may be somewhat limited given the controversy surrounding minority rights in some Member States. Taking into account Member States' concerns regarding EU encroachment upon their powers, the ECJ is likely to take seriously the principle of subsidiarity and the numerous safeguard clauses in EU treaties and the CFR. Therefore, to devise an internal regime of minority rights, further treaty revisions are essential. Were the political consensus to be achieved, the EU could establish an effective regime of minority rights, because it has a wide range of mechanisms and instruments at its disposal. What is needed at this stage is a clear political commitment of the EU and its Member States to take the issue of minority rights seriously.

Discussion

Introduction of Part Two

Ilze Brands-Kehris
Welcome back after the coffe break. My name is Ilze Brands-Kehris, I am Director of the Office of the High Commissioner on National Minorities and it is a particular pleasure for me to be here and I would like to thank the organizers and personally Krzysztof Drzewicki for having invited me to listen to all of these very interesting arguments we are already starting to build up in the first panel. We have now part two of the National Minority Panel – 'Functional Approach'. I must admit that I am looking forward to finding out what we will fill this functional approach with.

I am told that this is also bridging into our thinking about the future, or where we are heading. One thing is the reflection that since the end of 2009 about what the Lisbon Treaty does for national minorities in the UE. We still of course are learning lessons from the accession period to the UE of many present member states but this again is something that may lead to the future thoughts on how these elements that we already heard about in the first panel can be linked up together and where we are heading. It is also perhaps an opportunity to look at what we are dealing with the legal basis and the legal implications but, as we also were reminded in the first panel, it needs political commitment and political will to make a move ahead to not only use the legal basis that it is there but also to develop it further.

I think a very important moment from the previous panel we should pick up, and which I guess is *raison d'etre* of the whole panel, is the inter-institutional cooperation. There are and had been there the opportunities of the references to the Council of Europe Framework Convention. This cooperation has particularly occurred in the course of accession of candidates to EU and we will hear more about it. I had been very evident that the cooperation has been quite close and well-working but there are many other questions on how this cooperation can be further developed by putting the content and interpretation of the legally binding standards from the Council of Europe for the other institutions. So I agree very much with conclusions of Professor Florence Benoit-Rohmer about the potential we have. I guess this is a good introduction to our panel on this idea of potential and seeing where it would lead us.

It is my pleasure first of all to introduce to you, not to introduce you because you all know him, but to give the floor to Professor Krzysztof Drzewicki who is from the Chair of Public International Law, Faculty of Law and Administration of the University of Gdańsk. His specialization is of course

international human rights law and humanitarian law. He was the Agent of the Polish Government before the European Commission and the Court of Human Rights from 1994 to 2003, and then from 2003 to 2010 he was the senior legal advisor of the OSCE High Commissioner on National Minorities. Unfortunately he has left just before I arrived to the Office. I hope however that this is nearly correlation and there was no causality intended in this. So please, the floor is yours, Krzysztof.

Ilze Brands-Kehris (comment after 1st panelist, K. Drzewicki)
Thank you very much for some very interesting thoughts, including some rather unusual one as well which is always good to provoke our thinking discussions. I mean a point on the rights of national minorities being a part of human rights and this is important to remind us where that leads us in terms of consistency. So we will hear more about exactly this aspect of demands on accession countries, or candidate countries by member states. It has many dimensions, including what then happens to these countries once they do become member states. Of course it is another question; the unusual part perhaps was your praise of France. I am sure the members in the audience who know France well are not used to hearing this but it is always refreshing to have new perspective and in addition of course your stress on the need for action, for practical measure that maybe the way ahead.

Now it is my pleasure to give the floor to our next panel member who is Doctor Kyriaki Topidi. It has been already mentioned that her book appeared recently and I am sure we will benefit from some insides from that book. She has Maîtrise en Droit from the Robert Schuman Faculty of Law in Strasbourg but then she has gone to University of Birmingham where she also did her PhD. She has done a lot of research in the area of minority rights also on EU law and public international law. She is now at University of Lucerne since 2006 in Switzerland. So please, it is my pleasure to give you the floor.

Ilze Brands-Kehris (comment after 2nd panelist, K. Topidi)
Thank you very much. This was an extremely rich presentation. You put a lot of information that I think will be good to discuss. I will not even attempt to summarize your points. I do think that your evaluation of the conditionality is very interesting contribution and whether that was or not the success. You said it is the success but of course it is good to look at the outcome also knowing that the conditionality in that phase brings a question of social policy versus rights as another big implication.

Now we go to our third panelist who is Doctor Gulara Guliyeva. She has had her diploma in law an LLM in international law from Baku in Azerbaijan and has then studied at University of Birmingham for some years both for LLM and also where she did her PhD which was indeed on the right of minorities of European Union. So you for had quite a few years you focused on this particular field and you are also now a lecturer at the Birmingham Law School and your research interests of course include EU law, European human rights law and minority rights law; so it is my pleasure to give you the floor.

Ilze Brands-Kehris (comment after 3rd panelist, G. Guliyeva)
Thank you very much. We have had a pleasure of having our panelists really focusing on different aspects and questions, all of them fundamental that indeed point us possible future directions,

including both short-term and perhaps very long-term future perspectives when it comes to expanding competences. But the shorter term can focus on what can actually and practically be done within the system that we have already, combining of course the different institutional approaches – the question of conditionality and how to cope with and address the double standards - ”old ghosts” that we have dealt with over time. The reminder – I think – from all our panelists is that dealing with minority rights and indeed the situation of minorities - we do deal with political context and sensitivities that make it particularly sensitive area and difficult one perhaps to have progress on.

The issue of antidiscrimination came up as it did in the first part of our panel. Is this the way ahead to broaden the interpretation of antidiscrimination which is interpreted very narrowly. The developments within the EU, including the question of positive action, raise the question of what minorities actually and in which way will benefit from the strong antidiscrimination regime and is there a bridge also to Council of Europe instruments, when they look at social policy questions. This may lead to social rights questions and maybe the area of the rights that have not necessarily always received equal attention within the national minority protection regimes. All of these questions – I am sure we could have another whole conference on them but I think it would be a very interesting thing to see if you have comments to the questions that were raised by our panelists, either by the previous panelists or of course by anyone or questions to anyone of them. The floor is open. I have been told that we can go – I know the time is up – but we can go ten minutes over time. So please, feel free to raise questions and add comments or arguments. This is why we are here.

Discussion

Tove Hansen Malloy

Thank you again for this excellent panel. I have been waiting for years to get an opportunity to discuss the functionality of law actually. Because we all know that government behavior is not only directed by law – it is of course directed by law – but it also happens by other means and measures. And I think actually that Professor Drzewicki raised a very good example with France. And I think this could be something which I would like to use as an example because if we think of Article 2 TEU in the functionality aspect and if we think of conditionality the way it has been implemented in the enlargement process then we could maybe think of France as an example of what has been called in political science a *reversed conditionality*. And that is the fact that conditionality might begin to work inwards. If - Krzysztof - your personal research in France is correct - which I am sure it is - then you could argue in a sense that reversed conditionality may be happening for other reasons of course. Because you have mentioned that France is going maybe towards more positive measures in certain areas. And perhaps in 50 years from now some left-bank philosopher will sit down and write a book and say France has gone from the neutrality perspective to the more positive perspective because that is basically what may be happening.

But then if we check the example that Dr Gulara Guliyeva mentioned about France and the recent developments in the public space then of course you could say – that you have a very negative development because France is basically even claiming the subsidiarity principle in terms of the way it sees implementing human rights on French territory because arguably it is a question of violating

international human rights. So there we have very complex situation within the same country. On one hand we could argue that the functionality is at work but on the other hand if we follow the purely human right approach then we could say that there is a violation. However, the subsidiarity might give France a way out. I am not an expert on subsidiarity but that is one way that we are looking at it.

And let me just add at the end on functionality. I think we need to look a little bit at the other policies because this is of course where you can monitor government behavior also that is in policies and programmes. And we have already heard about social policy but in another area I would like to point to some developments about regional policies. Because if you take Article 15 of the Framework Convention and you read the Explanatory Report thereto you can find that minorities should be included in those issues of development in the region where they live - issues of development that could be aimed at them. If you then look at the way the structural funds have been implemented into inter-regional commissions – we have had an example in the region where our institution is based – you may find that minorities have a seat in the inter-regional commission, so they are actually part of the decision-making process and this of course has nothing to do with protection – *per se* – but it has to do with participation and democratisation of the process at the regional level. So, I mean, there is a lot of openings that we could discuss and maybe look at in future research. That was basically my comment not a question. Thank you.

Ilze Brands-Kehris
Thank you very much. Yes! That has been a pertinent reminder that it is not only a social policy that is worth looking at but there are many other aspects as well of policies. Are there any other comments or questions?

Gabriel Toggenburg
I would have a very short question to Dr Topidi. There has been a tradition of bashing the Commission for applying a double standard approach in its enlargement policies when it comes to the protection of minorities. I would have two arguments why this is a bit unfair, but I do not want to be long here. Knowing that we have still another ten years of upcoming conditionality I would rather like to learn from you what would be your concrete proposals to make conditionality better in your eyes.

And a second question will remark on Dr Guliyeva. What you say brings me back to one possible conclusion which is that all those interesting things actually have less to do with cherished constitutional principles now offered by Treaty of Lisbon but rather with technical down to earth Common Market principles. Just to give you one example: the cherished principle of cultural diversity is a contradiction in itself because it is diversity on the one hand *between* member states and on the other hand *within* member states. And often you will be in a situation that those two fronts of diversity contradict each other.

So, it remains interesting to observe how the common market plays in here. You could think of two scenarios: the one is - you have a member state and it imposes certain obligations, and a person from another member state wants to argue that those obligations do not apply to him or her and he or she

invokes what you argued now from Article 2 TEU and Article 21 of the Charter. I would say that the common market freedoms would suffice. And the other scenario is that a member state provides special rights and then again you have a person moving to that member state and he or she would argue that those special rights apply also to them. And again I would say that this is an issue of common market principles. What will be of utmost relevance is then, what sort of union citizenship the Court will develop in the future. If EU law would start applying also to purely internal situations then of course the whole system gets revolutionized. Then we would no longer only discuss what implications EU law has on existing regimes of national minority protection but also about whether EU law imposes widened or additional systems of protection at national level. Such a development would create tensions with the subsidiarity principle. Thanks.

Ilze Brands-Kehris
Thank you very much. Unless there are other comments, I think we can take a last round of questions to our panelists. There was a specific question but also any other comments that you would like to add to each other. May I just add to the conditionality one what Gabriel just said that the other question is that there are also the double standard arguments in claiming just the Copenhagen criteria. But the criteria we are now exposed to are so much more advanced and so much more specific with reference to the same documents. But actually learning the lessons presumably from the previous accession have then put the bar up even higher. So what is at stake in Gabriel's submission: how to make conditionality better or is it just raising the bar. Who would like to start? Please, Dr Topidi.

Kyriaki Topidi
Thank you for the question. When we discuss about regional policy that you raised, in fact there are studies that look at precisely how cohesion policy and structural funds and the EQUAL Program when it used to still exist, tackled that question, again with emphasis on Roma. There is a starting discussion already as to how we could pursue that avenue with success. Again we are lacking a legal basis and we are approaching this from below at the same way that we do with social rights. Now moving on to the two questions: what is the best way to approach conditionality for the future. I would find three directions. And again I am referring to what we have learnt so far, so how can we make it better.

First of all I would argue for a case by case basis of negotiations, not in groups like it that was done last time, in groups of five-six states which actually ended up being eight, and then the other two that were lagging behind. I do not think that was the best approach. Then there were historical and moral arguments for it to happen that way. We can discuss if that was the good idea or not. But anyway for the future I would say: approach it on a single basis, candidate by candidate approach. And I am not saying chronologically only.

The second leg of perhaps the better approach to conditionality I think involves harmonization and clarity of requirements, and harmonization both internally and externally. So what others are asked to do with the existing members and also what other relevant organizations for other standards are to do in each specific area? And if we refer to minorities, what other European organizations actually think is appropriate in each case. Clarity of requirements here refers more to the type of scenario I know

from resources. Once the Slovak government asked about what is minority policy in the EU and never received an answer. So I think it is the best to have answers.

My third line of conditionality would be to approach enlargement on a more customized base and look at the problems that future members have. We must try not to change the requirements each time because that would be only unfair, it would be impractical as well. For example, future members for minority protection do not have the same problems that Central-Eastern Europe had. So to some extent we have to take account of that and reflect that in a way that we negotiate with them and in a way that we formulate our requirements from them, especially, if we are to keep this at the political level and not to tie it to a legal basis. As for the gradual complication and upscaling of conditionality, I personally do not think that this is necessarily a bad thing. Conditionality is a process and you cannot expect that it will remain linear and static to the extent that it does not become unfair and I am oversimplifying here for the sake of being fast. I think that it is only natural that it happens that way.

Ilze Brands-Kehris
Thank you.

Dr Gulara Guliyeva
Thank you very much for the question. I think a balancing act of internal market freedoms and special minority rights may be difficult in practice. It may also be very complex and context-specific. For example, if we look at the cases involving names, they show that depending on the context of a case, the outcome might be quite different. Significantly, if a case comes from a very solid background, where minority rights are essential to the state, then the European Court of Justice might be more willing to engage in such a balancing act. For instance, in *Omega Spielhallen*, the ECJ balanced a fundamental right to human dignity with free movement of goods and services. Because human dignity is so central to the protection of fundamental rights in Germany, the ECJ elevated this right to the status of the general principles of EU law and balanced it with market freedoms. To do otherwise could endanger the principle of supremacy. Such a development has not taken place in relation to special minority rights yet. But depending on the context of a case, it is a possibility, though not a very likely one.

As to EU citizenship, its scope has been recently expanded further. Arguably, the *Zambrano* case suggests that EU citizenship now applies to purely internal situations as well. Therefore, potentially, the ECJ may deal with purely internal situations in the future. Overall, as you said, a preliminary reference involving an individual moving to another member state and wanting to benefit from special minority rights available in that state could potentially trigger a balancing act you mentioned. However, it is not fair to put the burden on the ECJ only. It would be much preferable for relevant Treaty revisions to take place. Such a development would put the ECJ in a position where it could comfortably balance market freedoms with special minority rights. Thank you.

Krzysztof Drzewicki
Thank you very much. I will try to be very brief. I like this ferment, this problem of what you have called from social science perspective a *reversed conditionality*, is in the case of France that what I

have meant. To conclude about it, there are different reports from different regions of France. Probably level of claims and the satisfaction is varying from region to region. Imagine Basques, probably concessions of public authorities of France will be more cautious for a sort of extended cultural autonomy than in case of Brittany or Alsace. That is one thing.

Let me now refer to one of your concepts, Tove, discussed in your book, which I believe would be perfectly applicable here. Your concept relied on the assessment or identification of needs of different communities in the course of up-down and down-up processes. If you link it in the case of France with identification of needs down-up that will perfectly work because this would be very much adjusted to genuine needs of communities. I believe so because reports by NGOs confirm that they finally got concessions in cultural field they had claimed for decades. This is a process for which we should pay attention how it works: is it just a sort of appearance or it works genuinely well. This policy is applied to culture, to education and to use of language. So these are three areas in which we must see an evolution of interrelationship between French strong centric approach to governance and the autonomy approach. It is open whether they are to clash or could be reconciled.

As far as the question about conditionality is concerned I would like to say that I am coming from a country which had passed through the enlargement assessment. Such a process appeared to be tough but indeed effective. It still needs however some improvements. Often candidate states are requested to achieve more than members are. For instance, the minority clause of Article 2 TEU prevented EU law from continuation of its earlier double standard by requiring candidate states to protect national minority and addressing no such condition to actual EU members. Another example was with a condition of ratifying specific treaties. I remember there was a long list of treaties indicated as home work for ratification. A problem in this method of pressure was that some of those treaties were very poorly ratified again by members of the EU. Consequently, the problem is not with exerting a strong pressure on our countries to improve our human rights record. Our wish has been to be treated more equally or rather fairly. We are aware that if the conditionality is properly addressed, we can successfully change specific legislation and sometimes adjust the whole system of governance. Furthermore, we still need years for creating a specific human rights culture for democracy and the rule of law. But once we have been admitted to the EU instances of such pressures are infrequent.

This latter observation leads me to an ironical comment made by Walter Kemp at one of the conferences about accession to EU of eight Central and Eastern European states in 2004. He compared these states to a group of young persons awaiting outside a night club where they were told that they could come in only if they had proper dress, shoes and a tie. Once they were allowed to enter they discovered regular customers (EU members) wearing ripped jeans, sports shoes and having no ties. Thank you.

Ilze Brands-Kehris
Thank you very much. Let me just to conclude in one or two sentences. When we look at what our two panels discussed it turns out that we can be very happy in this good and big company. The panel is called national minority issues in the European Union, stocktaking and post-Lisbon challenges, and I think we have indeed listed a lot of challenges and approaches, but it seems also clear that when we are talking about national minority issues in the EU the clear case is more inter-institutional

cooperation and learning from each other. It needs indeed an effective dialogue on the experiences bringing on board the Council of Europe and EU. And also I will put in a pitch my own institution that I represent at this table which is the OSCE High Commissioner on National Minorities.

Conditionality is one of the very good ways to use national minority rights as an instrument to improve the situation. Where there are tensions and risks it is not only the political sensitivity that adds up to their continuation. Again I refer to the first panel when Professor Rainer Hofmann referred to the emerging need that we have multilateral cooperation and not only bilateral relations.

Thank you very much to all the panelist and for the opportunity of being here.

The EU's Minority Rights Identity: Emerging from Fundamental Crisis in Commitment?

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Rapporteur's Report on the EU and Minority Protection, Warsaw 29 September-1 Oct 2011, National School of Public Administration and Ministry of Foreign Affairs

The 5th Warsaw Seminar on Human Rights held two panels on the protection of minority rights in the EU, which were followed by two rich discussion sessions. My aim in this chapter is to comment on the key themes arising from the panels' discussions and to draw up some conclusions in terms of how we envisage the EU to go forward in the field of minority protection. I would like to begin by explaining the context of the title of my chapter, which serves as the framework for the recommendations presented. The title "The EU's Minority Rights Identity: Emerging from a Fundamental Crisis in Commitment?" sums up the current position of EU law on minority protection and can be broken down into three aspects.

The first aspect is that there is now such a thing as the EU's 'minority rights' identity. In other words, the issue of minority protection is part and parcel of legal, political, sociological, media and other discussions which occur on a daily basis within, and in relation to, the EU. For proponents of minority rights, this is to be commended and is itself a fundamental achievement.

Second, it should be acknowledged that EU law impacts positively on minority protection through numerous avenues, largely because implementing some aspects of EU law, for example on non-discrimination or on cultural diversity necessitates focus upon issues relevant to minorities. However, these competences and legal developments have not provided the EU with a settled direction for minority protection. Indeed, when other aspects of EU law do not follow suite, they demonstrate an EU in crisis and confusion with respect to its commitments to minority protection.

Third, nonetheless recent advances in the last few years may indicate a way out of the crisis, in that they provide the potential for the EU's greater commitment to minority rights protection: not least

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through Articles 2 and 3 TEU and Articles 10 and 19 TFEU.[241] Let me explain how. In doing so, I would like to make links to the papers within the minority rights panels of this workshop, focusing on aspects presented here which are important to considering the future direction of EU law in its protection of minorities.

Several papers in this workshop have discussed the legal competences that are available to the EU in relation to minority protection. A few comments need to be made on this. There are indeed more competences in the EU than we give the EU credit for. EU law which can impact on minorities can be found in relation to free movement of goods, workers, services, establishment and provisions on citizenship, as well in law relating to anti discrimination rights, political rights, employment rights, social policy, education, culture, protection of the environment, industry and enterprise, regional development, common foreign and security policy and so on.[242] The EU's Charter of Fundamental Rights also contains similar provisions and includes a reference to non discrimination on grounds of membership of a national minority in Article 21.

The existence of a plethora of provisions which have a relevance to minority protection tells us that minority rights protection cuts across all areas of the lives of individuals and the duties of public authorities. Thus instead of a singular provision in the EU committing to minority protection, we find a range of EU laws open up to minority protection. Indeed, as the Council of Europe's Framework Convention on National Minorities demonstrates, minority protection is an all-pervasive concept, and such protection can only truly be achieved if properly mainstreamed across all spheres. The potential of minority rights to enter all of these spheres in EU law is no different.

However, these EU law competences are not always applied to minorities, nor applied consistently or to their optimum. The EU's anti-discrimination competence is an example. The EU possesses a strong competence in the field of anti-discrimination under Article 19 TFEU. However, the form of equality pursued in the EU – formal equality - is rather restricted. In Panel 1 of the workshop, Dr Toggenburg was correct to emphasise that the potential of EU anti-discrimination law is dependent on the definition adopted of discrimination.[243] In this regard, it ought to be noted that substantive equality is not excluded from EU competence – a concept which acknowledges the unequal starting points of two subjects and recognizes that positive action measures are required for persons in a different situation to the comparator group (the comparator group is usually the majority population) in order to ensure equal access to a good.

The achievement of both forms of equality is an objective of general human rights law. Activities contributing to substantive equality are practiced within the EU, for example, in relation to promoting cultural and linguistic diversity. However, these actions are not exercised as part of anti-discrimination law. This indicates the unease felt within the EU in addressing substantive equality directly through its anti-discrimination legislation. It may also indicate a desire to separate minority protection from legally binding legislation.

[241] Which, respectively, express a commitment to minority rights, cultural and linguistic diversity, the mainstreaming of anti-discrimination and the competence to act in the field of anti-discrimination.
[242] See further, Tawhida Ahmed, *The Impact of EU Law on Minority Rights*. Oxford: Hart Publishing 2011
[243] Transcript of discussions, p.50

Another example of unfulfilled implementation of anti-discrimination competences concerns religious freedom. EU anti-discrimination law has a clear prohibition on religious discrimination in employment. Yet, the fundamental issue of religious dress is not touched upon by the EU. The European Commission has issued several reports and undertaken a range of activities in the field of *race* discrimination including reports which target the renewed discrimination of Roma in Europe – a contemporary European problem. By comparison, there is a neglect of concern for the contemporary issue of religious discrimination in relation to religious symbols. This sends mixed messages in relation to the importance given by the EU to religious freedom and as to its role as a governing institution in the matter. Dr Topidi's paper discusses these significant gaps in anti-discrimination, in that the prohibition of race and ethnic discrimination is favoured over the prohibition of discrimination on grounds of religion and also national minority status.

So far the discussion has noted that the EU has competences in relation to minority protection, but that these are not utilised optimally. Recent developments, including within the case law of the Court of Justice of the EU (CJEU) and arising from the Treaty changes adopted by the Treaty of Lisbon may however stimulate a more positive landscape for minority protection in the EU. This section explores this proposition, noting the potentials, but also the limitations of these recent developments.

The first point relates to the existence of competence for minority protection. As already noted, the EU has no explicit competence to actively protect minorities, yet Article 2 TFEU declares that the EU is founded on respect for the rights of persons belonging to minorities. As the most significant development on minority rights in EU law recently, Article 2 was extensively discussed in the workshop. Several interpretations of Article 2 were offered.

Dsr Drzewicki, Pakodzi, Guliyeva and Toggenburg analyse the potential Article 2 TEU. Pakodzi claims that Article 2 represents general values to be respected by both the Member States and the EU.[244] He argues that 'the provision may serve as a legal basis for the EU and its institutions to be active in the above-mentioned matters, in spite of the fact that no provision of the Lisbon Treaty confers to EU institutions the right to make law in the field of minority protection'.[245] This view is demonstrative of the potential seen in Article 2 for transforming minority protection. Guliyeva argues that Article 2 does not create a legal base.[246] Article 2 is instead phrased in a less assertive manner than the minority rights composition in the EU's Copenhagen Criteria. The latter requires respect for and promotion of minorities whereas Article 2 only requires respect for minorities. Moreover Guliyeva notes that Article 2 follows the formulation of Article 27 ICCPR, which is a provision interpreted to offer rights to individuals which they enjoy in community with other members of their group – but which do not comprise collective rights. Drzewicki and Toggenburg are also of the view that Article 2 supports the rights of minorities as individuals, not collectives.[247]

Regardless of the merits of each specific interpretation, Toggenburg convincingly argues that Article 2's reference to minorities must possess some value beyond that of general human rights protection, because Article 2 includes minority rights, as well as human rights protection. In light of this, EU

[244] p.12, section 3.1
[245] P.12, section 3.1
[246] P.74
[247] Drzewicki, p.56; Toggenburg, discussions, p.49

institutions must interpret EU law bearing in mind that where minority groups are concerned, their rights might differ from the general human rights given to other individuals.

The lack of clarity surrounding Article 2 is confounded by the absence of, or amendment to other, EU legal competence provisions which could provide the basis for supporting the rhetorical commitment of Article 2. Article 3 TEU declares the importance of cultural and linguistic diversity to the EU, this is again a provision setting out the objectives of the EU and as argued by Toggenburg, this merely consolidates the pre-Lisbon EU position on minorities. Likewise, the bringing into force of the EUCFR which under Article 21 provides for non-discrimination on grounds of language and national minority, still leaves one at a loss as to the obligations on the EU regarding minority protection, given that the Charter cannot interfere with any of the EU's existing competences (Article 6(1) TEU). Moreover, the shifting emphasis in EU programmes on anti-discrimination and integration leaves EU policy on minority rights 'ambivalent'.[248] Further, in any case, the strengthening of anti-discrimination protection in the EU is insufficient for adequate minority protection, without further minority-specific rights, as emphasised by Professor Hoffman.

These developments therefore provide little clarity on whether or how the EU should manifest its foundation of minority protection as declared in Article 2 TEU. The Lisbon changes of course enter into a field of existing EU *acquis*, which has, on several occasions, taken bold steps towards minorities, and thus an alternative interpretation of these developments in EU law might suggest that they represent an EU determine to construct an (implicit and incremental) identity as a polity concerned for European minority groups, despite the ongoing limitations of its explicit competences. In this regard, it should be noted that in addition to Article 2, new competences introduced by Lisbon include that of mainstreaming anti-discrimination across EU policies under Article 10 TFEU.

So far, we have primarily discussed the existence of EU competences. Law, however, requires implementation. As pointed out in several papers, institutions are critical to the question of implementation. Our papers have discussed the role of the European Parliament, the Council of Europe, the Court of Justice of the EU (CJEU), the European Commission, the Fundamental Rights Agency (FRA) and (of critical importance) the EU Member States.

In this regard, it is poignant to outline that the jurisprudence of the CJEU has had an interesting impact on the minority rights dimension of the EU, as comprehensively discussed by Professor Vyrozumska in her chapter. In general, the Court can be seen as a key player in the evolution of minority protection. From its delineation of the concept of non-discrimination, from *Sunday Trading*, *Groener, Mutsch, Bickel and Franz, Prais, Avello*[249] and beyond, the Court has addressed issues of cultural diversity. The case of *Mutsch* for the first time recognised that the rights of minorities might be a legitimate aim of a derogation from EU law (although this argument did not prevail in this case). Since then the Court has been more prepared to engage with the argument for minority protection. The Court in *Wardyn* ruled that the Race Equality Directive did not apply to the issue of the manner in which names are recorded on certificates of civil status. Moreover, the Court held that it was for

[248] Topidi, p.65

[249] Case 145/88 Torfaen BC v. B & Q plc. [1989] *ECR* I-3851; Case 379/87 *Groener* v Minister for Education [1989] *ECR* 3967; *Case* 137/84 Mutsch [1985] ECR 2681; *Case* C-274/96 Bickel and Franz [1998] ECR I-7637; C 130/75 *Prais v Council* [1976] ECR 1589; Case C-148/02 Garcia *Avello* [2003] *ECR* I-11613

the national court to decide whether a serious inconvenience was presented to the applicants. Professor Vyrozumska concludes that the CJEU's case law demonstrates that the existence of Article 2 did not influence a more positive interpretation by the Court. Thus, the impact of Article 2 has been negligible in this case.

Another institution which will be significant in the development of minority protection within the EU is the FRA. Toggenburg's paper assesses the important role that the FRA has in the sphere of driving forward a minority rights agenda. As demonstrated, although there is no formal role to adjudicate or set standards, the FRA has already made significant contributions in human rights terms to minority protection. The FRA is involved in the collection of evidence and provision of information for the benefit of the EU and the Member State when they implement EU law. In 2011, it published a report on minority protection.[250] The Report was drafted in response to a request from the European Parliament and provides information on the situation of minorities in the EU, as well as analysis of EU legislation and activities in the field. The FRA can provide information to the European Commission on the Race Directive (Directive 2000/43/EC), under the competence embodied in Article 17 of that Directive, and the European Commission can use this information to suggest amendments to the Directive.. This provides a vital mechanism for the – at least potential – evolution of EU law in the field of race, ethnic and religious discrimination, which is important, because, as noted by Topidi, minority rights awareness across the EU remains weak. The EU needs to take seriously the findings and recommendations of the FRA, which is based upon real evidence collected on the ground.

Development of institutional coordination need to occur within the EU and outside the EU. In this respect, Professor Hofmann advocates the needs for the Council of Europe, the High Commissioner for National Minorities and the EU to engage in intensive dialogues in light of the increasing national minority issues emerging in Europe. In particular, the EU must take initiative from these institutions and go beyond a non-discrimination approach to minority protection. In this respect, Professor Hofmann indicates for example that although the *Wardyn* case was held not to breach EU law on anti-discrimination under the Race Directive, it would probably have been incompatible with Article 11 Framework Convention on National Minorities.

As far as institutional cooperation is concerned, the special place of the Council of Europe continues to be recognised. The Council of Europe provides a useful human rights framework to serve as a benchmark for the EU in the protection of minority rights. This is due to the expansion of its minority rights instruments, the development of general human rights to positively affect minorities and commitment to these instruments (albeit in differing degrees) by the EU Member States.

Two final points remain to be raised. First, in relation to the implementation of its competences which may implicate minority groups, the EU needs to be more proactive in organising and monitoring the use of its resources in key financial instruments and initiatives. Topidi raised this instrumental point in her contribution to the workshop. As argued by Topidi,

[250] European Union Agency for Fundamental Rights, *Respect for and Protection of Persons belonging to Minorities 2008-2010* (2011).

> ‘Monitoring and evaluation of existing instruments are a *sine qua non* condition for taking minority policy to the next step, following enlargement. Adequate policy analysis and implementation is necessary to provide impetus to existing instruments that have now moved from the abstract Commission annual progress reports to the specific initiatives of the various Community programmes. The limited systematization and reliability of current arrangements influence the concrete situation on the ground and do not allow for measurable and visible results.’[251]

The second point to mention is that it is important to understand the reasons why the EU is to make contributions to minority rights. It seems there are a number of reasons, but it is unclear which, if any, the EU supports. First, there seems to be a practical argument that the EU should protect minority rights simply because it provides a benefit to minorities. Second, it could be argued that the EU should protect minority rights in order to prevent the erosion of national and sub-national identities caused by its existence and activities. Third, the EU is viewed as an entity which could replace or supplement the inadequacy of the nation state in providing minority rights protection – an inadequacy which, it is argued, presents a potential threat to the European order because neglect of minority protection can cause tensions and instability between groups in and across states. Unless the EU leads the discussion on clarifying the reasons for its intervention in the field of minority protection, EU law on the matter will continue to remain in disarray, with a lack of focus.

Having taken stock of where the EU is currently at, and having identified some key criticisms, the remainder of this chapter makes some suggestions as to where reforms might be best (and realistically) placed within the legal framework of the EU as it stands.

Recommendations

Whilst not claiming to develop a fully-fledged minority rights policy, the recommendations submitted below aim to address key points in the growing number of concerns and questions raised in this field and as emerged from the papers of this workshop.

1) One of the fundamental needs is for the EU to clarify the basis on which it proceeds with minority protection, both in terms of what sources of law (internal and external to the EU, such as the ECHR or the Framework Convention) will constitute its substantive benchmark and also in terms of what role it sees itself as having in relation to the protection of minorities.
2) The EU needs to pursue consistency in its minority rights policy. It especially needs to narrow the gap between rhetoric and legal reality and avoid the image of favouring some minority group concerns (eg Roma discrimination) over others (eg religious groups). In this way, it needs to avoid sending mixed messages as to the value it places on minority protection.
3) The EU needs to ensure that Article 2 TEU makes a difference to the interpretation of EU law in relation to minority protection. In this regard, the interpretation of Article 2 needs to be clarified at an institutional level, including within the CJEU, which should recognise the added value of Article 2 and interpret EU law in light of the value given to minority protection therein.

[251] Topidi, p.69

4) The EU has competences which are not brought to fruition. Thus, arguably one of the most important recommendations is for EU law to be implemented. Surprisingly, the EU's equality law underachieves in relation to minority groups and the following two recommendations are important means of rectifying this.
5) The EU should expand its concept of non-discrimination to adequately encapsulate substantive equality.
6) The EU should put into effect the legal obligation embodied in the EUCFR in relation to non-discrimination against national minority groups.
7) Institutions such as the CJEU and the FRA (but also Commission, Member States, private actors and different international organisations such as the Council of Europe) will be crucial to the development of EU minority rights protection. These institutions need to work together in order to achieve the full implementation of relevant EU law.
8) As an extension of Recommendation 7, the EU should in particular pay close attention to the information, concerns and suggestions presented by the FRA.
9) The EU should continue to recognise the pervasiveness of minority rights across all EU competences, which simultaneously strengthen the perspective that the protection of minorities is not solely dependent on the existence of an explicit minority rights framework. Article 10 TFEU is important, as is mainstreaming of cultural diversity in Article 167 TFEU. These provisions and other reference to minority groups in the EU Treaties should be used to raise awareness of minority rights across the EU territory.
10) The EU should develop a monitoring system for relevant financial instruments to secure their better use towards minority groups.

Panel Two

Rights of Elderly Persons in Europe

Moderator: Mrs. Urszula Gacek
Permanent Representative of the Republic of Poland
to the Council of Europe

Human Rights of Older Persons: Participation, Equality and Dignity

Keynote speech

Mr. Thomas Hammarberg
Commissioner for Human Rights
Council of Europe

Europeans are becoming older. The median age within the EU has already risen from 35 years in 1990 to 41 currently and may reach 48 in 2060. 17 per cent of the population is now over 65 years' old and this percentage is projected to almost double to 30 in 2060.

This demographic trend has huge implications for European societies. The size and age of the working population as well as old-age pension and care systems will all be subject to important changes. The need for sufficient labour force will affect immigration policies. Inter-generational solidarity will matter even more than before.

The number of people living longer than 80 years is also increasing rapidly. From 5 per cent in the EU today, their share may reach 7 per cent in 2030 and 12 per cent in 2060. For some individual countries, these figures will be even higher, and an unprecedented number of people will live beyond 100 years.

Of course older persons are a highly diverse group and we should by no means view them through well-rehearsed stereotypes. Their individual characteristics, life choices, experience and capabilities vary immensely. Yet all of them are holders of human rights which have to be respected.

The Universal Declaration of Human Rights stated specifically that older persons have the right to security. The revised European Social Charter highlights the right of elderly persons to social protection. In fact, all major human rights treaties apply to older persons without discrimination. Although age is not always explicitly mentioned as a protected ground against discrimination in the treaties, it is interpreted to be one of the protected characteristics. Member states are under an obligation to ensure the full enjoyment of all human rights by older persons and to protect their human dignity.

In reality, the human rights of older persons are still often ignored and sometimes totally denied. Older people suffer from prejudice viewing them as non-productive members of society and therefore not worthy of full social participation. One problem is that older people often do not have a strong say in politics. Organisations defending their interests are – with few exceptions – weak and political parties do not give older persons enough attention as voters and political activists. The fact that the majority of the elderly are women may also have contributed to this lack of political attention. Gender balance is still to be achieved in politics in most member states.

The rapid demographic development should see the end to the politicians' ignorance of older people. A serious review of working life, available services and inter-generational solidarity must be initiated. The active participation of the growing number of older persons in the political process will be necessary.

The main objective of the European Social Charter's provision on the elderly is to enable older persons to lead a decent life and participate in society. To put this into practice, states should ensure that their social protection systems, health care and housing policies are suited for older people. They should also enact non-discrimination legislation in certain areas including the labour market.

Within the EU, the employment equality directive specifically prohibits age discrimination in employment. In many member states, national non-discrimination guarantees related to age are extended to other fields of activity as well such as access to goods and services. The EU Charter of Fundamental Rights prohibits age discrimination explicitly. It also recognises the rights of the elderly to lead a life of dignity and independence and to participate in social and cultural life.

The Court of Justice of the European Union has stressed that the prohibition of age discrimination is an integral part of equal treatment and therefore belongs to the fundamental norms of the EU legal order. Accordingly, any justification for differential treatment based on age has to be tested rigorously. While the Luxembourg Court has upheld the right of member states or collective bargaining to set mandatory retirement ages, it has subjected them to detailed scrutiny on the objectives pursued. A few weeks ago in the *Prigge* case, it ruled that collective agreements could not force airline pilots to retire automatically at the age of 60 when the general safety legislation allowed them to fly until the age of 65 under certain conditions.

Indeed, many people who are reaching the mandatory retirement age wish to go on working and are perfectly fit to do so. The current demographic change is provoking a rethink about the length of working lives and pension systems. More opportunities for longer careers will most likely be offered which will enable us to profit from the professional skills, experience and dedication of the individuals concerned. Pensionable age is likely to be higher in most countries and rigid age limits for automatic retirement will be reconsidered. With some adjustments in working conditions, including work hours, many more may want to continue long after the present pension day.

The Luxembourg Court's serious approach to age discrimination should be extended to other fields than employment. The differential treatment of older persons in health care and education, for

example, may often lack objective justification and be based on prejudice and stereotypes. We should take a fresh look at our national laws and practices to screen them against age discrimination.

The true diversity of older people needs to be taken into account when taking measures against discrimination. Older persons have many other characteristics than their age and may suffer from multiple discrimination. Old age can compound the discrimination faced by women, ethnic minorities, migrants, people with disabilities or lesbian, gay, bisexual and transgender persons. The specific needs of each group would have to be considered.

Age can also be an indicator of discrimination. If the life expectancy of a certain minority is clearly below average, the reasons for this would require serious attention. This tends to be the case with Roma, for example.

Healthy ageing preserving the maximum extent of personal autonomy should be the aim of national policies on ageing. Both the Social Charter and the EU Charter of Fundamental Rights highlight independent lives and full participation in society for the elderly. Specific protective measures should ensure the availability of adequate financial resources, housing and health care. The human dignity of older persons must always be respected.

Protection measures should be adaptable so as to fit the individual needs. The increasing number of older people will inevitably be a strain on the social and health care system. Even with a more flexible employment and pension policy, there will be a less favourable relationship in future between the proportion of the working population and those in need of long-tem care. However, a humane and just society must accept that responsibility and respect the rights of the very oldest.

Many older persons live in poverty: their human right to an adequate standard of living is not respected. In many cases older women receive a relatively small pension if their professional life has been shorter owing to unpaid activities at home. In many countries old people have suffered disproportionately from changes related to economic restructuring and have had little possibility to compensate price increases with more work or higher salaries. A great number of them have had to accept, for instance, a dramatic downturn in housing standards and even homelessness. New social security strategies are required in order for older people to have adequate protection in the future. It is also important to make pension systems more transparent so that future pension entitlements can be predicted with clarity in individual cases.

An OECD report published in May states that half of all people who need long-term care are over 80 years old.[252] Driven by ageing populations, spending on long-term care is set to double or triple by 2050 among the OECD countries. While family-carers currently provide the backbone of long-term care, a great number of long-term carers are in fact migrants. In some countries such as Austria, Greece and Italy one in two of long-term carers are migrants. Major reforms to attract more care workers are necessary. Immigration policies and attitudes must be reviewed with these facts in mind.

[252] Organisation for Economic Co-operation and Development, *Help wanted? Providing and paying for long-term care*. 2011.

The possibility to remain in ordinary housing for as long as possible is usually the preferred option among older persons. It boosts independence and is cost-effective. A wide range of support measures can be made available at the home by family or professional carers. Adjustments to the living environment and transportation are often needed to enable accessibility and mobility.

However, it is my impression that more could be done to offer the elderly more choices and more influence on what care they would prefer now and later. One aspect is to give more priority to supporting and sometimes off-loading family members who are carers. Professional carers also need more recognition and these professions will have to attract more interest in the future. The well-being of care givers has a significant impact on the quality of care and the dignity of those cared for.

Institutions for the care of the elderly are challenging. There have been too many reports about bad treatment and abuse. During my visit to Ireland in June, I welcomed the intent of the authorities to introduce whistle blower legislation which would protect staff in such institutions from negative consequences when reporting on sub-standard conditions or abuse. A recent survey published by the Financial Times demonstrated that the quality of services in many privatised care homes for older persons in the UK had deteriorated to a worrying degree.

I have seen the extremes during my country visits: both modern and home-like institutions with a democratic atmosphere and excellent medical care but also centres in which the residents were reduced to numbers while the staff were untrained, overstretched and resigned. There is clearly a need in many member states to monitor the conditions in institutions for the elderly much more thoroughly through independent complaints and inspection systems. Minimum standards for care in institutions would have to be drawn up to prevent ill-treatment and promote quality care.

Persons living in institutions should of course receive adequate care and services. Their right to privacy and dignity should be fully respected. They have also the right to participate in decisions concerning their treatment as well as the conditions of the institution. It should also be possible for individuals to make decisions on the future direction of their care and on options for assisted decision-making in case of diminished capacities. The UN Convention on the Rights of Persons with Disabilities has been instrumental for encouraging the development of supports for assisted decision-making.

Faced with undeniable demographic developments, political discussions on future approaches to ageing are under way. European political leaders will have to review their policies for fulfilling the human rights of older people. Realism and long-term vision are necessary: a wide range of policies related to employment, immigration, pensions, health and social care are to be reconsidered. These questions will not go away through populism and quick fixes. The human rights principles of participation, equality, and human dignity have more to offer in guiding the search for sustainable solutions.

National Human Rights Institutions Acting for Inclusion and Enforcing Rights of Elderly People

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At the very beginning one shall explain the meaning of "National Human Rights Institutions" (NHRIs). They are national institutions of statutory or even constitutional mandate for the protection and promotion of human rights in their countries. Their scope is universal – they conduct inquires and take actions concerning human rights infringements of different kind. Paris Principles, adopted by General Assembly resolution 48/134 of 20 December 1993[254], explain and describe main responsibilities of NHRIs and set common standard of their functioning. Basic feature of NHRIs is the independence and impartiality in three different dimensions. It is an independence of persons governing NHRIs (monocratic of an ombudsman type institutions[255]; like Polish Human Rights Defender), institutional and functional independence and finally - financial independence. The last one, in times of economic crisis, is today the most vulnerable one. Contemporarily NHRIs fulfill intermediary tasks of dialogue between citizens, civil society organizations, national authorities and international human rights institutions. One may nevertheless observe some evolution of NHRI's mandate. Together with the Optional Protocol to the Convention against Torture (OPCAT), mandate of many national human rights institutions was broadened with new task of National Preventive Mechanism (NPM)[256]. So is the Polish case. Accession to the European Union brought for many institutions, including the ombudsman institutions, new tasks of an equality body as foreseen in European equality directives.

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[254] *Principles relating to Status of National Institutions (Paris Principles);* Internet: http://www2.ohchr.org/english/law/parisprinciples.htm
[255] See more in: G. Kuscko-Stadlmayer (ed.), *European Ombudsman-Institutions. A comparative legal analisys regarding the multifaceted realization of an idea*, Springer-Verlag Wien 2008.
[256] OPCAT provides that the NPM shall visit places of detention in order to prevent torture and other cruel, inhuman or degrading treatment or punishment (torture and ill-treatment). See more on web page of Subcommittee on Prevention of Torture: http://www2.ohchr.org/english/bodies/cat/opcat/index.htm

In Poland, the national ombudsman – Human Rights Defender, established in 1987, having from 1997 a constitutional basis, was equipped with such two, above-mentioned, additional tasks: NPM from 2008 and independent national equality body from the beginning of 2011[257]. Polish ombudsman, the only such institution in Poland, has A ICC status – like only 11 other NHRIs in the EU. One has to notice that within this number only three are ombuds institutions.

From 1 January 2011 the Human Rights Defender in Poland is also an independent equality body in the meaning of the EU antidiscrimination directives. This new task was introduced by the Act of 3 December 2010 on the implementation of some regulations of the European Union regarding equal treatment[258]. The Act specifies areas and methods of counteracting violations of equal treatment principle due to sex, race, ethnic origin, nationality, religion, denomination, beliefs, disability, age or sexual orientation, and competent authorities with respect thereto.

Article 8 states that unequal treatment of natural persons due to age shall be prohibited in the scope of:

1) professional education, including continuation of education, improvement, change of profession and professional practices;
2) conditions for taking and conducting business or professional activity, including, but not limited to the employment relationship or work under a civil-law contract;
3) joining and acting in trade unions, employers' organizations and professional selfgoverning associations, and also exercising rights to which members of these organizations are entitled;
4) access to and conditions of use of labour market instruments and labour market services, specified in the act of 20th April 2004 on the promotion of employment and labour market institutions, offered by labour market institutions and labour market instruments and labour market services offered by other entities acting for the employment, development of human resources and prevention of unemployment.

Those provisions mark the scope of protection also for elderly persons. They constitute the competence of the Ombudsman as an equality body as well. The act of 3 December 2010 is not however a complex antidiscrimination regulation. The antidiscrimination provisions are spread in many other laws, including the Constitution as basic law. In this context one may say that the Human Rights Defender functions as a european independent equality body and constitutional antidiscrimination institution at the same time. It is worth to underline the general meaning of article 32 of the Polish Constitution: "All persons shall be equal before the law. All persons shall have the right to equal treatment by public authorities. No one shall be discriminated against in political, social or economic life for any reason whatsoever". It is argued whether this constitutional provision is applicable horizontally but for sure one shall say that it is applicable vertically and must be obeyed by all public authorities when passing legislation.

The Ombudsman, professor Irena Lipowicz, at the very first moment of her term, in 2010 underlined her three priorities: rights of 1. migrants, 2. people with disabilities, and 3. elderly people. Elderly

[257] The Act of 3 December 2010 on the implementation of some regulations of European Union regarding equal treatment (Dz.U.10.254.1700).
[258] Journal of Laws of 2010, No. 254, item 1700. Internet: http://www.rpo.gov.pl/pliki/13203205690.pdf

people's rights at first glance seem to be a very good choice. One should look first of all into demographic situation of Polish society. According to Central Statistical Office (GUS) datas, in the light of population perspective till year 2030, a number of people in productive age will fall down systematically[259]. Those demographic changes will be accompanied by unfavorable ageing trend in the society. More and more old people will be living in Poland. Medium age in Poland, which is now 36, will rise up to 45,5 in 2030. These demographic tendencies will have enormous impact on social structure and some social problems will become very serious. Within next 20 years a number of population in productive age will decrease to 20,8 million in 2030. In the same time the number of people retired will reach 9,6 million. A substantive growth of people over 85 will be visible and their number will exceed 800.000. All those changes will have dramatic consequences for social security system, but also for goods and services market. In economic terms that market will have to adapt to the needs of ageing society. Living longer now needs to be matched by extending healthy working abilities. This will also require substantial investment in public healthcare – and call for crucial reform in preventive healthcare system. It will also require investment in enabling older people to work – in jobs that are appropriate and secure, as laid out in the ILO's Decent Work Agenda. That is why population ageing is mainly described as "a human success story", but it also cautions on challenges this brings, like rapid growth of the oldest-old, changing family structures and working patterns, ageing workforces and the rise of non-communicable diseases.

One may ask how to deal with all these challenges? In my opinion, the most important issue is to adopt and apply the rights-based approach[260]. In all their efforts to address the challenges of ageing, countries should take steps – within human rights agenda to create and develop laws, policies and programmes designed to improve the living conditions of the older population. Population ageing must not be regarded as a matter that concerns only the current generation of older persons. The steps taken to address this issue in all areas of the public agenda and in all relevant laws and policies, as well as the corresponding budget allocations, will have an impact throughout society. The essential point, from this perspective, is to determine what steps need to be taken in order to build more cohesive, democratic and inclusive societies. The sooner we define necessary elements to build "good old age", the easier elderly people will accomplish independence in fulfilling their needs[261].

A rights-based approach should be used first of all in developing public policy. The civil, political, economic, social and cultural rights enshrined in binding national and international agreements should form the normative framework for such development. Elderly people shall form the subject of rights. Those rights impose certain obligations on the state and the rest of society. The individual is therefore the central subject of all public policies and programmes. That is why the guarantees enshrined in the universal system of human rights protection constitute the conceptual framework accepted by the international community and capable of providing a coherent set of principles and rules for guidance. This human rights based approach is also useful for defining the obligations that public authorities must assume with regard to the economic, social, cultural, civil and political rights to be enforced as part of their long-term strategies.

[259] See: http://www.msap.pl/npr/prognozy/Prognoza%20ludnosci%20na%20lata%202003+2030%20(GUS).pdf.
[260] *Ageing, Human Rights and Public Policies* - http://social.un.org/ageing-working-group/documents/ECLAC_en_HR%20and%20public%20policies.pdf/
[261] A. Pierzchalska, P. Klag, *Społeczne role osób starszych*, [in:] „Równość w Unii Europejskiej. Teoria i praktyka", pod red. W. Bokajły i A. Pacześniak, Wrocław 2008, s. 437-447.

In the normative dimension we have to ensure that regulations concerning rights of elderly people must be explicitly built upon international human rights standards. Older persons are protected by binding international human rights instruments including the Universal Declaration of Human Rights of 1948; the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights of 1966. In the European Union one must pay attention to the Charter of Fundamental Rights[262] and EU secondary antidiscrimination legislation. There is, however, up to now, no international universal binding instrument embodying the rights of older persons such as exists for other social groups like women, children and persons with disabilities.

As an example one may point on obligations arising from binding international regulations. General Comment No. 6 of the Committee on Economic, Social and Cultural Rights specify:

- Equal rights for men and women (article 3): States parties should pay particular attention to older women and should institute non-contributory old-age benefits or other assistance for all persons, regardless of their sex, who find themselves without resources on attaining an age specified in national legislation.
- Right to work (articles 6, 7 and 8): States parties must adopt measures to prevent discrimination on grounds of age at the workplace, ensuring that older workers enjoy safe working conditions until their retirement; it is desirable that States also promote employment of older workers in places where they can make the best use of their experience and knowhow, and set up retirement preparation programmes.
- Right to social security (article 9): States parties must establish general regimes of compulsory old-age insurance, establish a flexible retirement age, provide non-contributory old-age benefits and other assistance for all older persons who, when reaching the age prescribed in national legislation, have not completed a qualifying period of contribution and are not entitled to an old-age pension or other social security benefit or assistance and have no other source of income.
- Right to protection for the family (article 10) Governments and non-governmental organizations must establish social services to support the family when there are older people in the home, and must also implement special measures for low-income families who wish to keep older persons relatives at home.
- Right to an adequate standard of living (article 11): The basic needs of older persons in terms of food, income, care, self-sufficiency and others should be met. In addition, policies should be designed to enable older persons to continue to live in their homes by improving and adapting their accommodation.

In the procedural dimension, we have to ensure that all legislation and policies on ageing respect fundamental rights and freedoms during old age. To make this a reality, public authorities must supply the necessary instruments and the resources to implement them, for example, by enshrining these rights in special regulations for the protection of such rights or guaranteeing the rights of older persons in policies or plans of action at national or regional level. They must also assign a proper budget to cover those plans. As defined in different international human rights instruments, discrimination against older persons means any differentiation, exclusion or restriction based on age

[262] See: *Karta Praw Podstawowych w europejskim i krajowym porządku prawnym*, pod red. A. Wróbla, Warszawa 2009.

which has the intention or effect of preventing or nullifying the recognition, enjoyment or exercise of their fundamental human rights and freedoms. That is why NHRIs in Europe find themselves obliged to defend those principles in the human rights protection context.

The Committee on Economic Social and Cultural Rights has identified older persons as one of the groups most vulnerable to rights discrimination and therefore has recommended that States have to review their legislation and eliminate any *de iure* or *de facto* discrimination, approve rules that protect older persons from discrimination and establish affirmative action measures whenever they bring opportunities for older persons in line with those provided to other social groups in the enjoyment of given rights.

It is very important to remember that decision concerning such a vast part of population cannot be taken by politicians with no proper consultation with civil society. Such important long distance decisions cannot be taken in vacuum of democratic participation. The opinions of older persons and their organizations should be taken into consideration when determining these benchmarks. Older persons should also be encouraged to participate in the process and form part of accountability bodies. Thus, information on rights and freedoms must be provided and disseminated. This calls for specific mechanisms to enable older persons to exercise their right to participation and to ensure that they can access the information they need to increase their influence. In Poland the activities taken by the Ombudsman (which will be described below) form part of such participatory process, which is not satisfactory when assessing steps taken by public authorities.

From the content-related dimension it is necessary to underline that all programmes and policies must be universal and offer mechanisms for making benefits and services enforceable. This dimension includes the responsibility and enforceability issues associated with a rights-based approach, whereby States must create and develop mechanisms to fulfil their obligations.

Today one must ask an important question – are all those international instruments sufficient for the protection of elderly people? Do we need a new specialized mechanism at the international arena? The answer is not simple. The 1948 Universal Declaration of Human Rights and other international rights conventions apply to everyone regardless of age. However age is usually not listed in universal human rights conventions explicitly as a reason why someone should not be discriminated. As it was already mentioned earlier, we have a number of normative instruments on regional European level, but not universally. That is why one may say we come across a "normative gap" in human rights protection system. One can find also a significant body of soft law regulations guiding the treatment of older people. The most notable ones are the UN Principles for Older Persons (1991) and Madrid International Plan of Action on Ageing (MIPAA, 2002). However, these soft laws are not legally binding and so they are having relatively little practical effect. Although it must be admitted that in some countries they have real impact on domestic policies and legislation.

However it is worth to describe here these documents more extensively. UN Principles for Older People formulate five general principles: independence, participation, care, self-fulfillment and dignity. The principle of independence calls for access to food, water, shelter, clothing, health care, work and other income-generating opportunities, education, training, and a life in safe environments

for elderly people. When it comes to participation, one have to pay attention that older persons should remain integrated into community life and participate actively in the formulation of policies affecting their well-being. Older persons should have access to social and legal services and to health care so that they can maintain an optimum level of physical, mental and emotional well-being. The principle of self-fulfillment states that older persons should have access to educational, cultural, spiritual and recreational resources and be able to develop their full potential. And finally, older persons should be able to live in dignity and security, be free of physical or mental exploitation and be treated fairly regardless of age, gender and racial or ethnic background.

There are a number of central themes running through the Madrid International Plan of Action on Ageing 2002, which include the full realization of all human rights and fundamental freedoms of all older persons, the achievement of secure ageing, which involves reaffirming the goal of eradicating poverty in old age and building on the UN Principles for Older Persons and empowerment of older persons to fully and effectively participate in the economic, political and social lives of their societies. MIPAA includes also provisions for individual development, self-fulfillment and well-being throughout life as well as in late life, through, for example, access to lifelong learning and participation in the community. A very important issue is a commitment to gender equality among older persons through, inter alia, elimination of gender-based discrimination. Of course, it is not possible to mention all MIPAA provision in such a short text, but it must be underlined that the year 2012 will mark 10 years after the adoption of the Madrid International Plan of Action on Ageing. The second review and appraisal of MIPAA is now underway, with governments undertaking national appraisals during 2011. The process calls for governments to consult with civil society on how their policies and programmes are being implemented. That is why civil society organisations and older people themselves should have a crucial part to play. The ombudsman institutions may also have important impact within the process.

In Poland however, the process of creating and assessing of existing mechanisms is not always participatory as it should be. According to the Ombudsman knowledge, the government prepared an "Information on the realization of MIPAA", but taking into account only the views of government sector (even local government was not included in the consultation process). What is regrettable particularly is the fact that all civil society organisations were omitted during the consultation procedure. In such circumstances, one must ask how to improve the situation? As it was already mentioned at the beginning, the crucial element is to adopt and apply human-rights based approach.

In 2010 the Ombudsman in Poland established a Board of Experts consisting of scientists (i.a. lawyers, sociologists, geriatrists) and representatives of civil society organizations. The task of the Board is to prepare recommendations for the Ombudsman, monitoring the implementation thereof, collect and disseminate "good practices" promoting older people participation is working, social and cultural life. What is very important, the Ombudsman, functioning also as an independent equality body, understands his antidiscrimination obligations not from purely legal point of view, but widely through lens of social exclusion concept. The attitude is even far more open in this context that it is commented in the literature[263]. For the office of the Ombudsman equally important is to take actions

[263] M. Dziurnikowska-Stefańska, *Wymiary wykluczenia prawnego w sprawozdaniach Rzecznika Praw Obywatelskich*, [in:] „Prawo i wykluczenie. Studium empiryczne", pod red. A. Turskiej, Warszawa 2010, s. 293-318.

against legal discrimination on different grounds and to give impulse or animate systemic social and legal changes which help to include and insert all deprived people into society.

The Ombudsman promotes active Polish participation in 2012 EU Year for Active Ageing and Solidarity between Generations. The Minister of Labour and Social Policy is the country coordinator. Unfortunately, his activities are not to be assesed as sufficient in this area. That is why the Ombudsman supports and animates many activities in these areas. Already in 2010 three special groups of experts, consisting of academics of differing specialization, representatives of civil society, were established by the ombudsman. One of them concentrates its activity on elderly people only. The group is to prepare a complex report that will be presented to the government. For 2012 many issues are to be raised. The office acting together with board of experts and civil society organizations will concentrate on several issues. First of all it is the problem of discrimination of elderly persons on financial market (two conferences are to be organized on particular topics: discrimination in banking services and insolvency of natural persons). Professional activity and labour market for older persons will be an equally important issue. In area of public healthcare a proposal of reform of the system of psychiatric aid for old people will be discussed. The Antidiscrimination Law Unit is to conduct research of mutual understanding between young and old people in Poland.

As an independent equality body, the Ombudsman safeguards the observation of the equal treatment principle. Vast part of its activities is directed towards protection of rights of elderly people. Thus the Human Rights Defender provides support to the victims of discrimination based on age, analyses, monitors and supports equal treatment of elderly persons, prepares and issues independent reports and recommendations regarding discrimination-related problems. The Ombudsman also cooperates with associations, civic movements and other voluntary associations and foundations in the area of equal treatment or examines facts described by a complainant. The office of the Ombudsman can apply to another control body for examination of the case if he/she establishes that the principle of equal treatment has been violated. The ombudsman can apply then to competent authorities for elimination of violation and subsequently monitors the implementation of his/her recommendations. The Defender may initiate in some cases preparatory proceedings and participate in all ongoing civil or administrative proceedings. In cases where only private entities are involved, the Ombudsman can indicate legal measures to which a given person is entitled. The Ombudsman however does not have legislative initiative, but he/she can apply to competent authorities for undertaking a legislative initiative, issuing or amending legal acts.

Apart from research and analytical functions of the Ombudsman's office is it necessary to notice that the Human Rights Defender uses his competences to ensure that the equal treatment principle is observed. One has to mention just few examples[264].

On 21 of January 2010 the Supreme Court, basing on ombudsman's motion, issued an judgment stating that retirement age cannot be the sole reason for the employer to get rid of an employee (II PZP 13/08). The Supreme Court declared that this could lead to direct discrimination based on age

[264] Every year Human Rights Defender issues an annual information on his activity and state of rights and freedoms in Poland, covering also all relevant information on antidiscrimination activities.

and indirect discrimination based on gender, because female workers are usually affected by unfavorable interpretation of article 45 of Polish labour code and therefore their pensions are smaller. That judgment made a real breakthrough in judiciary in Poland.

In 2007 the Ombudsman send a motion do the Constitutional Court questioning constitutionality of insurance law provisions on unequal retirement age for men and women. On 15 July 2010 the Constitutional Court declared that those provisions are compatible with Polish Constitution and do not infringe equal treatment principle (K 63/07). The Court, however, on the same day issued a special document (signalization) addressed to public authorities stating that in due course some changes shall be made in the insurance system. Demographic and financial challenges are so severe that they should be taken into consideration in coming years. It is not difficult to realize that these events had some significant impact on reform of social insurance system planned today by the government.

The Ombudsman supported for many years new alternative methods of voting. Finally in 2011 such possibilities were introduced into the Electoral Code by the parliament. Post voting in all kind of elections are accessible for people with disabilities. Proxy voting is possible for people with disabilities and for elderly persons (above 75 years). Unfortunately, the provisions of Electoral Code are not consistent, because post voting is not accessible for elderly people.

One have to mention also activities of the Ombudsman animating social campaigns or supporting social and civic initiatives towards improving the situation of elderly people. The Ombudsman meets very warmly all initiatives establishing Universities of Third Age. Those activities, usually in cooperation with high schools and universities, are actually a phenomenon in contemporary Poland, gathering more than 100.000 elderly people all around the country. Right to education becomes a reality thanks to these educational activities also for elderly people. What cannot be underestimated is the aspect of enhancing social participation of old people in the society. In 2011 the Ombudsman initiated also a project “Ambassadors of Human Rights” in collaboration with Third Age Universities. Activists willing to promote human rights and protection of fundamental freedoms can, together with the Office of Human Rights Defender, take part in campaigns or disseminate knowledge. Pilot projects on first universities proved that this idea is worth further efforts.

What could be mentioned here is the fact that the Ombudsman functions also as an intermediary between civil society and its organizations and public authorities. There are many problems concerning the work of the equality bodies, which are common for them all in the European Union. One of the main problems, which is not only important for protection of rights of elderly people, is under-reporting. Under-reporting is a threat for equal treatment bodies to have a real impact on public policy. Once the equality body does not have sufficient information on human rights infringements, when victims of discrimination do not claim their rights, the risk that social exclusion is very severe is rising. Despite all problems National Human Rights Institutions must therefore take an active position in fighting discrimination and social exclusion, initiating or animating activities in areas where public authorities are not active sufficiently or policies are not shaped.

Human Rights of Older Persons: Policy or Implementation Gap?

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Many thanks to the Foreign Affairs Ministry of Poland for this invitation to participate in the 5th Warsaw Seminar on Human Rights, in the panel on the Rights of Older Persons. It is a great pleasure to be here.

I will briefly touch on 3 points, with a particular focus on the right to social security.

1. Human Rights of Older Persons in the international human rights system
2. Human Rights of Older persons in the European human rights system
3. Challenges for the future

The International Bill of Rights has a number of references to protection in old age. As early as in 1948, Article 25 of the Universal Declaration of Human Rights ensures the right to security in the event of old age, while the 2 mother Covenants, of Civil and Political Rights and Economic, Social and Cultural Rights, of 1966, provide the rationale for the protection of older persons in various substantive provisions.

As an example of the protection guaranteed by the core human rights treaties, the Covenant on Economic, Social and Cultural Rights sets out a vast range of economic, social and cultural rights.

States parties to this Covenant need to comply with their obligations to respect, protect and fulfill the rights set out therein, either through immediate measures to fulfill core obligations that imply satisfaction of, at the very least, minimum essential levels of each of the rights, or through the promotion of adequate policies for the progressive realization of the rights.

Because all core human rights treaties are of universal application to everyone living under the jurisdiction of the State party, older persons naturally come under their purview. In their national

reports on the implementation of the Covenant on Economic, Social and Cultural Rights, States are required to provide information on the measures taken to protect the rights of older persons under each of the substantive rights, in particular work, social security and an adequate standard of living, and in the context of Article 10, on the protection of, and assistance to, the family.

Not only the UN Committee on Economic, Social and Cultural Rights, in charge of monitoring the Covenant, but all UN treaty monitoring bodies deal with issues pertaining to the protection of the human rights of older persons and 2 treaty bodies have issued specific General Comments on the rights of older persons. As early as in 1995, the Committee on Economic, Social and Cultural Rights, issued its General Comment 6, on the Economic, Social and Cultural Rights of Older Persons, while the Committee on the Elimination of all Forms of Discrimination against Women (CEDAW) issued its General Recommendation No. 27, on Older Women and Protection of their Human Rights, last year.

Non-discrimination provisions in the core human rights treaties did not always include age as an express ground for discrimination. It was included in the list of grounds for discrimination for the first time in Article 2 of the International Covenant for the Protection of the Rights of all Migrant Workers and Members of their Families, in 1990.

In the most recent General Comment on non-discrimination in economic, social and cultural rights, adopted by the Committee on Economic, Social and Cultural Rights in June 2009, age is a prohibited ground of discrimination in several contexts. The Committee has highlighted the need to address discrimination against unemployed older persons in finding work, or accessing professional training or re-training and against older persons living in poverty with unequal access to universal old-age pensions due to their place of residence.

As I have already mentioned, I would like to focus on the right to social security and social services for older persons because it is of paramount importance for this age group.

The Covenant on Economic, Social and Cultural Rights, in its Article 9, guarantees that everyone has the right to social security while CEDAW also enshrines in its Article 11, the right to social security in old age for women.

Social protection models are influenced by political and institutional systems, economic and social development levels and cultural backgrounds, but the notion of social protection is inextricably linked to combating poverty and social exclusion and to promoting individual and collective well-being.

The concept of social protection as an instrument of poverty eradication and, therefore, more or less restricted to means-tested benefits and basic social services, has been shared by countries in certain developing regions of the world. At the other end of the spectrum, are social protection systems inspired by the welfare state that cover individuals and groups through a range of benefits and services to ensure protection against social risks like unemployment, sickness, maternity, family charges, old age, disability and death.

The differences in the nature and scope of social protection models do not depend only on the financial resources of States. It is true that in many developing countries social protection is very limited, leaving a large proportion of the population, in particular those working in the informal economy without adequate coverage, but it is equally true that in some of the most developed industrial countries, individuals and families in need are also left without coverage due to the large gaps in public social policies.

Globalisation has had a negative impact on the right to social security, specially because social development policies have been mistakenly considered as being contrary to economic growth and international competitiveness and the establishment of social safety nets absolutely necessary to cushion the unwanted or unexpected effects of globalization on poor persons, families and communities, has not been considered a national and international political priority.

In its interpretation of Article 9 of the Covenant, in General Comment 19, adopted in 2007, the Committee on Economic, Social and Cultural Rights has indicated that the core obligation requires States parties "to ensure access to a social security scheme that provides a minimum essential level of benefits to all individuals and families that will enable them to acquire at least essential health care, basic shelter and housing, water and sanitation, foodstuffs, and the most basic forms of education".

This is in line with the concept of the Social Protection Floor that is being promoted in the context of an on-going joint effort on the part of all the UN agencies led by the ILO and the WHO that includes tax-financed universal pensions for older persons, persons with disabilities and persons who have lost the main breadwinner in the family as one of the components of a basic set of essential social transfers in cash and in kind. What is more important is that the ILO considers that all countries without a formal social security system in place have the financial possibilities to begin implementing the Social Protection Floor, using domestic resources and international assistance.
So far, cash transfer programmes to complement social security gaps either because older persons are not covered by statutory social security or because benefit amounts are inadequate have been useful in guaranteeing minimum amounts in universal flat rate pensions.

Turning now to the European human rights system.

Among the most important human rights instruments that are binding for the 47 Member States of the Council of Europe, are the European Convention on Human Rights**,** directly based on the Universal Declaration of Human Rights and in force since 1953, and the European Social Charter in the sphere of economic and social rights. It was adopted in 1961 and guarantees the enjoyment, without discrimination, of fundamental social and economic rights defined in the framework of a social policy that Parties undertake to pursue by all appropriate means. It is gradually being replaced by the Revised Charter.

The Additional Protocol to the European Social Charter that came into force in 1992 extended the rights guaranteed and added new rights, including the right of older persons to social protection

(Article 4). In order to fulfil this new right, State Parties undertake to adopt or encourage, either directly or in co-operation with public or private organizations, appropriate measures designed in particular to enable older persons to remain full members of society for as long as possible and to choose their life-style freely. States also need to guarantee older persons living in institutions appropriate support.

The Council of Europe has also played a major role in establishing social security minimum standards either through standard-setting instruments that set out the underlying principles of what is referred to as the European social security model or through co-ordinating instruments.

Moving on to the EU, as we all know, the primary responsibility for ensuring the rights of their citizens naturally rests with Member States. All of them are party to the European Convention on Human Rights (and the EU itself is on its way to ratifying the Convention) and to the core international human rights treaties.

The Charter of Fundamental Rights that became legally binding with the entry into force of the Lisbon Treaty, in 2009, prohibits discrimination based on a number of grounds including age.

In the context of the rights of older persons, the Charter makes clear that the Union recognizes and respects their rights to lead a life of dignity and independence and to participate in social and cultural life.

The Charter of Fundamental Rights recognizes the entitlement to social security benefits and social services. Everyone residing and moving legally within the European Union is entitled to social security benefits providing protection in cases of maternity, illness, industrial accidents, dependency or old age, and in the case of loss of employment in accordance with Union law and national laws and practices. Member States are free to determine the details of their social security systems, but European rules ensure that the application of the different national legislations respects the basic principles of equality of treatment and non-discrimination.

A word on social security rights for older women.
In Europe, the positive outcome of the entry of women into the labour market is that they acquire more individual work-related social security rights that contribute towards an individual pension making them independent of their husbands or partners as male breadwinners. But the reverse side of this coin is the need for a vast range of measures to reconcile professional, family and personal life, so that men and women share both worlds – the outer world of work and professional satisfaction and the inner world of the family and emotional satisfaction.

Coming to the challenges, which are considerable!
As we all know, the crumbling of the welfare state is related to its difficulties in responding to a number of challenges. All of them need to be tackled without diluting the ethical approach and the final responsibilities of States towards all those living under their jurisdiction. The challenges call for on-going adjustments and adaptation in the architecture of public systems and continuous monitoring of public policies.

In EU Member States, pension reforms are ongoing and in some cases made more urgent by the crisis. Some of these reforms come as a response to demographic developments and are aimed at meeting the challenge of guaranteeing the adequacy and sustainability of pension systems in the long term, for example, through incentives for people to work more and longer; the raising of the statutory and effective retirement age; the introduction of stricter criteria for certain pensions (e.g. disability pensions); and adjustment mechanisms that link the contribution-benefit formula and/or the pensionable age to longevity and GDP developments.

Other pension policy measures, however, have been directly prompted by the crisis and the new financial constraints. For example, many Member States have reduced the indexation of pensions or temporarily frozen pension benefits levels. It is true that minimum pensions and minimum income provisions for older people are often exempted from these limits so as to ensure that low income pensioners are better protected and that the smallest pensions maintain their purchasing power. But a decrease in pension amounts when they are low at the outset has a negative impact on the standard of living of pensioners and their families. Demographic ageing requires new social security strategies in order for older people to have adequate protection in the future. As the number of pensioners in Europe rises, and the relative number of people of working age declines, further reforms are needed if pensions systems are to remain adequate and sustainable in the long term.

In the context of reforming the health care and social services sectors, long-term care represents a key area for intervention in many Member States. Several measures have been implemented with the aim of widening the range of options available to potential users of long-term care services and of supporting de-institutionalisation by promoting home care and improving end-of-life care. But long-term care is still inadequate in many European countries and suffers from labour shortages and low quality. This type of care will prove critical as people live longer, mainly for 2 reasons. First, because ageing population is associated with varying prevalence of dependency and disability rates leading to multiple chronic diseases; second, because access for all and greater patient choice must be balanced against financial sustainability since spending on long-term care is expected to grow fast in the coming years.

In his recent viewpoint on “Elderly across Europe living in extreme hardship and poverty” Commissioner Hammarberg recalls that older persons have been deeply affected by the economic crisis. He underlines the need to rethink and review policies and strategies - with the view of protecting the rights of older persons – and to make them age-friendly and adequate to the improvement of the living conditions of elderly people.

Specific groups such as the ‘oldest old’; older migrants; dependent older persons; and older women who often receive a reduced pension allowance because they have had to care for family members rather than being professionally active, all need close attention on the part of policy formulators. Particular aspects such as non-discrimination; risk of poverty and social exclusion; access to social rights; employment and pensions; autonomy; care issues; training and lifelong learning; informed

and effective participation; personal development; voluntary work; and cultural and leisure activities, will require additional efforts on the part of Member States.

An anywhere else in the world, in the European region, international treaties lack consistent implementation. All the rights enshrined in all the treaties become more accessible to a wide range of people, if they are also actively promoted and supported by sound public policies and involvement of civil society.

2012 is the European Year for Active Ageing and Solidarity between Generations. The aim is to raise awareness of ageing and its implications and to encourage stakeholders at all levels to take new initiatives that will remove obstacles to older people playing an active role on the labour market and in society and to ensure that they can stay autonomous for as long as possible.
But this broad objective needs to be materialized in a pragmatic and concrete manner in order to ensure that all older persons indeed enjoy their right to active, and I would add, happy ageing, in their workplace, in their families and communities, and in society at large.

Older persons' Right to Participate in Social and Economic Life – New Challenges for Europe

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1. Participation as a component of older persons' welfare

Independence, participation, self-fulfilment, care and dignity have been formulated in the "*UN Principles for Older Persons of 1991*"[265] as components of older persons' welfare. The effective participation in social and economic life is an outcome of preservation of the other elements. The mutual interactions occur among all of them. A person cannot enjoy the cultural, economic and political life of a given country or decide on the type of care of himself or herself if he or she is not able to lead an independent life. Moreover, all these elements must be equipped with the basic value – dignity.

The *Principles* do not mention the non-discrimination of older persons but it is obvious that the elderly are not able to fully participate in social, cultural and political life and to invest in their self-fulfilment, cannot be independent and enjoy the highest attainable level of health, if they are discriminated against their age, disability and all the limitations which are caused by their old age. If the elderly are to be independent, to participate in economic and social life of a country, the principles of equality and non-discrimination (understood as equality of chances) should be respected. It is obvious that the preservation of the equality of chances obliges States not only to refrain from violation of human rights but also to take positive action in order to fill in the gap between the situation of a vulnerable group and the rest of a society[266].

Participation of the elderly in social and economic life depends significantly on preservation of their political and civil rights. Through their participation in political life, for example through taking part in parliamentary and municipal elections, they can affect their social position, and the conditions under which they live. Despite the fact that in comparison with the younger part of the society, the

[265] http://www.monitoringris.org/documents/norm_glob/ARES461.pdf
[266] It is clearly explained in the General Comment of 1995 no. 6 "*The economic, social and cultural rights of older persons*" of the Committee of Economic, Social and Cultural Rights (CESCR). http://www.unhchr.ch

elderly do not have the whole range of instruments allowing them to affect the state policy (e.g. use of the right to strike), but the "silver electorate" becomes stronger and stronger. Growing activity of organizations of the elderly is easily noticeable. However, a great diversity of such organizations, parties, movements, clubs and informal circles, etc. can also be observed[267]. It arises, *inter alia*, from the fact that older people are rarely interested in taking over the political power. Their main aim is to improve their social position and defend their social and economic rights as well as to participate in decision making processes referring to their daily life.

However, participation in public life cannot be confined solely to the procedural aspects relating to the implementation of the right to vote. The participation in social, economic and cultural life is determined by the possibility of exercising the right of association, freedom of speech, of expression, access to the media, education, culture, recreation, etc. It should be remembered that civil and political rights fall into the vacuum, if they are not completed by social and cultural rights.

The diverse relation should be also indicated. Social conditions and practical solutions determine the realization of political rights of the elderly. The ability to vote by proxy, by mail or via the Internet, as well as various types of facilities associated with physical access to the polling station, access to medical care, to social assistance, are of fundamental importance for the execution of their political rights and participation in widely understood public life.

That is why, at the time when the world's and Europe's population is ageing at an unprecedented pace, it is worth checking if the instruments adopted by European countries are sufficient to protect the right of the elderly to participate in social and economic life.

2. The international and European forum towards global ageing

The issue of the rights of the ageing and elderly as well as practical problems of the participation of the elderly in social and economic life has appeared in many documents adopted on various international fora.

First of all, there are programs and plans of action like "*Vienna International Plan of Action on Ageing*" [268] and "*Madrid International Plan of Action on Ageing 2002*"[269] and some regional plans[270]. They are usually "modern" documents equipped with the road maps and the follow-up instruments.

The strategies taken within the European Community, and later the European Union, should also be assigned to this group. Since the early 1990s – this issue has been presented within the EC/EU, mainly in relation to ageing through the prism of older workers. The specific situation of the elderly is highlighted, among others, within the "*European Employment Strategy*", which promotes active

[267] M. Riekkinen: *Assisting the Elderly in Remaining Politically Active: A Focus on Russia and its International Legal Obligations*. "Review of Central and East European Law" 2011, No.2 p. 158, 177.
[268] http://www.un.org/ageing/vienna_intlplanofaction.html
[269] http://www.c-fam.org/docLib/20080625_Madrid_Ageing_Conference.pdf
[270] For example: *Macau Plan of Action on Ageing for Asia and the Pacific*, the *African Union Policy Framework and Plan of Action on Ageing*' or *Arab Plan of Action on Ageing to the Year 2012*.

ageing and the right of the elderly to remain in the labour market[271]. Moreover, the demographic changes, ageing society and active ageing are subjects of the European Commission's communications like „*Towards a Europe for all ages – promoting prosperity and intergenerational solidarity*" adopted in 1999[272]. The EU forum discusses various aspects of the issue, not only in relation to economic matters and non-discrimination but for example in relation to the family or the innovative approaches to learning[273]. All of the documents are directly or indirectly connected with the issue of participation of older people in social and economic life.

These documents are completed by various green papers[274], reports[275] and studies[276]. It should be stressed that the EU policy to combat poverty, to promote integration and intergenerational solidarity relies on the OMC (Open Method of Coordination) which is used in areas where "hard law" is not effective. The OMC uses the mechanisms of "soft law", different types of guidance, data collection, comparisons, as well as sharing experiences and good practices of States.

According to the EU Commission Communication of 2008, among the objectives of the OMC in the social are elimination of poverty and social exclusion, promoting longer participation in the labour market, ensuring adequate and sustainable pensions which allow to maintain a reasonable level of living standards after retirement and to meet their needs, aspirations and the requirements of modern societies[277].

The goals of the OMC concerning social issues, including older people's matters, are very ambitious, but it is voluntary and it does entail any sanctions for lack of success in the above indicated spheres. The OMC "sanctions" rather resemble the means used by non-governmental organizations, including among others, the so called "mobilization of shame". The OMC strategies do not necessarily lead to the implementation of the goals.

The other type of the activity at the international and regional levels in the discussed sphere results in the political declarations adopted by global and regional bodies[278] and the global summits' conclusions on social issues. However, the resolutions and recommendations adopted by the UN General Assembly seem to be crucial. We should mention, for example, its resolutions No. 37/51

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[271] M. Bell: *The Rights to Equality and Non Discrimination* W: T.K. Hervey, J. Kenner (ed.) *Economic and Social Rights Under the EU Charter of Fundamental Rights: a Legal Perspective.* Hart Publishing, 2003, p. 106 – 107; M. Hutsebaut: *Expanding Opportunities and Security for Older Working People: a European Trade Union Perspective*. "Journal of Poverty & Social Justice". Feb 2010, issue 1, p. 81.

[272] COM (1999) 0221. See also: COM(2006)0571, COM(2007)0244, COM(2009)0180

[273] See report by Thomas Mann on the demographic challenge and solidarity between generations. Committee on Employment and Social Affairs. Available at: http://zpravy.ods.cz/docs/pdf/a7-0268_2010_en_final.pdf

[274] The Green Paper of 2005 on *Confronting Demographic Change: a New Solidarity Between the Generations*. COM (2005) 0094 final

[275] For example: Chin – Sung Chung: *The necessity of a human rights approach and effective United Nations mechanism for the human rights of the older person***.** Human Rights Council Advisory Committee Fourth session 25–29 January 2010, A/HRC/AC/4/CRP.1.

[276] *The Demographic Change – Impact on New Technologies and Information Society.* European Commission Employment and Social Affairs DG. Report of August 2005.

[277] COM(2008) 418 final.

[278] *Brasilia Declaration of 2007*; Léon Ministerial Declaration: *A Society for All Ages: Challenges and Opportunities, Graz Declaration on Disability and Ageing.* Worth mentioning are also the CIS *Charter for Older People* of 1998 – the declaration dedicated exclusively to the elderly and the *Andean Charter for the Promotion and Protection of Human Rights of 2002*, containing two paragraphs (46, 47) referring to the participation of elderly in social life.

"*Question of the Elderly and Ageing*"[279], No. 47/5 „*Proclamation on Ageing*"[280] and the most important resolution no. 46/91 containing the mentioned *Principles*. Also worthy of note is the ILO document of 1980 No. 162 entitled "*Older Workers Recommendation*"[281].

The European organizations are very active in the discussed area[282]. Worth mentioning are the documents adopted by bodies of the Council of Europe. They can be divided into those directly referring to the elderly and the aging of Europe and those, which are part of a wider issue[283]. In the context of participation, worth mentioning are resolutions of the Parliamentary Assembly "*The future of senior citizens: protection, participation and promotion*" 1428 (1999) and "*Challenges of social policy in Europe's ageing societies*" 1591 (2003)[284]**.**

The whole series of resolutions on the demographic future of Europe, the European social model, elimination of poverty and various forms of discrimination have been adopted by the European Parliament[285].

All these documents, strategies and plans, etc. are not legally binding. However, they shape the "consciousness of States" in Europe and in the world towards the rights of the elderly. They may affect the interpretation of the international obligations of States in the discussed area[286]. However, this influence depends on possibilities and good faith of States.

3. Human rights obligations

As it was stated above, older people's independence is the precondition for their participation in all spheres of life. It should be considered in the context of the right to adequate food, cloth, accommodation, the highest attainable standard of living, etc. These rights are guaranteed by Article 11 (the right of everyone to an adequate standard of living) of the International Covenant of Economic, Social and Cultural Rights (ICESCR). Another right, closely connected with the independence of the elderly is contained in Art. 12 of the Covenant (the right to the enjoyment of the highest attainable standard of physical and mental health).

The economic independence relies mainly on the access to labour market, financial stability and safety, which is closely connected with the efficiency of the social security systems. That is why, Article 6 (right to work) of the Covenant should be taken into account and its Article 9 (the right to social security, including social insurance)[287]. Article 6 does not exclude anyone from the right to work. That is why, it is reasonable to consider all the cases of compulsory retirement in the light of

[279] http://www.un.org/documents/ga/res/37/a37r051.htm
[280] http://www.undemocracy.com/A-RES-47-5
[281] http://www.ilo.org/ilolex/cgi-lex/convde.pl?R162
[282] The issue is discussed also within other organizations. In June 2010 OAS adopted the resolution "*Human Rights and Older Persons".*
[283] For example: the protection of health, family policies, poverty, social development, dependence and disability.
[284] Texts at http://assembly.coe.int/Documents.
[285] OJ 2006 C 292E/131, OJ C 2006 305 E/141.
[286] It is possible to observe this, inter alia, in recommendations, decisions and general comments of the UN committees, among others CESCR and CEDAW.
[287] These rights are also contained in the ILO conventions.

this provision. In this context worth noticing is the opinion that compulsory retirement, despite the physical and intellectual abilities of an employee, is a form of violation of human dignity[288]. Moreover, failure to participate in labour market is a source of poverty, which prevents or at least limits the opportunity to participate in social and economic life.

Unquestionably, education is a form of combating poverty[289]. Therefore, access to education in the sense of a possibility to complete education and access to vocational training and programs are essential elements of the participation of the elderly in social and economic life. The right to education means also sharing of know-how with the elderly and, simultaneously, the use of their experience and knowledge by younger generations. The relevant rights in this sphere are protected by Art. 13 of ICESCR.

Moreover, access to education is inseparable from the right of everyone to participate in cultural life (Article 15 of the Covenant)[290].

Unfortunately, provisions referring to the social sphere usually are not protected by a strong controlling mechanism and the States are obliged only to take steps, to foster, to promote, etc. As a result, the protection of the social rights of the elderly are relatively weak. There are also some instruments with the stronger mechanism (individual communications) - the Convention on Elimination of Discrimination Against Women (CEDAW)of 1979[291] and the Convention on the Rights of Persons with Disabilities of 2006. They refer to quite significant group of elders but not to all of them, of course[292].

On the other hand, the social and economic rights are supported by the relevant civil and political rights contained, among others, in the International Covenant on Civil and Political Rights (ICCPR), whose Article 26 requires States to prohibit discrimination and to ensure effective protection against discrimination because of race, colour, sex, language, religion, political or other opinion, national or social origin, financial situation, birth or other circumstances (probably "other circumstances" include age). This principle of equality and non-discrimination occurs as a distinct, autonomous norm, connected not only with the rights set forth in the ICCPR, but also it refers to social rights, which are of particular importance to the elderly[293].

In contrast, Art. 14 of the European Convention of Human Rights of 1950 (ECHR) is a relevant non-discrimination clause on the European level, but it is not a provision of an autonomous nature. It is the provision of subordinate role to the other provisions of the Convention.

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[288] M.S. McDougal, H.D. Lasswell, L. Chen: *The Human Rights of the Aged: an Application of the General Norm of Nondiscrimination*. "University of Florida Law Review" 1976, No. 5, p. 640.
[289] P. Dhillon: *The Role of Education in Freedom from Poverty as a Human Right*. "Educational Philosophy Theory" 2011, No. 3, p. 249.
[290] CESCR General Comment No. 21 *Right of everyone to take part in cultural life.*
[291] Worth mentioning is the General Recommendation on the rights of older women issued by the Committee on Elimination of Discrimination of Women in 2010. It stresses States' obligation in the sphere of preserving older women's independence which allows them to participate in public life[291].
[292] The EU joined the Convention and most of its members adopted the Protocol.
[293] CCPR General Comment No. 18 *Non –discrimination*.

Such a formulation of the prohibition of discrimination greatly reduces the ability to force States to raise any positive action towards preservation of the rights excluded from the ECHR. It means that the achievement of the real equality (equal opportunities) is under this provision difficult. It requires States to ensure that a person will benefit from the rights enshrined in the Convention without discrimination, but it does not mean automatically that the State is obliged to take specific actions in this regard.

Art. 14 does not also contain "age" as a ground of non-discrimination. It may be contained in the prerequisite "other status". Moreover, in contrast to a prohibition of discrimination on grounds of religion (Art. 9) or political views (Art. 10), it cannot be combined with the rights contained in the Convention, so "age" appears as the premise of the "second category"[294].

In addition, discrimination on grounds of age takes place mostly in the field of employment and social life which are not included in the ECHR. However, on the other hand, the European Court of Human Rights (ECtHR) considers each case individually. It is possible that in a particular case, the Court will refer to the positive obligations of a State, also in the social sphere. In *Airey* the Court found that although the Convention protects civil and political rights, which are not theoretical and illusory, but practical and effective, and many of them are affected by social or economic nature.[295].

Due to limited power of Article 14 some hopes may be connected with Protocol No. 12 to the ECHR of 2000. Its Art. 1 (2) creates a general prohibition of discriminatory treatment, also outside legal sphere, in practice. The Protocol does not go as far as Article 26 of the ICCPR, which clearly formulates the right to equality, but it goes far beyond the scope of Article 14. The problem is that it has been ratified by only 18 European States.

Most of the rights which are crucial for the participation of the elderly in social and economic life are contained in other European conventions, their protocols and interim agreements on social security schemes and medical assistance adopted in the fifties, sixties and seventies. But these treaties have not reached many ratifications. Therefore, the additional Protocol of 1988 to the European Social Charter of 1961 (its Article 4) and the Revised European Social Charter of 1996 (RESC) become particularly important for the discussed issue.

The most significant Article 23 of RESC contains the rights of elderly persons to social protection. According to part II of the Charter, States undertake to adopt appropriate measures enabling elderly persons to remain full members of the society for as long as possible, play an active part in political, social and cultural life, to choose their lifestyle freely and lead decent and independent lives in familiar surroundings.

The Charter contains more provisions of significant importance for the participation of the elderly in social and economic life. The list is quite long and consists of the right to appropriate facilities for

[294] H. Meenan*: Reflecting on Age Discrimination in the European Union – the Search for Clarity and food for Thought*. "ERA Forum" 2009, No. 10, p.123
[295] Complaint No. 6289/73.

vocational training, the highest possible standard of health, adequate housing, social security, social and medical assistance, benefit from social welfare services as well as freedom from poverty.

According to the Charter, States should accept the first part of the treaty but they are allowed to select at least 16 articles or 63 paragraphs from the second one. It means that a State may omit obligations arising from Articles 12, 23, 30 and 31 – the most important provisions for older persons[296].

The relatively weak mechanism of control over the implementation under the Charter should also be noticed. The European Committee of Social Rights (ECSR) is not a judicial body, and its activity is based on examination of the reports submitted by States. According to the Protocol of 1995 the procedure on the basis of collective action can be introduced but unlike the UN committees and ECtHR, the ECSR does not have the competence to consider communications or complaints in individual cases.

In the EU law, the most important for the participation of the elderly in social and economic life are two acts. They are the Council Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation[297] and the EU Charter of Fundamental Rights of the EU.

The first of them introduces the principle of non-discrimination in employment. But simultaneously it contains Article 6 justifying different treatment on grounds of age. It allows States to adopt various types of rules leading to unequal treatment (such as coercion for early retirement). Such a differentiation should be objectively and reasonably justified by a legitimate aim, including legitimate employment policy, labour market and vocational training objectives. The means of achieving that aim should be appropriate and necessary. However, States invoke this possibility quite often and not always properly, what is noticeable in the EU Court of Justice's jurisprudence[298].

The drafted provisions referring to equality and non-discrimination outside employment may turn out to be a milestone of the participation of the elderly in social and economic life. The aim of the presently drafted Directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation[299] is to prohibit discrimination in public and private sectors in relation to social protection, including social security and healthcare, education, access to goods and services publicly available and supply, including housing.

Work on the new act is still in progress and before it is accepted (which is not so obvious) and transposed, a lot of time may elapse[300]. Moreover, as illustrated by Protocol No. 12 to the ECHR, States are very wary of implementing the general principle of non-discrimination in all spheres of life.

[296] Only France and Portugal are bound by all the RESC provisions.
[297] OJ 2000 L 303/16
[298] See cases: *Mangold, Felix Palacios de la Villa, Lindorfer, Age Concern England , Rosenbladt, Georgiew Andersen, Petersen* and the newest one - *Prigge, Fromm and Lambach v. Lufthansa.*
[299] COM (2008)426 final
[300] The time for transposition of the Directive 2000/78/EC was 6 years.

The second act of unquestionable importance for the participation of the elderly in social and economic life is obviously the EU Charter of Fundamental Rights. Its Article 25 stipulates "*The Union recognises and respects the rights of the elderly to lead a life of dignity and independence and to participate in social and cultural life*".

In contrast to other provisions of the Charter referring to children (Art. 24) and gender equality (Art. 23), the wording of Art. 25 is different. It does not require taking any positive action to ensure the rights of older people. In the case of older people, it is possible to speak at least about the negative obligations, consisting of non-interference in their dignified and independent life as well as in their participation in social and cultural life.

Conclusions

Undoubtedly, the participation of the elderly in social and economic life requires many ingenious practical solutions. However, they should find support in the legal sphere. Presently, there is a significant number of provisions affecting the economic and social life of a human being, but ones regarding the population of the elderly and their specific situation are exceptions. They are scattered across various documents of various legal power, usually equipped with weak controlling mechanisms. The Convention referring to disabled persons cannot be a remedy for all older people's needs because these groups are not identical.

Therefore, it seems indispensable to consider the need and possibility of finding a legal solution allowing to face the new demographic and sociological challenge. One of the proposals is adoption of a binding document uniting all the achievements of the international community in the discussed area and taking into account all the above indicated interactions. However, due to enormous social diversities all over the world, the idea of adoption in Europe of a regional binding instrument may be considered separately.

Presently, in Europe the level of ensuring the participation of the elderly in social and economic life cannot be assessed as sufficient[301]. Probably one of the reasons for such a situation is that the elderly are not treated as a separate group with their own, specific needs. They are at least specified as one of many vulnerable groups. Secondly, the age (if it is indicated) is always one of many prerequisites of non-discrimination (like in the EU directives). Maybe States would be more willing to adopt norms prohibiting age discrimination solely rather than to accept a general non-discrimination clause.

[301] For example, in comparison with solutions adopted in the USA – "*Elderly Justice Act*" of 2009 and ADEA of 1967.

Human Rights of Older Persons at the United Nations: State of the Art, Process and Challenges

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1. THE WORLD IS AGEING AND GROWING INTO A MULTIGENERATIONAL SOCIETY

It is a fact: people in the world are living longer and in better health than ever before in the history of human kind. The escalating number and increasing percentage of older persons worldwide coupled with decreased birth rates highlights the urgent need to understand and address the implications of population ageing and increasing longevity in the world. For example, the phenomenal longevity records[302] not only in age but in very diverse activities and the growing section of centenarians is giving rise of a multi-generation society with up to 4 or 5 generations, thereby unveiling a whole range of unprecedented gaps and inequalities in legal and policy issues, such as intergenerational legislation or exclusions and multiple discriminations on the ground of old age (Stuckelberger, 2006, 2008a).

[302] The official longevity world record is held by Jeanne Calment who lived up to 123 years old in a relatively good health.

Table 1: Evolution of fertility rate and life expectancy at birth for the EU-27 in 1990 and 2008 compared to other countries in the world

	Total fertility rate (live births per woman)		Life expectancy at birth (years)	
	1990	2008	1990	2008
EU-27	:	1.60	:	79.4
Argentina	2.90	2.25	72.1	75.3
Australia	1.86	1.93	77.5	81.4
Brazil	2.60	1.90	67.3	72.2
Canada	1.69	1.65	77.8	80.5
China	2.01	1.64	69.9	72.7
India	3.72	2.73	59.0	64.2
Indonesia	2.90	2.19	63.1	67.9
Japan	1.48	1.32	79.5	82.7
South Korea	1.70	1.29	72.9	80.0
Mexico	3.19	2.41	71.8	76.2
Russia	1.55	1.44	66.6	67.7
Saudi Arabia	5.45	3.03	69.6	73.1
South Africa	3.34	2.55	61.2	51.2
Turkey	2.90	2.15	64.4	73.0
United States	1.99	2.07	75.6	78.0
World	3.04	2.52	64.4	67.9

(1) World and non-member countries, averages for 1990-95 and 2005-2010.
Source: Eurostat (online data codes: demo_frate and demo_mlexpec);
United Nations, Department of Economic and Social Affairs,
Population: World Population Prospects, 2010 revision

Source: Eurostat and United Nations, Department of Economic and Social Affairs, Population: World Population Prospects, 2010 revision

The latest data from the United Nations Population Division (2010) shows that population ageing keeps on being a global phenomenon, to prove it, a few statistical facts:

- *Life expectancy* is today at an all time high of 69 years (67 for men, 71 for women). Regional disparities are marked: 80 years in northern Europe (77 for men and 82 for women) versus 54 years in sub-Saharan Africa (53 for men, 55 for women). Life expectancy being an average it often hides the age group distribution, especially in countries where a generation disappeared because of war or diseases such as HIV-AIDS – it is precisely in those countries that older persons are an important section of society and the need for intergenerational rights, such as grand-parenting or great-grand-parenting right, are important.
- *The number of older persons over 60 years old* is rising steadily while fertility is decreasing steadily worldwide. While 384 million older persons lived in the world in 1980, today the figure has more than doubled to 893 million and the projection estimate the number of older persons will rise to 2,4 billion by 2050. The very old, 80 years old and above are the fastest growing segment and their needs in services, in health care and health literacy, but also in their protection and human rights in a fast changing world, are increasing.
- *Longevity is increasing: the number of centenarians (aged 100 years or older) is projected to increase 14-fold from approximately 265,000 in 2005 to 3.7 million by 2050.*
- *The proportion of older people* is also growing. In the developed world, about 1 out of 4 people is now over age 60 and by 2050, it will be 1 out of 3. In the developing world, this proportion is of 1 in 20' now and will reach 1 in 9 in 2050.

- *The dependency ratio* calculation shows that while in 1950, for every person over 65 years in the world there were 20 persons of working age. Today there are 7 and in 2050, the projection say there will be 3 working persons for 1 person over 65 years old.

This situation is undoubtedly shaping a new health, social and economic order and calling for innovative public health and public policies to guarantee a sustainable governance system. In Europe for example, the current social security system and legislative policies are mostly built on the post-war demographic situation at a time where fertility was high with no contraception for women, where life expectancy was 20 years lower than today and where longevity over 80 years old was exceptional. Today all those parameters have changed and require a fine reconsideration or adaptation of those policies. On the other hand, the majority of countries globally have no social security system and it is estimated that 80% of older persons of retirement age or more in the world have no retirement income from pensions or government programmes (Population Reference Bureau, 2010). In the countries with retirement age, laws in 61 countries require women to retire earlier than men, usually five years earlier, despite women's higher life expectancy and longevity (UNDP, 2010). The world economic crisis has pointed out towards increasing inequalities and highlighted the special condition of older person's lack of social and economic protection in various fields. Some authors have even argued that the current crisis is due to the fact that old age has been excluded as a parameter of global socio-economic policy[303] and the crisis may well worsen if nothing is done.

[303] The 2012 Ageing Report: Underlying Assumptions and Projection Methodologies" European Economy. 4. September 2011. Brussels. http://ec.europa.eu/economy_finance/publications/european_economy/2011/ee4_en.htm

Table 2: Evolution of population age structure by major age groups from 1990 to 2010 in the EU27 (as a percentage of the total population)

	0-14 years old		15-64 years old		65 years old or over	
	1990	2010	1990	2010	1990	2010
EU-27	19.5	*15.6*	66.7	*67.0*	13.7	*17.4*
Belgium	18.1	16.9	67.1	65.9	14.8	17.2
Bulgaria	20.5	13.6	66.5	68.9	13.0	17.5
Czech Republic	21.7	14.2	65.8	70.6	12.5	15.2
Denmark	17.1	18.1	67.3	65.6	15.6	16.3
Germany	16.0	13.5	69.2	65.9	14.9	20.7
Estonia (1)	22.3	15.1	66.1	67.8	11.6	17.1
Ireland	27.4	21.3	61.3	67.3	11.4	11.3
Greece	19.5	14.4	66.8	66.7	13.7	18.9
Spain	20.2	14.9	66.3	68.2	13.4	16.8
France (2)	20.1	*18.5*	65.9	*64.8*	13.9	*16.6*
Italy	16.8	14.1	68.5	65.7	14.7	20.2
Cyprus	26.0	16.9	63.1	70.1	10.8	13.1
Latvia	21.4	13.8	66.7	68.9	11.8	17.4
Lithuania	22.6	15.0	66.6	68.9	10.8	16.1
Luxembourg	17.2	17.7	69.4	68.3	13.4	14.0
Hungary	20.5	14.7	66.2	68.6	13.2	16.6
Malta	23.6	15.6	66.0	69.6	10.4	14.8
Netherlands	18.2	17.6	69.0	67.1	12.8	15.3
Austria	17.5	14.9	67.6	67.5	14.9	17.6
Poland	25.3	15.2	64.8	71.3	10.0	13.5
Portugal	20.8	15.2	66.0	66.9	13.2	17.9
Romania	23.7	15.2	66.0	69.9	10.3	14.9
Slovenia	20.9	14.0	68.5	69.4	10.6	16.5
Slovakia	25.5	15.3	64.3	72.4	10.3	12.3
Finland	19.3	16.6	67.4	66.4	13.3	17.0
Sweden	17.8	16.6	64.4	65.3	17.8	18.1
United Kingdom	19.0	*17.5*	65.3	*66.1*	15.7	*16.5*
Iceland	25.0	20.9	64.4	67.1	10.6	12.0
Liechtenstein	19.4	16.4	70.6	70.1	10.0	13.5
Norway	18.9	18.9	64.8	66.2	16.3	14.9
Switzerland	17.0	15.2	68.4	68.0	14.6	16.8
Montenegro (1)	:	19.6	:	67.7	:	12.7
Croatia (1)	:	15.3	:	67.5	:	17.3
FYR of Macedonia (1)	:	17.7	:	70.7	:	11.6
Turkey	35.0	26.0	60.7	67.0	4.3	7.0

(1) The population of unknown age is redistributed for calculating the age structure.
(2) Excluding French overseas departments in 1990.
Source: Eurostat (online data code: demo_pjanind)

Source World population, 1960-2010 - Source: United Nations, Department of Economic and Social Affairs, Population: World Population Prospects, 2010 revision

According to former Minister of Health of Germany and Professor of Gerontology Ursula Lehr, conflicts between generations will not so much be generated by demographic change but by economic constraint (1998). In countries with strong social welfare systems, the government is slowly replacing the 'traditional inter-generational economic system' and has taken a key role in the management of micro-family economies (i.e. social security, health and disability insurance, homelessness, unemployment, divorce regulation, etc.). Consequently, new forms of solidarity are developing and other forms are vanishing. Ties between generations no longer depend on an 'obligatory economic interdependence". Inheritance is still the main form of legalized economic transfer that is universally admitted.

Table 3: Old-age dependency ratio 1960-2060 (1) in the EU-27 compared to the world
(population aged 65 years and over as a percentage of the population aged 15-64 years old)

	1960	1970	1980	1990	2000	2010	2020	2030	2040	2050	2060
EU-27 (2)	:	:	:	20.6	23.2	25.9	31.4	38.3	45.5	50.2	52.6
Argentina	8.7	10.8	13.1	14.8	15.8	16.4	18.5	20.8	24.1	30.3	35.9
Australia	14.0	13.3	14.8	16.8	18.6	19.9	25.5	31.5	35.9	39.0	42.8
Brazil	5.9	6.5	6.9	7.4	8.5	10.4	13.8	20.0	26.6	35.8	43.6
Canada	12.7	12.7	13.9	16.6	18.4	20.3	27.7	37.8	41.0	42.3	44.9
China	7.1	7.1	8.7	9.0	10.4	11.3	16.8	23.9	36.9	41.9	51.8
India	5.4	5.8	6.3	6.5	6.9	7.6	9.5	12.2	15.4	19.9	25.4
Indonesia	6.3	6.2	6.4	6.3	7.1	8.2	10.0	15.1	22.2	30.0	36.1
Japan	8.9	10.2	13.4	17.1	25.2	35.5	48.2	52.9	63.3	69.6	68.6
South Korea	6.8	6.1	6.2	7.2	10.2	15.4	22.4	37.3	52.0	60.7	64.3
Mexico	6.4	7.5	7.4	7.6	8.6	9.8	12.5	17.4	24.8	31.3	38.6
Russia	9.9	11.7	15.0	15.3	17.9	17.7	22.5	29.4	31.2	38.5	42.4
Saudi Arabia	7.0	6.7	5.6	4.8	5.8	4.4	6.6	9.0	13.0	22.2	32.1
South Africa	7.0	6.3	5.6	5.5	5.9	7.1	9.4	11.7	12.5	14.6	18.7
Turkey	5.5	6.8	7.3	6.3	8.0	8.8	11.7	16.5	22.5	30.5	36.9
United States	15.3	15.9	17.1	19.0	18.7	19.5	25.3	32.7	34.7	35.4	36.8
World	8.8	9.3	10.1	10.2	10.9	11.6	14.3	18.0	22.2	25.7	29.6

(1) From 2020 onwards: Eurostat's population projections Europop2010 for EU-27 and UN's medium variant for the world total and non-member countries.
(2) Excluding French overseas departments in 1990.
Source: Eurostat (online data codes: demo_pjanind and proj_10c2150p);
United Nations, Department of Economic and Social Affairs, Population: World Population Prospects, 2010 revision

Source: Eurostat and United Nations, Department of Economic and Social Affairs, Population: World Population Prospects, 2010 revision

In this context, it is urgent to address the issue of older persons in the world and to protect and insure their specific human rights, which will also contribute to increase social cohesion and peaceful intergenerational regulations.

2. THE PARADOX OF THE 'INVISIBLE HUMAN RIGHTS OF THE OLD' IN AN AGEING WORLD

Considering the global demographic situation of an increased ageing world described above, one is entitled to assume that ageing would be part of global policies. However, facts show that not only older persons and ageing issues are mostly neglected at the international level, but moreso old age and older persons are discriminated, excluded and even abused as shown by more and more reports (WHO, 2002ab, Help Age International, 2011) and by the development of numerous non-governmental and governmental websites to report elder abuse (i.e. INPEA,[304] ALMA, Alter Ego, USA and Canadian government, etc). Those reports show that at all levels, local, regional and international, older persons suffer from age discrimination and exclusion leading to unreported social, economic and health mistreatment. The specific condition of older persons and the needs for specific human rights of older persons are not fully recognized nor addressed. Consequently, older persons are too often ignored, underestimated, creating a situation intensifying the risk of abuse, neglect and violence, affecting not only the older victim but their families and society as a whole

[304] INPEA: International network on the prevention of elder abuse www.inpea.net, ALMA: Allô Maltraitance des personnes âgées www.alma-france.org, Alter Ego: Association Suisse de lutte contre la maltraitance www.alter-ego.ch, Maltraitance Aînés/Elder Abuse : site of the Canadian government to report abuse http://maltraitanceaines.gouv.qc.ca/ or the National Center on Elder Abuse of the US Administration on Aging http://www.ncea.aoa.gov/Main_Site/Library/CANE/CANE_Series/CANE_International060614a.aspx

(WHO, 2002a, 2002b). The fact that old age puts you at risk of being exclude and 'invisible' bears consequences:

> *For the individual*, exclusion has an impact on their physical, psychological and social quality of life and it violates the fundamental rights of human beings. it affects in particular the most vulnerable situations which frail elderly suffer at the last stage of their life, with cognitive and physical impairment.
>
> *For society and the family*, the way older persons are treated bears trans-generational consequences: the implicit and explicit models of life/death, peace/violence and the images of old age are known to affect the younger generations (Stuckelberger, 2002). According to the new social and epigenetic findings, the experiences of the older generation entail psycho-social and cultural effects on their descendants (Stuckelberger, 2008b). Yet this phenomenon remains unreported in policy-decisions.

To better express the attitudes of the discrimination and exclusion towards the elderly, Dr Butler (1969) has pinned down the term of "Ageism"[305] There are many situations where older persons suffer from *'ageism'*, stigmatisation and multiple discriminations which lead them to be increasingly excluded or victims of inequalities. This is especially obvious for those affected by life events such as widowhood or by physically or mentally disabling conditions which make them vulnerable to abuse of all kinds. To cite a few examples (see also table 4):

- *Older employees* are statistically more frequently unemployed, are not being offered continuous training at work, suffer from the stigma that they are 'old fashioned', not up to date with technology' and with the false prejudice that competencies decrease with 'being older'. For example, studies show that despite the will of older persons to be included in the 'Information society', they are ICT-excluded and would need more than any group to be trained to be included[306] and the industrial designs need to be age-friendly. This especially relevant for old age, knowing that the older generation has a 'chronologically-embedded digital deficit to catch up. They so are at risk of becoming the new 'digital homeless' generation of society[307].
- *Older poor* are neglected in the statistics and policies on poverty at the global level (e.g. UN, MDGs and World Bank reports but also national statistics), they suffer from the absence of safety nets and social security policies. Older widows, the majority of the 80 year old and more, have been found to be more often victims of financial or inheritance abuse, such as loss of land, by ignorance of their rights and lack of protection.
- *Older patients* often receive unequal treatment and care compared to younger patients and do not obtain the best standard of care available for different reasons, which rise numerous legislative or ethical questions, to cite a few: age-based medical care rationalization, medical mis-treatment with effects of polymedication pharmaco-dynamics, medical treatments mostly

[305] "Ageism is a process of systematic stereotyping of and discrimination against people because they are old, just as racism and sexism accomplish this for skin colour and gender. Old people are categorized as senile, rigid in thought and manner, old-fashioned in morality and skills...Ageism allows the younger generation to see older people in different from themselves, thus they subtly cease to identify with their elders as human beings" (Dr Robert Butler, 1975, p. 35).

[306] See studies from Seniorwatch projects (2002, 2007) – see www.seniorwatch.de [retrieved 5.1.2012]

[307] Research programmes at the EU level have raised the issue and are aiming at bridging technology and ageing, thus creating an e-inclusive society (for example "Assisted Ambient Living" (AAL).

not tested for old age specificites by the pharma before being sold, regulation on anticipated directives and informed consent with patients affected by irreversible dementia and Alzheimer disease, end-of-life and pain management, etc.

- In general, older persons are also more often excluded from 'normal' social activities. For example "*long life education":* the right to lifelong learning and studying at Universities or higher education until you are hundred years or more is a new paradigm and therefore is not automatically granted.

The reasons for those often involuntary discriminatory attitudes are due partly because policies and the social system is unprepared and has not yet adapted to the new phenomenon of a healthy and active population up to canonical ages. Another explanation to this situation is that the ancestral image of old age and aging as an irreversible decline still prevailing in all areas of life despite the fact that scientific findings of last century has demonstrate that the majority of people live a "successful aging' until their last year of life, pathological ageing being no longer recognized as a normative rule of old age. Therefore the stigma attributed to old age as a "destiny of deterioration" has also led to create the idea that the more you age the more you disappear, therefore becoming "the invisible old" excluded from policy-making and shaping social life. It is not rare to witness a pessimistic mindset among decision-makers such as "why invest in the old, there is no cash return!", or "older persons are going to die anyway..."! This engrained stigma can only be erased by addressing age discrimination with a solid human rights and ethical framework and promoting more evidence-based policies in favour of active and healthy ageing such as the EU year has launched in 2012. Only with such measures will we be able to ensure a society for all ages and offer the highest possible standard of life for all ages!

THE EUROPEAN UNION DIRECTIVE AGAINST AGE DISCRIMINATION AND EXCLUSION (2000)

Europe is the 'oldest continent' in the world with a high and growing percentage of older persons. Therefore, since the turn of the Century, the EU has taken this issue more seriously and has considered age discrimination as one of the roots of stigma, exclusion and inequalities. According to the European Commission (2000), '*Discrimination' is the application of different treatment in a negative and unfavourable way, on the basis of race or origin, ethnicity, religion or convictions, handicap, age or sexual orientation*". Since 2000, age discrimination is contrary to EU law, as stipulated by the Council Directive[308], which establishes a general framework for equal treatment in employment and occupation. To monitor progress, the *"Eurobarometer"* was put in place, a 'discrimination indicator' surveying perceptions and attitudes on discriminations in the EU. The 3rd Eurobarometer survey (2009), conducted with a sample of 26,756 people interviewed in 30 countries, confirmed the former surveys which revealed that age discrimination was the most experienced discrimination reported (among all other types listed in the definition) and that the rate was increasing at each surveys. Other surveys in the EU such as the European Social Survey are even more alarming (Stuckelberger, Abrams and Chastonay, 2012, Abrams et al., 2011).

At the European level, progress has been achieved. The European Union's Employment, Equality Regulations establish a general framework for equal treatment in employment and occupation covers

[308] http://ec.europa.eu/justice_home/fsj/rights/discrimination/printer/fsj_rights_discrim_en.htm

a number of grounds of discrimination including age. The EU's population is ageing and there is much evidence that age discrimination is widespread (Stuckelberger, Abrams and Chastonay, 2012). The Directive is a reaction to that and the consequent desire to encourage greater participation in the labour market by older workers.

The most recent reinforcement of fundamental rights and non-discrimination in the EU came with the proclamation of the Charter of Fundamental Rights of the European Union at the Nice European Council on 7 December 2000. Article 21 of the Charter *prohibits discrimination on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, **age** or sexual orientation and also discrimination on the grounds of nationality*[309].

It is interesting to note that the first area of application of the Charter successfully being implemented is in the area of work: the European Union's Employment and Equality Regulations have inspired many new laws on age discrimination in different countries (e.g. Ireland in 1998, Denmark in 2004, United Kingdom in 2006). Furthermore, several countries in the European Region have passed anti-discrimination acts and equal opportunity laws or have adapted their national constitutions or are in the process to do so (e.g. Cyprus, Germany, Denmark, Finland, Great Britain, Greece, Lithuania, the Netherlands and Sweden). Germany, Hungary and the Netherlands have dedicated anti-discrimination/equal treatment authorities and Cyprus and Austria have introduced an ombudsperson for equal treatment and prepares for the establishment of a monitoring and advisory office on age discrimination[310]. Despite the progress made, the results are still heterogeneous across countries and topic areas and need more efforts. Reports pointed out the difficulties in implementing a right-based policy approach. The lessons learnt from countries around the globe is: a) that legislation by itself is not enough to bring about changes in behaviour, as attitude change is crucial, b) that legislation can only help to change attitudes if it is combined with employer education and other policies to promote equal rights for older workers, and that finally c) doing away with ageist employment practices is a "long term process".

Despite the fact that the Directive has been implemented in various ways by Member States with mixed results, it remains a model in the world and the EU can be praised for setting a new standard for anti- age discrimination which the international framework could get inspired to consider.

Why is it that the rights of older people are not recognised?

The fact that age discrimination and exclusion have not been seriously addressed until the last decade can be explained by 2 symptomatic factors:

- the fact that ageing of the population went unseen for many decades and with the increasing longevity the old age/ post-retirement period revealed new issues of age as a discriminating factor.

[309] http://ec.europa.eu/justice_home/fsj/rights/discrimination/printer/fsj_rights_discrim_en.htm
[310] See UNECE country report at the UNECE ministerial conference on ageing (www.unece.org/pau/age/ConferenceonAgeing_2007)

- The fact that old age is associated with a series of prejudice on what is an older person and created a ‘social mindset of negative norms’ which today scientific findings are combating (see the table 4).

Therefore combating age discrimination and ageing is a challenge not only at the political and social level, but also at the individual level. Social policies addressing all forms of age discrimination is quite a recent trend at the European level, and still mere promises at the United Nations level.

TABLE 4: AGE DISCRIMINATION WITH SOCIAL AND POLICY IMPLICATIONS

AGE DISCRIMINATION AND PREJUDICE *- known as 'Ageism' -*	**SOCIAL AND POLICY IMPLICATION** **ENHANCING EXCLUSION AND DISCRIMINATION**	**SCIENTIFIC FINDINGS** **DISCARDING THE DISCRIMINATION**
Work and Employment		
"Older persons can't direct their lives, are not productive and are a burden to society"	<u>*Consequences*</u>: Age discrimination in the employment sector: unequal treatment and access to work, enforcement of people to early retirement, unemployment of the pre- or post-retired, age discrimination in employment selection, prejudice on performance with age, etc.	Today, the generations of retirees are healthy, active and creative; most of them can and want to participate in society, they have a role and responsibility in the way they use their full civil citizenship
Health and Health Care		
"To be old is to be sick, dependant and senile" *And/or* ***"Ageing is determined by the genes, there is nothing you can do…"***	<u>*Consequences*</u> Age discrimination in medicine and in health care. Assuming that it is normal to lose memory and be sick with age increases neglect in socio-medical interventions and health care, as well as mistreatment (under- or over medication) but also abuse in the most vulnerable older persons such as the mentally affected older persons or those suffering from irreversible loss of autonomy (e.g. Alzheimer).	The majority of older persons age in good mental and physical health. Statistics show that the majority of older persons, even at 80 years old, are independent and live at home. Twin studies have shown that with age the genetic factor weakens and life course experience modulates positively or not the health condition in old age.
Society: Long Life Learning and Adaptation to Innovation		
"The elderly can't learn anything…" *and/or* ***"They are unable to understand technology…because of their age, they will never be able to adapt and learn new skills…"***	<u>*Consequences*</u>: Age discrimination and exclusion from social and educational policies and activities (e.g. non access to higher education in old age). Unfriendly urbanization and environment creating an amplification of exclusion with new technologies not adapted to the ailments of age. Inaccessible information and participation to daily life (e.g. banking). The growing "technological way of life" generates e-exclusion for those affected by the digital divide, making them into "digital homeless". Older persons are the first victims of new high-tech tools and youth-oriented society.	At all ages, one can learn, develop and expand knowledge and skills. Concepts such as continuous education or Life Long Learning (LLL) are now well established; Universities of 3rd Age (and 4th Age) as well as "Senior web networks" have flourished around the world. The strongest demand from seniors for training is the use of internet and learning access and utilization to new technologies of information and communication (ICT)

Economy: Burden and Financial Contribution		
"No cash return when investing in the elderly..not worth the investment!" *and/or* ***"Older persons have survived a life, it is their problem if they have not spared for their old age: those who have and those who have not is the result of a lifetime, society should not pay for that."***	Due to the lack of specific safety nets, growing poverty in older persons, especially in older women is observed, The absence of social security, social protection and welfare measures increases the risk of isolation, poverty and insufficient health care of the elderly. Older persons seen only as a 'capital to invest or not on' increases inequality and poverty.' Consequence: financial abuse, distortion of inheritance rights, neglect in legal protection of assets and land rights (especially for the illiterate or for widows or in conflict zones)	The older persons do contribute to the economy of the nation and the family through informal work and volunteering, through financial transfers to younger generations but also as consumers. Less than a third of the countries of the world do have social security measures to protect the older persons from extreme poverty

Based on scientific findings of such as Baltes and Baltes (1998), Rowe and Khan (1998), Stuckelberger (2006, 2009).

3. STATE OF THE ART ON THE PLACE OF OLDER PERSONS AT THE UNITED NATIONS

Population ageing being a worldwide phenomena, it appears clearly that the United Nations has a key role in bringing together the knowledge and evidence, the policy coordination of ageing at the global level in the many different aspects of human development from birth to adulthood unto old age and death.

Structural Element: What exists currently at the UN on older persons?

To analyze what exists in the structures of the United Nations agencies and specialized programme, a simple count of the programmes, institutions, people and budget can be listed:

- **Specific institution or institutional structure:**
  None. To mention that during the UN World Assembly on Ageing in 2002 (WAA 2002), China made a request that a "UN AGE" be created in the same line as UNICEF for children and UN Women for women, which was never adopted.
- **Specific budget for fixed long term personnel working on ageing issues:**
  Two fixed official positions with a secretariat and mostly no budget:
  - UNDESA, New York: Rosemary Lane
  - WHO, Geneva : John Beard
- **Official focal points on ageing**
  None. For the WAA 2002, focal points were created such as in ILO but they were closed a few years later.
- **Ageing issues mentioned as a permanent programme or structure in other UN agencies**
  None. Some programmes or projects are created ad hoc or outsourced to an external institution just for a specific event such as UNECE is doing for the regional ministerial conference on ageing where governments will review the progress made to implement the Madrid International Plan of Action on Ageing adopted at the WAA 2002.
- **Official ad hoc documents and publications on ageing**
  - UN Population Division is providing regular data on the World Population with a huge amount of data in many other areas. The analysis of this data for the ageing population is done every 5 year or so.
  - UNFPA: regular reports on ageing or generations but at a very slow pace considering the emergency of the situation.
  - UNECE: regular analysis and reports on demographic ageing from the population division but at a slow pace. Reports and study every decade on intergenerational aspects, housing, etc with little impact
  - WHO: different documents on ageing issues linked to health promotion or long term care. In 2002, two reports were produced on violence against older persons point out to the special needs in prevention for the elderly as a vulnerable group exposed to isolation, frailty and diseases. However, the theme

of ageing is not mainstreamed in the WHO departments and some topics are poorly addressed such as mental health and ageing or specific functional impairment of old age.

- ILO: a few documents such as working papers on social security and employment of older workers
- UN-DESA :beside the coordination of the WAA 2002, coordination of information on an ad hoc basis for specific UN events addressing ageing such as the Commission on Social Development
- OHCHR: no specific item agenda on older persons, no focal point on ageing to this date, no 'rapporteur' on the violation of human rights of older persons. Progress has however been made since 2010. (see below)
- Other UN programmes or multilateral agencies: very few documents or papers on older persons with no impact on policy

- **Ethics and older persons at the UN or in International Research**
  - UNESCO: the International Ethical Guidelines for Biomedical Research Involving Human Subjects does not make any mention of older persons in the texts or as a chapter
    - WHO: the Ethics Review Committee (ERC[311]) has developped guidelines for ethical review with little consideration of age-specific ethical issues. The basic framework of the CIOMS Council for International Organizations of Medical Sciences has also discarded the old age group in the text and would need to mainstream the specific condition of old age and its specific and complex ethical consideration.

In conclusion, despite all the demographic, social and economic evidence of increasing challenges of population ageing worldwide, the United Nations has not yet invested a decent budget and structure for addressing the issue of older persons and population ageing in all its aspects.

Operational Element: old age human rights of old age mentioned in the UN Agenda?

It is quite obvious from a glance at the United Nations structure that a very weak structure to address ageing or the human rights of older persons. However a few operational elements are raising hope that progress is on the way.

To analyze what exists in the structures of the United Nations agencies and specialized programme, a simple count of the programmes, institutions, people and budget can be listed:

- **Ageing in the UN Development Agenda**
  - Older persons not on the UN agenda of most agencies
  - No mention in the Millennium Development Goals on age or ageing
  - No specific item on the Human Right Council

[311] http://www.who.int/rpc/research_ethics/erc/en/index.html

- No life long perspective on many topics : work (ILO), UNESCO, education (UNESCO), development (UNDP), etc
- No ethics specific to old age in the development agenda (corporate responsibility, fair business, distributive justice)
- No systematic age specific consideration in agenda, reports, conferences e.g. the older poor, inheritance, end-of-life issues, dying with dignity, older refugees, older migrants and older displaced persons, older victims of conflict situations, older prisoners, etc.

- **Working groups or inter-agency committee working on ageing**
  Until 2011, the ***UNECE working group on ageing*** was the only official ongoing group meeting annually since 3 years. Member countries of the United Nations Economic Commission for Europe (UNECE) gave new momentum to the implementation of the Madrid International Plan of Action on Ageing and its Regional Implementation Strategy by joining forces in the Working Group on Ageing.

  However, ***a new open-ended working group on the Right of Older Persons*** was adopted on 16 November 2010 by the UN Third Committee of the General Assembly with a resolution on ageing (A/C.3/65/L.8/Rev.1) in which the General Assembly decided "*to establish an open-ended working group, open to all States Members of the United Nations, for the purpose of strengthening the protection of the human rights of older persons by considering the existing international framework of the human rights of older persons and identifying possible gaps and how best to address them, including by considering, as appropriate, the feasibility of further instruments and measures*".

It appears that the operational elements in place to address ageing at the United Nations are also quite weak. The fact is that today, it is the Office of the High Commissioner for Human Rights which has demonstrated the most progress by taking new initiatives and adopting a General comment on older women in the Convention on the elimination of Discrimination against Women. The process is today the strongest element of change, and this process is pointing toward a reinforcement of the old age issues. Let us take a look at some of those fundamental steps where older persons human rights are mentioned.

4. STATE OF THE ART ON THE HUMAN RIGHTS OF OLDER PERSONS AT THE UNITED NATIONS

Although some countries in the world have enacted partial legislations, the human rights and ethical framework to eliminate discrimination, exclusion, abuse or unequal treatment due to age has until now only barely been addressed at the United Nations and at the European level (Stuckelberger, 1999, 2006).

In addition to the need to develop a general framework for the human rights of older persons, the *specific situations* or vulnerable groups of older persons need attention, such as: the rights of older persons with mental and physical diseases, dependant or dying elderly, but also older working poor, older migrants, older refugees or displaced persons, older victims of conflict, war or disasters, older prisoners, older tortured and abused persons, etc., without forgetting other key issues such as *gender equality in old age, access to health care, right to dignity, respect of the cultural and spiritual needs until the end of life* (United Nations, 2006, 2008)

However the fact that some countries have established a social security system for retirement and health care management must be recognized, even though as stated in the first part only 1 out 4 person in the world benefits of a full social security coverage. However, this entitlement to social security in a form or another does not preclude the prohibition of age discrimination in the employment sector or equal access and treatment for women or the most vulnerable. Beside the current trend towards the elimination of compulsory retirement and promotion of partial work after the retirement age, as set by the European directives, it is evident that a human rights framework to eliminate discrimination, exclusion and economic abuse or unequal treatment due to age has not yet been systematically integrated into policies.

What is missing is that older persons have Human Rights and access to those rights. What is lacking is the recognition that older person have specific physical, mental and socio-economic needs due to old age., while they need to be empowered to carry out their important role and contribution to socio-economic cohesion and a peaceful society.

It is only relatively recently that the human rights of older persons have been addressed at the international level (see table 5). With the Universal Declaration of Human Rights[312], and the numerous International Instruments[313] there are many references to the Rights of all with no specific mention of older persons. But not until the Declaration on Social Progress and Development in 1969 is there any specific mention of old age *(Article 11).* It then took until 1982 for the UN to adopt the *1st International Plan of Action on Ageing in Vienna,* and until 1991 for the General Assembly to promulgate the *UN Principles for Older Persons (Resolution 46/91)*[314] which reaffirms fundamental human rights, the dignity and worth of the human being and the need for equality in 5 areas: *independence, participation, care, self-fulfilment and dignity*.

[312] It is interesting to note that the Universal Declaration of Human Rights does not make any mention of age which could be attributed to the fact that when signed in 1948, population ageing was not identified as an issue.
[313] including the Covenants on Economic Social and Cultural Rights, on Civil and Political Rights as well as the Convention on All Forms of Discrimination against Women (CEDAW/General Assembly resolution 34/180, 18 December 1979).
[314] with 4 main themes: independence, participation, care, self-fulfillment and dignity.

The most important elements of the international legal standards[315] so far came in *1995* when the Committee of the *International Covenant on Economic, Social and Cultural Rights* finally adopted for the first time the *General Comment no 6 on the Economic, Social and Cultural Rights of Older Persons* (Doc E/1996/22, Annex IV). This Comment stressed that States needed to adapt their social and economic policies to respond to the needs of ageing populations and should give more consideration to older persons in their human rights monitoring and reporting. The general comment also sheds light on the relationship between the provisions of the International Covenant on Economic, Social and Cultural Rights, the Vienna International Plan of Action and the United Nations Principles for Older Persons, clearly indicating that both binding and non-binding commitments are linked. Furthermore, it is the only United Nations document focusing on the full range of human rights of older persons which was adopted by the United Nations Treaty Body. Nevertheless, "General comments" in ILO and in CEDAW are considered as a 'soft law' in their legal nature, which is not as binding as the articles of the international treaties for the states which ratified the Covenant. In addition, although the issue of the right of older people may be related to the mandate of this Treaty Body within the economic, social and cultural, the committee, which monitors the implementation of the Covenant on Economic, Social and Cultural Rights, is not mandated to focus on this issue since there is no particular provision of the Covenant states such a right. The latest step in 2009 was made by integrating a General Recommendation in the Convention on the Elimination of all Forms of Discrimination against Women (CEDAW[316]).

TABLE 5: INVENTORY OF BINDING AND NON-BINDING LEGAL TEXTS AT THE UNITED NATIONS INCLUDING AGE OR OLD AGE

1948: Universal Declaration of Human Rights

Art. 2 no mention "[… without any distinction of any kind, such as race, colour, sex, [..] or other status.

Art. 22 Everyone, as a member of society, has the right to social security and is entitled to realization, through national effort and international co-operation and in accordance with the organization and resources of each State, of the economic, social and cultural rights indispensable for his dignity and the free development of his personality.

Art 25. mention of social security: *[…] right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control.*

OHCHR: Office of High Commissioner for Human Rights

Treaties contain specific references to old age, although not always explicit:

1990 International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families [resolution 45/158 of 18 December 1990] specifically identifies age as a prohibited ground for discrimination

[315] International legal standards as the General Comment(s) are interpretation of the provisions of the covenants by the internationally recognised independent expert members of the Committees.

[316] http://www.un.org/womenwatch/daw/cedaw/

Art. 1 *The present Convention is applicable, except as otherwise provided hereafter, to all migrant workers and members of their families without distinction of any kind such as sex, race, colour, language, religion or conviction, political or other opinion, national, ethnic or social origin, nationality,* ***age****, economic position, property, marital status, birth or other status.*

OHCHR

Committee on Economic, Social and Cultural Rights

1995 General Comment no. 6:*The economic, social and cultural rights of older persons*

2008 General comment 19: *The right to social security*

2009 General comment 20: *Non-Discrimination in Economic, Social and Cultural Rights* (art. 2, para. 2)
Specific provisions of the Covenant such as : Article 3 Equal rights of men and women, Article 8 Rights relating to work, Article 9: Rights to social security

Convention on the Elimination of all Forms of Discrimination against Women (CEDAW, 1979)

1979 *Article 11:* stipulates "the right to social security, particularly in cases of retirement, unemployment, sickness, invalidity and old age and other incapacity to work". It is also understood that the prohibition of discrimination included in major human rights treaties is understood as non-exhaustive; therefore, *even if age is not mentioned specifically as a prohibitive ground for discrimination, it should still be accepted under "other status".*

2009 General Comment 27: *Older women and protection of their human rights.* The by the United Nations, for the first time adopted a text mentioning older women [CEDAW/C/2010/47/GC.1]

ILO - International Labour Organization (ILO)

Main standards are established at the General Conference of ILO by Conventions[317] and Recommendations[318]:

1952 *Convention no. 102*[319] *Social Security (Minimum Standards)*
establishes worldwide-agreed minimum standards for all nine branches of social security, which are:
medical care, sickness benefit, unemployment benefit, old-age benefit, employment injury benefit, family benefit, maternity benefit, invalidity benefit and survivors' benefit

[317] Once a Convention is ratified, member States are required to file a report (Article 22 report) to the Committee of Experts on the Application of International Standards as to what the country has done in policy and/or law to meet the criteria outlined in the Convention. In recent years, the Committee has welcomed reports that included discussion of efforts to address age discrimination by member States in their national contexts, though they do not specifically obligate countries to take action if they have not done so already. (Ghosheh, ILO, 2008)

[318] ILO Recommendations, unlike ILO Conventions, do not need to be ratified by member States, nor do they create legally binding obligations. What they do provide are detailed policy recommendations that can be used in the development of national policies and legislation. For example, ILO Recommendation No. 162 leaves ILO member States free to address how member states define "older workers" and it stipulates that employment problems of older workers should be managed so that it does not shift the problem from one generation to another group in society. (Ghosheh, ILO, 2008)

[319] http://www.ilo.org/public/english/protection/secsoc/areas/legal/conv102.htm [retrieved 9.1.2012]

	Convention no. 102 is considered as a tool for the extension of social security coverage and provides ratifying countries with an incentive for doing so by offering flexibility in its application, depending on their socio-economic level.
1967	*Convention no. 128*[320], [321] *Invalidity, Old-Age and Survivors' Benefits*
1980	*Recommendation no. 162* *Older Workers*

Despite the fact that documents concerning the protection of older persons exist, only the Conventions are binding. Until this date, no specific measures to protect the specific human rights of older persons or fight age discrimination except for the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families.

The right to social security is probably the most firmly grounded in international human rights law and several treaties contain specific references to old age protection through social security scheme:

- articles 22 and 25 of the Universal Declaration of Human Rights
- articles 9, 10 and 11 of the International Covenant on Economic, Social and Cultural Rights
- article 5 (e) (iv) of the International Convention on the Elimination of Racial Discrimination
- article 11 of the Convention on the Elimination of Discrimination against Women
- article 26 of the Convention on the Rights of the Child
- article 27 of the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families
- article 28 of The Convention on the Rights of Persons with Disabilities mentions the right to social protection.

At the regional level, there are several provisions ***recognizing the specific vulnerability of older persons*** that call on States to implement specific measures to protect the elderly. They also emphasize the right to social security, such as

- *The Revised European Social Charter*[322] recognizes "the right of elderly persons to social protection" (art. 23). It calls on States to adopt or encourage appropriate measures to: (1) "enable elderly persons to remain full members of society for as long as possible"; (2) "enable elderly persons to choose their lifestyle freely and to lead independent lives in their familiar surroundings for as long as they wish and are able"; and (3) "guarantee elderly persons living in institutions appropriate support, while respecting their privacy, and participation in decisions concerning living conditions in the institutions".
- *The Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Right*[323]*s* recognizes that "everyone has the right to

[320] http://www.ilo.org/ilolex/cgi-lex/convde.pl?C128 [retrieved 9.1.2012]
[321] Convention no 128 is a revision of the Convention 37 adopted in 1933 on *(Shelved) Invalidity Insurance (Industry, etc.)* http://www.ilo.org/ilolex/cgi-lex/convde.pl?C037 [retrieved 9.1.2012]
[322] Council of Europe Treaty adopted 18 October 1961 and revised 3 May 1996 – see http://conventions.coe.int/Treaty/en/Treaties/html/163.htm
[323] Adopted 17 November 1988, entered into force 16 November 1999 – see http://www.oas.org/juridico/english/treaties/a-52.html and http://www.oas.org/juridico/english/sigs/a-52.html

special protection in old age" (art. 17). It also called for States to take the necessary steps "to make this right a reality", particularly by providing food and adequate medical services; undertaking work programmes specifically designed for the elderly and establishing social organizations designed to improve the quality of life for the elderly.

- *The African Charter on Human and Peoples' Rights*[324] which stipulates that "the aged and the disabled shall also have the right to special measures of protection in keeping with their physical or moral needs" (art. 18). The Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (Maputo Protocol) recognizes the particular vulnerability of older women and requests States to take a number of measures "commensurate with their physical, economic and social needs as well as their access to employment and professional training" and "ensure the right of elderly women to freedom from violence, including sexual abuse" (art. 22).

However, the implementation process of those Conventions, Recommendations and provisions is not fully in action nor realized and much remains to be done to protect and affirm the rights of the older persons. As the World Social Security Report 2010/11 pointed out: "Worldwide, nearly 40% of the population of working age is legally covered by contributory old age pension schemes. In North America and Europe this number is nearly twice as high, while in Africa less than one-third of the working-age population is covered even by legislation." (p.46). While numbers are growing into visibility, no staff or unit specifically dedicated to older worker in ILO. A person was appointed as "Focal point on ageing" at the time of the UN World Assembly on Ageing in 2002, but the post was removed soon after which contradicts the growing concern on this matter!

5. XXIST CENTURY: WORK IN PROGRESS…..

ADVANCEMENT OF HUMAN RIGHTS OF OLDER PERSONS

The scientific community and the NGO committee on aging at the United Nations in Geneva[325], have taken actions in the past years which yield important consequences. Results have emerged: in 2010, CEDAW[326] adopted a general recommendation on older women, in 2011: the Human Rights Council requested 2 reports (social security and extreme poverty in old age), adopted the creation of an open-ended working group on the rights of older women, and asked that the rapporteur of health reviews the situation of older person, a report that concludes "Age is not good for your rights".

[324] adopted 27 June 1981, entered into force 21 October 1986 – see http://www.hrcr.org/docs/Banjul/afrhr.html

[325] See documents and statements of the NGO Committee on Ageing at the United Nations in Geneva https://sites.google.com/site/unngocommiteeonaginggeneva/ and the Geneva International Network on Ageing (GINA) http://sites.google.com/site/ginagenevaintlnetworkonaging/

[326] CEDAW: The United Nations Committee on the Elimination of Discrimination against Women, an expert body established in 1982, is composed of 23 experts on women's issues from around the world. http://www.un.org/womenwatch/daw/cedaw/committee.htm

Following the mobilisation of NGOs, the only concrete actions taken so far concerning the rights of older persons at the United Nations have been the general recommendation of CEDAW (below) and the report of the special rapporteur on extreme poverty. NGOs, both of the academic, advocacy and senior groups have a key role to play, they give a constant reality-check to both and they are often a bridge between NGOs and Policy-makers

Many efforts and lobbying of NGOs, especially in Geneva, have contributed to advance the cause of the Rights of Older Persons. It started with the Intl Year of Older Persons in 1999 (a brochure produced on the Right of Older Persons), followed up by a panel report on Long Life Human Rights, then our official statement to the Human Rights Council in 2006 (Human Right of Older Persons) and in 2009 (Human Right and Protection of Older Women) then the commitment of all NGOs in Geneva, Vienna and New York. It really is the proof that dedication of NGOs to ageing can show convincing results, to mention 4 crucial advances this year and especially those last months:

To mention major steps in bringing visibility of older persons in the United Nations, and more specifically in the human rights and ethics framework, some of the past and current process must be reminded[327], [328],:

1991 ***United Nations Principles for Older Persons*** adopted the process by the General Assembly resolution 46/91[329]

1999 **Adoption of the Conceptual Framework during the International Year of Older Persons**,*(Doc A/50/114)*[330], Special calls made to ask for a UN Convention on the Rights of Older Persons by the NGOs at the United Nations in Geneva and production of a booklet assembling the OHCHR texts of the Economic, Social and Cultural Rights General Comments concerning older persons.

2002 **Adoption by the 2nd World Assembly on Ageing in Madrid (WAA) of a *Political Declaration* and *the Madrid International Plan of Action on Ageing (MIPAA)*** with a section on human rights – strong call from the NGO Forum Declaration for the human rights of older persons.

2006 ***1st Official UN written Statement on the Rights of Older Persons***[331] [E/CN. 4 2006/NGO/93] in English and French submitted by the NGO Committee on ageing in Geneva to the 22nd session of the UN Commission on Human Rights, item 14(d)

[327] For different documents see https://sites.google.com/site/unngocommiteeonageinggeneva/ngo-statements-on-ageing
[328] For viewing or downloading several documents listed see http://sites.google.com/site/ginagenevaintlnetworkonageing/publications/human-rights-older-persons
[329] http://www2.ohchr.org/english/law/olderpersons.htm [retrieved 9.1.2012]
[330] This document is based on the Plan and Principles and include 4 priority area (a) The situation of older persons, (b) individual lifelong development, (c) the relationship between generations, (d) the interrelationship of population, ageing and development.
[331] http://www.un.org/ageing/documents/StatementAgeingHRC06b.pdf

"*specific groups and individuals: other vulnerable groups and individuals*"), signed by 24 non-governmental organisations demanding a Rapporteur on human rights violation with older persons and the rights for older persons and the creation of a specific item on older persons rights.

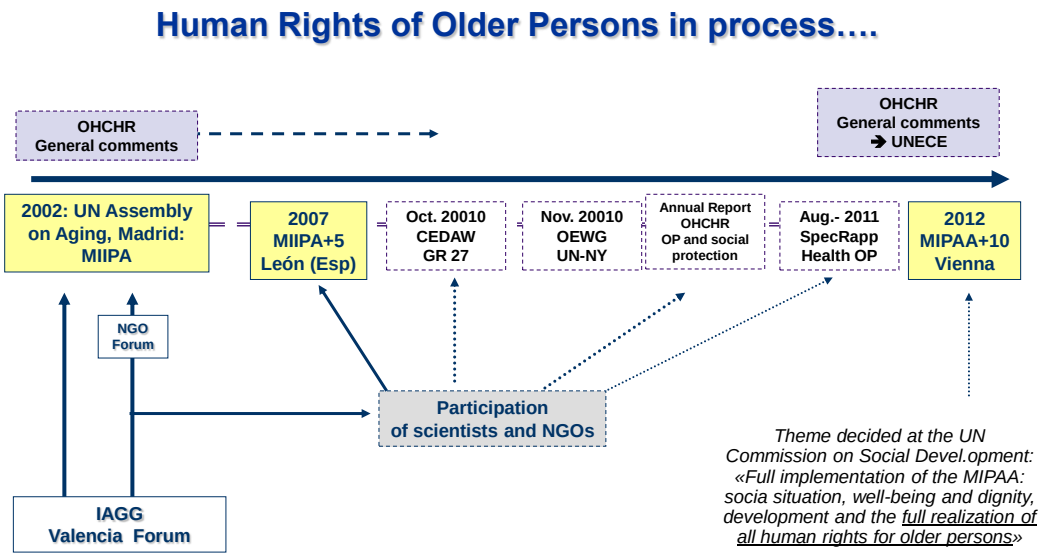
2007 ***Scientific Forum Declaration of the UNECE Ministerial Conference on Ageing in Leon***[332] (MIPAA+5) urged Member States to establish a stronger framework for the rights of older persons as well as intergenerational rights by (i) appointing a Rapporteur at the Human Right Council on the neglect, abuse and ill treatment of older persons and (ii) establishing a working group within the Human Rights Council, to draft a Convention on the Rights of Older Persons and mainstream age in the agenda of the Council (iii) systematically including older persons in all international and European ethical guidelines (see UNECE report - Stuckelberger and Vikat, 2008).

2009 ***2nd official UN written statement on the Protection of Older Women's Rights*** [A/HRC/10/NGO 95] submitted in French, English and Spanish by the NGO Committee on ageing in Geneva by the NGO Committee on ageing in Geneva to the 12th session of the UN Human Rights Council - Agenda item 3 *"Promotion and protection of all human rights, civil, political, economic, social and cultural rights, including the right to development",* signed by of 34 NGOs in Consultative Status with ECOSOC, requested the Human Rights Council to urge Member States to (i) support the CEDAW Working Group drafting a General Recommendation on the Human Rights of Older Women, (ii) to work on Convention on the Human Rights of Older Persons, (iii) to designate a Special Rapporteur on the Specific Situation of Older Women (Iv) to mainstream older women's right in all the items of the work programme, (v) to require systematically disaggregated UN data by gender and age; (vi) to revise the International Ethical Guidelines to include old men and women, (vii) to establish an international surveillance and protection mechanism to monitor the financial abuse of older women and the protection of their human rights, especially in war and conflicts, as well as refugee and humanitarian situations. Such a mechanism would require the development and application of specific international legislations monitored by the International Court of Justice in the Hague.

2010 ***CEDAW***, the Convention on the Elimination of All Forms of Discrimination against Women adopts the General Recommendation No. 27 on older women and protection of their human rights[333].

[332] UNECE document
http://www.unece.org/fileadmin/DAM/pau/_docs/age/2007/AGE_2007_MiCA07_DeclrResearFor.pdf
full document UNECE Ministerial Conference on ageng in Leon 2007 available at
https://docs.google.com/viewer?a=v&pid=sites&srcid=ZGVmYXVsdGRvbWFpbnxnaW5hZ2VuZXZhaW50bG5ldHdvcmtvbmFnZWluZ3xneDo0NzA4YzE3YzU4ZmMwNjJi

[333] Available online: http://www2.ohchr.org/english/bodies/cedaw/docs/CEDAW-C-2010-47-GC1.pdf



A few small steps:

2010

- ***Working paper supporting the human rights of older persons***[334] by Ms. Chinsung Chung, member of the Human Rights Council Advisory Committee on « The necessity of a human rights approach and effective United Nations mechanism for the human rights of the older person."
- ***Resolution to create and open-ended working group*** (A/C.3/65/L.8/Rev.1): the UN Third Committee of the General Assembly adopted a landmark resolution on ageing deciding "to establish an open-ended working group, open to all States Members of the United Nations - Resolution A/RES/65/182 which met twice in 2011.
- ***Annual Report of OHCHR on Older persons and social protection***[335] - Magdalena Sepúlveda Carmona Independent Expert on human rights and extreme poverty. The report addresses the role that social protection systems play in reducing extreme poverty and contributing to the realization of human rights of older persons. In particular, the report focuses on the relevance of social pensions. In this report, the independent expert calls on States to recognize that social pensions are critical elements for the progressive realization of the right to social security for older persons. The report also provides recommendations on how to ensure that non-contributory pensions comply with core human rights standards. Finally, it addresses the role of international assistance and cooperation in the field of social security.

[334] http://www2.ohchr.org/english/bodies/hrcouncil/advisorycommittee/session4/documentation.htm
[335] Available online: http://www.ohchr.org/EN/Issues/Poverty/Pages/OlderPersons.aspx

2011

- UN New York: Open-ended working group conducted 2 meetings April and August 2011
- OHCHR: Special Rapporteur on the Right to Health with a specific focus on older persons by Anand Grover. This report was presented as making the case that "Age is bad for your rights"

To stop the cycle of poverty, violence, abuse, and most UN agenda issues, development cannot make the economy of forgetting the older population or it is bound to fail. Fail because addressing only part of the population and forgetting 15% to 20% of 2020 world population will just create an economic time bomb for society and sustained development. In this perspective, 2012 is an important year which will not only be the review of the UN Plan of Action on Ageing 10 years after it was adopted through regional conference. In Europe, UNECE organised the Regional Ministerial Conference on Ageing for the appraisal of the Madrid International Plan of Action+10 (MIPAA+10). 2012 marks also the European Year on Active Ageing and Solidarity between Generations, an important theme for the older continent of the world.

6. CONCLUSION AND RECOMMENDATIONS

Global Policy and older persons: The need for age-specific human rights and ethics

Policy analysis of international instruments and structures show that older persons are still very rarely mentioned in the United Nations system and its agenda. Therefore it is only an understatement to say that older persons are excluded from the United Nations daily work and budget! The international system needs to embed and mainstream aging and a 'multi-older-generational' perspective in all international agencies and programmes (e.g. migrants, refugees, displaced persons, women, emergency operations, food programme, technology, etc).

At the global level, despite increasing evidence of the specific needs of older persons, the analysis of policy and data shows the absence of a specific framework for older persons human rights, in particular:
a) lack of age-specific binding international human rights instruments
b) lack of bioethics and ethical guidelines concerning old age.

Achievements in exercising rights of older persons and combating discrimination are slight and a lot remains to be done. No age-specific comprehensive international convention yet exists in relation to the rights of older persons and no binding supervisory arrangements are attached to the various sets of United Nations principles in this area. It is only through the determination of a strong network and community commitment that we can advocate to improve the situation, but we must not forget that rights alone are not enough, and that

mechanisms to monitor and protect those rights are as important and should be incorporated from the start in future international and national legislations and policies, but also in be part of a human rights education system.

In the area of research ethics framework, the situation is not better: despite international consensus on ethical guidelines or standards, none of the basic international documents mention the specific conditions of old age (e.g. CIOMS biomedical ethical guideline, UNESCO bioethics documents).

Facing the demographic and economic trend in Europe and in the world, one can only acknowledge from the above that the challenge ahead is huge.

Many recommendations could be made at the theoretical, practical and political level

Theoretical: First that science advocates the new science of ageing and hope to age well and better for the next generations with as few pathologies as possible. Older person's Right to Health should be modelled based on scientific and medical evidence and this evidence should always appear disaggregated in different age groups and gender to avoid generalizing the 60 and over a one homogenous 'chunk' of society when it is exactly the opposite, with age people become more and more differentiated.

Practical; more needs to be done to train and empower individuals and institutions to realize the Rights of older persons and take a life long perspective on their activities. Families0 & communities should also be trained and empowered to get rid of their prejudice and avoid neglect and prejudice against old age and their own ageing

Political : putting old age and older women on the agenda should be a must as well as allocating new structures and a decent budget to permanent staff and programme to work on the many issues of ageing. Expert networks and constant monitoring of evidence-based and ethical perspective should also be implemented

Recommendation

As demonstrated, permanent structures on older persons are just about nonexistent in the UN system. What is needed is to systematically mainstream ageing and creating permanent funded structures and programmes and even a "UN AGE" as requested by China in 2002 World Assembly on Ageing, which would address the specific issues of older men and women. For example :

	Topic or Department
OHCHR	Rights of older persons, Rapporteur on the elder abuse and age discrimination
ILO	Older worker Unit, Report on gaps in Social security

UN Women	Older women & grand-motherhood, Beijing +15 Platform of Action to add older women
UNESCO	Ethical framework for older persons, Transgenerational culture
UNHCR	Older refugee and displace person
OCHA	Humanitarian aid, emergency of the aged
IOM	Older migrants rights
UNAIDS	Older persons and AIDS prevention and specific care
ITU	Information, technology and communication for the elderly
World Bank	poverty in older persons

At the European level, a few recommendations could be made such as creating a European Observatory on Ageing, revisiting all official texts for correcting age-discrimination and age exclusion, reassessing Ethical protocols (research, clinic, industry-pharma), identifying the gaps in specific older persons' human rights (e.g. intergenerational rights, anticipated care, social justice in financing, fair innings), setting mechanisms to prevent and combat age discrimination, neglect and abuse in health care, finance, inheritance and property (especially widows)

Integrating ageing populations in policymaking is not just a question of financing welfare policies. It requires a change of vision of the relations between generations and the roles of different age groups. States should not rely on the traditional vision that families will take care of older persons that have become dependent, especially as traditional family care structures are under increased pressure as a result of, inter alia, migration and urbanization. States have a duty towards older persons that must not be reduced to a question of affordability, but to a question of realizing their human rights and protecting them from age discrimination, neglect and abuse.

The imperative of developing instruments and policies on human rights and ethics for older persons should be a priority. Not only does it ensure socio-economic cohesion but it is a guarantee of a peaceful society based on inclusion and equal rights for all ages. The grandeur of a civilization is often viewed in the way it treats its elderly. With ever more people living longer, the protection and promotion of older persons' rights and security is a matter not only of public policy but of basic human rights and dignity of a civilization. A long life society requires long life human rights which will maximize the quality of life of each and everyone to the very end of their lives.

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Strengthening the European standards for the Protection of the Human Rights and the Dignity of the Elderly

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Introduction

The elderly should have a decent and independent life and remain full members of society for as long as possible.

This principle, paraphrased from Article 23 of the European Social Charter, is the essence of all protective measures called for by the Council of Europe and the objective that any new initiative to strengthen the protection of human rights of the elderly in Europe should aim at.

Europe is at a cross road. We already have heard from my fore speakers how Europe's demography is changing and that the protection of the elderly requires our focus. I believe that the Council of Europe can provide an important contribution in securing, through its standard-setting work, the well-being of all generations in an ageing society.

I will explain this in more detail in the last part of my presentation, after having highlighted to what extent the elderly already receive protection through human rights law in Europe and how the Council of Europe, in particular, has so far contributed to this protection.

1. The Elderly have Human Rights!

The human rights of the elderly is a topic which has been neglected for a long time. It is only recently that it gains international attention.[336] Previously, the debate on protection of the elderly was framed solely in medical, political, economic or other terms. We have perhaps overlooked the human rights perspective.

This is changing, but this somewhat new concept of human rights of the elderly is still hard to grasp for several reasons.

Firstly, it is problematic that no commonly agreed definition of the "elderly" exists. In a Recommendation of 1994, the Committee of Ministers even stated that it is "useless to attempt to define [when] exactly […] old age begins". I believe the Committee is correct in asserting that "ageing is a process: being old depends on the individual's circumstances and the environment"[337].

Secondly, the concept of the rights of the elderly is multifaceted and includes protective, participatory and informative rights alike. It relates to questions as diverse as social protection, social inclusion, health care, education, participation in political, public and cultural life, information and communication, rehabilitation, accessibility to buildings and transportation, the raising of awareness about the elderly's situation among the general public, the protection against violence and abuse, research and development on their situation and age-based discrimination.

However, despite the absence of an international or European comprehensive convention, the elderly are already protected through numerous human rights provisions.

It is true that few international legal instruments include the elderly explicitly. At the European level, Article 23 of the revised European Social Charter of 1996 was one of the first binding provisions.[338]

Nevertheless, the rights of the elderly are secured through many general human rights clauses. Rights like the right to life, the prohibition of torture and inhuman and degrading treatment, the right to health care or the right to family apply equally to the elderly. The principle of non-discrimination on grounds of age is also, as we heard, generally recognised.

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[336] Megret Frederic (2011): The Human Rights of Older Persons – A Growing Challenge, in: Human Rights Law Review Vol. 11 Issue 1, pp. 37-39, online at: http://hrlr.oxfordjournals.org/content/11/1/37.full.pdf+html

[337] Recommendation R(94)9: Concerning Elderly People

[338] Another notable expectation is Article 18(4) of the African Charter on Human and Peoples' Rights. "The aged and the disabled shall also have the right to special measures of protection in keeping with their physical or moral needs". (adopted 1981, entered into force1986, judicable since 2004 – creation of the African Court on Human and Peoples' Rights)

In addition, the elderly receive a great deal of protection indirectly through their inclusion in other vulnerable groups. In fact, the elderly share many traits with those groups who are protected explicitly like the disabled, the dependent, the survivors (widows), the sick or the poor. The Council of Europe, for instance, has focused on the development of rules safeguarding disabled people. The elderly benefit from this work.

2. Existing Council of Europe Protection Measures

I want to focus now on how the Council of Europe has supported the human rights of the elderly in the past, through several legally-binding and non-binding instruments that directly or indirectly protect the elderly.

I will focus on the European Convention on Human Rights[339], the European Social Charter[340] as well as Recommendations and Resolutions of the Committee of Ministers and the Parliamentary Assembly. But I would also briefly refer to other, less well known instruments, such as the European Code[341] and the European Convention of Social Security[342].

European Convention on Human Rights

The European Convention on Human Rights contains no explicit provisions on the elderly. Nevertheless, the European Court of Human Rights has taken into account the particular conditions of the elderly when applying the Convention and thus is tailoring some rights to their needs.

The Court has considered the specific conditions and age of the elderly to be relevant in the interpretation and application of multiple articles: 2 (the right to life),[343] 3 (prohibition of torture and inhuman and degrading treatment),[344] 5 (right to liberty and security),[345] 6 (right to fair trial),[346] 8 (right to respect for private and family life),[347] 10 (freedom of expression),[348]

[339] Convention for the Protection of Human Rights and Fundamental Freedoms as amended by Protocols No. 11 and No. 14, 4 November 1950, CETS No. 194

[340] European Social Charter, 4 November 1950, CETS No. 035; European Social Charter (revised), 3 May 1996, CETS No. 163

[341] European Code of Social Security, 16 April 1964, CETS 048; European Code of Social Security (revised), 6 November 1990, CETS 139 (not in force)

[342] European Convention of Social Security, 14 December 1972, CET No. 078

[343] Dodov v Bulgaria, Application no. 59548/00, judgment of 17 January 2008

[344] Mouisel v France, Application no. 67263/01, judgment of 14 November 2002; Sawoniuk v the United Kingdom, Application no. 63716/00, decision on admissibility of 29 May 2001

[345] Haidn v. Germany, Application no. 6587/04, judgment of 13 January 2011, Shtukaturov v. Russia, Application no. 44009/05, judgment of 27 March 2008; M. v Switzerland, Application no. 39187/98, judgment of 26 February 2004

[346] Enea v. Italy (GC), Application no. 42184/05, judgment of 17 September 2009; Shtukaturov v. Russia, Application no. 44009/05, judgment of 27 March 2008; Jablonská v. Poland, Application no. 60225/00, judgment of 9 March 2004; Price v The United Kingdom, Application no. 33394/96, judgment of 10 July 2001, Dewicka v. Poland, Application no.38670, judgment of 4 April 2000; Suessmann v. Germany, Application Number 20024/92, judgment of 16 September 1998

14 (prohibition of discrimination),[349] 41 (just satisfaction),[350] and Article 1 of Protocol 1 (protection of property, with regard to pension rights).[351] Moreover, age would probably be included in the notion of "other status" under Article 1 of Protocol 12.

The Court's case-law with relevance to the elderly covers diverse topics. I will give some examples, starting from a very recent judgment in which the Court recognized the elderly as a group that is especially vulnerable and deserving of special protection. In *Heinisch v. Germany* - a case which concerned a whistle blower in a home for elderly patients who needed specials assistance – the Court stated:

> *In societies with an ever growing part of their elderly population being subject to institutional care, and taking into account the particular vulnerability of the patients concerned, who often may not be in a position to draw attention to shortcomings in the care rendered on their own initiative, the dissemination of information about the quality or deficiencies of such care is of vital importance with a view to preventing abuse.*[352]

The Court was already called upon, for instance in *Dodov v. Bulgaria*, to assess the quality and use of institutional care for the elderly. The Court found a violation in this case, which concerned the disappearance of an aged person from a nursing home, because the State violated its positive obligation to make available judicial remedies capable of establishing the facts and holding accountable those responsible for imperilling the life of the disappeared. States need to regulate the activities of public health institutions.

As regards detention issues, the Court found that there is no prohibition in the Convention against the detention in prison of persons who attain an advanced age including those who are are ill provided that appropriate medial care is provided. Nevertheless, a failure to provide the necessary medical care to prisoners, or detention in conditions inappropriate to a person state of health (elderly and disabled), may constitute inhuman treatment violating Article 3. It also found that there is an obligation on States to adopt measures to safeguard the well being of persons deprived of their liberty.

In the *Price v. the United Kingdom* the Court found thus a violation of Article 3 because the detention conditions were inappropriate for a disabled person. The applicant, who was a four-

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[347] Georgel and Georgeta Stoicescu v. Romania, Application no. 9718/03, judgment of 26 July 2011;Enea v. Italy (GC), Application no. 42184/05, judgment of 17 September 2009; Shtukaturov v. Russia, Application no. 44009/05, judgment of 27 March 2008, Botta v Italy, Application no. 153/1996/772/973, judgment 24 February 1998

[348] Heinisch v. Germany, Application no. 28274/08, judgment of 21 July 2011

[349] Stummer v. Austria (GC), Application no. 37452/02, judgment of 7 July 2011; Carson and others v. the United Kingdomn (GC), Application no. 42184/05, judgment of 16 March 2010

[350] Georgel and Georgeta Stoicescu v. Romania, Application no. 9718/03, judgment of 26 July 2011; Shokkarov and Others v. Russia, Application Number 41009/04, judgment of 3 May 2011, Imakayeva v. Russia, Application no. 7615/02, judgment of 9 November 2006

[351] Stummer v. Austria (GC), Application no. 37452/02, judgment of 7 July 2011; Carson and others v. the United Kingdomn (GC), Application no. 42184/05, judgment of 16 March 2010; Moskal v. Poland, Application no. 10373/05, judgment of 15 September 2009

[352] Heinisch v. Germany, para. 71

limb deficient thalidomide bound to use to a wheelchair, was detained for one night in a standard cell at a police station and an additional three days in the medial wing of a prison. The Court found that to detain a severely disabled person in conditions where she is dangerously cold, risks developing sores because her bed is too hard or unreachable, and is unable to go to the toilet or to keep clean without the greater difficulty, constitutes degrading treatment within the meaning of Article 3 of the Convention.

Moreover, in the admissibility decision of *Sawoniuk v. the United Kingdom* – the case concerned a Polish national, born in 1921 who was serving a sentence of life imprisonment – the Court found that

> *there is no prohibition in the Convention against the detention in prison of persons who attain an advanced age. Nevertheless, a failure to provide the necessary medical care to prisoners may constitute inhuman treatment and there is an obligation on States to adopt measures to safeguard the well being of persons deprived of their liberty.*

The recent cases of *Enea v. Italy (GC) (2009)*[353] or *Haidn v. Germany (2011)*[354] confirm this principle. In *Haidn v. Germany* the Court held that the applicants relatively advanced, but not particular old age, combined with his state of health could not be considered as critical for detention purposes. Hence, his treatment did not as such attain a minimum level of severity so as to fall within the scope of Article 3. Likewise did the Court stress in *Enea v. Italy* that "the detention of an elderly sick person over a length period may fall within the scope of Article 3." It did, however, not find a violation of Article 3 even though the health of the applicant deteriorated, as the authorities protected the applicant's well-being by monitoring his state of health carefully, assigning the seriousness of his health problems and providing him with appropriate medical care. The authorities even allowed for two major operations in a civil hospital.

The *H.M. v Switzerland* case concerned the involuntary placement of an aged person in a nursing home. The Court did not find a violation of Article 5 (1) as the it was convinced that the Swiss Court had "ordered the applicant's placement in the nursing home in her own interest in order to provide her with the necessary medical care and satisfactory living conditions and standards of hygiene". Moreover, the Court deemed it relevant that the applicant was not placed in the secure ward of the nursing home, but enjoyed freedom of movement and was able to maintain social contact with the outside world.[355]

[353] The case concerned an Italian national who was born in 1938. He was sentenced to 30 years' imprisonment for among other offences, membership of a Mafia-type criminal organisation.
[354] The applicant, who was born in 1934 and who was detained in a psychiatric hospital in Bayreuth, complained, *inter alia*, that his continued involuntary detention violated Article 3 of the Convention.
[355] H.M. v. Switzerland, para. 48 (Background: H.M, who was born in 1912, lived in her sons house and had received already help form an association for house and sick visits. Those visits were stopped after her son moved in and they refused to cooperate with the caring association.)

Moreover, in *Suessmann v. Germany*[356] and *Jablonská v. Poland*[357] the Court considered that the advanced age of a person can tighten the requirement for expeditious trials under Article 6 of the Convention.

In *Stummer v. Austria* former prisoners complaint about their non-affiliation to the national old-age pensioning system despite their work performed while imprisoned.[358] In another case relating to pensions (*Carson and others v. the United Kingdom)* the Court had to decide whether the pensions of the applicants – UK nationals living abroad – had been calculated correctly.[359]

Finally, when deciding on the value of pecuniary damages the Court deems it relevant whether earnings forgone by a violation would have been used to support "elderly parents." [360] In the case of *Georgel and Georgeta Stoicescu v. Romania* the Court took the Courts age into account when rewarding damages stating that "regard must also be had to [the applicant's] dire financial situation, her advanced age and deteriorating state of health and to the fact that she was unable to benefit from free medical assistance until two and half years after the incident."[361]

These are only a few examples on how the European Court of Human Rights protects the elderly. However, most of the cases do not specifically built on the age of a person, but on its conditions, e.g. being disabled, vulnerable or (economically) dependent.

Also, the protection offered to the elderly by the European Convention of Human Rights is lower compared to other instruments like the European Social Charter, especially with regard to social and economic rights. In *Botta v. Italy*, an applicant, who was physically handicapped,

[356] The applicant, who was born in 1916, brought in 1988 proceedings before the German Federal Constitutional Court to challenge the reduction of a supplementary pension he received. He alleged that the proceedings before the Court, which rejected his complaint 3 years and 5 month later, took to long. The Court did not agree.

[357] The applicant was a Slovak national of Polish origin who tried to receive restitution or compensation for property her family was evicted from 1945. At the beginning of the national litigation procedure the was 71 years old.

[358] The Court stressed that "it cannot look at the question of prisoners' affiliation to the old-age pension system in isolation but has to see it as one feature in the overall system of prison work and prisoners' social cover." (para. 102). The Court did not find a violation of Article 14 in conjunction with Article 1 Protocol 1. It attaché weight to the fact that the applicant, although not entitled to an old-age pension, was not left without social cover. Following his release from prison he received unemployment benefits and subsequently emergency relief payments. (paras. 108-110)

[359] The case concerned 13 British nationals who had spent some of their working lives in the United Kingdom before emigrating or returning to other countries. The applicants challenged the failure to index-link her pension. In particular they criticized their different treatment compared to other who had emigrated to countries with whom the United Kingdom had bilateral agreements. The Court did not find a violation of Article 1 Protocol 1 taken alone or in conjunction with Article 14. The Court held that Article 1 of Protocol 1 does not guarantee the right to acquire possessions or to receive a social security benefit or pension payment of any kind or amount, unless provide for by national law. (para. 53)

[360] Shokkarov and Others v. Russia, Imakayeva v. Russia

[361] The cases concerned an elderly lady who was attached by stray dogs. The Court found a violation of Article 8 based on the fact that the authorities failed to undertake adequate measures to safeguard the health and security of the population.

complained that Italy had failed to take measures to remedy omission imputable to a private bathing resort. Invoking Articles 8 and 14, the applicant criticized that the resort's facilities hampered the access to the beach and sea. The Court, agreeing with the Commission that "the social nature of the right concerned required more flexible protection machinery, such as that set up under the European Social Charter,"did not find a violation of Article 8. [362]

European Social Charter

I want to now briefly address the European Social Charter.

Previously I mentioned Article 23, which is part of the revised Charter of 1996. It is a milestone in the fight for the rights of the elderly. The article stipulates that parties should adopt and encourage measures to enable elderly persons to remain full members of society for as long as possible by adequate resourcing and the provision of information about services and facilities availability to them.

The Committee on Social Rights held that the objective of this provision is to "enable elderly persons to play an active part and have some influence in society, to guarantee them sufficient resources to live independently, to provide housing and an environment suited to their needs, and to guarantee adequate health care and social services."[363] It also includes their protection against mistreatment. Moreover, States are required to combat discrimination, especially with regard to the access to goods, services and facilities.

The Secretariat of the European Social Charter writes on the term "full members of society":

> *Les termes « membres à part entière » signifient que les personnes âgées ne doivent souffrir d'aucune mise a l'écart de la société du fait de leur âge, voir de leur condition physique. Le droit de participer aux divers domaines d'activité de la société doit être reconnu à toute personne active ou retraitée, vivant dans une institution ou non. Les effets de restriction à la capacité juridique doivent être limites à l'objet de la mesure.*[364]

Parties to the Charter who accepted Article 23 are required to adopt measures that protect in law and practice the aged against discrimination and guarantee the elderly's full participation within society.

In addition, other articles, which already existed in the original Charter, benefit the elderly. Article 11 provides the right to the protection of health. Article 13 protects the right to social and medical assistance. And, whereas Article 12 guarantees the right to social security, Article 14 enshrines the right to benefit from social welfare services. Notable is also Article

[362] Botta v Italy, para. 28
[363] European Committee of Social Rights, Finland, in 1 European Social Charter Conclusions XV-2 146, 182 (2011)
[364] Les Droit des Personnes Âgées dans la Charte Sociale, Informative Document prepared by the Secretariat of the Social Charter, March-April 2011, p. 3

15, which protects the right to independence, social integration and participation in the life of the community of persons with disabilities.

Those articles are especially relevant for the elderly in states that have not accepted Article 23[365] of the revised Charter or are only members of the of the 1961 Charter.[366] The Secretariat of the Charter recalls that "le Comite considère qu'ils restent malgré tout lies au respect d/un certain minimum de bien-être par rapport aux personnes âgées. Pour cela le Comite justifie son appréciation sous l'angle de 'autres disposition de la Charte révisée."[367/368]

The European Committee of Social Rights decided up to now only one complaint with relevance for the elderly. In the case of *International Federation of Human Rights Leagues v. Ireland* it had to rule on the old age pensioning system in Ireland.[369] However, two other complaints regarding social security schemes are pending.[370]

The Committee has developed the social rights mainly through its "conclusions" when reviewing state reports.

The Parliamentary Assembly and the Committee of Ministers

The Committee of Ministers and the Parliamentary Assembly of the Council of Europe have continuously produced resolutions and recommendation dealing with the elderly.

The impulses provided by those resolutions and recommendations for the development of the rights of the elderly in Europe should not be underestimated. They are essential in the process which could finally lead to judicable rights. They can spark and structure a debate on the rights of elderly among member states. They also help to strengthen principles by casting them in agreed language which may later reappear in binding national and international instruments.

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[365] States members of the revised Charter who have accepted Article 23 (17): Andorra, Bosnia and Herzegovina, Finland, France, Ireland, Italy, Malta, Montenegro, Netherlands, Norway, Portugal, Serbia, Slovakia, Slovenia, Sweden, Turkey, Urkaine.
States members of the revised Charter who have not accepted Article 23 (14): Albania, Armenia, Austira, Azerbaijan, Belgium, Bulgargia, Cyprus, Estonia, Georgia, Hungary, Lithuania, Moldova, Romania, Russian Federation

[366] Croatia, Czech Republic, Denmark, Germany, Greece, Iceland, Latvia, Luxembourg, Poland, Spain, the Former Yugoslav Republic of Macedonia, the United Kingdom

[367] Les Droit des Personnes Âgées dans la Charte Sociale, Informative Document prepared by the Secretariat of the Social Charter, March-April 2011, p. 5

[368] For example, the Committee of Social Rights considered the complaints against Armenia, which has not accepted Article 23, the appropriateness of the non-contributory pensioning system under Paragraph 1 of Article 13 of the Charter. It took into account the nation poverty line to decide whether with the resources provided an aged person could afford essential food and non-food items to enjoy a decent and healthy life.

[369] International Federation of Human Rights Leagues v. Ireland, Complaints No. 42/2007, decision on the merits of 3 June 2008

[370] Association of Care Giving Relatives and Friends v. Finland, Complaints No. 71/2011 and 70/2011

Whilst few resolutions and recommendations of the two organs deal with the issue of ageing generally[371], many do refer to specific aspects of it such as health care[372], the working potential[373] of the elderly, rehabilitation of the disabled, the integration of elderly in society and family life[374], the treatment of elderly migrants[375], the creation of a European Social Security Passport[376], the treatment of care-takers[377], or the elderly's right to self-reliance. [378/379]

The most recent recommendation of the Committee of Ministers (CM/Rec(2011)5) is entitled "on reducing the risk of vulnerability of elderly migrants and improving their welfare". Interestingly, it does not define "elderly" migrants by age, but by condition, stating that for the purpose of the recommendations elderly migrants are "those […] who, because of their age or health, are (i) no longer active in the labour market and/or (ii) are no longer self-sufficient in terms of their physical, economic, social and cultural needs." The recommendation aims to promote national policies that encourage the empowerment, autonomy, sense of belonging, recognition and participation of the elderly in society and enable them to reside in their homes for as long as possible. The recommendation covers diverse aspects like the procedures to acquire residence permits or the nationality of a host nation, the role of families caring for elderly migrants or the organisation of public services in favour of elderly migrants. Moreover, the recommendation contains specific guidance on elderly women. Overall, the resolution of language and cultural barriers is key to the document.

Also noteworthy are the very extensive 2009 Recommendation of the Committee of Ministers on ageing and disability in the 21st century[380] and the 2007 Parliamentary Assembly Recommendation on the situation of the elderly in Europe.[381] The former elaborates on the

[371] See for example CM Recommendation R(94)9 concerning elderly people; CM Recommendation R(94)9 concerning elderly people; PACE Resolution 1502 (2006) and PACE Recommendation 1749 (2006) on demographic challenges for social cohesion

[372] PACE Recommendation 1959 (2011) preventive health care policies in the Council of Europe member states; PACE Recommendation 1254 (1994): on the medical and welfare rights of the elderly: ethics and policies, CM Resolution Res(70)16E on social and medico-social policy for old age; CM Resolution Res(74)31E on health care and social work for old people living at home

[373] PACE Resolution 1793 (2011) Promoting active ageing: capitalising on older people's working potential

[374] CM Recommendation R(94)14 on Coherent and Integrated Family Policies (esp. annex 10)

[375] CM Recommendation CM/Rec(2011)5 to member states on reducing the risk of vulnerability of elderly migrant and improving their welfare

[376] PACE Resolution 761 (1975) on the payment of pensions in cases of mixed careers and on the establishment of a European passport of social security

[377] CM Recommendation R(91)2E on social security for workers without professional status

[378] CM Resolution 1008 (1993) on social policies for elderly persons and their self-reliance

[379] In addition, some documents mention ageing only remotely. For example those dealing with social security systems,[379] migration in general[379] or the ratification of the European Social instruments (Charter, Code, Convention): PACE Resolution 1824 (2011) The role of parliaments in the consolidation and development of social rights in Europe; PACE Resolution 1805 (2011) The large-scale arrival of irregular migrants, asylum seekers and refugees on Europe's southern shores; PACE Recommendation 1573 (2002) Ratification of the European Code of Social Security

[380] CM/Rec(2009)6 of the Committee of Ministers to member states on ageing and disability in the 21st century

[381] PACE Recommendation 1796 (2007) on the situation of elderly persons in Europe

principles of equality of opportunity for all citizens, non-discrimination, respect for and acceptance of disabilities as part of human diversity, the rights of people with disability to be fully involved in all decision-making processes that affect them. The latter stresses the disconnection between age of the elderly and their physical conditions.

The Council of Europe's "Forgotten" Instruments

Surprisingly, two of the most extensive and detailed protective instruments produced by the Council of Europe stem from 1964 and 1972: the European Code and the European Convention of Social Security.

The European Convention of Social Security is a very technical agreement that governs the application of social security systems to foreigners and migrants.[382] On the other hand, the European Code of Social Security is an attempt to harmonize the protection guaranteed by national social security systems and to create higher European standards. In both instruments the sections on "old-age benefits", "invalidity benefits", "medical care" and "survivor's benefits" are of particular importance for the elderly.

Unfortunately, those instruments have not been ratified widely. The Convention has only 8 member states. In addition, while the original 1964 European Code of Social Security has attracted 21 ratifications, the revised version of 1990 has only been ratified by a single state. Therefore, it has not yet even entered into force. One could say that despite their detailed guidelines the Convention and the Code have become Europe's forgotten instruments.

3. What the Council of Europe Can Do to Improve Protection

I hope I could show that protection of the elderly is not a new topic for the Council of Europe. What is new, though, is that it's becoming a focus of its work and that the topic is being looked at from the perspective of human rights. In a context of reform and concentration of the work on major priorities, the mainstreaming of elderly issues appears explicitly in the priorities approved by the Committee of Ministers for the biennium 2012-2013.

As a response, the promotion of the human rights of the elderly, and in particular the possible elaboration of a non-binding instrument in this field, appears in the draft mandate of Steering Committee of Human Rights (CDDH) for 2012 and 2013, currently under discussion in the Committee of Ministers. If this mandate is adopted by the Committee of Ministers, then the CDDH will further discuss and define how to carry out this ambitious task.

[382] Stressing the principle of equal treatment for nationals of Contracting Parties, refugees and stateless persons, it aims to allow persons to maintain benefits under social security legislation despite any change of residence within the territories of the Contracting Parties. It does not create "new" substantial rights, but rather co-ordinates the European social security systems.

There are, however, some essential points that can already be underlined:

First: When embarking on such an exercise, the Council of Europe needs to pay attention to the ongoing work of other international fora, including the United Nations and the European Union. It is only through close cooperation that the Council of Europe can identify where it could add value and the doubling of workload can be avoided. We are already regularly in touch with the Secretariat of the UN open-ended working group and are aware of its developments. We also followed with great interest the debate in the panel on the right to health for older persons in the context of the last session of the Human Rights Council.

Second: There is a need for further studies on the situation of the elderly within the Council of Europe and on the specificities of Europe, with a view to the identification of specific gaps, be they normative, implementation, monitoring or information gaps. Further reflection may also be needed to define the scope of a legal instrument on the rights of the elderly, and to structure the debate on various aspects of the rights of the elderly.

Third: While the objective of the CDDH is to focus on the Human Rights dimension, the Council of Europe recognises this as a cross-cutting issue. This initiative may lead to other initiatives in other areas, which would require a certain degree of co-ordination and which may even develop into a consistent and comprehensive multiannual Action Plan, comparable to the current Action Plan to promote the rights and full participation of people with disabilities in society 2006-2015, and in the long run, to a full mainstreaming of the issue in all the Council of Europe work.[383] The Council of Europe could also encourage further ratification of Procotol No. 12 to the European Convention of Human Rights and of the revised European Social Charter, in particular as regards acceptance of Article 23.

Fourth: In order to be meaningful and effective, any standard-setting work should involve, in its preparation, the civil society, and in particular international non-governmental organisations with adequate expertise on the protection of the human rights and dignity of the elderly.

Finally, it may be noted that the "sectoral" approach to the human rights of the elderly is consistent with the approach followed as regards other vulnerable categories of persons, and should by no means be seen as bringing prejudice to the integrity and the universality of Human Rights. As in other documents, it could easily be envisaged that the new instrument will provide specific guidance as regards the application of the relevant provisions of the ECHR and of the European Social Charter to the elderly, on the basis of relevant case-law, by essentially codifying in a single text existing standards and case law, and thereby consolidating their recognition at international level as minimum common standards.

[383] CM Recommendation R(2006)5 of the Committee of Ministers to member states on the Council of Europe Action Plan to promote the rights and full participation of people with disabilities in society: improving the quality of life of people with disabilities in Europe 2006-2015

Conclusion

The Council of Europe has the capacity to structure a European debate on the topic and facilitate a knowledge exchange on the European Level. Its standard-setting work can help the gradual development of a detailed European protection regime for the elderly.

Discussion

Alexander Hoefmans

Hello, my name is Alexander Hoefmans, I'm a human rights advisor with the Belgium Ministry of Justice, I have a question maybe for all panelists in relation to the issue of a convention. Now, I came into the coffee break thinking I had heard spectacular presentations but I missed a little bit the human rights perspective of the debate. And now I've heard another three spectacular presentations and I've heard a human rights perspective but it's a very instrumental human rights perspective. So I still haven't fully gotten an answer to my question, being how government policymakers can in a very effective and concrete way deal with the issues regarding the elderly from a comprehensive human rights perspective. I've heard Mr. Cangemi talking about mainstreaming for example, Ms. Stuckelberger, you passionately defended the creation of a convention, and I think a convention, I mean like the example of the disability convention, a comprehensive human rights convention for the elderly can be useful but only if it has an added value to the existing instruments of course. So I ask myself what can be the added value? When I look at the issue of protection of human rights of the elderly from a legal dimension I very often fall into a non-discrimination prism, everything is a bit channeled through this non-discrimination prism, and I'm wondering, is that prism sufficient to provide the necessary legal protection for preserving all human rights of the elderly? Can for example issues relating to the treatment of the elderly in institutions be treated through this anti-discrimination prism, I don't think so. Then you can say of course, yes, but there are the other instruments, the U.N instruments, general instruments. A counterargument to that, however, is that in those instruments the elderly are not or not enough visible. If I am wrong and if from a legal protection dimension everything is okay, we are on the right track and then it becomes very much a debate on creating more visibility, awareness so do we really need a new convention for that? It worked very well for the disability convention though, it has created a whole new momentum, a whole new dynamic for people with disabilities, especially for their representative associations and this can be an element to work with, if we don't need an instrument how do we then create or try to create a momentum, a dynamic for increasing human rights protection of the elderly, thank you.

Urszula Gacek

Thank you very much, I propose that we take couple more questions from the floor so our panelists have a chance to scribble their answers.

The lady in the very fetching silver beret caught my eye. It's such a very good ploy, actually, wearing something like that at the conference, you always get the microphone.

Lena Kondrateva-Bryzik
Thank you, thank you. Lena Kondrateva, Polish Academy of Science. I have a question to Ms. Astrid Stuckelberger because I was very impressed by the presentation and I am also concerned personally because I am also getting older and once I will be an elderly person myself. But you know, the issue is about the United Nations, "U.N. Age", why do you think that creation of a new body will improve the situation? Because, you now, I really appreciate your research but I feel a little bit skeptical about creation of a new United Nations body instead of try to empower the existing ones. I'm really not sure that if you create a new United Nations committee, body, or something like that, that it will improve the situation instead of just creating some kind of bureaucracy, thank you.

Urszula Gacek
Another good ploy is sitting in the front row then you always catch the moderator's eye…

Krzysztof Drzewicki
Thank you very much. I have a question to Dr. Stuckelberger. At one point of your presentation you mentioned that the elderly should no longer be considered in the category of the vulnerable group.

My question is what does this mean? What is your aim when you propose not to use this category of 'vulnerable'? From my perspective as a human rights lawyer, by the term "very vulnerable group" we do not mean anything that is negative or pejorative. It is rather an indication that a group needs some special attention. There are so many happy children so that we do not need to recognize every child to be a vulnerable but it is a condition due to age that he/she may be in danger having no chance to defend himself or herself. This is why they should be watched better but it is not a negative connotation. I had an impression that this is something like liberating people from old age denomination. I hope it is not the case. Thank you.

Urszula Gacek
We have one more question. This will be the final question. Thank you.

Claudia Mahler
My name is Claudia Mahler from the German institute for human rights. I have just one small question. When I was talking in Germany about the new open-ended working group on ageing many experts from the German Society of Gerontology and Geriatrics working with elderly people or Assocations of elderly people told me they do not want another Convention because they feel they get stereotyped by new Convention. What are your arguments against this?

Urszula Gacek
Thank you very much. So I will sum up. We have two questions about Conventions. One is "do we need a convention?" and one is "do the elderly or the future elderly want the convention?", and there are couple of questions to Doctor Stuckelberger: will the new UN body be effective? Will we solve the problem by creating new expert body? And one from Professor Drzewicki – do we really need to consider or should we consider the elderly as vulnerable? Doctor Stuckelberger, you have the floor as most of the questions ar for you…

Astrid Stuckelberger
It is interesting, all the questions are around the same issue: do we consider old age distinct from other age groups? do we create a specific agenda or right for older persons?

I sometimes wonder why other people don't understand that it is so important to consider the ageing group as a specific part of society in order to protect them, to promote their health and give them a voice. It seems to have been the same combat for children and for women as it is now for old age.

Having worked in a geriatric hospitals and in the community of older persons and am doing research on ageing since more than twenty years – I am even ageing with my subject... And when you work in this field, it is so clear that it is really such a specific population which has lived its life for longer than any other group making it so rich so complex that you cannot mix it up with other groups. Medically, in fact, it is absolutely clear that ageing has its specificity and is marked by the ageing process and the cumulative effects of a life course. Despite that fact, internal medicine wants to consider older patients as general medicine patients and not differently even questioning geriatric medicine in some regions of the world. So there's always this fight of specificity vs generality. If we take the question of vulnerability for example. Of course there are older persons that are vulnerable, of course there is no doubt that we need to make the vulnerabilities emerge, show the specificities of some typologies of older persons in order to try and make sound policies such as cases of neglect, abuse and violence. We must see who are older persons and study their profile to give a clear picture, or document case reports to policy-makers so they understand how specific old age is, issues that need to be addressed. This also shows how important it is to create a UN global agency on ageing such as the Chinese idea of a "UNAGE", to deal with social security and old age management – one of the key factors of today's crisis. It underlines how crucial it is to describe the age-related conditions of the old and its consequences. All those points make the case for establishing - if not a Convention on ageing - at least some instruments really specific to age so people understand. Generalizing old age to younger age would be like generalizing our experience to our parents experience and denying their right to a different life and condition.

One of the difficulties which is unique to old age is that most of those involved in policy-making and legislations have not lived old age, nor have studied them nor have worked with old people. If you go and work with them, you go and see their reality, especially at very

higher ages (the ‘old old’), you really see the difference and the need for specific frameworks and policies. You see neglect and abuse of all sorts such as economic abuse or neglect in caring or in addressing their rights.

I can take just a few examples to illustrate some specific problems. In geriatric medicine one of the specificity is “polymorbidity” – multiple chronic diseases at the same time. You can have hypertension, diabetes, visual incapacities, mobility impairement, mental problems such asdementia or Alzheimer disease. The reality is heterogeneity: you can have twenty health problems , you can have three or four or none, and it is not static, it can increase until death – studies show that the last year and last months of life are the most costly and the most complex to manage. So the question is how do you treat a person with such complex conditions? what if we must apply a legislation? what if we must ensure access to care and social justice in an economic crisis setting?I can give you a precise example of missing legislation for the case of older persons. The treatments that are coming out from the pharma in Europe and Switzerland are applied to old age with no scientific evidence on the specificity of old age, thus creating what is becoming more and more evidenced and known as ‘adverse drug reactions’ and ‘letal risk of medication’. Why? because those drugs are being tested in the labs, first on mice, which are mainly quite healthy male and not on female, because the female mouse is always pregnant, which is far too complicated for studies. So after testing on male healthy mice, the drug goes into a clinical trial with adult human beings with only one disease and one treatment. . They then apply and distribute this medication to all ageing groups suffering from multiple conditions and taking many treatements with no distinction.. Same with women, studies with cardio-vascular treatement show that women treated the same as men have higher risk of adverse reaction because they absorb, and assimilate differently than man and are suffering and dying. The treatment has been tested on the adult healthy male and is applied to old age. It is the same for children.

Another example is the case of Dementia or Alzheimer Disease. How do we guarantee the rights of those patients with the anticipated consent form and if there is none – is this an ethical or legislative problem to solve? Another very polemic issue which further complicates the issue is assisted suicide: how can you deal with suicide will in a public setting devoted to careSwitzerland is known for a movement called Dignitas guaranteeing assisted suicide at home or even sometimes in residential care settings. How do you deal with this in terms or human rights? if you apply it to all ages can this be justified for the younger generations? European countries have very mixed views on this issue and it is reflected in a range of legislative frameworks. This issue needs a real social debate. One argument I often use, based on scientific data, is that suicide is ‘socially and transgenerationally contagious’ it is known to psychiatrists that if somebody jumps of a particular bridge one day, the next days there will be more suicides from this precise bridge. Furthermore, new findings in epigenetics now demonstrate that traumatic experiences transmit to future generations so if somebody committs suicide it can dribble down to the next generations which will be at high risk or repeating this behaviour. Hence, it is legitimate to hypothesize that old people committing suicide, assisted or not, are actually having an effect on their descendants, a transgenerational

effect, and this has not been raised anywhere which shows many things pass silent in old age. for many it is too late, they are too old and this just promotes an age discrimination pattern which must be addressed. We need to have more instruments, we need to document the situation of older people and provide a framework for their protection but also to promote their rights.

Urszula Gacek
Thank you very much. For the convention, because we had a general question, is there a need for legally binding instrument – this is one of the fields to come through. You are here saying: „yes".

Astrid Stuckelberger
It is very important that we do no forget that other legal instruments need to be reinforced and that more needs to be done than aiming solely to a Convention, because if we wait for 10 years for a Convention on Older Rights and we forget the rest, I think we take a high risk of missing the point. There is so much to be done… Older persons are 'invisible' in most global policy papers and other ministries than the family.

Urszula Gacek
Who would I ask next? I will ask the Commissioner. He's our special guest here today. The case of legally binding Convention.

Thomas Hammarberg
Thank you. Normally, I belong to those who are concerned when new instruments are proposed; there are already a great number of human rights treaties and there is a risk of diluting the treaty system with too detailed standards. But this case is special. It would be useful to have a comprehensive, international treaty protecting the rights of the older people.

Some interesting comparisons could be made. One is with the UN Convention on the Rights of the Child. Some of the arguments now raised against an instrument on older people were raised when the child convention was originally proposed. There is no doubt that the fact that we analyse the specific rights relevant for children in one document, partly assembled from the other existing documents already, was a tremendous help for the work for children's rights.

Another parallel is the UN Convention on the Rights of People with Disabilities. Again people said: "Do we really need it? What does it add? Again, there is no doubt now that the fact that we did go ahead with this project, has been very valuable.

I believe that a legally binding instrument to protect the rights of older people would very valuable as well. To have all relevant righs assembled in one document would serve as an inspiration for the struggle to secure human rights also for the elderly. There would be values added. So, I am quite positive to this suggestion. I hope it won't take 10 years, I hope it won't

mean that other things cannot be done at the same time for the elderly. I think the time is right now. Many people have now realised the needs in this field, this momentum should be used.

Urszula Gacek
Mr Wróblewski, is the time right? One document, one treaty, possibly one convention? What's your opinion?

Mirosław Wróblewski
As a lawyer I have to say – it depends. It depends on the content, that's the first thing. What would be the scope of such convention? And what would be the institutional framework? I think that's very important. I think that if the content and the institutional framework of such convention gave prospects of ensuring its effectiveness and full implementation, than the answer would be much closer to "yes". But, of course, I am looking from the perspective of the ombudsman institution. I see the tendency, which I assess positively, that United Nations see the necessity of implementation and monitoring bodies at the national level, as in the case of the Convention on the Rights of Persons with Disabilities. And if the new convention is signed, its implementation and monitoring at the national level would probably be exercised by the national human rights institutions. So I think such a convention would be a very useful tool in persuading the public authorities to take care of those most vulnerable one. And, at the end, I would like underline the importance of ethics. I think this is a very specific area where also the notion of dignity should be highlighted. To sum up, it is very attractive for lawyers to have a convention, however many issues which we discuss today cannot be solved within legal framework only. Thank you.

Nicola-Daniele Cangemi
Well, the answer from my perspective is that it's clear that we have to do something. I am probably not in a position to say at this stage what instrument would be the best and whether we should work at the international or at the European level. I think in any case that work at the international and at the European level can be perfectly compatible with each other. If the project of an international convention on the right of older people will go ahead, that would not be a reason for Europe to stop considering whether there is a need of underlining and promoting further the human rights of older persons in Europe, be this through a binding instrument or through a non-binding instrument collecting the existing standards and giving them a visibility and a systematization that they do not have a present. The latter would already, I think, provide added the value *per se*. But this doesn't exclude the fact that probably there are aspects, as Mr. Wróblewski just said, that may be more suitable to be dealt with in a binding instrument. That is why one thing I underlined in my presentation is that it is important to decide that something has to be done and to start studying at intergovernmental level what can be done. There is probably a need for a gradual approach, starting with a study identifying the real gaps and the ways how to deal with this different gaps. This is what we can possibly think about as from now. Another aspect that is important is that if a convention has to be drafted – at whichever level - in order to be effective this convention must have

some monitoring mechanism. Too many conventions are just there to fix in marble beautiful principles, and then do not provide for adequate enforcement mechanisms. This is of course a very ambitions thing to do, but if a convention has to be drafted, then it should have enough power to ensure that it will, in perspective, change something in the lives of older persons.

Barbara Mikołajczyk
Well I have stated in my presentation that I think that is the highest time to think about the treaty on older people, about their rights, but referring to the first question I think that two kinds, two tips of activities should be tanked. The first one is of course thinking about something more than the treaty it is the practice. It is working on consciousness of states about the problem and I think that it is everything what we can do now. I am a little bit skeptical because sometimes states and their sovereignty is the main obstacle for the development of the international law.

So, I think that there is a need, there is real need to adopt a new convention, but I'm afraid that it will be in... maybe in future, maybe in ten years, maybe earlier. It isn't enough to elaborate good treaty but this treaty should be also accepted, signed, ratified, so we need, we need time, so I think that what we can do, we can do things like this we are doing today and it is great that the issue of older people has appeared during the fifth Seminar on Human Rights in Warsaw, so that's all. Thank you.

Urszula Gacek
Thank you, and if you can pass the microphone to Ms. Bras Gomes.

Maria Virginia Bras Gomes
It's fine. I wish I could actually be exempted from answering because this is a difficult question and I myself am not very sure. I've had ups and downs in my thinking process. I think I'd like to go back to some of the issues raised by the gentleman from the Mission of Belgium, I'm not sure if he comes from the human rights institution or if he is the human rights adviser to the government. But it doesn't really matter. His issue on non-discrimination is well taken. How we have been looking at problems of vulnerable groups and this question of whether you are vulnerable or you are made vulnerable by outside forces, is something that could take us another evening to discuss. It is not enough to look at the group of older persons almost exclusively from the non-discrimination perspective, and stop at the static understanding of non-discrimination. I think it's far too little. In an ideal world, I don't think we would need another convention, but we don't live in an ideal world, and like my colleague from the Council of Europe said, the entire human rights system is confronted with legislation gaps, implementation gaps, monitoring gaps and information gaps. So, whatever can be done to overcome those gaps, is a welcome solution. Now, whether a new convention will help overcome these gaps, that in all fairness, I'm not sure. That is my absolutely honest stand. I'm sure that a new convention will raise the visibility, that it will put older persons in the forefront of the political agenda, where they not have been. Demographic ageing has shifted dramatically, so it is a group that is more and more in need of specific measures. My approach

would be at this moment, not to put all the eggs in one basket, not to think of a new convention as the only way to push this issue further. Look at one of the examples Astrid gave, of the assisted suicide rooms… You can't write a new convention to deal with that, you got to deal with it by taking up the human rights of older persons in the existing international human rights instruments or European human rights instruments. What I mean is that we should take advantage of the solutions, of the instruments we already have and we should also be looking broadly and open-mindedly at the possibility of a new instrument. However, when considering the possibility of a new instrument, there is a problem. Is this the right moment? I know what Commissioner Hammarberg said, that it is the right time in the sense that older persons are more than ever in need of specific protection. But, is it the right time to open up a new intergovernmental negotiating exercise? At this time when the crisis is so often used as a blanket excuse for lowering protection standards? Obviously, in many systems this is what is happening. That is why I wonder if it is the right time to start an intergovernmental negotiating exercise. Do we want to run the risk of lowering some of the standards that are already there? This is an issue that needs to be tackled. It is, of course, of the sovereign responsibility of states to decide what is the approach they want to take. Finally, I have a feeling that if the convention does come, it won't take ten years. Whether we should open the issue now, whether we should wait for another year or two, I don't know. What I do know is that we should strengthen what is already there, and I think it is fundamental that everyone uses his or her capacity to influence national governments, and civil society has a huge role to play in this regard, in order to make better use and ask for better implementation of international human rights and European human rights system that are already in place. Thank you.

Urszula Gacek
Thank you. The most difficult part of day like this is to sum up. But I think we have panelists that agree there is an urgent need for further action.

In general, our panelists are open to move towards legally binding documents, but they put conditions on this. It must be comprehensive in its scope, it must be ratifiable, it must be effective, it must take on board the dimension of ethics, of human rights, it cannot just look at the problem through the prism of non-discrimination, and it must be subject to monitoring procedures to give it real teeth.

But at the same time the panel is aware of how long and cumbersome negotiating internationally binding document is, and so there is understandable and justifiable caution that we do not get down in such long and cumbersome process. The question is what we can do now with non-legal instruments and instruments we already have at our disposal? The most important thing is to keep this matter on the agenda of both intergovernmental bodies and of national policy-makers.

And of one thing I am sure, with the panelists that I have had the pleasure to spend this afternoon with, is that they will be the greatest champions for keeping this matter on the

agenda, giving the voice to those whose voice is heard so quietly and so feebly in the international community today. Ladies and gentlemen, would you please join with me and give applause to our panelists, they have worked very hard and they have done an excellent job here.

Panel Three

Freedom of Expression and Respect of Private Life

Moderator: Mr. Ilia Dohel
Office of the Representative on Freedom of the Media,
Organization for Security and Cooperation in Europe

Evolution of the European Court of Human Rights' Case-Law Concerning Article 10 and Article 8 Conflict

Mr. Guido Raimondi[384]
Judge of the European Court of Human Rights

The issue of conflicting rights, not only before the European Court of Human Rights, received in recent times increased attention by the doctrine[385].

Among these situations, no doubt the conflict between the rights protected, respectively, by Article 10, Freedom of Expression, and Article 8, Right to respect for private and family life, of the Convention, is one of the most interesting and very likely the one receiving most attention by commentators. As it is well known, there is a certain expectation about the future delivery of the judgment of the Grand Chamber of the Court in the *Axel Springer AG v. Germany* (no. 39954/08) and *von Hannover v. Germany* (nos. 40660/08 and 60641/08) cases, both involving the tension between these two articles of the Convention in the case of celebrities.

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[384] **Guido Raimondi**, born in Naples (Italy) in 1953, was elected as a judge of the European Court of Human Rights, in respect of Italy, in January 2010 and took office in this position, which he currently holds, on 5 May 2010. He has a long experience in the legal field, at national and international levels.
In particular he was appointed as a judge in 1977 and served in courts of first instance, dealing with civil and criminal cases, until 1986, when he joined the Legal Service of the Italian Foreign Ministry (*Contenzioso diplomatico*). Between 1989 and 1997 he acted as co-Agent of the Italian Government before the European Court of Human Rights. Between 1997 and 2003 he served in the Italian Supreme Court of Cassation, first as Deputy to the Attorney General and then as judge of the Court. During the same period he acted as judge *ad hoc* of the European Court of Human Rights in a number of cases concerning Italy. He joined the ILO in May 2003 as Deputy Legal Adviser and was appointed Legal Adviser with effect as of 1 February 2008.
Guido Raimondi authored a number of legal publications in the field of International Law, in particular on Human Rights issues.

[385] See, in particular, O. DE SCHUTTER and F. TULKENS, *Rights in Conflict: the European Court of Human Rights as a Pragmatic Institution*, in E. BREMS (ed.), *Conflicts between Fundamental Rights*, Anvers, Intersentia, 2008, pp. 169 *et seq.*, and authors cited therein (footnote no. 2). New approaches, in particular, are proposed by these authors in order to tackle these conflicts, on the assumption that the traditional method of balancing of rights might be not the best solution for this kind of problems.

In the *Axel Springer* case, a publishing company complains under Article 10 of the Convention that the German domestic courts prohibited the publication of a number of articles about a relatively famous German TV-actor. The impugned articles concerned the actor's arrest and subsequent conviction and sentence for an offence of unlawful possession of drugs.

In the *Von Hannover* case, the applicant essentially complains under Article 8 of the Convention about the domestic courts' refusal to prohibit the publication in two German magazines of a number of pictures of her which were taken whilst she was on a ski holiday. In particular, she avers that the German domestic courts failed to take into account the Court's jurisprudence in the first *Von Hannover* case of 24 June 2004.

The fact that these two famous cases are considered at the same time by the Grand Chamber might lead to the expectation that the Court will seize this opportunity to further clarify its jurisprudence on the matter. In fact the two applications, which both raise the issue of the conflict between the two rights we are considering, do not reflect parallel situations, because in the case of *Axel Springer* the complaint is based on Article 10, while *Von Hannover*, conversely, is based on Article 8 of the Convention.

Article 8 and Article 10 are qualified rights. Although States Parties benefit from a margin of appreciation under both Articles, the Court's approach in Article 10 cases is different from its approach in Article 8 cases. In Article 10 cases, States Parties enjoy a margin of appreciation in making the initial assessment of whether a particular *interference* with that Article is justified or not. In this respect, the aim pursued by the measure, such as the protection of the reputation or rights of others, is part of that assessment. Under Article 8, by contrast, the Court examines the case through the lense of the *positive obligations* of the State to protect the private life of the person concerned *vis-à-vis* freedom of expression.

In the first case we are confronted with an obligation *to respect*, while in the second there is an obligation *to protect*.

The margin of appreciation conceded to Member States in Article 10 cases has traditionally been relatively narrow. The Court thus generally refers to a "*certain*" margin of appreciation only (see for example, *Chauvy and Others v. France*, no. 64915/01, § 64, ECHR 2004-VI). In this respect, while always emphasising its supervisory function in ensuring that the reasons given by the national courts are relevant and sufficient (*Karhuvaara and Iltalehti v. Finland*, no. 53678/00, §§ 39 and 41, ECHR 2004-X), the Court has in fact proceeded in most cases to a rigorous re-assessment of the facts of the case, essentially acting as fourth-instance court. In some cases, the Court has concluded that it was satisfied that the reasons adduced by the domestic courts were relevant and sufficient (*Standard Verlags GmbH v. Austria (no. 2)*, no. 21277/05, § 52, 4 June 2009), whilst in others, it has reached the opposite conclusion (*Eerikäinen and Others v. Finland*, no. 3514/02, § 71, 10 February 2009).

Conversely, in Article 8 cases, the traditional approach of the Court is that the competent authorities in the respondent State should be accorded a "wide" margin of appreciation. In this respect, one might consider that the first *Von Hannover* case is an example of the Court

narrowing the margin of appreciation of the domestic courts. Indeed, the German courts had arguably carefully balanced the interests at stake. Nevertheless, the Court laid down a different test in assessing whether the publication of the photos at issue was permissible in the circumstances.

Needless to say, it will not be appropriate at this stage to speculate on the possible result of the cases currently pending before the Grand Chamber. I will try, according to the title of my contribution, to give an idea of the evolution of the jurisprudence of the European Court of Human Rights on the topic we are considering.

A preliminary remark should be made in relation to conflicts between Articles 8 and 10. Conflicts between freedom of expression and personality rights (reputation, private life, the image) have been traditionally examined from the standpoint of Article 10 of the Convention, since the majority of cases concerning these conflicts have been brought before the Court by the publishing company, the journalist or the photographer concerned.

Under Article 10, freedom of expression is the principle (Article 10 § 1) and "*the protection of the reputation or rights of others*" is one of the permissible grounds of restriction on that freedom (Article 10 § 2). According to the Court's traditional approach in Article 10 cases, the Court had to be satisfied that the restriction was "*necessary in a democratic society*": this test required the Court to determine whether the "*interference*" complained of was proportionate to the legitimate aim of protecting "*the reputation or rights of others*" (see, for instance, *Bladet Tromsø and Stensaas v. Norway* [GC], no. 21980/93, §§ 65 and 73, ECHR 1999-III, where the Court admitted that the right to the protection of honour and reputation is itself internationally recognised under Article 17 of the International Covenant on Civil and Political Rights).

The degree to which the Court applies the "*margin of appreciation*" concept therefore very much depends on the circumstances of the case. In any event, what clearly emerges from the Court's recent case-law since the adoption of the *Von Hannover* judgement of 2004 is that the Court's approach to the balancing exercise between Articles 8 and 10 has evolved. In particular, the Court now proceeds to what may be termed a "*proper*" balancing of the Articles 8 and 10 rights at stake. This is also very much linked to another important development in the Court's case-law, namely the relationship between the right to private life and the protection of reputation.

Right to reputation

Traditionally, Article 8 has been concerned with aspects of personal identity such as a person's name (*Burghartz v. Switzerland*, 22 February 1994, § 24, Series A no. 280-B) or a person's picture (*Schüssel v. Austria* (dec.), no. 42409/98, 21 February 2002). In *Von Hannover v. Germany*, no. 59320/00, § 50, ECHR 2004-VI, the Court went further in defining the scope of Article 8 and held that private life included a person's physical and psychological

integrity. As the guarantee afforded by Article 8 was primarily intended to ensure the development, without outside interference, of the personality of each individual in his relations with others, it followed that there was a zone of interaction of a person with others which could be said to fall within the scope of "*private life*" despite a public context element (Ibid., § 50). With this jurisprudence, the Court also made it clear that freedom of expression had to be interpreted narrowly in circumstances where the impugned articles or photos concerned the private life of private individuals and/or public figures without contributing to matters of public debate. At that point however, no mention was made of reputation as falling within the scope of Article 8.

Indeed, reputation was customarily referred to in the context of Article 10 cases. Under Article 10, freedom of speech is the principle (Article 10 § 1) and the protection of reputation is one of the permissible grounds of restriction on that freedom (Article 10 § 2). According to the Court's traditional approach in Article 10 cases, the Court had to be satisfied that the restriction was "*necessary in a democratic society*". This test required the Court to determine whether the "*interference*" complained of corresponded to a "*pressing social need*"; whether it was proportionate to the legitimate aim pursued; and whether the reasons given by the national authorities to justify it were relevant and sufficient (*Sunday Times* (no. 1) *v. the United Kingdom*, 26 April 1979, Series A no. 30, p. 38, § 62). In carrying out this assessment, it may be said that there was a presumption in favour of free speech (the principle) over protection of reputation (the exception), especially insofar as politicians were concerned.

In recent years however, there has been a clear trend in the Court's case-law towards treating the protection of honour and reputation as being closely linked to, or amalgamated with, the right to private life under Article 8. In *Chauvy and Others v. France*, no. 64915/01, § 70, ECHR 2004-VI, which was an Article 10 case, the Court stated for the first time that reputation was a right protected by Article 8 of the Convention. This was confirmed in *Pfeifer v. Austria*, no. 12556/03, § 35, ECHR 2007-XII, an Article 8 case. The Court considered in that case that a person's reputation, even if that person is criticised in the context of a public debate, forms part of his or her personal identity and psychological integrity and therefore also falls within the scope of his or her "*private life*". The same considerations were held to apply to "*honour*" in the *Sanchez Cardenas v. Norway*, no. 12148/03, § 38, 4 October 2007 and *A. v. Norway*, no. 28070/06, § 64, 9 April 2009 cases -although it may be noted that the Court did not define the meaning of that word on those occasions.

The picture, however, is not crystal clear. In *Karakó v. Hungary*, no. 39311/05, §§ 22-25, 28 April 2009, however, the Court seemingly departed from this line of jurisprudence and narrowed the scope of protection of reputation under Article 8. The Court held that for Article 8 to be engaged, it was not sufficient for the applicant to claim that his reputation had been damaged. The applicant had to demonstrate that the impugned publication allegedly affecting his or her reputation constituted a significant interference with his private life such as to undermine his personal integrity (§ 23). This jurisprudence remains unsettled however as in *Petrenco v. Moldova*, no. 20928/05, § 52, 30 March 2010, the Court apparently reverted to the trend established in *Pfeifer* without mentioning the *Karakó* case.

These developments are significant because, as noted above, they have introduced a different way of approaching the balancing exercise in Article 10 cases. In particular, the Court increasingly refers to Article 8, and with it the positive obligation to protect private life (*Cumpănă and Mazăre v. Romania* [GC], no. 33348/96, § 91, ECHR 2004-XI) in cases brought under Article 10 and vice versa.

A new trend?

This has been perceived by some as giving privacy rights the upper hand over freedom of expression, thus sidestepping much of the traditional Court's case-law in Article 10 cases.[386] Indeed, this seems to be confirmed by another related development, namely the increased protection from which politicians have benefited under Article 8 of the Convention (see for example *Rumyana Ivanova v. Bulgaria*, no. 36207/03, 14 February 2008 and *Petrina v. Romania*, no. 78060/01, 14 October 2008).

More in general, criticism has been expressed towards what is perceived as a progressive erosion of the protection of freedom of speech. In recent years, academics and practitioners alike have voiced their concern that the Court's case-law in this area is increasingly lacking in predictability and consistency.[387] The Court's *Von Hannover* (2004) jurisprudence has also been the subject of a number of criticisms in academic circles.[388] One could refer in this connection, in particular, to a number of interventions made at a Seminar recently held at the European Court of Human Rights on *The European Protection of Freedom of Expression: Some Recent Restrictive Trends* (Strasbourg, 10 October 2008).

The new *von Hannover* case and the *Axel Springer* case therefore present the Grand Chamber with an opportunity to clarify the principles underlying a proper balancing of the right to privacy and freedom of expression.

Waiting for these judgements, maybe the following can be said.

One should refrain, in my view, to rush to the conclusion that the Court has inaugurated a new course of its case-law, departing form its previous approaches, which more effectively protected freedom of association.

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[386] See G. MILLAR, *Whither the Spirit of Lingens?*, in European Human Rights Law Review, Issue 3 2009, pp. 277-288, at 281-282.

[387] See among others, G. Millar, *Whither the Spirit of Lingens?*, in European Human Rights Law Review, Issue 3 2009, pp. 277-288'; and the papers presented at a Seminar on Freedom of Expression: Reflections on Some Recent Restrictive Trends, held in Strasbourg on 10 October 2008: http://www-ircm.u-strasbg.fr/seminaire_oct2008/index.htm.

[388] P. Wachsmann, *Secrets petits et grands : sur deux arrêts de la Cour européenne des droits de l'homme (Société Plon c. France*, du 18 mai 2004 et *Von Hannover c. Allemagne*, du 24 juin 2004), L'Europe des Libertés, 4e année, n°14 (août 2004) pp. 3-8 ; M.A. Sanderson, *Is Von Hannover a Step Backward for the Substantive Analysis of Speech and Privacy Interests ?*, European Human Rights Law Review, vol 9 (2004), at 631-644 ; N. Nohlen, *Von Hannover v. Germany* : ECHR decision on balance between privacy rights of public figures and freedom of the press, American Journal of International Law, vol 100, no. 1(Jan. 2006), at 196-201.

I would definitively join Judge Christos Rozakis, who in his introductory remarks to that Seminar said that, despite the rather strict limitations imposed by Article 10, and the reference to duties and responsibilities, the case-law of the Convention has been oriented towards a very liberal direction, "probably not as liberal as that of the very exceptional and extraordinary moments of the U.S. Supreme Court, but still, much more progressive than the case-law of most of the European State-parties, against whom violations have recurrently been found. The pace given by the *Handyside* judgment, which boldly expanded the protection of freedom of expression, not only to "information" or "ideas" that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb, considering that "such are the demands of pluralism, tolerance and broadmindness, without which there is no democratic society", and that the exceptions-limitations of paragraph 2 must be constrained strictly, and the need for any restrictions to be established convincingly, has been faithfully followed in hundred of judgments of our case-law, including recent examples of the case-law of the "new" Court."

It is also worth noting, as Judge Rozakis did, that a number of elements have been added to the protection of this right, following the general enunciations of the *Handyside*, such as the particular degree of tolerance which must be shown by individuals exercising public functions vis-à-vis criticisms coming from the media or other quarters (*Oberschlik*), the distinction adopted by the case-law between "facts", which must be substantiated by those who criticise a person, and "value judgments", which do not need profound substantiation – only some relevance of a statement to the facts behind it -, etc. have all contributed to widening the protection of free speech.

What appears as an increased concern of the Court for the protection of the privacy, including of politicians and public figures, can indeed be explained as a response to , through some forms of expression, which, while not serving any real interest, have unnecessarily detrimental effects on the private or family life of individuals, and its constituent component, the right to reputation.

The compass which guides the Court is the test of public or general interest. This concept has been interpreted by the Court to include public activities which contribute to the fundamental issues of a public debate, such as political matters, or serious questions closely linked to public life. Marginal issues of public life which concern aspects of interest only to specific strata of the population, satisfying their curiosity or their amusement, clearly benefit of a lower degree of protection, in particular if they have the potential to affect seriously, and unnecessarily, the reputation of others and possibly seriously attempting at their personality.

Libel – civil or criminal liability?

Prof. Jacek Sobczak
Judge of the Supreme Court, Poland
Dr. Aleksandra Suchorzewska
The Warsaw School of Social Sciences and Humanities, Poland

Free press was supposed to serve man and citizen, it was to have informative and monitoring function, take care that none of the existing authorities abused their competence. The condition for the freedom of the press was and still is the independence of journalists. This independence was primarily understood as not being connected with any authority, any office. It was to guarantee the objectivity and impartiality of the press. That thesis is completely and utterly true. Any connections of the press with any of the constitutionally favoured authorities in fact contradict its freedom, similarly as the illegal executive's influencing the contents of the message is the contradiction of that freedom. It cannot be forgotten however that the freedom of the press is not a value existing for itself, that it does not perform a decorative function, but it is to serve people craving for information, knowledge, commentary. Meanwhile, the freedom of the press for some means fetish to which they bow low with reverence, without the consideration that that freedom ceased to serve the right goals, the society as a whole as well as its individual members.

The belief that the press is "the fourth estate" is slowly going out of date. The observation of political, social and economic life proves that it was in actual fact the first and only authority. It is the press that decides what is appropriate and inappropriate, moral and immoral, wise and stupid, just and unjust.

Despite the obvious facts and the letter of the law there is the conviction that journalist is the profession of public trust. Unfortunately, it does not meet the constitutional criteria that are required for such professions. Immeasurable strength and the role of the press that is

performed by journalists in the society results in their demanding greater and greater rights, though they are not always willing to fulfil their duties in connection with that. Journalists demand from the legislator informal immunity heedless of the fact that aspiring to "have authority" they are not chosen by anyone and are not responsible to anyone. The demands lodged for years boil down to the demand to abolish criminal liability for libel and to abolish the obligation of authorization. The latter will probably be achieved after the decision of the European Court of Human Rights in Strasbourg in the case *Wizerkaniuk against Poland*, though contrary to various claims, authorization although called differently is present in different legal systems.

The freedom of the press, contrary to journalists' belief, is not boundless and is not superior to the right to privacy, inalienable human dignity expressed in numerous normative acts, among others, in the Preamble and art. 1 of the Charter of Fundamental Rights of the European Union.

The proverbial thorn in journalists' side is the liability for libel. Arguments are bandied about that such criminal liability is against the standards that were developed by the European Court of Human Rights on the ground of the Convention for the Protection of Human Rights and Fundamental Freedoms, and that no one can be punished for words with imprisonment. Both arguments are simply dishonest. The European Court of Human Rights never stated that libel should not result in criminal liability. On the contrary, in many decisions it indicated that such a liability is allowed, expressing the conviction that it should not result in excessively severe punishments. These decisions are easily accessible and have been discussed by Jacek Sobczak, as well as Ireneusz C. Kamiński, and Marek Antonii Nowicki. It is not true that prisons are "overcrowded" with journalists who serve imprisonment for accidental libels. It is quite the other way round. For years no journalist has been sentenced to imprisonment without the conditional suspension of its execution and no journalist has been punished for libel. Quoting, in the course of the discussion, Marek from Police is dishonest as, firstly, he was sentenced to imprisonment without the conditional suspension of its execution; secondly, committing libel – what was demonstrated to him by the Supreme Court – he was aware he was lying; thirdly, he failed to carry out the imposed obligation to apologise, considering himself superior to court authorities, hence the punishment which execution was suspended was brought for execution. Finally, it is not true that he was pardoned and that the sentence was waived. It is only true that president Kaczyński recognizing the third petition of the convict for pardon released him only from the obligation to apologise.

It should be remembered that after the decision of the Constitutional Tribunal [pl Trybunał Konstytucyjny, TK], the Sejm, with the act dated 5 November 2009, amended the contents of art. 212 – not to such a degree as journalists demanded, but to such a degree that in practice they can without great concern raise objections concerning the conduct of persons performing public functions, or concerning the defence of a socially justified interest. Could those who so eagerly desire the abolition of liability for libel really demand the possibility to publicly raise or trumpet untrue accusations?

The question whether it is reasonable for the criminal and civil honour protection systems to coexist in the Polish law has been considered in theory. Criminal liability for libel, as stated by TK, in the decision dated 30 October 2006[389] constitutes a permissible form of the protection of honour in a democratic legal state, even in the case of the existing alternative civil-law regime for that protection. Protection of personal interests in the form of honour, good name and human dignity requires the necessity to weigh and balance contradictory values as well as legal rules accomplishing them, namely: freedom of expression and the right to privacy and dignity. The importance of those rights is identical, as well as the level of protection given to them both in the system of international law (also European, the order of the European Council and the European Union), as well as in the system of internal. None of those rights has an absolute character and none has priority. Settling the antinomy between those rights may only be done with reference to a specific case, whereas there is no way to find explicit abstract rules in this scope[390]. The right to the protection of honour, good name, dignity and privacy may be accomplished on civil as well as criminal grounds. Criminal liability, as stated by TK, in the decision dated 20 October 2006[391], has a repressive objective, and civil liability - primarily compensatory objective, however both penal as well as civil law use material sanctions. In the field of penal law it is not only about a fine, specified in art. 212 § 1 and 2 of KK [pl Penal Code], but also about punitive measure in the form of the so called exemplary damages which pursuant to art. 212 § 3 KK may be adjudged for the injured party, the Polish Red Cross or for other social goal indicated by the injured party, yet the upper limit of the amount of exemplary damages is PLN 100 000 (art. 48 of KK). However, in the scope of civil liability for infringing personal rights (art. 24 § 1 sentence 3 in connection with art. 448 of KC [Civil Code]), the court may order the offender to pay an appropriate sum of money as a compensation for the person whose personal right has been infringed or for the social goal indicated by that person. That amount is not limited by law. As a result, the material problem connected with civil liability for infringing personal rights (which in particular is honour and good name) may be much more burdensome from criminal liability for libel. The present regulation of pecuniary compensation for infringing honour and good name creates – as observed by TK in the decision dated 20 October 2006 – the possibility of using that sanction in order to evade the limitations specified in the provisions of the penal law. Prerequisites of adjudging the exemplary damages are strictly specified in the provisions of KK, however the civil judicature has not worked out a uniform position as to the question whether on the ground of the changed in 1996 art. 448 of KC the award of the pecuniary compensation is possible in each unlawful case of infringing personal rights, or only in the case when the infringement has the features of an unlawful act as understood by art. 415-449 of KC, or finally when the offender can be blamed for the offence. TK emphasized that it is

[389] ref. P 10/06, OTK-A 2006, No. 9, item 128

[390] decision of TK dated 12 May 2008, ref. SK 43/05, Dz. U. [The Journal of Laws] 2008, No. 90, item 560; also see J. Sadomski, Ochrona czci (dobrego imienia) w polskim prawie cywilnym i karnym – analiza porównawcza, in: A. Siemaszko (red.), „Stosowanie prawa. Księga jubileuszowa z okazji XX-lecia Instytutu Wymiaru Sprawiedliwości", Warszawa 2011, p. 158-159

[391] ref. P 10/06, OTK-A 2006, No. 9, item 128

difficult to determine whether civil liability and criminal liability, as different measures of actions which are at the disposal of the legislator, are equivalent in terms of effectiveness of the completion of the intended goals, in that case – against the caused libel, the infringement of dignity. No unambiguous grounds to accept that the protection of personal interests on the ground of civil law in the present conditions of functioning of the administration of justice may be considered an equally effective protection of honour and good name as the criminalization of libel. Equally important is the question that the equivalence takes place neither between the results which are connected with sentencing a defamer in a criminal trial with the results of considering the demands of the suit in a civil trial. Convincing is the position of theorists that "despite all positive sides of the civil procedure the decision of the civil court stating the infringement of human honour cannot be treated as to its substantive contents and consequences as equivalent to a condemnatory sentence in a criminal trial. The perceptible degree of social condemnation, expressed in a decision recognizing the act of the defamer as criminally unlawful, is different from the one with which is connected the decision of the civil court stating infringement of personal interests. The planes of civil and criminal law may complement, but not substitute each other"[392]. Although, the aim of the criminal procedure in cases for the infringement of honour is not primarily the restoration of good name of the defamed person and compensation for the suffered injury, but punishing the offender, from the perspective of the injured person the "court settlement of the matter is crucial, for it may constitute for their environment a sufficiently convincing proof for the fact that exposing them, as a consequence of libel, to humiliation in the public opinion was unjustified and wrong"[393]. Civil law remedies which may be applied pursuant to art. 24 § 1 sentence 2 of KC in case of infringement of personal interests also include ordering the offender to make an appropriate statement, e.g. an apology. The low effectiveness of that sort of remedies is proven by the actual state of the case pending before Constitutional Tribunal, case ref. SK 9/06. In that case the District Court conditionally suspended the execution of the pronounced sentence and pursuant to art. 72 § 1 point 2 of KK bound the offender to apologize to the defamed person. The deficiencies of civil law protection of good name infringed by raising and spreading defaming accusations are proven by the course of many civil cases in which persons infringing personal interests do not follow court decisions, though it also happens in connection with some of criminal cases[394]. It should be observed that it is the close connection between honour and good name with human dignity that speaks for the inclusion of the issues of infringing honour and good name of persons, the regulation of criminal law, and only civil law. The latter is the fundamental value of the legal order and is closely connected with the notion of the common good. Art. 1 and art. 30 of the Constitution cannot be regarded separately from each other as these are the provisions specifying the ideological grounds of state and social order[395]. Hence, interference in the

[392] W. Kulesza, Zniesławienie i zniewaga. Ochrona czci i godności człowieka w polskim prawie karnym – zagadnienia podstawowe, Warszawa 1984, p. 162

[393] W. Szkotnicki, Przestępstwo zniesławienia i próby nowej jego prawnej regulacji, PS 1995, no. 5, p. 23

[394] It was pointed out by TK in the decision dated 20 October 2006, ref. P 10/06; also A. Bodnar, Nie ma skutku przeprosin, wyroku więc nie wykonano, Rzeczp., 10 August 2006

[395] J. Trzciński, Rzeczpospolita Polska dobrem wspólnym wszystkich obywateli, in: „Sądownictwo administracyjne gwarantem wolności i praw obywatelskich 1980-2005", Warszawa 2005, p. 456

sphere of human dignity is such significant infringement of the grounds of that order that it ceases to be only the case of the interested persons. Regulating calumny as a crime means that the legislator considers that act as a generally socially harmful, thus as an infringement of the common good, and not only as "pure" infringement of subjective rights of other persons. From that point of view, the justification of a criminal sanction for libel is striving for emphasizing that also the state (state community), and indirectly the Nation as a sovereign assess negatively the infringement of good name and honour, and they condemn such behaviour. It should be pointed out here that it can be inferred from the above international documents that taking advantage of the freedom of words is connected with particular responsibility and particular obligations. Regardless of the validity of art. 212 of KK, slander is certainly one of the behaviours that should not occur. In the discussed decision, TK observed that the threat of a criminal sanction is not a typical limitation of taking advantage of freedom or rights, but an "indirect" limitation that does not consist in prohibiting some of the behaviours (because that prohibition is already in effect in legal order), but in the specific determination of further leading consequences affecting persons violating the law. The legislator has a certain degree of freedom in that scope. It is connected primarily with a constitutional regulation which says that the protection of public morality can be a prerequisite for limitations. In such a perspective, public morality can be, on the *a maiori ad minus* basis, the prerequisite for not the prohibition of specific actions, but for introducing further leading sanctions, e.g. criminal sanction. From that point of view, introducing a criminal sanction is the fundamental form of expression of the social condemnation for the person violating the law. However, the prohibition of some conduct only connected with sanctions of private and legal character is not such a form. Such a sanction may be considered to be sufficient possibly in a situation when it allows in full or almost in full to "restore the previous state". Libel is one of such actions the consequences of which are to a considerable degree "irreversible". It is possible to compensate (repair) property damage by restoring the previous state or by payment pecuniary damages, but it is not fully possible to compensate all negative psychological and life's consequences of libel. The defamed person is exposed to negative public and social consequences which in any case can be "balanced" with the subsequent prohibition, dismissal of accusations, and even with an apology. In fact, because of libel, the injured person is forced to assert their rights in a long-lasting, costly and time-consuming court procedure. That person bears the burden of proof for the infringement of their interests in the civil procedure. The responsibility for taking advantage of the freedom of words should mean the burden of sanctions for infringing it which correspond to the size of material and non-material damages caused by that infringement. If the specified regime of responsibility does not allow that, it is also justified to use other forms of responsibility.

Now it is the time for the conclusion and the forecasts. Actions for libel used to be frequent occurrences in court calendars. Today, they are rare what in my opinion is a painful testimony of the lack of trust as to the effectiveness of court decisions. Actions for libel are brought by politicians against politicians and journalists, and recently by journalists against journalists. Powerful journalistic lobby in my view will lead to waiving the liability for libel which will enable journalists to blacken the name of everyone they wish to become target of their attack

or who will be pointed to them by the editor-in-chief or the owner of a magazine. As it is just a myth that journalists are independent.

Internet Service Providers Liability for Free Speech On-Line

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Abstract

The article introduces the human rights aspect of Internet Service Providers (ISPs) content liability. As a result of the architecture of the global network, ISPs might be considered liable for a wide range of offences, including civil liability or criminal responsibility for copyright infringement, defamation or incitement to genocide and promoting racial hatred. Should ISPs be held liable for hosted content, the logical consequence would be an undesired chilling effect: limiting the risk by blocking the access to or removing any content, potentially exposing the ISP to liability.
This form of substitute ISP liability and the chilling effect it brings are regarded undesired by most states. Appropriate notice-and-takedown procedures are being introduced in order to protect ISPs from liability. The presentation will include a brief recapitulation of such mechanisms provided for in Europe and share an insight into the key differences with similar non-European legal tools. In numerous Asian countries service providers are obliged to censor ("filter") the content they provide and bear liability for materials they do not block the access to. This comparison will show instrumental to reflecting the global nature of the Internet as an arena for exercising free speech. Resulting inefficiency of national legislation on and enforcement of on-line censorship laws will be emphasized. In particular a reference to the current national and European legislative endeavors as well as key jurisprudence will be made.

1. Defining ISPs

21st century is the age of the information society. A tool crucial to further development of the information society is the global network. Internet Service Providers (ISPs) are the ones who play a key role in this process, since it is them who provide Internet access to the members of

the information community. ISPs provide a wide range of services, therefore among them four basic groups may be identified. Access providers are usually telecommunication companies, which enable Internet access to its users through appropriate hardware and basic software. The three other groups may be generally described as providers of other information society services and include application-providers, content-providers and host-providers.[396] Therefore this smilingly swift abbreviation covers numerous and diversified groups of entities, however sharing one joint feature: they all provide commercial services enabling Internet access through IP-assigned devices (be it computers, tablets, "smart-phones" or other "smart" devices, collectively referred to as "the Internet of Things"; IoT).[397]

This key role that the ISPs hold gives them much genuine power. The power to decide what kinds of content may be accessed on-line by the users they render their services to. National authorities and international organizations realized this potential that the ISPs hold quite some time ago and what followed was an extensive legal regulation introducing their scarce rights and plentiful obligations. Those obligations rarely related to the content created or offered by the providers themselves (such as e.g. terms of use or company information), but primarily introduced restraints onto content created or enabled (uploaded) by the users, obliging the ISPs to disable access to certain categories thereof.

Numerous national acts of law were enforced, obliging providers to introduce certain mechanisms for data retention and content censorship (the latter often referred to as on-line "filtering"). ISPs are obliged to keep data sent among and between their users (data retention) and render it available to widely defined national authorities at their request. They are also usually obliged by the law to disable access to certain content, based on their own assessment rather than on a court order, while failing to do so might make them face civil liability or criminal responsibility. Both of those obligations are referred to in more detail below.

While the data retention debate is today as eager as it was in 2006,[398] it puts the ISPs is a relatively safe (although instrumental) position. They need to meet the obligations defined within certain national legal acts, setting in much detail what kind of information and for what period of time ought to be kept and who may access it. ISPs' biggest concern with the data retention is the financial concern of providing enough disk space to store the retained data. The data retention debate seems just another facet of a lengthy debate on the suitable compromise between state security and individual privacy.

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[396] Human rights guidelines for Internet service providers Developed by the Council of Europe in co-operation with the European Internet Services Providers Association (EuroISPA), H/Inf (2008) 9, p. 3.
[397] See generally: R. H. Weber, R. Weber, Internet of things: legal perspectives, Springer, 2010.
[398] See: Directive 2006/24/EC of the European Parliament and of the Council of 15 March 2006 on the retention of data generated or processed in connection with the provision of publicly available electronic communications services or of public communications networks and amending Directive 2002/58/EC and the discussion is provoked, e.g.: the joint letter to Cecilia Malmström, European Commissioner for Home Affairs, Viviane Reding, European Commission Vice-President with responsibility for Justice, Fundamental Rights and Citizenship and Neelie Kroes, European Commission Vice-President with responsibility for the Digital Agenda, 22 June 2010, available at: http://www.vorratsdatenspeicherung.de/images/DRletter_Malmstroem.pdf.

ISP content liability however raises more serious questions. It may be considered as falling somewhere between the question of media liability for defamation and service provider warranty liability. As already mentioned the scope of ISPs may be defined quite broadly, encompassing telecommunications companies, web service providers or every day users (should they be administering or moderating a website enabling others to create content). Their joint feature is the technical capability to disable access to certain data. The legal obligation to exercise this capability is being regulated differently in different parts of the globe.

2. Regional approaches to ISP liability

Article 15 of the Directive on electronic commerce[399] provides a good example of a general principle, recognized in both: Europe and America, according to which states do not impose a general obligation onto service providers to monitor the information they provide access to, which they transmit or store.[400] ISPs are also not obliged to actively seek information that might be deemed illegal.[401] The e-commerce Directive introduces however a number of situations, where ISPs might be held liable for on-line content (Articles 12-15). Those situations include providing access to communication networks, transmitting data and hosting information.[402]

ISP liability may result from a notice-and-takedown procedure, as generally introduced by the e-commerce directive, but the particular details of such a procedure left to national legislation**.** Generally this practice obliges an ISP to promptly block the access to certain content upon receiving a notification of its illegal character, under the pain of ISP subsidiary responsibility. Should an ISP be made aware of a potentially infringing character of the content it enables or hosts and decide not to disable access thereto, they will be the ones facing legal consequences brought about by such content, regardless of the direct responsibility of the individual who had uploaded or created it. Such subsidiary liability mechanism brings numerous crucial questions.

First one would be on that on the appropriate form of the takedown notice. Who and in what form ought to inform the ISP it is e.g. hosting illegal content? Existing regulations often remain vague and leave much room for interpretation. The Polish act on rendering electronic services[403] mentions in Article 14 "**credible information** [emphasis added – J.K.] on the illegal character of the enabled data or activities related thereto" provided to the ISP as one of

[399] Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (Directive on electronic commerce), Official Journal L 178 , 17/07/2000 P. 0001 - 0016.
[400] Human rights guidelines for Internet service providers Developed by the Council of Europe in co-operation with the European Internet Services Providers Association (EuroISPA), H/Inf (2008) 9, p. 13.
[401] Ibidem.
[402] Ibidem.
[403] Ustawa oświadczeniu usług drogą elektroniczną, June 18, 2002, Journal of Laws 2002/144/1204.

the forms of conveying the responsibility for that data onto them. Should the ISP not block access to illegal content of which they are being informed promptly, they will be facing liability for the damage that this content might actually cause. Such vague formulation forces the ISPs to decide on their own on the legality of particular content or "activities related thereto" and act accordingly.

This brings us to the second problem with the notice-and-takedown procedure. The decisions on the potential illegality of the hosted data and the following denial of access thereto are of detrimental consequences, since should the ISP be wrong, they will be facing legal responsibility himself. This situation brings an undesired **chilling effect**: ISPs are limiting their own risk of potential lawsuits by blocking the access to or removing any reported content, as potentially exposing them to liability. This makes the ISPs actual censors of on-line content and is sometimes regarded as an actual, unproportionate limitation of free speech of the users. The right to free speech of the users is being restrained without a fair trial, without any court decision, as a matter of fact. Whether such practice might be considered as meeting the ECHR requirement, of both: Article 10 and Article 6, remains highly questionable.

There are few regulations providing clearer guidelines of the procedure. The 1996 US Digital Millennium Copyright Act (DMCA),[404] although relating to only one category of illegal content (copyright infringing data) puts in much detail both: the form of the notice and the mechanism following its issuance. The DMCA introduces also rigid periods of time for particular phases of the take-down procedure, which seems an answer to another problem still present in the Polish regulation: the obligation of the ISPs to "promptly" take down the illegal content. Although promptness is a term common to civil law procedures, in relation to ISP activities it might require certain modifications (regarding e.g. the technical capabilities of the service provider) and therefore has already led to confusion on numerous occasions.[405]

The third and possibly most important issue relating to content liability is ISP **criminal responsibility**. This issue is raised with most significance when it comes to copyright infringement, but the criminalization of libel still existent in national legal systems also ought to raise concerns as a possible footpath for ISP subsidiary liability. The newly amended Polish act on rendering electronic services did not explicitly exclude ISPs' criminal liability (although demanded by the ISPs themselves) and foreign court judgments seem to confirm criminal responsibility for hosted content (just to mention the recent Swedish case on *The Pirate Bay* website). National courts usually found ISPs responsible for "contributory copyright infringement" rather than a direct offence, however such a construct may still raise

[404] 112 Stat. 2860 (1998).

[405] See e.g.: Wroclaw Appellate Court decision (Sąd Apelacyjny we Wrocławiu) of January 15, 2010, in the case of Dariusz B. v. Nasza Klasa ltd. where the company operating a social platform was found liable for personal rights infringement by failing to "promptly" disable access to a fake account created with the use of the plaintiff's data. (case file I C 625/08). See also the recent Appellate Court in Lublin judgment in case Jezior (case file I ACa 544/10).

questions as subsidiary criminal liability. Whether the ISP may be regarded as entrusted with a certain legal obligation (a warrant) and therefore criminally liable for its omission seems doubtful in the light of the two issues raised above (the unclear scope of subjects the obligation is addressed to and the contents of the required action designated in an insufficiently detailed manor to bring criminal liability).

Regardless of that doubt strict criminal ISP responsibility is a legal standard in numerous countries, mainly in Asia and the Near East. Open Network Initiative, an organization researching regional and national limitations of access to electronic content world-wide, names China, Iran, Uzbekistan, Burma, Vietnam and Turkmenistan as world's top "filtering" countries when it comes to censoring political content (it regards the filtering of political content in those states "extensive").[406] Their national policies include extensive Internet "filtering" (preventive censorship of all electronic content), obliging ISPs to monitor the content they enable and disable access to all information that might be regarded dangerous to widely defined state interest.[407] This geographically and culturally distant state practice is of relevance to the current debate on the application of the European Convention of Human Rights and its Article 10 for two reasons.

Internet filtering infringes the individual right to communication, derived from Article 10 ECHR. Should an individual under the jurisdiction of a ECHR Party State attempt to impart information to or receive information from individuals located within those "filtering" territories, exercising that individual right might be seriously impaired. The problem is similar to traditional press or mail, however with the impact of the Internet onto modern society and the scale of electronic contacts, it holds more significance. While national policies in Asia may be subject to Article 19 of the Universal Declaration of Human Rights or Article 19 of the International Covenant on Civil and Political Rights, they are not subject to ECHR and therefore lack any factual enforcement mechanisms. However the network's architecture brings a challenge to this traditional reasoning. None of the "filtering" policies operate on software or electronic infrastructure produced and run solely within their jurisdictions. Most transnational telecommunication companies operate in those parts of the globe, adopting to national legislations. It is usually US or Europe based ISPs that render services to individual and corporate users in those physically distant parts of the globe. Those companies' obligations to censor electronic content might originate from national legislations of China or Iran, however will eventually target the freedom to impart information of their country-men in Europe or the USA. Such a situation is likely in the cyber-arena and raises interesting questions on the possibility to exercise jurisdiction under the ECHR.

A closely related aspect of Internet filtering is the rapid popularization of on-line censorship in Europe. While some 10 years ago Internet filtering was the exclusive domain of countries widely regarded as autocratic, currently such model democracies as Sweden or UK openly

[406] See: Internet Filtering in Asia, http://opennet.net/research/regions/asia.
[407] Ibidem.

approve of filtering electronic content available within their territory. In Europe, other than in Asia, national filtering usually operates based on one of two mechanisms. It may be introduced through a court order, obliging a particular national ISP to block access to a certain website the content of which is found contrary to national law (as provided for by the regulation of Article 13 par. 2 of the Polish act on rendering electronic services or exercised by Danish,[408] German[409] and numerous other European national courts in their orders against ISPs providing access to e.g. the controversial The Pirate Bay website). This mechanism is questionable with regard to human rights, in particular Article 10 ECHR for the reasons named above.[410] It infringes the right to impart and receive information, as confirmed by the recent Organization for Security and Co-operation in Europe (OSCE) report.[411] OSCE clearly states, that "*Internet access policies, defined by governments, should be in line with the requirements of (...) Article 10 of the European Convention on Human Rights*" and defines internet access as a human right.[412] This mechanism, as bound with much legal uncertainty, arising primarily out of the grounds named above, seems unsatisfactory also to the ISPs themselves. Often operating in numerous jurisdictions simultaneously, they are obliged to face varying national legislations and standards and adopt to often contradicting national courts' decisions. Therefore it was the ISPs themselves that offered a unique, alternative and transnational solution to the problem of content liability.

Initiatives such as the Global Network Initiative[413] resort to the industry self-regulation, calling upon ISPs to adhere to a uniform set of rules and principles aimed at granting an equal level of protection to all their users worldwide.[414] Such sets of rules are not directly rooted in legal acts, although their contents aim to envisage the current state of contemporary compromise on the scope of protection of human rights, such as the right to freedom of expression of protection of privacy. This mechanisms seems to be the further way for unification of human rights protection on-line. The international public law background in soft-law development and application might show invaluable in aiding this process.

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[408] The verdict of the Eastern High Court of Denmark on 26 November 2008; Østre Landsrets kendelse af 26. november 2008: IFPI Danmark mod Sonofon A/S, available at: http://it-retsforum.dcmurl.dk/uploads/media/LKendelsePirateBay.pdf

[409] Hamburg District Court (Landgericht Hamburg), 10th Civil Chamber, order of May 6th, 2010 with an injunction against CB3Rob Ltd & Co KG (Cyberbunker), ordering them to disable access to The Pirate Bay site (case file 310 O 154/10).

[410] The ECHR will have to address this very question of ISP liability for content and needed safeguards for protecting free speech on-line in the pending case of Delfi AS v. Estonia (no. 64569/09).

[411] OSCE, REPORT Freedom of Expression on the Internet Study of legal provisions and practices related to freedom of expression, the free flow of information and media pluralism on the Internet in OSCE participating States, 2010, available at: http://www.osce.org/fom/80723.

[412] Ibidem, p. 35.

[413] http://www.globalnetworkinitiative.org/.

[414] On the results of such efforts vide: Global Network Initiative, *Inaugural Report Our work. Our vision. Our progress*, GNI 2010. Online. Available HTTP: <http://www.globalnetworkinitiative.org/cms/uploads/1/GNI_annual_report_2010.pdf> (accessed: 2011-09-25).

Defamation Laws before Courts

Mr. Łukasz Ptak[415]

The defenders of the defamation laws often invoke their placement within the structure of criminal laws system as a positive virtue. They claim state positive duty to guard one's reputation is better realised in the system where all the traditional principles are secured. The impartiality of judiciary as well as the prosecutors obligation to act in the name of harmed ones as well as relatively not severe sanction in comparison to extensive civil damages are pointed as positive virtues. However, it has to be noted that, when it comes to the defamation laws some fundamental principles of modern criminal law and procedure are not realised in the straight forward way. It could be even said that this principles, like the presumption of innocence, the traditional balance of the burden of proof or publicity of the hearing become reversed. This is also a consequence of very special role and origins of defamation laws.

1. Defamation defined

Defamation is defined within legal dictionaries as: "the act of harming the reputation of another by making a false statement to third person"[416] or "an act of communication that causes someone to be shamed, ridiculed, held in contempt, lowered in the estimation of the community, or to lose employment status or earnings or otherwise suffer a damaged reputation"[417]

It is a statement that is made within the public sphere that intends or has the capacity to injure the reputation of another person. The legal definition of defamation varies between different legal systems. However "there is a common agreement that a communication that is merely unflattering, annoying, irksome or embarrassing, or that hurts only the plaintiff's feelings is

[415] Łukasz Ptak – graduate of European Master in Human Rights and Democratisation at European Inter-University Centre for Human Rights and Democratisation (EUIC) in Venice and of Law Faculty at Jagiellonian University in Cracow; works at the Ewa Nowińska and Maria du Vall Law Firm in Cracow.
[416] Garner, B.A. Black's Law Dictionary 9th edition, West Thomson Reuters Bussines, 2009, pp. 479.
[417] http://www.legaldictionaries.org/defamation (consulted on 10 october 2011).

not actionable"[418]. A speech act that is classed as defamatory has to have the capacity to injure or have a negative influence on the person's image in others eyes. As stated in US Restatement (Second) of Torts, defamation tends to "lower him in the estimation of the community or to deter third persons from associating or dealing with him"419 or as stated in other places: "lowering the plaintiff in the estimation of right-thinking people generally", "injuring the plaintiff's reputation by exposing him to hatred, contempt or ridicule" and "tending to make the plaintiff be shunned and avoided"[420].

2. Defamation origins and evolution

History of the defamation laws from it's very beginning shows the special role, of this regulation – namely the protection of 'rich and famous' against the lowering of their esteem. Milestone in the history of libel in the legal codes was the introduction of 1275 Scandalum Magnatum in England. Statute introduced criminal sanction on anyone who "(...) tell or publish any false news or tales (...)"[421], which can injure "The great man of the realm"[422]. This created a political function to the libel laws, since from that moment these laws granted special protection for important public figures ("great men of the public realm"). In 1488 the Court of Star Chamber (England) developed common law criminal libel rules aiming to protect monarch and aristocracy against criticism[423]. This law was in force until 1888, when the Statue Law Revision Act abolished it. Mr. Holt, an English lawyer composing his book on libel in 1816, self-confidently stated:

"It would indeed be most irrational and absurd to imagine that the law of England afforded a better protection to the character of private individual, than to magistrate or public person, employed in the administration of justice, or the offices of government"[424].

Also in Germany the law against insults has aristocratic roots. Whitman notes that the law against insults was applied only to certain aristocrats and was generally only enforced to protect their honour[425]. Thus, it is noteworthy that the *Scandalum Magnatum* had a great

[418] Sack, R. D. Sack on Defamation: Libel, Slander and Related Problems, Practising Law Institute, USA, 1999. pp 9.
[419] Darrell, N. (ed.) Restatement (Second) of the Law. Torts 2d, Vol. 3, para. 559, American Law Institute, Washington, 1976. pp. 156.
[420] Docherty, B. 'Defamation Law: Positive Jurisprudence', pp. 284 – 287 in Harvard Human Rights Journal, Vol. 13, 2000. p. 265.
[421] Edward I, c. 34; Statutes at Large, i, 97 as quoted in Vechten, 1903.
[422] Ibidem.
[423] Kirtley, J. E. 'Criminal defmation. An instrument of destruction', pp. 89-102 in Karlsreiter, Ana & Vuokko, Hanna (eds.) Ending the Chilling Effect. Working to Repeal Criminal Libel and Insult Laws , OSCE, Vienna 2004., pp.90.
[424] Holt, F. L. The law of libel: in which is contained a general history of this law in the ancient codes and of its introductions, adn sucessive alterations in the Law of England J. Butterwoth And Son Booksellers, London, 1816., 1816, pp.20.
[425] Whitman, J. Q. 'Enforcing Civility and Respect: Three Societies', pp. 1279-1398 in Yale Law Journal Vol. 109, Yale, 2000hitman, 2000, p. 1279.

influence on the structure and function of libel laws in Europe. It was only later on that the defamation laws started to be applied to protect the reputation of common citizens.

Having in mind the place of the Seminar it is essential to trace the role and developments of defamation laws in Communist block countries. From the very beginning of the Communist system the role of the press was highly instrumental to the Communist regime. It was to serve the objectives of the Communist state. This was accompanied by the legal and practical denial of basic civil freedoms in Eastern block countries. Formal censorship was also common within Eastern block countries. However, most significant was the total monopoly that the state exercised over the mass media[426]. The freedom of speech and the free press were considered a threat to the socialist system, since they could be used to weaken the state by facilitating the resistance of the bourgeoisie[427]. According to the logic of the Communist state, freedom of expression could be exercised only by those who supported the official line of Communist ideology, whereas criticism of the Communist state was by definition counter-revolutionary and therefore often punished as a crime. Since the totalitarian system assigned an important role to the symbolism of the state, as well as to the leading role of the party and to public officials, it obviously introduced defamation laws, which punished offences against state officials and symbols gravely. It is thus a very characteristic pattern that, within the former Soviet Union, insult "could only constitute a criminal offence, not a civil wrong"[428].

The contemporary situation of defamation laws looks as in the presentation of my colleague from OSCE. For today, with some exceptions, the majority of modern European states have defamation laws in their codes. Usually they are constructed following the French example of the 1881 press law. The typical pattern of continental defamation laws is that defamation is predominately regarded as a crime rather than a civil wrong, whereas common law systems predominantly recognise libel as a tort. Usually the sanctions provided against offences of defamation and libels are fines, reparations and imprisonment from between 6 months to 3 years. While western democracies typically limited the enforcement of libel laws, they did no completely abolish them. Indeed, there are still cases where criminal sanctions are applied[429].

3. Odd characteristic of defamation laws

In the beginning of September this year the Polish journalist Joanna Najfeld has published following message on her blog:
'On the 12.09.2011 the Court has closed the session and delivered the judgement, which absolved me from the condemnation of committing defamation lodged by the abortionist

[426] Sajo, A. Freedom of expression, Insitute of Public Affairs, Warsaw 2004, 116.
[427] The Press in Authoritarian Countries, International Press Institute Survey 13 (1959).
[428] LLevitsky, Serge, 'Copyright, Defamation and Privacy in Soviet Civil Law', pp. 3-181 in Law in Eastern Europe No. 22 (I) , Documentation Office for East European Law, University of Leyden, 1979, p. 114.
[429] Yanchukova, E. 'Criminal Defamation and Insult Laws: An Infringement on the Freedom of Expression in European and Post-Communist Jurisdictions', L. 861 in Columbia Journal of Transnational Law Vol. 41 , 2003., p. 6.

lobbyist Wanda Nowicka. Unfortunately I can not present you the judgement, as it is not public as the whole trial up to this moment, following the wish of the plaintiff.' [430]

The above message was published after three years criminal defamation trial, which was fully closed to public. The trial was started by the abortion activists after the controversial statement of journalists about the source of founds for the lobbying actions[431.] The Contested speech took place during TV interview. Journalist had to appear in the Court for twelve sessions. From the very beginning of the trial she started blog mamproces.pl (translation: 'I have a trial.pl') with the aim to report from the court room. However almost no entries on the blog was made as the trial was held *in camera* from it's beginning. That effected in complete ban of the public to the arguments presented on the trial and to the justification of the judgement. The journalist openly complained that her readers may only assume that during the trial she presented required evidence of truth of her statement. However she is prevented form publishing it. Therefore the publicity can equally assume that she was absolved not because of truth of her word but for example as an effect of misconduct of the plaintiff. *This trial showed that the institution of secrecy of the proceeding in some cases is a gag and does not serve for the opening of the public debate* – commented her advocate.[432]

Closed to public session of the defamation proceeding is applied *ex lege* for whole trial in case of a libel accusation. The article 359 p. 2 of Polish criminal proceedings code obliges court to apply closed to public sessions of the proceeding automatically. Only the plaintiff (the victim) has the power to loge application for an open session. The justification for such regulation is the protection of the plaintiff against the repeated stigmatisation. However the law is not supported by any general clause of public interest or the right of the accused that would allow the disclosure. This is however straight contrast to the fundamental principle of the right to have public hearing of the case and as above example showed could be practically used to chill the public debate, even in case no defamation took place in fact, but the sole of length of proceeding and its closed to public character make the topic out of the reach for public. This is of course not a solely Polish criminal proceeding characteristic but a used pattern among the countries having ruling criminal defamation laws.

Another issue highlighted by those who oppose defamation laws is their odd pattern among other modern penal norms. In many legal systems defamation crimes break the rule of *nullum crimen sine culpa*. Often the dissemination of a defamatory statement alone is enough to convict the offender, without taking into account the intention of the speaker. Defamation laws therefore provide a problematical exception to the fundamental principles of the legal system. Thus, it is hard to talk about a person being guilty of defamation, but rather of a person who, in committing the offence of defamation, being in the wrong simply because of the definition of their behaviour. Absence of the *mens rea* requirement renders defamation an

[430] Najfeld J. blog. Mamproces.pl consulted on 11 october 2011
[431] Exact contested statemeant was: '(…) Ms *Nowickiej, who is the Polish part of the biggest world corporation of abortion providers (...) is on the payment list of that industry'*.
[432] Kucharczak P. 'Joanna Najfeld uniewinniona', http://info.wiara.pl/doc/941315.Joanna-Najfeld-uniewinniona.

archaic law and underlines its origin within autocratic legal systems. The modern legal system should contain the requirement for investigation of intention to cause harm by the offender. That should be proofed by the one claiming to be defamed or at least public authorities acting *ex officio.* Mendel points that "in relation to a statement of fact, this additionally requires either proof of knowledge of falsity, or, at least, reckless disregard of whether or not the statement was false"[433]. However, there are legal systems that require the establishment of guilt in defamation proceedings, many of laws does not fulfil this fundamental standard.

Closely related to the above described problem is another characteristic of defamation laws. It is frequent that libel laws reverse the burden of proof what is in fact contrary to the standards of criminal law. It is a fundamental rule of criminal law that the duty to provide evidence and establish the guilt of the defendant falls on the side of the prosecutor and not the prosecuted - the consequence of this presumption of innocence is the rule that obliges the court to treat the accused as innocent until proven guilty[434]. In the case of defamation laws this principle if frequently disregarded or reversed. In a rather anomalous way a number of legal systems require the defendant to produce evidence of the truth of their statement as a defence of the accusation of defamation. This construction of the "defence of truth" assumes that the contested speech was false and therefore unlawful. Thus, it is in this way that defamation laws break with the fundamental principle of that the accused is innocent until proven guilty. However, it can be disputed that the specific character of defamation laws justifies this unusual legal approach. Indeed, it is noteworthy that the dissemination of a defamatory statement, often containing criminal allegations, is also a form of accusation made before a wider public audience, rather than before a court. Nevertheless, those who are critical of defamation laws argue that the burden of proving the falsity of speech should lie clearly on the side of those who bring the case to court[435]. This issue of the presumption of falsity, until proven true, is not solely a matter for criminal law. The same rule of the reversed burden of proof is present in a number of civil laws which regulate the issue of defamation. It also contrasts with principle that duty to establish evidence should lay on side, which derives positive consequences of the proven fact. Some researchers posit that in England, where libel has a strictly civil character, a sociological survey conducted by media professionals "found that defendants in England face considerable difficulties in establishing truth; this produces the chilling effect"[436].

[433] Mendel, T. 'The Case against Criminal Defamation Laws', pp. 25-34 in Karlsreiter, Ana & Vuokko, Hanna (eds.) Ending the Chilling Effect. Working to Repeal Criminal Libel and Insult Laws , OSCE, Vienna 2004 p. 26.

[434] Preasumption of innocence is present in most important Human Right treaties like Universal Deklaration of Human Rights, Internationa Covenant of Civil and Political Rights, European Convention of Human Rights.

[435] Mendel, 2004, pp. 26.

[436] Barendt, E., Lustgarten L., Norrie K, Stephenson H. Libel and the media: the chilling effect, Oxford University Press, Oxford, 1997. , pp. 191.

Conclusions

Above shows that defamation laws have rather unique characteristic in the criminal law system. Some of their virtues like quasi-presumption of guilt, presumption of falsity and followed reversed burden of proof as well as the secrecy of the proceedings stays in visible contrast to the fundamental principles of criminal law aimed at the security of accused person. We can not also forget about the origins and historical evolution of defamation clauses, and the role that was attributed to them from the very beginning. Therefore, each defender of the defamation laws should always try to explain described virtues and justify them.

Discussion

Ilia Dohel
Thank you very much, Dr. Kulesza, for your wonderful presentation pointing out self-regulatory aspects of handling violations of privacy or other offences related to freedom of expression online. It is true that self-regulation – I think we have not mentioned it earlier in other presentations – can be and is in many instances a very good and viable alternative to legal regulation of speech, even in traditional media, not only online.

I thank all panelist for their great presentations. I am grateful for the work they have done. We will now take some time to answer questions and take comments. Because we started a bit late, I was told that we could take ten minutes more. So this gives us about twenty minutes. I suggest that we take maybe three comments at a time and allow our panelists to respond.

Łukasz Ptak
I have question to judge Raimondi. You said that during the evolution of the Court's approach, the Court came to a conclusion that the reputation includes the sphere of private life…

Guido Raimondi
In fact I wanted to say that private life includes the sphere of reputation.

Łukasz Ptak
Yes, private life includes the sphere of reputation. However, you departed from the position that private life is only a personal integrity, the very close to one's person. And my question is how the evolution of this position is justified? Because as far as I understand the reputation, it is a kind of my social mirror. This is what others think about me. And actually, my reputation can be different from my identity, as other people may feel completely differently about myself and of what in fact constitutes my personal identity. So how do you justify that the reputation, which is in fact an opinion of some people about another is a sphere of private life? That's my question.

Ilia Dohel
Ok, I think that judge may wish to respond now to this before we take the next questions, because it is rather specific.

Guido Raimondi
On this point, well, of course I don't know whether I have to justify this because I confined myself to present the jurisprudence of the Court. In fact there has been an evolution that you beautifully pointed out, that the early jurisprudence of the Court was more focused on the person itself, person as such. But then, starting from this *von Hannover* case I mentioned, more attention is given to the interaction of the person with other members of the society. This justifies the protection of the reputation, which is, as you said, the mirror of one's personality, among all the other persons. This reflects interaction. Individuals should be protected according to this most recent approach of the Court also in this interaction. I don't know whether it is a sufficient reply.

If you allow me, I would have a short remark on dr. Sochaczewska's presentation. She said, and she is absolutely right in my view, that the court never said that criminalization is a weapon that should not be used in the context of the right protected by article 10. This is absolutely true, but then I would say that the fact that one State Party decides to proceed with this nuclear weapon or with a lesser weapon and milder sanctions, is not irrelevant. Why? Because in the assessment of the Court's model of whether article 10 has been breached or not, you have these elements: that you need a legal basis, you need a legitimate aim, but the most important thing is that the measure which is challenged before the Court should be proportionate to the legitimate aim pursued and this is the question of whether the challenged measure is necessary in a democratic society. And of course the gravity of sanction is a very important element in this assessment. So it is true that there is no prohibition under the Convention to use criminal law in this connection, but if a State Party does not use the criminal law, there are definitely more chances that the Court will not find a breach of the Convention. Thank you.

Dominika Bychawska
I'm coordinating a project devoted to freedom of expression and mainly looking at criminal defamation. I would say that the main problem in Poland is actually the lack of understanding of the ECHR's case-law and its use in the proceedings before the national courts, including the Supreme Court. So none of the standards coming from this case-law are aplied during the criminal defamation proceedings, including the distinction between value judgments and statements of fact, the distinction between statements towards public and private figures.

Before the autumn 2011 we were running a campaign on the decriminalization of defamation with couple of other organizations in Poland. We were trying to get declarations from politicians in order to eventually decriminalize defamation. There was an attempt in 2009 in Poland to depenalise it totally, but unfortunately the Parliament left the depravation of liberty as one of the sanctions, which clearly goes against the ECHR case law.

And in the presentation of dr. Sochaczewska we heard that mainly journalists are sentence on the basis of art. 212 of the Criminal Code – defamation, but according to the Ministry's of

Justice statistics only ¼ of the cases actually concern journalists or bloggers, because we don't have distinct statistics being conducted.

What's happened in Poland is that through these many, many years when politicians were using the criminal defamation, the regular people learnt how to use it as well. We now see a growing number of cases where school teachers use criminal defamation among each other or people being sentenced from the words pronounced during court hearings or wrote in complaints and court pleadings.

The situation is getting a bit serious and since 2000 the number of convictions have increased considerably, from 33 convictions in 2000 up to 230 in 2011. No actions to change the situation are undertaken, although the ECHR is regularly coming with resolutions finding Poland in violation of art. 10 of the Convention.

Răzvan-Horaţiu Radu
Thank you. I wish to underline something about the presentation of Mr Boyko Boev. I have been the Government Agent of Romania before the European Court of Human Rights for 4 years and with regard to the example of Romania concerning the decriminalization of defamation, I want to add something to your presentation.

The Constitutional Court's decision is without effect. Why? Because we can't transform the Constitutional Court and its case-law into a positive legislature – that's on the one hand. On the other hand, since 2007 or 2006, when defamation was decriminalized, we don't have a domestic case-law concerning prosecution or conviction for defamation.

And we have as well an appeal for interpretation to the Supreme Court of Justice. And they told that in their opinion defamation does not exist after the depenalisation. And the conclusion is that we don't have a case-law concerning the defamation and if we had the decision of the Constitutional Court, that decision would be without any practical effect. That's the reality concerning Romania and we can help you with other presentations. We gonna change our contact details and we can send you all of this information for future presentations. Thank you.

Piotr Turek
I am a prosecutor and it probably explains my point of view. I would like to raise the question of quality of journalism and I think this is an issue which should be also examined in the context of article 10 and the freedom of expression. I would like to say one thing, that the public authorities are always obliged to respect the criterion of proportionality and the interference should be proportionate, but I often have the impression that journalists don't use this criterion and their criticism is rarely proportionate. They don't balance other rights, like rights under article 8, and their criticism is sometimes very, very much exaggerated and I think some kind of sanction should exist in the domestic law. Of course, it should be applied in a proportionate manner. Thank you very much.

Ilia Dohel
Thank you. I think we will now give a possibility for our panelists to respond to these comments. And we had two parts, one is related to Poland and I would allow, first of all, Dr. Suchorzewska to make comments on what was said regarding the situation here, and maybe you, Dr. Kulesza will have something to add later, if you like. And then Mr. Radu will respond to the Romanian part of the question. The floor is yours, Dr. Suchorzewska.

Aleksandra Suchorzewska
Thank you very much. My comment will be very short, a few words. I fully agree with everything what was said here. But after all, I think that it makes sense to have these two kinds of regimes of personal protection in the Polish law – civil responsibility and criminal responsibility as well. Of course, it is also the matter of how the law will be used by the judge in court. We have to keep the balance and we have to count on our judges. Thank you.

Joanna Kulesza
Just a brief comment on what the discussion is focusing on. I think that criminal liability is actually quite important because if we are facing criminal liability for information, for content, there is also this subsidiary criminal liability. There is a proposed amendment to the Polish act on rendering electronic services and there was a proposal from the community saying that criminal subsidiary liability should be outlawed. We shouldn't have subsidiary criminal liability as it is contrary to the whole idea of criminal law, but no such an amendment was made. So if we are facing criminal liability, we are also facing subsidiary criminal liability for contributing to the infringement, for contributing to the crime. Leaving criminal liability as it is, creates a strong impact on the whole community, not only on those directly abusing the freedom of speech, but also on those who may be liable for editing or hosting such abusive content. In press law it is different. We have editors and they would be the ones holding the responsibility. When we are speaking about so-called new media: bloggers – as was named here – or all those civil society journalists out there, who are trying to produce journalistic activities and may be held liable just as traditional journalists, I think that the consequences of their criminal responsibility, are reaching beyond the attempted aims of the legislation. Thank you.

Ilia Dohel
Thank you. Before going to the Romanian part of questions, allow me please to make a few personal and institutional comments about the situation in Poland that I have been monitoring, as well as some general comments.

When we talk about criminal liability for defamation and the lack of quality in journalism that justifies the need for criminal liability for defamation, we forget that even hypothetical possibility of a journalist being punished under criminal law – with or without imprisonment – means that they are stigmatized as criminals, they have to bear the stigma forever and this negatively influences their professional status. But first of all, this creates a serious chilling

effect that sends a strong message to the rest of a journalistic community that certain types of subjects and certain personalities are not be touched, should not be criticized – and is this what our society really wants? Is this in the interest of our society to have certain types of information being tabooed by instituting criminal charges against journalists? The recent cases of Poland that we registered include the cases of Dorota Kania and Jerzy Jachowicz who were prosecuted under the criminal defamation article for revealing allegations that the former security service employee had to testify in the U.S. court about some criminal matters after he had been invited as a witness. Both journalists acted professionally – this is confirmed by their colleagues – both journalists acted in the interest of the society, because it is in the interest of the society to be informed about important events like that.

However, they can still be prosecuted and sentenced in Poland. This chills criticism and stops journalists from covering important subjects in the interest of the society. And to respond to the part of the question about that journalists' lack the responsibility…. How about politicians? Who controls the politicians? Can we institute criminal charges against politicians? How often does that happen? Do the members of a public that find remarks of a politician offensive go to court and launch a criminal defamation charge or file a private defamation lawsuit against that politician? Like the President of my country, Lukashenko, I am from Belarus. Nobody! Well, there were some attempts but they were unsuccessful.

And the last point I want to make about Poland – and actually in relation to Belarus – is that Poland, if it still prosecutes journalists and other persons who speak up and who exercise the right of freedom of expression, if it prosecutes under the criminal law such people, it loses credibility when criticizing countries like mine. When Belarus sentenced recently correspondent of Gazeta Wyborcza, Andrzej Poczobut, in Grodno to three years of suspended imprisonment for defaming the President of Belarus, Poland criticized this very much, including the journalist community, the Ministry of Foreign Affairs and the Government. I think that if we want to avoid these 'double standards' and move community of nations, regardless of our political affiliations, towards more freedom of expression, every country should decriminalize defamation. There are other remedies for dealing with offensive publications.

Mr. Boev, would you like to comment now about the part of the question on Romania?

Boyko Boev
I actually would like to thank the gentleman for making this clarification. It is really of very big importance. I would say one of the outcomes of this conference, because both ARTICLE 19 NGO and also OSCE Representative on Freedom of the Media point to the countries that have decriminalized defamation and Romania was not among that countries. So it is very important that we have this cleared and I think there is an opportunity to understand the situation in Romania. But it is also very interesting constitutional law issue. If I were a professor in constitutional law I would ask my students what would be the outcome, what would be the effectivity of the Constitutional Court's judgments which are not followed by

the legislator? Obviously, there was an abolishment of criminal defamation and then the Constitutional Court said "no, no, no", that is wrong, but from what you have just explained to me, the legislator did not reintroduced the criminal defamation, which means there is no criminal defamation in Romania. Thank you for this clarification.

Another comment or remark. In the UK the question of quality of journalism is a hot, hot issue at the moment. The authorities are planning to introduce law on the media. And UK has been a country which has been boasting how they are free, how media is not regulated and there is no need to regulate the press. But now there is this serious, serious debate and I think we can all follow what will happen. The point that I would like to make is that this discussion does not concern reintroduction of criminal defamation. So in the UK we have a country without criminal defamation, where the question of quality journalism remains and they are going to introduce other means, we will see what this means will be, but not reintroduction of a criminal defamation.

Ilia Dohel
Thank you very much, Mr. Boev. Judge Giudo Raimodi, I understand that you have a final remark to make.

Guido Raimondi
Allow me to react briefly to two remarks. One from the distinguish lady in the front line on the question of the lack of attention of the national judges to the Strasbourg's jurisprudence and the one on the quality of journalism raised by the distinguish prosecutor.

First question is quite important and this is not necessarily confined to the issues we are discussing today, I mean mainly article 8 and article 10, but this implies the question of training of national operators – not only judges, but also lawyers – and this is a very important question because all the Strasbourg system relies on subsidiarity. The most important level is the national level, so the Strasbourg level is subsidiary to the national level and should intervene only when the national systems, which in principle should be effective, are not effective. But these should be exceptions. We know that this is not the reality and this is why the Court has now difficulties in its functioning. This is why I want to take this opportunity to stress the importance of the training, which is an important pillar of subsidiarity.

Then, on the quality of journalism.. This is a mine field… And one should be careful to establish a strict parallel between the attitude of journalists and the attitude of those who are supposed to control their activity, because some excess has to be tolerated. I refer again to them to decide. And then, well, maybe the guidance from the Court is not perfect. If we think about the two cases mentioned, one was the Austrian case *Standard Verlags GmbH* and the other one was the Finnish case. In these cases we have opposite outcomes. In both cases there was the question of sex and politics mixed, which is irresistible for the journalists. But in the first case, the Austrian one, it was a triangle, an extramarital relationship between a distinguish three, as the three corners of a triangle were politicians: the lady was a wife to the

president of the Republic and had a love affair with another political person. All this was reported on the press and the journalist was convicted. In that case the Court noted that this was an ideal gossip, thus making a value judgment on the quality of the journalism, and no violation of article 10 was found. But then we have the Finish case. What happened in the Finnish case? We have a lady, who is not a politician, who enters in a love affair with a politician. Then the story ends badly and the main reason is because the lady is making shouting outside the house of the politician so there is a scandal. Scandal is reported on the press and this is because you could choose another man in Finland, but you chose a political person, so you enter the political dimension and what you did is relevant for the public interest. One may ask himself or herself questions about this. Just to say that quality of journalism is a mine field. Thank you.

Ilia Dohel

Thank you very much for your remark. Ladies and Gentleman, thank you for your attention and I am sorry for taking up a bit longer than expected. Enjoy your coffee now! I am sure you can approach our panelists if you still have questions.

Panel Four

Current Issues Related to the European Convention on Human Rights System

Moderator: Prof. Christophe Swinarski
former Senior Legal Adviser
International Committee of the Red Cross
Geneva, Switzerland

Part One
Representing the Government

The role of a State agent in the proceedings before the European Court of Human Rights – changes in the existing practice and new challenges following entry into force of the Protocol No. 14. A view remarks from the Polish perspective

Dr. Aleksandra Mężykowska
Co-Agent of the Government before the European Court of Human Rights
Ministry of Foreign Affairs of Poland

In this presentation, I would like to draw your attention to changes introduced to the operation of State agent bureau following the reform of Court's work organization, implemented last year mainly due to entry into force of the Protocol No. 14 to the Convention for the Protection of Human Rights and Fundamental Freedoms[437]. The aim of my lecture is to demonstrate that operation of the entire Strasbourg system depends not only on the Court itself, but also on the cooperation with State representatives.

The main goal of the reform introduced by the Protocol No. 14 was to optimise the application processing system developed by the Convention without changing its structure. The Court was given new procedural means in order to process all submitted applications more effectively. At the same time, it was allowed to concentrate on the most important cases which required in-depth examination[438].

Changes supporting this goal were introduced in three main areas: firstly, the ability of Court's filtering capacity and faster identification of unmeritorious applications was reinforced; secondly, new admissibility criterion concerning cases in which the applicant has not suffered a significant disadvantage was introduced; thirdly, measures for dealing with repetitive cases were identified[439].

[437] Protocol No. 14 to the Convention for the Protection of Human Rights and Fundamental Freedoms, amending the control system of the Convention, (CETS No. 194) Agreement of Madrid (12.V.2009).
[438] Protocol No. 14 to the Convention for the Protection of Human Rights and Fundamental Freedoms, Explanatory Report, par. 35, http://conventions.coe.int/Treaty/EN/Reports/Html/194.htm.
[439] Ibid. par. 36.

While evaluating the introduced changes from the perspective of a State agent, I will focus on the third reform area mentioned above, namely the actions aimed at facilitating the operation of the Court in respect to the settlement of repetitive cases. It is this type of case that results in an enormous case-load for the Court and the agents as well[440]. The improvement and acceleration of Court's investigation of repetitive cases immediately translates into the work scope of a State agent.

New Article 28 of the Convention extends the powers of three-judge committees by the ability to settle the repetitive cases. According to the provision, the Court sitting in a three-judge committee can, unanimously, declare applications admissible and decide on their merits, when the questions they raise concerning the interpretation or application of the Convention are covered by well-established case-law of the Court. What is of utmost importance, the decisions and judgments issued in this procedure are final.

Simplified procedure of processing the application by the three-judge committee has a huge impact on the work of agents. The time period for presenting the State's standpoint is much shorter, the description of the case is laconic and facts are often presented in a form of a table. Often, the Court chooses not to send the documents attached by the applicant to the application, even though they form an integral part of it. Beside an undoubted advantage of rapid processing of applications in this procedure, its practice allows to point number of disturbing issues. In respect to Polish cases, we often observe automaticity in forwarding applications to the committee, which has considerable consequences. In one of the cases involving access to court, communicated before the introduction of the Protocol No. 14, the agent submitted observations in which a new domestic remedy was indicated. Due to entry into force of the Protocol No. 14, the case was handed for committee's examination. The agent contested the application of 28 (1b) but the protest was dismissed. The case, qualified as repetitive, was declared as Convention violation, without considering the effectiveness of a new remedy invoked by the Government. The verdict is final.[441] Unfortunately, this was not the only case when the agent contested the assignment of certain cases to the committee.

Another problem consists in that that the Court does not reason its decisions rejecting the Government's objections concerning the assignment of a case to a committee of three judges. The Court used to insert in its judgments only short information about the rejection.[442] It has to be noted that the Government used to provide detailed reasoning why a given case should not be assigned to the committee. On the other hand, in cases when the Court accepts the

[440] Repetitive cases account for a significant proportion of the Court's judgments - in 2003, approximately 60%. See, Explanatory Report, *supra* note 2, par. 7 and 68.
[441] Case *Urbanowicz v. Poland*, No. 40459/05, judgment 5.10.2010.
[442] See e.g. *Pastuszenia v. Poland*, No. 46074/07, judgment 21.09.2010; *Balcer v. Poland*, No. 19236/07, judgment 5.10.2010; *Kramarz v. Poland*, No. 34851/07, judgment 5.10.2010; *Skurat v. Poland*, No. 26451/07, judgment 14.06.2011; *Kowalenko v. Poland*, No.26144/05, judgment 26.10.2010.

Government's objection no reference to the fact that the case was previously assigned to the committee is to be found in the judgment.[443]

The velocity of simplified procedure is undoubtedly its huge advantage. However, implementation of this procedure requires attentive observation in order to assess its effectiveness and maintain contentious character of the proceeding. Undoubtedly, this is an area which would benefit from agents sharing their experience among themselves. In order to secure the interest of States, agents should develop a mechanism for contesting the appointment of particular cases to the committee. It would be advisable to expand regulations regarding the opportunity for a party to protest against the use of simplified procedure. It seems that appointing the Court with the sole competence to decide on the dismissal of objections and approving committees' judgments as final results in a very wide discretional power vested in the Court.

Cases assigned to three-judge committees for examination in the simplified procedure are assumingly cases in which the claim is based on the well established case-law of the Court stating violation of Convention or its Protocols. Basically, these cases deal with implied violation of the Convention.[444] In order to make the investigation of these cases more effective, the Protocol No. 14 introduced one more novelty, very important in respect to work of State agent – a new Article 39, which regulates the settlement of cases.

Prior to the reform, the Court was able to make itself available to the parties in regard to the settlement only following prior decision on admissibility[445]. The reform made this procedure more flexible. Introduction of new Articles 28 and 29 regulates the competences of the committees and Chambers in order to, inter alia, decrease the number of separate decisions on the admissibility[446]. At the same time, in accordance with the new wording of Article 39 of the Convention, the Court may place itself at the disposal of the parties with a view to secure friendly settlement at each stage of proceedings. While evaluating the new regulations, it should be noted that in fact they verify the existing practice of the Court. Even prior to entry into force of the Protocol No. 14, the Section Registrar, while communicating the case to the State, always informed the parties of his/her readiness to prepare perspective settlement proposal, had the parties expressed an interest in friendly resolution of the dispute. Often, in

[443] The only case adjudicated against Poland in which the reference to the fact that the objection of the Government was accepted is the case *Dombrowski v. Poland*, No. 9566/10, judgment 18.10.2011 issued after oral submission at the Seminar. Against this background in other cases no such reference is to be found. See, e.g. *Kosińska v. Poland*, No. 42797/06, judgment 14.12.2010; *Płaza v. Poland,* No. 18830/07, judgment 25.01. 2011; *Choumakov v. Poland (2)*, No.55777/08, judgment 1.02.2011.

[444] Among 37 judgments issued against Poland in the simplified procedure from 1 June 2010 until 30 September 2011 only in three the Court stated non violation of the Convention: *Bator v. Poland*, No. 6544/08, judgment 26.10.2010; *Kowalenko v. Poland*, No. 26144/05, judgment 26.10.2010; *Rogala v. Poland*, No. 40176/08, judgment 18.01.2011.

[445] Article 38 of the Convention and Rule 62 of the Rules of the Court, text of the Rule is available at: http://www.echr.coe.int/NR/rdonlyres/6AC1A02E-9A3C-4E06-94EF-E0BD377731DA/0/REGLEMENT_EN_Avril2011.pdf, last acceded on 29 November 2011.

[446] Explanatory Report, *supra* note 2, par. 73.

cases dealing with matters previously settled by the Court's case-law, the settlement offer was presented at the time of communicating the case. Upon entry into force of the Protocol No. 14, this practice obtained legal grounds and enhanced transparency of Court's actions in respect to the parties. Currently in vast majority of cases, the Court concurrently communicates the case and forwards the settlement offer.

Even though it has been only 16 months since the Protocol No. 14 entered into force, the increase of Court's pace of work may be already noticed in reference to settlement proposals in repetitive cases. In 2007, the Court gave a total of 68 decisions approving friendly settlements in respect of Poland. By the end of August 2011, there were 77 such decisions, including 45 decisions on cases communicated to the State after 1 June 2010, i.e. after the Protocol No. 14 had entered into force. There would be more such decisions, but in 11 cases the applicants refused to settle and the State presented unilateral declarations. The available data unquestionably points to the fact that the implemented reform produced the expected effects in the form of faster examination of repetitive claims. This is important not only to the Court itself, but to the agent as well. Obviously, factual evaluation of the effects of the reform will be possible after the Court presents the full statistical data for the year 2011.

The settled cases go to the execution stage. This also involves another novelty introduced by the Protocol No. 14. Article 38 (4) stipulates that the Court's decision to approve the settlement between the parties is passed to the Committee of Ministers, which supervises the execution of friendly settlement conditions provided in the decision. The goal of this provision was to subject the settlements to the "eye" of the Committee of Ministers. Until then, in order to assure this aim, the Court used to endorse friendly settlements through judgments. This procedure was very laborious for the Court and moreover, some States were reluctant to settle if the settlement was to be approved by a judgment. New solution reaches out to new goals, but it also has one more advantage for the applicants, and indirectly for the State agents as well. Supervision provided by the Committee of Ministers over the execution of friendly settlement decisions is an additional guarantee for the applicant, next to general obligation of the State, that the decision will be implemented. For some applicants, this factor plays a major role when accepting State's settlement proposal. New solution undoubtedly strengthens the process of settlements, however it increases the agents' work-load in the sphere of execution of the Court's verdicts.

Acceleration of applications' communication on the part of the Court, together with simultaneous forwarding of the settlement declaration makes the applicants more positive toward the settlement proposals. This probably results in a decreased number of cases in which the State is forced to make unilateral declaration while the applicant refuses to settle. In a situation, when the settlement is Court's, not agent's, initiative, friendly conclusion of the case has significantly higher chances of success. In the recent years, before the changes introduces by Protocol No. 14 the number of cases in which the unilateral declarations were submitted by the Polish agent has been increasing. In 2008 there were 28 such cases, in 2009 - 40 and in 2010 - 46. In 2011, there were only 11 declarations approved by the Court.

Simplification of the settlement procedure has coincided with the development of pilot procedure. Even though the regulations concerning the pilot procedure has not become a part of the Protocol No. 14, on 21 February 2011, the Court, while implementing the Interlaken Declaration, introduced to its Rules Rule 61, which regulates matters concerning this procedure[447]. Pilot procedure was supposed to implement 3 basic goals: firstly, to help the States eliminate systemic and structural problems on the national level; secondly, to provide the applicants with faster redressing of damages; thirdly, to help the Court to relieve the influx of workload fast and effectively by reducing the number of similar and usually complicated cases, which required an in-depth examination[448]. The new rule codifies the procedure. It provides that the pilot procedure can be used when facts in application "reveal in the Contracting State concerned the existence of a structural or systemic problem or other similar dysfunction which has given rise or may give rise to similar applications." The new rule does finally provide a legal basis, since until now the procedure was in fact based on existing practice. The goal of this presentation is not to discuss the Court's regulations in detail. However, it is worth noting that new regulations, even though they are a step forward, do not resolve all doubts related to the pilot-judgment procedure[449]. Since the introduction of Rule 61 to the Rules, the Court has not communicated to Poland any case in which it would point to new problems of structural nature. Therefore I will comment only on the so far unconcluded pilot procedure based on pilot judgments in the *Orchowski v. Poland and Norbert Sikorski v. Poland* cases of 22 October 2009[450]. In its judgments, the Court, based on Article 46 of the Convention, ruled that overcrowding in Polish penitential and detention facilities poses a systemic problem. In the current year, the considerable number of settlement approving decisions in cases concerning this systemic violation should be noted. As many as 22 have been concluded in the simplified procedure of settlement introduced with Article 39 of the Convention.

It should be noted that agent's work is also much influenced by the regulation of Rule 61 (6) stipulating that the applicants whose cases refer to similar problems but were adjourned also must be informed of the Court's decision on investigating the case in a pilot procedure. They should also be informed of any new circumstances which may have an impact on their own claims.

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[447] The new edition of the Rules of Court that includes the new provisions adopted by the plenary Court on pilot-judgment procedure (Rule 61) entered into force on 1 April 2011.

[448] E. Fribergh, *Pilot judgments from the Court's perspective*, Stockholm Colloquy 9-10 June 2008, available at: http://www.echr.coe.int/NR/rdonlyres/43C75D00-0F57-4176-8A7C-0AE28DBD4EE8/0/StockholmdiscoursFribergh0910062008.pdf, last acceded 29 November 2011.

[449] For more about the pilot judgment procedure see: C. Paraskeva, *Human Rights Protection Begins and Ends at Home: The 'Pilot Judgment Procedure, Developed by the European Court of Human Rights,* available at http://www.nottingham.ac.uk/hrlc/documents/publications/hrlcommentary2007/pilotjudgmentprocedure.pdf. last acceded 29 November 2011; A. Buyse, *The Pilot Judgment Procedure at the European Court of Human Rights: Possibilities and Challenges*, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1514441, last acceded 29 November 2011; Ph.Leach, H. Hardman, S. Stephenson, *Can the European Court's Pilot Judgment Procedure Help Resolve Systemic Human Rights Violations?* Burdov *and the Failure to Implement Domestic Court Decisions in Russia*, Human Rights Law Review (2010) 10 (2): 346-359.

[450] *Orchowski v. Poland*, No. 17885/04, *Norbert Sikorski v. Poland*, No. 17599/05.

The solutions approved in the Protocol No. 14 undoubtedly contribute to the increased effectiveness of Court's operation, and consequently to State agent's as well. New mechanisms require some caution in application so that the intended goal of enhancing the proceedings is not reached at the expense of substantial mistakes. It is worth noting that the use of some measures, which lead to fast conclusion of proceedings before the Court, result in the increased number of cases going to the judgment execution stage. This causes increased involvement of agents in the judgment execution procedure.

The European Court of Justice and the Protection of Fundamental Rights

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1. Evolution of the Protection of Fundamental Rights in the EU Legal Order

The three founding treaties of the international legal order known today as the EU provided a certain number of *rights and freedoms of economic nature* – such as the *freedom of movement, of stay and of residence and the principle of non-discrimination* – they did not contain a full "bill of rights". With time, this lack of a catalogue of fundamental rights turned out to be a deficiency of the community legal order[451].

The first explicit reference to the fundamental rights was made in the **Preamble of the Single European Act** (1986), followed by the **Treaty of Maastricht** (1992), according to which "*The Union shall respect fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms signed in Rome on the 4th of November 1950 and as they result from the constitutional traditions common to the Member States, as general principles of Community law*" (see article F paragraph 2). The **Treaty of Amsterdam** (1997) further develops the protection of fundamental rights by including new provisions. For example, the obligation to observe the principles of *liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law*, became a condition of accession to the EU. In this context, the Member States responsible of a serious and persistent breach of these fundamental principles exposed themselves to sanctions.

But we must keep in mind that the protection of fundamental rights was secured by the constant implication of the ECJ, which understood very early the need to provide a coherent

[451] The so called "institutional triangle" committed itself to respect the fundamental rights by its Common Declaration of April 1977. The chiefs of States and Governments took the same position in their common declaration on democracy of Copenhagen, in 1974.

system of protection of fundamental rights. The ECJ constantly and progressively developed the architecture of fundamental rights, in order to consolidate the Union of law by establishing an effective protection of fundamental rights[452].

2. The Crucial Role of the ECJ

At an early stage, in **Stork** case (1/58), it was apparent that the Court was not ready to review Community norms in the light of fundamental rights. It considered that, in its quality of judge of the Community legal order, it was not competent to enforce the respect of fundamental rights norms, even of constitutional order. But the Court had to reassess its position, as it became clear that the national courts were reluctant to accept the principles of supremacy and direct effect if the Community institutions themselves were not required to respect fundamental rights guarantees.

The ECJ first admitted the existence of an autonomous regime of the fundamental rights in the Community in **Stauder** case (29/69), by which it stated that *the respect of fundamental rights constitutes a general principle of Community law*. The ECJ relied upon the ex-Article 164 TCEE, which stipulated that the Court of Justice shall ensure that in the interpretation of the Treaty the law is observed. The Community judge progressively introduced references to the European Convention for the Protection of Human Rights and Fundamental Freedoms (the Convention) in its case-law. In its judgment in **Internationale Handelsgesellschaft** case (11/70), the ECJ stated that the protection of fundamental rights "*whilst inspired by the constitutional traditions common to the Member States, must be ensured within the framework of the structure and objectives of the Community".*

In its decision in **Nold** case (4/73), the ECJ drew its inspiration from the general principles of Community law, from the constitutional traditions common to the Member States and from the international instruments to which they participated, in order to make clear that it couldn't uphold measures which are incompatible with the fundamental rights established and guaranteed by the national constitutions.

This case-law was determined by the level of protection of the fundamental rights provided by the German and Italian Constitutional Courts. This case-law induced major transformations of the Community legal order. The ECJ found itself compelled to address the preoccupation of the national constitutional judges, according to which the transfer of some competences of the Member States to the Community would not jeopardize the protection of fundamental rights provided by national Constitutions.

[452] In its decision of 14 October 2004 in the **Omega** case C-36/02, the ECJ confirmed its attachment to the principle of the protection of human rights in the EU. Similar judgments were provided in cases: C-238/99, C-305/05, C-341/06.

The German Constitutional Court made clear its intention of preserving its ultimate competences of enforcing the protection of fundamental rights, despite the principle of supremacy of Community law, as long as equivalent measures of protection were not taken at a Community level (**Solange I** case-law as of 1974). In **Solange II** case as of 1986, the German Constitutional Court reviewed its position, considering that the Community legal order provided for a system of protection of fundamental rights equivalent to the one established by the national Constitution.

Starting with **Hauer** case (44/79), the ECJ further developed its doctrine of an autonomous notion of the fundamental rights.

3. The Charter of Fundamental Rights of the European Union

The adoption of the Treaty of Nice raised the issue of a European Constitution which would include a human rights catalogue. Upon this background was adopted the **Charter of Fundamental Rights of the European Union** (the Charter), which was not legally binding at that time, but which became part of the primary law with the entry into force of the Treaty of Lisbon (1.12.2009). The Charter enforces a certain number of constitutional values common to the Member States of the EU and puts in place a system of protection equivalent to the one established by the Convention for the Protection of Human Rights and Fundamental Freedoms.

The majority of the rights stipulated in the Charter find an equivalent in the Convention. Certain rights coincide with the ones established by the Convention, and **they have the same meaning and the same scope** - for example: *right to life* (The Society for the Protection of Unborn Children Ireland case, C-159/90), *respect of private and family life* (**X/Commission** case, C-404/92 P), *prohibition of torture and of inhuman or degrading treatment or punishment* (**Omega Spielhallen** case, C-36/02), *prohibition of slavery and of forced or compulsory labour, right to liberty and security, freedom of expression and information* (**C.A.S. SpA/Commission** case, C-204/07 P), *freedom of assembly* (**Eugen Schmidberger** case, C-112/00), *property rights* (**Booker Aquacultur Ltd** case, C-20/00), *presumption of innocence* (**JCB Service /Commission** case, C-167/04 P*)* and *right of defence* (**Yassin Abdullah Kadi** case, C-402/05 P).

Other rights may have a larger scope, such as *right to marry and to found a family, right to education, right to an effective remedy before a national authority* (**Unibet (London) Ltd** case, C-432/05), *right not to be punished twice for the same crime – ne bis in idem principle* (**Klaus Bourquain** case, C-297/07), **or they may have a more limited scope**, such as*protection of transgenders,* which are not recognised in official papers (P v S and Cornwall County Council case, C-13/94), *non-violation of a person's domicile* – principle which doesn't apply concerning the legal persons such as entreprises (**Hoecht** case as of 21.09.1989 and **Dow Chemical Iberica** as of 17.10.1989). Within the *freedom of expression*, ECJ limited

its control on a Member State measure restraining the circulation of a periodic journal (**Vereinigte Familiapress** case as of 26.06.1997).

The Charter also provides for different, new rights, which are not stipulated by the Convention – for example **the IVth Title of the Charter – Solidarity:** *workers' right to information and consultation within the undertaking, right of collective bargaining and action (***Albany International** case, C-67/96), *right of access to placement services, protection in the event of unjustified dismissal (***Pia Landgren** case, F-1/05), *right to fair and just working conditions, prohibition of child labour and protection of young people at work, entitlement to social security and social assistance (***Albert Nardone** case, C-181/03) **or the Vth Title of the Charter, concerning European citizens' rights:** *right to vote and to stand as a candidate at elections to the European Parliament, right to vote and to stand as a candidate at municipal elections, right to good administration* (max. mobil **Telekommunikation Service**, case T-57/99), *right to petition, the right to refer to the European Ombudsman, freedom of movement and of residence* (**Catherine Zhu and Man Lavette Chen** case, C-200/02), etc. or other rights such as *fundamental rights of the child* (**Inga Rinau** case, C-195/08), *protection of personal data* (**The Queen** case, C-369/98), *protection of medical privacy* (**Giuliana Gaspari** case, T-66/98), *protection of the environment, protection of consumers* etc.

The ECJ has the great merit of having introduced these rights, thus covering the initial silence of the treaties. Nonetheless, limits still exist in the protection of the individual as it is provided by the autonomous and coherent system of the EU legal order.

4. Sources of Inspiration for ECJ in Creating the 'Bill' of Fundamental Rights

ECJ established by its case-law a real unofficial 'bill' of fundamental rights protected within the EU system. This catalogue was supplemented in time and it had a sinuous evolution. Among the fundamental rights recognized by the ECJ within the EU system are the *principle of equality, freedom of religion, expression and information, secret of correspondence between an advocate and his/her client, domicile inviolability, respect of the defence right in criminal proceedings, non retroactivity of criminal law, effective access to justice, right to property and economic initiative, freedom of association and union rights, respect for private and family life, home and communications.*

One of the sources of reference having inspired the creation of the 'bill' of fundamental rights is the **European Convention for the Protection of Human Rights and Fundamental Freedoms**. The first specific reference to the Convention made by the EU judge was in **Rutili** case (36/75) as of 28.10.1975; subsequently the decisions of the human rights Court and the rights granted by ECHR were more and more often evoked and considered as the foundation of a democratic society.

The Convention inspired ECJ to proclaim *right to property, respect for private and family life, access to justice* (based on Article 6 – right to a fair trial, in relation with Article 13 – right to an effective remedy – see **Johnston** case as of 15.05.1986), *freedom of expression* (**CESE/E** case as of 16.12.1999), right to a *trial within a reasonable time* (**Baustahgewebw** case as of 17.12.1998), *principle of legality and proportionality of criminal offences and penalties* etc., but also to proclaim **new rights**, **adapted to EU legal order**, such as *right to medical secret* (based on Article 8 of ECHR, provided for in **X/Commission** case as of 5.10.1994), *right to family life of migrant workers* (based on Article 8 of ECHR, provided for in case **Commission/Germany** as of 18.05.1989), *protection of transgender* and *equal treatment of transsexuals* (link of right for private life with non-discrimination right –***P.S*** case as of 30.04.1996), *equal treatment of homosexuals* (**Grant** case as of 17.02.1998).

Other sources used by ECJ are the **Convention no 111 of the International Labour Organisation** concerning Discrimination in Respect of Employment and Occupation as of 25.06.1958 (**Defrenne** case as of 15.06.1987), the **International Covenant on Civil and Political Rights** as of 1966 (**Orkem** case as of 18.10.1989), the **European Social Charter** as of 1961 (**Blaizot** case as of 2.02.1988).

The ECJ case-law was also a source of inspiration for the European Court of Human Rights (ECHR), the judge of Strasbourg being inspired for example by **Defrenne** case (ECJ as of 8.04.1976) in order to interpret the principle of legal certainty (in **Marckx** case as of 13.06.1979), by **Commission/Belgium** case as of 17.12.1980 in order to highlight the criteria of the concept of *person employed in public administration* and extending the criteria of applicability of Article 6 ECHR to public function litigation (ECHR **Pellegrin** case as of 8.12.1999).

Nowadays there is not a total clarification of relations between the two courts, considering the complex rapports linking them. There is no open competence conflict between the judge of Luxemburg and the judge of Strasbourg, but the two Courts intervene mutually in the sphere of competence of the other one by 'legal constructions'. Thus, ECJ applies the provisions of the Convention and recognise them as *general principles of law common to all Member States*, and ECHR 'controls' the laws and regulations of EU, with the motivation that every infringement of fundamental rights is chargeable to the State of citizenship of the victim.
We can conclude that ECJ desires a certain independence and autonomy in interpreting the Convention, but in the same time not being controlled by the ECHR. This is a sensitive and actual topic still inciting to burning debates and discussions at European level.

Conclusions

ECJ has the great merit to have filled the legal blank of the EU concerning fundamental rights. The level of protection is at least the same with that insured by national legislations of Member States. This requirement is a consequence of the supremacy of the EU law.

If we compare the level of protection of fundamental rights within the legal order of the EU with the system of Convention, we'll find a delicate situation, sustained by the subtle links between the two legal orders. There is a good understanding between the two courts, and the legal system of EU is complemented by ECHR system, in order to ensure a democratic protection of human rights.

ECJ appropriated this protection by the means of general principles of law, and ECHR uses different external legal sources of interpretation, both European and international. Dialogue between judges is maintained by their intention to ensure a common space for this interpretation, in order to avoid contradictions.

The doctrine raised the question if the accession of the EU to the Convention is an attack against sovereignty of the Court of Luxemburg and against its exclusive and last competence in the field of EU law. Decisions of ECJ are out of the direct control of the ECHR and ECJ has also the powerful instrument of preliminary references, allowing it to impose a uniform interpretation and application to national judges. With the suppression of 2 pillars of the EU, ECJ also obtained competences in the field of fight against terrorism, within the common security and defence policy.

We don't know yet if the EU judge will become a real judge of human rights. A mechanism of controlling the respect of the Convention by this one has not been established yet. There is still a pending problem with the latter, facing a dilemma in case of contradiction between different interpretations of Luxemburg and Strasbourg judges: if it follows the EU interpretation, it risks a violation before the Court of Strasbourg and if it follows the ECHR interpretation, it risks to be sued for infringement before the Court of Luxemburg.

Concerning the accession of the EU to the Convention, the provision of the legal basis by Lisbon Treaty is not sufficient to be put into practice. The process is long, difficult and complex, and the term for its finalisation has not been established yet. But this is another debate.

Part Two
Improving Domestic Remedies

Introducing the Concept of General Domestic Remedy

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Creating effective domestic remedies against violations of human rights and freedoms guaranteed under the Convention for the Protection of Human Rights and Fundamental Freedoms is the duty of every High Contracting Party. Currently, this obligation thus applies to States, but after the expected accession of the European Union to the Convention it will also be the duty of the European Union. The latter obligation stems from Article 13 of the Convention and is a manifestation of the principle of subsidiarity.

Following the entry into force of Protocol No. 11 to the Convention there had been a rapid increase in the number of applications filed with the European Court of Human Rights. It soon became apparent that the Court is not capable of examining applications effectively. It was necessary to diagnose this new situation in order to restore the efficiency of the Court. This did not happen quickly, as instead of a diagnosis only suggestions for therapy were made. For instance, proposals were made to increase the funding of the Court or the number of judges, create additional mechanisms for filtering applications, reduce the amounts of just satisfaction awarded, introduce a fee for lodging an application, or apply more restrictive admissibility criteria. However, these suggestions lead to a dead end, and none of the proposals won wide support. A patient cannot be treated blindly, without knowledge about the causes of the disease. In addition, each of these proposals would require an amendment of the Convention, and thus – the consent of all the High Contracting Parties.

For the Polish Government Agent, it has been particularly important to make the right diagnosis of the situation. First of all, Poland has been directly affected by the massive inflow of applications. Secondly, we are a country that has been struggling over the past two decades with the transformation process and the negative remnants of the previous political system. Thirdly, Poles have from the very beginning perceived the Convention system as a fundamental guarantee of civil rights and freedoms.

After a thorough examination of the situation, we reached the conclusion that the main cause of the destabilisation of the Strasbourg system was the – rather common – lack of effective legal remedies at national level in the High Contracting Parties. Also the Council of Europe identified this problem at quite an early stage. On 12 May 2004 the Committee of Ministers of the Council of Europe adopted Recommendation Rec(2004)6 on the Improvement of Domestic Remedies. The purpose of this recommendation had been to urge the High Contracting Parties to establish legal remedies in accordance with Article 13 of the Convention. The response of the Member States was not encouraging, and the first attempts at creating those remedies were at times unsuccessful. Ms Inga Reine, the Latvian Agent, discussed this issue during the 4th Warsaw Seminar. We therefore made a strategic decision in Poland to first build a theoretical model of a perfect remedy and to implement it subsequently. When we examined applications filed against Poland with the European Court of Human Rights, we noticed certain regularities.

If one were to generalise and simplify to the greatest extent possible, it could be said that the source of every application lodged with the Court is a violation of the Convention connected to:
- the incompatibility of national law with the Convention; or
- the incompatibility with the Convention of the application of national law; or
- a combination of both situation.

Taking into consideration this distinction, in our search for a means of creating an effective remedy we concluded that it is theoretically possible to create two types of domestic remedies of a general nature.

The first type would involve situations in which the source of the application has been the incompatibility of national law with the Convention. Incompatibility with the Convention refers to the lack of compliance with the provisions of the Convention or its Protocols, or with the standards established by the Court or the Committee of Ministers, which monitors the execution of the Court's judgments. The notion of incompatibility also refers in this regard to the lack of an effective remedy, or the ostensible or illusory nature of such a remedy. Already at first glance one can notice a convergence between the situations of incompatibility of domestic law with the Convention and incompatibility of domestic law with the national Constitution. It is thus reasonable to say that the problem of incompatibility of national law with the Convention should be examined in a similar way as the constitutional complaint, while the body entrusted with such a supervisory task should be the national Constitutional Court.

For such a remedy to be considered effective the current model of a constitutional complaint would probably need to be changed. In particular, the complaint would have to involve the assessment of compatibility of national law with both the Constitution and the Convention. Moreover, after the termination of the complaint proceedings, the successful complainant

should be able to have recourse to an easily accessible and speedy remedy for obtaining financial compensation or another form of redress, and it should be guaranteed that the contested provision will be amended. However, it would be possible to maintain the current model of a constitutional complaint, and to create additionally another type of complaint – one that would also be examined by the national Constitutional Court, a complaint, which I would call *per analogiam* the „Convention complaint".

The second type of domestic remedy would refer to situations where the source of the application has been the incompatibility with the Convention of the application of domestic law. Also in such situations the problem of incompatibility with the Convention should be understood as a lack of compliance with the provisions of the Convention or its Protocols, or with the standards established by the Court or the Committee of Ministers, which monitors the execution of the Court's judgments. The incompatibility with the Convention of the application of national law would refer to situations where the domestic law itself is in compliance with the Convention but its application is not. These kinds of violations are not, as a principle, of a systemic nature, but are rather incidental, although if they are repeated, they may become systemic. Therefore, in these types of cases the assessment whether the Convention has been breached should be made by civil courts, not the Constitutional Court.

As regards the issue which courts should consider such complaints, a pragmatic approach should be adopted. In Poland the Courts of Appeal would be most suitable for such a role. They are evenly distributed throughout the country, they employ the most experienced judges, and they do not suffer from an excessive caseload. Due to the special nature of a complaint against the violation of the Convention, the substantive and procedural aspects of the complaint should be laid down in a separate law.

Some countries have tried to introduce an effective general remedy into their legal systems. This has usually taken the form of a modified constitutional complaint, which is examined by the national Constitutional Court. Complaints have been filed with the Constitutional Courts concerning both the incompatibility of domestic law with the Convention and the incompatibility with the Convention of the application of national law. The former type of complaints generally did not exceed in number regular constitutional complaints, while the latter were sometimes several times more numerous than the constitutional complaint. Hence, the adoption of such a model for a complaint on the compatibility with the Convention led in a short time to a paralysis of the constitutional judicature, and as a result the remedy was considered ineffective. In an attempt to overcome these problems specific effective remedies were created in parallel in those countries.

In Poland, we followed with great interest other countries' experiences in the field of domestic remedies. We reached the conclusion that first we should create specific effective remedies with respect to the most frequent violations of the Convention. For years nearly 90 percent of the cases brought against Poland concerned the excessive length of court proceedings.

For this reason, it was clear that legislative work should be oriented towards precisely such types of violations of the Convention. Finally, in 2004, Poland adopted an appropriate law, which ensured that complaints concerning a violation of the Convention of this type stayed at national level. Naturally, no system is perfect and it happens occasionally that some cases are not examined properly by the domestic courts. In such situations the complainants have the right to file an application with the European Court of Human Rights. However, I would like to stress that such situations only occur exceptionally. Moreover, as a rule in these kinds of situations the case usually ends before the Court with a friendly settlement or a unilateral declaration.

The experiences of Poland and a few other states have inspired the works on Recommendation CM/Rec(2010)3 of the Committee of Ministers to member states on effective remedies for excessive length of proceedings, which was adopted together with a Guide to Good Practice. I had the honour of chairing the committee that drafted this recommendation. The recommendation is a milestone on the way to establishing domestic remedies, as for the first time it not only recommends that States create such remedies, but also provides certain examples of state practice and guidelines on how such remedies can be created.

The adoption in Poland of the Act on a complaint against the excessive length of proceedings, which – as I have mentioned – has significantly reduced the number of applications brought to the Court, has now created the possibility of considering the genuine introduction into the domestic system of a general effective remedy. This proposal refers to both the incompatibility of the domestic law with the Convention and the incompatibility of the practice with the Convention.

Both situations have already been discussed in more detail. I believe that the creation of such a remedy is not merely a theoretical possibility, but can be done in practice. I am honoured that the European Court of Human Rights and a great part of the Council of Europe Member States share my views in this respect.

The great advantage of the concept of a general effective remedy is the fact that its implementation does not require any changes in the Convention, and also does not require that all Member States introduce such a remedy simultaneously. This is an option that States may or may not make use of. I am convinced that a discussion on a general effective remedy shall make Judge Jean-Paul Costa's call for a „nationalisation" of the Convention real, as only in such a case the principle of subsidiarity in its procedural aspect shall be implemented.

Effective remedies from the perspective of common national courts

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Article 13 of the European Convention on Human Rights ("Convention") entitled "the right to an effective remedy," states as follows:

> Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity.

1. The right to an effective remedy guaranteed by the Convention

Article 13 of the Convention guarantees the availability of an effective remedy at the national level, which allows a party to make a claim for the infringement of the rights and freedoms protected by the Convention in the national judicial system, regardless of the form in which they are guaranteed in the internal legal order.

It follows that any person justifiably seeking relief for an injury caused by a violation of the Convention, should be allowed to have her case heard by a national judicial, administrative or other body, and, if necessary, receive an appropriate remedy from that entity, before bringing the case to the European Court of Human Rights ("Court").

Such national bodies need not necessarily be a court, *per se*. However, if they are not a court, their ability to guarantee due process (i.e. the degree to which the body will examine a case, and the ability of a party to obtain a ruling from that body) and the guarantees of independence (as is the case in the courts) may be carefully evaluated by the Court to determine if recourse to such a body constituted an effective domestic remedy. I would be much better when a national body was a court, which could guarantee due process and independence of judges.

A single national remedy is not necessarily required to satisfy the full requirements of Article 13 of the Convention; it may be sufficient if a number of various measures existing under national law, taken as a whole, together provide the party with adequate relief.

The Convention does not specify what specific measures (or remedies) must be taken in every type of case, leaving the decision on this issue to the High Contracting Parties. However, the domestic remedy does not meet the requirements of Article 13, if it does not enable to suspend the implementation of the impugned decision of the State authorities. The effective remedy should prevent the implementation of the decision contrary to the Convention, if the decision can cause irreversible effects.

The requirements of Article 13 – just as with other provisions of the Convention – are a guarantee, so it is not sufficient that the national authorities acted in good faith nor found a specific practical solution in a given individual case. An effective remedy must be systemic in nature - it should enable the finding of a violation of the Convention in many different categories of cases, where the legal issue is the same, and for all similar recurring issues that may arise in future cases.

An appeal must allow for the real examination of the compliance of the challenged decision of the State with the Convention. This does not mean, of course, that the applicant is guaranteed a favorable outcome. National bodies considering the question of an effective remedy must, however, be entitled not only to find a violation of the Convention (to the extent they determine that the appeal is justified), but also to provide adequate relief for that violation. Such relief may include the possible suspension of the contested decision of the State and the granting of the party alleging violation of the Convention other appropriate redress.

Article 13 cannot be interpreted in such a manner that leads to the conclusion that there must be a remedy for every possible claim under the Convention, regardless of its merits. Instead, it only guarantees that a well-founded allegation can be justified. Decisions of the Court rejecting a complaint because of its obvious lack of merit give important clues as to when a national body may likewise dismiss a complaint without running afoul of the Convention.

2. Effective remedy by the Court

Article 13 of the Convention does not require exactly the same type of remedy be provided by each national body when it finds that a national law is incompatible with the Convention. The Court considers that an efficient measure under Article 13 must mean the most effective measure under the circumstances, taking into account the limitations resulting from the legal system of the particular State party to the Convention.

The State's responsibilities under Article 13, and thus the availability of legal remedies that must be provided by the State, varies depending on the national legal system being employed

and the specific violation that has been alleged. The required remedy must be effective, however, legally and in practice. Member States have some freedom of choice of measures designed to ensure compensation for the infringement, subject to compliance with the requirements of the Convention.

In this context, the principle of subsidiarity is very important. The essence of subsidiarity is to enable victims to obtain adequate satisfaction at the national level, without having to first make a complaint to the Court in Strasbourg. This principle requires that violations first be dealt with at the national level, according to national law.

The nature of the rights protected by the Convention and the kind of violation being alleged, has an impact on the nature of the remedies that must be guaranteed to injured parties under Article 13.

For example, if a valid complaint is lodged that the victim was wrongfully deprived of life by officers of the State, the concept of an "effective remedy" within the meaning of Article 13 also includes payment of compensation for the victim's families and a detailed and effective investigation to determine the cause of this violation, so that the perpetrators of the crime will be punished. A State has similar obligations under Article 13 in cases involving torture, inhuman or degrading treatment or punishment. In many cases, the Court has emphasized that the alleged violation of Article 13 cannot only be remedied by the payment of compensation. If the government restricts its remedy only to monetary compensation, while failing to take appropriate steps to identify and punish those responsible for the violation of the Convention, a kind of *de facto* immunity for abusers of power would exist. As a result, the overall protection against torture and inhuman and degrading treatment – despite its fundamental importance – would cease to be effective in practice. The Court considers that in cases concerning infringements of Articles 2 and 3 of the Convention – which are among its most fundamental provisions – compensation for moral suffering because of such violations must be generally available as one of many possible remedies.

On the other hand, where the State has been only accused of causing (through its illegal actions or negligence) damage to property in breach of Articles 3 and 8 of the Convention, a national remedy that provides for full monetary compensation may be sufficient.

The Court also may assess – on the basis of Article 13 – whether a remedy provided by a national body was ineffective due to procedural and other hurdles imposed by State authorities on the party seeking to enforce a remedy that was granted. In this way, a remedy that on its face may be consistent with the requirements of the Convention may nevertheless be held to be ineffective due to the obstructionist behaviour of the State and its organs, where the State's acts or omissions render the remedy effectively unenforceable.

3. Reasons for seeking solutions on a national level

The attempt to reform the system of the Convention by creating a generally effective domestic remedy is designed to reduce the number of complaints received by the Court in Strasbourg.

The creation of a general remedy – or several complementary specific remedies – at the national level would relieve the Court from the burden of hearing certain categories of cases which are typical, similar, and constantly repeated in a given State being the Party to the Convention.

Most Member States of the Council of Europe ("Council") have not yet developed a general domestic remedy against violations of the Convention which would include at least 50% of the cases submitted to the Court from that State. According to the Court's expectations, a State should ensure a domestic remedy which would resolve most of the valid complaints arising from a State (at least half). This would reduce the influx of cases from that State to the Court, stop the actions at the national level, and enable national authorities to determine violations of the Convention and thus lead to the creation systemic, preventive measures to prevent future violations of the same nature.

To the extent such effective general remedies were, in fact, implemented, the Strasbourg system of enforcing human rights would be nationalized to a degree. A system that protects human rights defined by the Convention, would not only be protected through the proceedings held before the Court, at the European level, but also in the proceedings before the relevant national authority, at the national level.

This move towards nationalization of the Convention's safeguards is fully justified by the purposes of the Convention itself. The maintenance of a high standard of protection of human rights should be primarily the responsibility of the State which has acceded to the Convention for the Protection of Human Rights and Fundamental Freedoms, thereby committing themselves to respect the rights guaranteed by the Convention .

The possibility of appealing violations of the Convention to a national authority (for example to a court) may also serve important preventive and educational aims. For instance, most complaints against Poland, alleging a violation of the Convention, relate to the functioning of the wider understood criminal and civil justice system (i.e., the activities of the courts, prosecutors and prison administration). The introduction of a general remedy (general right of appeal), referred to the Polish common courts, could result developing in Polish judges and prosecutors a greater sensitivity to human rights violations, and would also encourage the Ministry of Justice and other judicial administration authorities to undertake preventive actions, including organizational and educational activities, in order to eliminate similar violations in the future.

The creation of a general effective remedy at the national level would be an important step towards the transposition of the Convention to internal legal system or internal legal order by the Member States of the Council of Europe.

First, a national level would be the first forum where the violation would initially be considered. Not only will this relieve the excessive workload of the Court in Strasbourg (as less complaints would be addressed directly to the Court), but it will also generate increased discussion of the reasons for violations of the Convention at the national level, which in turn could lead to systemic solutions (reforms).

Secondly, national decisions (for instance provisions or ruling given by a court), made pursuant to a general effective remedy, would be more accessible to a wider domestic audience - for judges, prosecutors, lawyers, government officials, activists of human rights organizations, as well as the media and the public in general – more accessible than the decisions issued by the Court in Strasbourg, even in the absence of a language barrier.

Thus, there are many factors which weigh in favour of creation an effective, general domestic remedy. Such a remedy need not even be universally, or 100% effective, to provide a benefit. Even if it cured 70-80% of possible violations in a specified category of cases in a State, it could still fulfil the role of a general effective remedy.

4. The situation in Poland

The question of the possibility of using a constitutional complaint under Polish law to satisfy Article 13's effective remedy requirement, including the legal constraints inherent in such constitutional complaints, have been described separately.[453]

Surely we can not treat – as a general effective remedy – the constitutional complaint (or its equivalent, which can be described as a "conventional action" or "conventional complaint" when it concerns the non-compliance of the provisions of domestic law with the Convention). Not all violations of the Convention are based upon a provision of national law violating the Convention. On the contrary - most of the violations of the Convention rise s a result of the poor practices of various State authorities, which do not respect existing national law and thus violate the standards developed by the Court in the process of the interpretation of the Convention. In order to find a violation of the Convention, an appropriate evidentiary procedure (procedure of presenting and evaluating evidence) is required, that enables a national body to determine whether and in what circumstances a breach of the Convention has occurred. Such a process does not exist in the Constitutional Court. The Constitutional Court

[453] Vide: Prof. Paweł Wiliński, *General Domestic Remedy and the role of the Constitutional Court – opening remarks*, below.

is not a fact-finding body that is equipped to take and evaluate conflicting evidence. Findings of fact (based not only on documents, but also on other types of evidence, including the testimony of witnesses, the testimony of parties to the proceedings, expert opinions, visual inspection of places and things, audio-visual materials, etc.) are prepared by a common court of law, rather than by the Constitutional Court. The same applies to the procedural tools utilized to assess the credibility of the evidence.

This leads to the conclusion that “an action for infringement of the Convention" should be directed to a common court, not to the Constitutional Court. Indeed, since 2004, a specific remedy (entitled a "claim for the excessive length of process”) has existed within the Polish legal system, which could serve as a model for constructing a general domestic remedy. Accordingly, a few words should be mentioned about this measure.

5. Complaints about the length of judicial proceedings in Poland

In Poland, the main source of violations of the Convention is the excessive length of judicial proceedings and criminal investigations. One may even describe this as a structural problem.

For a long time it has been assumed that Article 6 of the Convention, which guarantees the right to a fair trial, is a *lex specialis* to Article 13, thus a complaint alleging an infringement of Article 6 also encompasses a claim for a violation of Article 13. However, in the *Kudla v. Poland* case the Court undertook a substantial change from its previous position, stating that the individual's right to trial within a reasonable time would be weakened if it was not possible to make such a complaint first to the national authority. In the context of a claim for excessive length of judicial proceedings, a remedy may be considered effective if it results in either the proceedings being sped up, or provides adequate compensation for damage that occurred as a result of the delay.

After the judgement of the Court in the *Kudla v. Poland* case was issued in 2000, an Act of Parliament was adopted (in June, 2004), permitting parties to the proceeding to file a complaint in violation of the right to have their case heard in court without undue delay (hereinafter abbreviated to "complaint about delay"). Since May, 2009 the law was amended (*inter alia*, under the influence of judgements and decisions of the Court in Strasbourg and recommendations coming from the committee of Ministers) and now includes not only judicial proceedings (civil, criminal and judicial-administrative), but also a criminal investigation carried out by a prosecutor. The amendment also introduced a mandatory monetary award (“just satisfaction”) as an appropriate form of relief, if a party raises such a claim. The maximum amount of lump sum monetary compensation was also increased from 10,000 złoty (approximately 2,500 euros) to 20,000 złoty (approximately 5,000 euros).

The Polish statutory law from 2004 ensuring that a party’s complaint is heard without delay provides following main provision:

First – the court must determine whether the length of proceedings has been excessive. If so, this finding also establishes a violation of Article 6 of the Convention. In such a case, there will be a finding that the public authorities (i.e., the prosecutor or the court) have committed an improper act of omission – they have not acted, even though they were obligated to do so. This finding opens the door way for the institution of separate civil proceedings – based on the general principles of the Civil Code – so that the aggrieved party may receive full compensation for any damage resulting from the excessive length of these proceedings.

Second – the court must determine adequate recommendations (with the exception of cases involving the claim where such recommendations are not necessary). The court can decide, for example, that the proceedings themselves (whether before the court or in the hands of a prosecutor) should be brought to a conclusion within a prescribed time set by the court. This is a form of equitable relief, which prevents further protracted delays in the process. Even so, this order cannot influence the merits of the investigation or the legal matter before the court.

Third – the court must determine an adequate amount of money damages ("just satisfaction") as a remedy for the violation. The Polish State Treasury is responsible for paying any awards resulting from the conduct of the courts or prosecutors, and in case of complaints about the excessive length of proceedings conducted by the bailiff - the bailiff is responsible for satisfying any damage awards. Awards may range from 2,000 to 20,000 złoty. The court must grant at least the minimum amount of just satisfaction, if the party claims a financial loss and the court found that the length of proceedings were excessive.

Polish law concerning the excessive length of proceedings – especially after the May, 2009 amendments – are sufficient to meet the expectations of the Court.

Only a few Member States of the Council of Europe have a specific remedy in place concerning claims for excessive length of proceedings (e.g. Italy, Spain, Poland). Of course, such a remedy may not be necessary in many states, where substantiated allegations that the length of judicial or prosecutorial proceedings are excessive do not exist, or exist only in sporadic cases.

In Polish civil procedure, there is another specific remedy that can sometimes be indirectly applied (apart from a violation regarding excessive delay of proceedings) to correct the unlawful conduct of civil courts. This measure is an action to declare the illegality of a final court decision (hereinafter abbreviated as a "complaint on illegality"). It concerns first of all final judgements of the court of second instance that are not subject to further appeal, and where the party has suffered harm as a result of the illegal decision. Complaints on illegality are directed to the Supreme Court. If the Supreme Court finds that the decision was illegal, the aggrieved party may – as a general rule under civil law – obtain compensation from the State Treasury for the damage caused by that final verdict. It should be noted, however, that only very rarely does a final court decision in a civil case implicate a violation of the

Convention. The Convention regulates primarily the relationship between an individual and the State, and thus sets forth public law, and not private law. Civil courts violate the Convention primarily due to procedural deficiencies (e.g., by an unfounded refusal to exempt a party from court fees, the refusal to appoint an *ex officio* lawyer to an indigent party, by failing to provide an appropriate remedy, and most often by excessively protracted proceedings), and only occasionally by issuing a ruling inconsistent with the provisions of Article 1 of Protocol No. 1 to the Convention, concerning the right to peaceful enjoyment of property.

The collection of various measures existing under Polish law, as described above (i.e., constitutional complaint, "complaint on illegality", "complaint about delay"), may be still nevertheless be insufficient from the standpoint of Article 13 of the Convention. These existing procedures (complaints about the length of proceedings and the illegality of the court's decision) do not form a coherent, comprehensive system of effective remedies under Polish law, which could be an alternative to a general remedy. Therefore it is advisable to seek other solutions.

6. The proposed solution - an action for violation of the Convention as an appeal of a general nature on a national level

In Poland, most breaches of the Convention relate to Articles 5 and 6, and are associated with protracted litigation and prosecution and excessive pre-trial detention. A number of complaints against Poland also apply to infringements of Article 3 (regarding degrading treatment) and Article 1 of Protocol No. 1 (relating to the protection of property).

In some Member States (e.g., Slovakia and the Balkan states) there is a general remedy, which resembles a constitutional complaint, and is directed to the Constitutional Court. This procedure was in some cases ineffective, however, because the extraordinary number of complaints that were filed blocked the work of constitutional courts in the States which introduced the measure. Importantly, an effective remedy also depends on the fact that it may be issued in reasonable amount of time.

In Polish conditions, a general remedy could be based on a pattern related to the existing model for complaints about the excessive length of proceedings. For purposes of following remarks it will be entitled a "complaint for infringement of the Convention" or "conventional complaint".

This measure (general remedy) should be directed in Poland to the courts of appeal – the highest level of common courts (there are 11 courts of appeal through all the country) or to the provincial administrative courts (there are 16 of them in Poland). The courts of appeal as courts of second instance deal with civil, family, company, criminal, labour and social insurance cases. The provincial administrative courts review the legality of administrative

decisions issued by the local and state administrative bodies). Entrusting those courts with jurisdiction over complaints for infringement of the Convention would have the added advantage that it does not require changes to the Convention.

This measure – proposed remedy – should be carried out in the following manner:

First – where the court finds that there has been a violation of the Convention, the decision should include not only a description of the infringement, but also a specification of the article(s) of the Convention that have been violated. The primary aspect of the court's ruling would be a declaration of the illegality of the actions or omissions of the relevant public authorities. Finding of a violation of the Convention would pave the way for an investigation of the State in a separate civil proceedings – based on the general principles of civil law - which would ultimately provide full compensation for the damage caused as a result of the breach.

Secondly – the court should order the public authority that violated the Convention to take appropriate actions within a prescribed period of time to eliminate the state of violation. Such guidelines and recommendations would also serve an important role in prevention and education. In this part of the ruling, the reviewing court could: suspend the operation of the challenged decisions of the State, declare the resumption of proceedings, order the State to take affirmative action or educational measures, etc. – depending on the type of violation and the necessary ways to remove it. Most importantly, in order to be effective, the relief ordered by the court should prevent the execution of a decision contrary to the Convention, whose side effects would otherwise be irreversible. In this part of the ruling it would also be possible to formulate specific recommendations, advising how to improve deficient practices, instituting certain educational activities (the training of officers and other public officials), giving special attention to the prevention of repeat violations, giving the introduction of appropriate legal regulations and/or organizational changes, and issuing necessary new legislation as well as amendments to existing legislation.

Third – the court should adjudicate an adequate amount of just satisfaction. If the proposed and described remedy is to be effective, it must provide not only a declaration or a finding of a violation, but also just satisfaction to the party that has been harmed. The principle of subsidiarity requires that a national measure guarantees a level of protection comparable to that provided by the Court's ruling in Strasbourg. In other words, subsidiarity requires mirroring - to a certain extent - the Strasbourg system at the national level. Any sums of money awarded as compensation by a national court should be comparable with the amounts awarded by the Court in Strasbourg. Only then could the national remedy be considered effective within the meaning of Article 13 of the Convention. At the same time, a party should have the possibility to pursue a claim for full compensation for damages in separate civil proceedings for damages. The Court in Strasbourg never awards full compensation to a party injured by a breach of the Convention, because such a determination requires an exhaustive inquiry as to the size of the injury and also proof of causation between the breach of the

Convention and the injury's formation and size. Similarly, the national court adjudicating the question of a violation of the Convention should not make a determination on full compensation.

How could the general remedy act in particular cases of a violation of the convention.

For example – in case of violation of Article 5 of the Convention on account of the excessively long application of pre-trail detention, the effective domestic remedy should result not only in finding of the said violation or awarding the appropriate just satisfaction but it should also entail an opinion of the court that would be respected if a next motion for extension of pre-trial detention is filled. Therefore in case of the prosecutor's next motion for extension of the pre-trail detention a detainee could rely on the aforementioned opinion, which should result in prompt dismissal of the prosecutor's motion.

In this way, at least some of the detainees' complaints addressed directly to the Court, alleging additional violations of Article 5 of the Convention, could be eliminated. Of course, the national court, ruling on a general appeal, could not issue a recommendation on the applicant's release from custody. Nowadays existing complaint concerning the excessive length of an investigation and prosecution does not resolve the underlying problem of a prolonged pre-trial detention. As a result, it may be ultimately ineffective with regard to this aspect of the excessively long investigatory proceedings.

In the event of an infringement of Article 3 of the Convention relating to prison overcrowding, the national court hearing a complaint for infringement of the Convention could make, for example, a recommendation to immediately transfer the prisoner to a new facility in which there will be no overcrowding and therefore no inhuman or degrading treatment.

Any national action alleging a violation of the Convention should be directed against the State. The State, in turn, should be represented in these proceedings by the authority that has allegedly violated the Convention. While the State is represented by the government (the Ministry of Foreign Affairs) in proceedings before the Court in Strasbourg, in national proceedings it could be represented by the relevant government agency or even by a local government authority. Similarly, in complaints about the excessive length of proceedings, the State Treasury is a defending party.

In principle, the possibility of presenting complaints alleging violations of the Convention only to the Supreme Court must be ruled out. Such a solution would fail for the same reasons as that similar solutions implemented by other Member States of the Council of Europe (directing complaints to the national constitutional courts) also failed.

More specifically, first, the sheer number of complaints alleging a Polish violation of the Convention would clog (or at least considerably slow down) the workings of the Supreme

Court. Secondly, the Polish Supreme Court serves as a court of final appeal, and not as a court of first instance that engages in routine fact-finding. The Supreme Court's systemic role and task is to make a determination on the legality of the challenged rulings – again, this Court does not make a factual assessment of the evidence, and does not collect evidence. Just as a national constitutional court would not have the capacity to entertain complaints alleging violations of the Convention, especially if a resolution of such complaints would necessitate taking evidence, evaluating evidence and determining facts, the Polish Supreme Court would likewise lack the capacity to rule on such cases. It should be noted that due to the nature of many violations of the Convention – which are fact specific, and require (for example) the examination of the victim and the complainant in order to ascertain a violation of the Convention – it would be beyond the competence of the Supreme Court to make a decision in such matters.

There is one exception to this thesis. In the unlikely event that there would be a violation of the Convention in the proceedings before the Supreme Court or the Supreme Administrative Court (which in reality happens very rarely) the court which should recognize an action for infringement of the Convention should properly be the Supreme Court or the Supreme Administrative Court. This would include situations involving a complaint against the excessive length of proceedings before the Supreme Court or the Supreme Administrative Court.

In Poland, the largest category of violations of the Convention is related to the poor conduct of various state organs (especially those associated with civil and criminal justice system - courts and prosecution, rather than public authorities involved in administrative matters), and not the enactment of bad laws. Approximately 98% of Polish breaches of the Convention were connected with bad conduct (bad practice), and only 2% of breaches were the result of the application of specific Polish laws that violated the Convention. Therefore, it seems preferable to construct a general remedy, which would remedy the poor practices of various state organs. Complaints should be addressed to the courts of appeal, that involve a violation of the Convention by the courts, prosecutors, enforcement authorities, prison administration, and to the provincial administrative courts, that involve the violation of the Convention by other the state and local (municipal) government authorities.

To entrust such complaints alleging violations of the Convention to the courts of appeal and provincial administrative courts involves pragmatic considerations. These courts are staffed by the most experienced judges, with the longest work and life experience.

The court considering a "conventional complaint" (a complaint for infringement of the Convention) as a general domestic remedy should have the right to ask the Court in Strasbourg for "advisory opinion" (interpretation of the Convention) in similar way that every court of each Member State of the European Union has the right to ask the European Court of Justice (the Court of Justice of the European Union) in Luxembourg for interpretation European law within the procedure of preliminary ruling.

General Domestic Remedy and the role of the Constitutional Court – opening remarks

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General introduction to the analysis of application of general domestic remedy to the national level (in Polish example) and recognition of possible sources of violation the Convention, Protocols or standards (divided between wrong practice and incompatibility of national law with the Convention)[454] sets direction for further consideration. One should refer here to the constitutional court approach.

The issue we should consider is the possibility of maintaining the conclusion of the Constitutional Court to the general domestic remedy system. Is there a chance of existence such a remedy before the Constitutional Court? Can the Constitutional Court, with its central position in the state system, scope of competences and its own tasks, play an active role in the European system of human rights' protection, based on the dominant position of the ECHR? There is no doubt that the answer to these questions requires deep/profound analysis of significant number of issues, both of legal and political origin. Concentrating on the first field of interest the following issues, related to the Polish legal system, should be considered here:

a) the ability of the Constitutional Court to rule on the basis of the Convention;
b) the possible, proper mode of the adjudication of the Constitutional Court.

The problem of acceptability of the Constitutional Court's extension of competence lies outside the scope of presented thesis, as it is strongly related to political issues.

[454] See: Concepts of General Domestic Remedy and Simplified Procedure for Amending the Convention in the Post-Interlaken Process, Warsaw 2010, p. 17-114.

The inclusion of the Constitutional Court of Poland to the structure of national courts, responsible for introduction of general domestic remedy, seems to be a possible option for at least four reasons.

Firstly, the Constitutional Court of Poland is empowered to adjudicate in such cases. According to the art. 188 of the Constitution, the Constitutional Tribunal shall adjudicate regarding to the following matters: 1) the conformity of statutes and international agreements to the Constitution; 2) the conformity of a statute to ratified international agreements whose ratification required prior consent granted by a statute; 3) the conformity of legal provisions issued by central state organs to the Constitution, ratified international agreements and statutes; 4) the conformity to the Constitution of the purposes or activities of political parties; 5) complaints concerning constitutional infringements (as specified in Art. 79, para. 1 of the Constitution).[455]

Secondly, much of the constitutional rights and freedom contained in the Constitution is modeled on the regulations of the international law, including primarily the European Convention on Human Rights. The Constitutional Court has been repeatedly emphasizing the particularly close relationship between the number of regulations set in the Constitution and in the Convention[456]. It also results from the fact that the actual bound Polish human rights' standards designated by the European Convention on Human Rights had taken place before the Constitution of 1997 entered into force.[457]

Thirdly, standards established in the jurisprudence of the ECHR case law have strong influence on the jurisprudence of the Polish Constitutional Court inter alia, as it refers to the following rights: the right to the court, standards of the impartial and independent court, public hearing, personal freedom, protection of property, the right to information, the right to privacy, and others. It is visible in its jurisprudence that standards derived from EHRC case law are essential elements of the Constitutional Tribunal's findings and reasons.[458] Lastly, in its jurisprudence the Constitutional Court not only refers to the ECHR standards as additional argumentation. There are examples of Constitutional Court's verdicts in which its findings are directly based on the achievements of the Strasbourg Tribunal's case law. For example, in the judgment U 7/01, on July 2002 (OTK ZU nr 4/A/ 2002, poz. 48) assessing issues of

[455] See. Z. Czeszejko -Sochacki, *Sądownictwo konstytucyjne w Polsce na tle porównawczym*, Warsaw 2003, p.83-466. See also Judgments of Constitutional Court from: February 23, K 1/08, OTK-A 2010, nr 2, p. 11; July 15 2010 r., K 63/07, OTK-A 2010, nr 6, p. 60; November 16 2010, K 2/10, OTK-A 2010, nr 9, p. 102.

[456] W pierwszym zakresie zob. wyrok TK z dnia 2 kwietnia 2001 r., SK 10/00, OTK 2001, nr 3, poz. 52; w drugim – wyrok TK z dnia 7 września 2004 r., P 4/04, OTK-A 2004, nr 8, poz. 81.

[457] Having received in December 1991, full membership in the Council of Europe and, consequently, the ratification of the Convention in January 1993. Under the unilateral declarations made by the Polish government in April 1993 and in accordance with Article. 25 and 46 ECHR, the Republic of Poland recognized the competence of the ECHR as regards the settlement of complaints addressed from Polish citizens in breach of human rights contained in the European Convention.

[458] Among many see f.e. Judgments of Constitutional Court from: June 15 2004, SK 43/03, OTK-A 2004, nr 6, p. 58; March 16 2004, K 22/03, OTK-A 2004, nr 3, p. 20; July 13 2009, SK 46/08, OTK-A 2009, nr 7, p 109. ; December 7 2010, P 11/09, OTK-A 2010, nr 10, p. 128.

discrimination against students because of the financial aid system, the Constitutional Court based its decision directly on art. 14 of the Convention and its additional protocol.[459]

It is therefore obvious, that standards of European Convention and jurisprudence of ECHR constitutes a part of the jurisprudence of the Constitutional Court of Poland. Adjudication on the basis of the Convention has already been within the competence of the Polish Constitutional Court and the knowledge of the jurisprudence of the ECHR has been within the duties of Constitutional Court judges.

In further consideration the following question seems to be crucial: which mode, within the general domestic remedy system, could be the proper one in the adjudication of the Constitutional Court? Should we try to improve the existing mode of adjudication or implement a new legal instrument to court's activity? The following three propositions may be worth to be taken into consideration:

a) the extension of the constitutional complaint;
b) the introduction to the new conventional complaint before the Constitutional Court;
c) employment of institution of "legal question" of common or administrative court to the Constitutional Court.

Considering the first option, for the extension of the constitutional complaint, there is a need to refer to Art. 79 p.1 of the Constitution. According to it "everyone whose constitutional freedom or rights have been infringed, shall have the right to appeal to the Constitutional Tribunal for its judgment on the conformity to the Constitution of a statute or another normative act upon which basis, a court or organ of public administration has made a final decision on his freedom or rights or on his obligations specified in the Constitution".

This is a very important instrument to guarantee the constitutional rights' protection of individuals.[460] It is a strong tool to fight against improper legislation and wrong interpretation of the law which results in assignment to specific provisions in unconstitutional contents. As it is shown in the jurisprudence of Constitutional Court of Poland and as it causes further changes of legal provisions[461] and functioning of legal system, this instrument is both effective and precise.

[459] The Court found that ddiscrimination referred to in Article. 14 of the ECHR refers to "exercise the rights and freedoms" recognized as an individual legal rights, and also requires that individual rights were listed in the European Convention. A broad view of equality (not requiring links with liberty regulated by law or in the Convention) provides for the twelfth Additional Protocol to the Convention, opened on 4 November 2000, which has not yet entered into force. Poland has ratified it or not, or not signed. Still so when formulated claim of discrimination based on Art. 14 European Convention, please indicate right or freedom recognized in the Convention itself, which in this case violated.

[460] See *Skarga konstytucyjna*, ed. J. Trzciński, Warsaw 2000, p. 46–219; B. Banaszak, *Prawo konstytucyjne*, Warsaw 2008, s. 493–499.

[461] See examples in criminal procedure P. Wiliński, *Proces karny w świetle Konstytucji*, Warsaw 2011, p. 48-73.

Seemingly therefore, the solution would be the next step towards the extension of the scope of constitutional complain, along with conventional freedom or rights. However, constitutional complaint is only seemingly a good solution. The most important argument against it is the practical one. The expected, significant increase in the number of cases referred in this mode to the Constitutional Court would not accelerate the recognition of complaints but would without doubt overload the Court, consisted of 15 Judges, in a short period of time. We would achieve the same situation and the same length of proceedings that we have had before the ECHR. No progress would be achieved and general domestic remedy would not be operational. The second argument is the system issue. It considers the extension of the constitutional complaint to the constitutional and conventional one. It would require amendment to the Constitution, which might not be easy to perform. Lastly, after implementing such a remedy, in a short period of time, the Constitutional Court would probably have to deal with complaints against wrong practice which does not fall within its competence. We should remember that statistically out of 100% of complaints raised by the ECHR, 98% refers to the wrong practice of national organs and only 2% are based on the charge that national legislation is incompatible with the Convention. For this reasons, the first option does not seem to be a proper choice.

For the same reasons we should not be positive about the idea of new conventional complaint before the Constitutional Court. Introducing a general measure of direct access to the Constitutional Court had been already observed in a few counties (Balkan countries, Slovakia), and we know its consequences. One may have reasons to expect that also in other countries, like Poland, it could lead to a blockage of such courts and further increase in the number of complaints. That would be treated as an additional instance in the domestic proceedings.

Finally we should consider the possibility to employ the institution of "legal question" referred by any court to the Constitutional Court[462]. According to Art. 193 of the Constitution, "Any court may refer a question of law to the Constitutional Tribunal as to the conformity of a normative act to the Constitution, ratified international agreements or statute, if the answer to such question of law will determine an issue currently before such court." The subject of legal question is therefore a determination, whether a provision which was made applicable in the case pending before the court (common or administrative), is consistent with the normative act of higher order. The subject of the legal question can only be a provision that compliance with a specific pattern, affects the content of the decision by the court of the case. The examination of the legal question depends on the fulfillment of following conditions: a) the subject of questioning may may only be a court; b) the subject to a legal question must be a legal act or a part thereof, c) it must include formulated and substantiated allegation of inconsistency with a normative act of higher rank; d) it must prove in relationship between the response to the legal question and the settlement of the case by the court.

[462] M. Wiącek, *Pytanie prawne sądu do Trybunału Konstytucyjnego*, Warsaw 2011, p. 19–410.

In this model common and administrative courts would adjudicate complaints based on the violation of Convention. Not the Constitutional Court but common and administrative courts should be responsible for adoption of general domestic remedy. In this model the role of the Constitutional Court ought to be auxiliary and minor. Its participation would be an essential one in a situation when the complaint raise before the common or administrative court also contains charge of incompatibility of the national legislation to the Convention. The common or administrative court would be entitled to refer a question to the constitutional court, under the same conditions as it is already foreseen. The fundamental benefit we could achieve from such a model would be consistency of the legal system. There would not be a need to introduce new instruments before the Constitutional Court but already known institutions could be used effectively. What is also important, it would not require formal amendments of the Constitution. Such a model seems to be consistent with the current court system in Poland. These findings of course do not end the discussion and are not exhaustive. The following questions will still remain open: a) the scope of the constitutional court bound by the ECHR case law; b) the competence of the Tribunal to refer the matter directly to the ECHR, because of the precedential nature of the relationship to the conventional complaint to court complaints directly to the ECHR; c) the relation between general domestic remedy and the development of specific domestic remedies; d) the relation between constitutional and supreme court.

Creating general domestic remedy system seems to be a challenging task. The most difficult part does not seem to be an indication of courts that should be entrusted with the task but creating a procedure of common and administrative courts' involvement to the conventional system. No doubt, the Constitutional Court should play an active but auxiliary role in it.

The Potential of Mediation to Facilitate Friendly Settlement and the Implementation of Remedies in European Court of Human Rights' Cases *(ISLP ECHR Pilot Mediation Program in Poland)*

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Summary

The European Court of Human Rights faced a backlog of more than 151 600 cases at the end of 2011.[463] *In its Report to the Committee of Ministers of the Council of Europe, the Group of Wise Persons identified friendly settlements and mediation as an alternative means of resolving disputes that would reduce the Court's workload, while also assisting both victims and member States. This recommendation was echoed in the 2010 Interlaken Declaration and Action Plan.*

In partnership with civil society and leading Polish jurists, the International Senior Lawyers Project, an international organization that leverages the skills of highly experienced lawyers on a pro bono basis, has developed a pilot mediation program that will implement this recommendation in Poland, initially for a few test cases, and subsequently, on more widespread basis. The program will examine whether its goals can be met within Poland, and if so, whether the model can be effective in other Member States.

In short, the ISLP European Court of Human Rights Pilot Mediation Program: Poland ("ISLP Polish Human Rights Pilot Mediation Program" or "the Pilot Program"), will leverage the fact that mediation can assure resolution of certain types of disputes, with the

[463] Annual Report 2011 of the European Court of Human Rights, Council of Europe, p. 11

goal of achieving the dual goals of promoting friendly settlement and lessening the burden on the European Court of Human Rights.

1. INTERNATIONAL SENIOR LAWYERS PROJECT: BACKGROUND

The International Senior Lawyers Project provides the pro bono services of highly skilled and experienced lawyers to promote human rights, equitable and sustainable economic development and the rule of law worldwide. ISLP assists governments and non-governmental organisations working to advance the rights and the well-being of their citizens and helps to build the capacity of the legal profession to meet the needs of their communities. ISLP's unique model has resonated with individual lawyers, international law firms, civil society advocates, and developing country governments alike.

Founded in 2000 and headquartered in New York, ISLP's core mission is to serve the needs of NGOs and developing country governments by recruiting highly experienced lawyers and outstanding law firms to provide pro bono legal assistance. The Paris office, ISLP-Europe, was founded in 2010 to focus on pro bono projects that are of particular interest to the legal community in continental Europe.

ISLP volunteers have helped human rights NGOs with such tasks as legal research, writing, and training of staff lawyers in written and oral advocacy, and have also participated as co-counsel in ECHR hearings. ISLP volunteers include many who have extensive experience with mediation as a tool of alternative dispute resolution (ADR), both as counsel representing parties in mediation, and as mediators.

2. BURDEN ON THE ECHR

The ECHR receives 50,000 new applications a year[464] and its backlog increased by some 12,300 cases in 2011.[465]

In May 2005, the Heads of State and Government of the Council of Europe member states established the Group of Wise Persons to consider the long-term effectiveness of the ECHR control mechanism and to submit proposals going beyond the measures contained in Protocol No. 14, while preserving the basic philosophy underlying the European Convention on Human Rights.

[464] www.echr.coe.int/NR/.../0/FAQ_ENG_A4.pdf
[465] Annual Report 2011 of the European Court of Human Rights, Council of Europe, p. 6

In its Report to the Committee of European Ministers dated 15 November 2006, the Group of Wise Persons noted the explosion in the number of cases and the likely consequences for the Court and specifically the judicial control mechanism:

> 23. The right of individual application enshrined in Articles 34 and 35 of the Convention is the most distinctive feature of this control mechanism. . . . The right of individual application is today both an essential part of the system and a basic feature of European legal culture in this field.
>
> 26. The exponential increase in the number of individual applications is now seriously threatening the survival of the machinery for the judicial protection of human rights and the Court's ability to cope with its workload. . . .
>
> 28. This situation, which, despite the various measures taken by the Court, is likely to get worse, is extremely serious. If nothing is done to resolve the problem, the system is in danger of collapsing. It is the Group's responsibility, therefore, to recommend effective measures to remedy this situation on a permanent basis, thus making it possible to ensure the long-term effectiveness of the Convention's control mechanism. . . . [466]

3. FRIENDLY SETTLEMENTS AND MEDIATION IDENTIFIED AS A REFORM MECHANISM

In the same Report, the Group of Wise Persons proposed ten reform mechanisms, which included alternative (non-judicial) or complementary means of resolving disputes, and specifically friendly settlements and mediation:

> **8. Friendly settlements and mediation**
>
> 106. The Group notes that Protocol No 14, in an amendment to Article 39 of the Convention, provides that the Court "may place itself at the disposal of the parties concerned with a view to securing a friendly settlement of the matter on the basis of respect for human rights".
>
> 107. The Group also notes with approval that the Registry of the Court is already stepping up its efforts to encourage parties to reach friendly settlements in cases that lend themselves to the mediation approach.
>
> 108. In order to reduce the Court's workload still further and to assist both victims and member states, recourse to mediation at national or Council of Europe

[466] Available at https://wcd.coe.int/ViewDoc.jsp?id=1063779&Site=CM

> level should be encouraged where the Court . . . considers that an admissible case lends itself to such a solution. Proceedings in the cases concerned would be suspended for a limited and identified period pending the outcome of the mediation. This method of settlement would in any event be subject to the parties' agreement.

In its response to this recommendation, the Court stated in 2007 that "The proposals on friendly settlements and mediation are also among those which the Court endorses, subject to a thorough examination by itself or by the States Parties." [467] At the end of 2011, the Court again pointed to "the interest in increasing recourse to friendly settlements and unilateral declarations"[468] and noted a positive trend by which

> numerous applications, mostly concerning well-established case-law, tend to be resolved by a friendly settlement or unilateral declaration. In 2011 more than 1,500 applications were struck out in this manner, an increase of 25% compared to the previous year. This figure includes follow-up applications dealt with by decisions after the resolution of a pilot case concerning a systemic violation. [469]

Further, the Interlaken Action Plan, defined in February 2010 at the High Level Conference on the Future of the European Court of Human Rights, calls for State Parties to facilitate the adoption of friendly settlements in the context of reducing repetitive applications.[470]

4. OUTLINE OF THE ISLP POLISH HUMAN RIGHTS PILOT MEDIATION PROGRAM

A pilot mediation program in one country that is a Council of Europe member state would test the proposition that mediation can be useful to the resolution of ECHR cases and/or the implementation of remedies and thus provide concrete evidence for the examination of the Group of Wise Persons' proposal.

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[467] Jean-Paul Costa, *President of the European Court of Human Rights, "*Comments on the Wise Persons' Report from the perspective of the European Court of Human Rights" Proceedings, Colloquy on Future developments of the European Court of Human Rights in the light of the Wise Persons' Report, Committee of Ministers of the Council of Europe, San Marino, 22-23 March 2007, pp. 41-42 (available at http://www.coe.int/t/e/human_rights/cddh/1._publications/SanMarino_en.pdf.

[468] Annual Report 2011 of the European Court of Human Rights, Council of Europe, p. 6.

[469] Annual Report 2011 of the European Court of Human Rights, Council of Europe, p. 13.

[470] D(7)(a) Repetitive applications: "The Conference: calls upon States Parties to: facilitate, where appropriate, within the guarantees provided for by the Court and, as necessary, with the support of the Court, the adoption of friendly settlements and unilateral declarations…." High Level Conference on the Future of the European Court of Human Rights, Interlaken Declaration, 19 February 2010

ISLP believes that Poland is an ideal candidate for the pilot mediation program, for a number of reasons:

a. Poland's positive experience in using mediation in the Broniowski v. Poland case;
b. the Polish legal community's experience with mediation in other types of cases[471], and
c. Poland's size, which makes in-person mediation meetings of the parties, which are essential to the effectiveness of mediation, feasible.

As currently envisioned, the ISLP Pilot Mediation Program will have five major components:

(I) Continuous development of a list of mediators who have at least basic qualifications and are willing to serve on a *pro bono* basis, and who are either Polish or Polish-speaking;

(II) providing training to members of this group, as needed, in state-of-the art mediation techniques and/or ECHR law and procedure, such training to be provided by highly expert ISLP volunteers;

(III) Development of the terms of the mediation service and the documents to be used;

(IV) Continous selection of cases as candidates for mediation. At least initially, we contemplate targeting two classes of cases: applications against Poland that have been communicated to the Government, and cases where liability has been established by ECHR but the judgment requires complex implementation measures;

(V) Offering the services of the ISLP Pilot Mediation Program to the parties in the selected cases and, where both sides accept, providing them the ISLP Pilot Program Mediators List from which they can mutually select a mediator for their case;

(VI) Facilitating the planning and conduct of actual mediation proceedings, including providing needy applicants with stipends for travel expenses.

[471] See, e.g., Pieckowski, Sylwester "Using Mediation in Poland to Resolve Civil Disputes: A Short Assessment of Mediation Usage from 2005-2008," Dispute Resolution Journal, Nov 2009-Jan 2010, pp 82-87.

Part Three
Challenges to the Reform of the European Convention on Human Rights System

Agreeing an approach to subsidiarity post Interlaken- the perspective of the European Group of National Human Rights Institutions (NHRIs)

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The principle of subsidiarity is one of the fundamentals underpinning the Convention system. States are responsible for the effective implementation of the Convention : as the Court stated in *Scordino v. Italy*

> "140. Under Article 1 of the Convention, which provides: 'The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention', **the primary responsibility for implementing and enforcing the rights and freedoms guaranteed by the Convention is laid on the national authorities. The machinery of complaint to the Court is thus subsidiary to national systems safeguarding human rights**. This subsidiary character is articulated in Articles 13 and 35 § 1 of the Convention."[473]

The responsibility and shared duty of all state organs to prevent or remedy human rights violations and guarantee convention rights at the national level is a direct obligation under Article 1 and has been reiterated in many fora [474]. [475] It includes a requirement for "legislative

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He is the co-author of the Blackstone's Guide to the Human Rights Act, Blackstone's Guide to the Freedom of Information Act, Blackstone's Guide to the Equality Act 2010 and Blackstone's Guide to the Identity Cards Act. Before moving to the EHRC he spent four years as the full time Deputy Chair of the Independent Police Complaints Commission and was previously the Director of Liberty (the human rights organisation).
[473] *Scordino v. Italy (no. 1)* ([GC], no. 36813/97, ECHR 2006-V, 26 March 2006),
[474] See for example Varvana and Others v Turkey [GC], nos 16064/90 et al., ECHR 2009 , 18 September 2009, Burden v UK, [GC], no 13378/05, ECHR 2008,

bodies to be rigorous in systematically verifying the compatibility of draft and existing legislation with ECHR standards, ensuring the existence of effective domestic remedies, "[476] in addition to ensuring compliance of actions of the executive. This has been confirmed by the Interlaken Declaration. States are best placed to understand how such rights can be given effect in the domestic context, and identify and provide redress for any possible infringements. [477] Similarly domestic courts, with proper independence and judicial attributes, are best placed to assess the national situation, and provide an effective remedy when violations occur.[478] Indeed, this is a legal obligation under Article 46 of the Convention.

From the perspective of one of 22 "A" status independent "Paris Principles" NHRIs in the Council of Europe - the UK, we believe that prevention of human rights violations is obviously essential.

There are many successful ways in which States have proved themselves effective guarantors of Convention rights. Review of legislation and actions of the executive to ensure compatibility with Convention rights and jurisprudence is the main way in which this can occur. Domestic courts have a complimentary role in ensuring the application of Convention rights, and providing effective redress where these have failed to me met. Domestic institutions, including Parliaments, NHRIs and NGOs all have their role, in providing education and awareness raising about Convention rights, and effective scrutiny of legislation and the actions of the executive. These are all ways through which effective implementation of Convention rights at the national level can be ensured, without need for recourse to the Strasbourg courts.

However the reality is that, for all States, there are occasions on which national systems prove unable, or unwilling to guarantee Convention rights to individuals within their domestic jurisdictions. As the Commissioner for Human Rights stated "applicants turn to Strasbourg because they feel unable to find justice at home."[479] And it is for these individuals, to give effect to the fundamental principle of the Convention that rights must be effective, not merely theoretical or illusory[480], that European Court of Human Rights, pursuant to Article 19 can

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[475] Parliamentary Assembly of the Council of Europe**,** Committee on Legal Affairs and Human Rights, *The future of the Strasbourg Court and enforcement of ECHR standards: reflections on the Interlaken process,* Conclusions of the Chairperson, Mrs Herta Däubler-Gmelin, AS/Jur (2010) 06 Paris, December 2009 at para. 4.

[476] Parliamentary Assembly of the Council of Europe, Committee on Legal Affairs and Human Rights, *"Effective implementation of the European Convention on Human Rights: the Interlaken process Report*", Rapporteur: Mrs Marie-Louise Bemelmans-Videc, Doc/ 12221 27 April 2010 at para. 20. Available at: http://assembly.coe.int/Documents/WorkingDocs/Doc10/EDOC12221.pdf

[477] Interlaken follow up: Principle of Subsidiarity. Note by the Jursiconsult . Strasbourg July 2010. P 4

[478] Burden v UK, ibid

[479] Parliamentary Assembly of the Council of Europe, *High Level Conference on the Future of the European Court of Human Rights*, Contribution by Thomas Hammarberg, Council of Europe Commissioner for Human Rights CommDH/Speech(2011)4 Izmir, 26-27 April 2011. Available at https://wcd.coe.int/wcd/ViewDoc.jsp?id=1779117&Site=CommDH&BackColorInternet=FEC65B&BackColorIntranet=FEC65B&BackColorLogged=FFC679

[480] Artico v Italy , 13 May 1980, s 33, Series A no 37

and must intervene in "its essential role as guarantor of human rights and to adjudicate well founded cases with the necessary speed , in particular those alleging serious violations of human rights[481]".

The continuing numbers of violations, and breadth of issues across Europe, found by the Court, show the continuing necessity of this role. There is a major issue with the number of inadmissible applications before the court . NHRIs and others have a role in reducing the number of ill-founded (or inadmissible) cases through the provision of timely advice and information and advice provision to would-be applicants;

But leaving aside the large numbers of inadmissible applications, the Court still faces a significant caseload- the total number of pending applications allocated to judicial formation (ie declared admissible) as of August 2011 is 160,200. 62.1 % of these come from just 5 states _ Russia, Turkey, Romania, Italy and Ukraine[482]. In 2010 the court made 1282 judgements finding at least one violation of the Convention[483].While there are clear trends in relation to the numbers of cases against Sates, and violations of particular articles of the Convention, it is also fair to point out the breadth of Convention articles, and different States, that the Court has found violations against.

These statistics point to the ongoing challenges across Europe to ensure effective implementation of the Convention by States, and the role of the Court. They also raise questions about the concept of subsidiarity, and its interpretation by some States within discussions about reform of the Court.

What do we mean by the term "subsidiarity"? We in the European Group of NHRIs understand it to mean the following:

1. Addressing well-founded (or admissible) cases through effectively addressing the underlying problem at the national level; and
2. In those cases where the national system proves itself unable or unwilling to protect the right domestically, allowing the well-founded case to be considered by the European Court and executing the Judgment through national implementation.

It must be accepted that the Court is not merely a court of appeal: it is a fundamental key stone for the protection for the rights of 800 million people across the Council of Europe. Its cases also have ramifications across the rest of the World. It obviously has particular

[481] Interlaken Action Plan, point 2
[482] http://www.echr.coe.int/NR/rdonlyres/92D2D024-6F05-495E-A714-4729DEE6462C/0/Pending_applications_chart.p. Russia 43,800, 27.3%, Turkey 18,450, 11.5%, Romania 13,450, 8.4%, Italy 12,550, 7.8%, Ukraine 11,300, 7.1%
[483] http://www.echr.coe.int/NR/rdonlyres/596C7B5C-3FFB-4874-85D8-F12E8F67C136/0/TABLEAU_VIOLATIONS_2010_EN.pdf

competence to review and oversee the protections arising under the convention system. However, this will inevitably involve the court considering how the both the national authorities and the domestic courts applied the convention provisions.

The backlog facing the court is largely caused by a small number of States who are repeat offenders on serious human rights violations. Member States need to get serious about the logjam being caused by such States rather than focusing on unproven issues such as fees, use of lawyers etc. The point to make here is that the individual and the Court are being blamed for the backlog whereas swift implementation of the Convention, including in repetitive and clone cases is the solution.

There is also the issue of infrastructure: if State are serious on court reform, they also need to send additional judges and registry lawyers on secondment to bolster the capacity of the court.

There are four roles for the Court in ensuring application of the Convention in its subsidiarity role :

1. Filling the gap in protection not provided by the domestic systems - where there is a lack of subsidiarity - those states who have the worst record of compliance have already been listed above

2. Picking up specific issues where the domestic courts have not always properly followed the Convention jurisprudence. Examples of this from the UK include in relation to issue such as the retention of DNA profiles or the right to vote for prisoners.

3. Strategic interpretation of the Convention - an example of this form the UK is issues of jurisdiction that the Court considered in Al Skeni v the UK

4. The strategic development of Convention law- examples of this include the the right to privacy for sexual acts and sexual minorities

A key tenet of the principle of subsidiarity is that States are swift to comply with Strasbourg rulings to prevent repetitive cases. Where domestic law, policy or practice does not correspond to Strasbourg's jurisprudence, it must be addressed and amended. However the Committee of Ministers, speaking of necessary law reform, has itself acknowledged that the "the manner in which many national legislative bodies function in respect of implementation of Court judgments is still not satisfactory, in spite of the efforts of the Assembly."[484] The pilot judgement process offers one way forward for dealing with systemic and endemic cases.

[484] *Parliamentary Assembly ibid* . at para. 20.

However, its effectiveness will inevitably depend on the willingness and ability of States to implement the terms of the judgements, and general measures specified. [485]

Also of importance is the role of the department of execution of judgments, and the Committee of Ministers in supervising judgments. While again implementation is primarily a matter for the domestic authority, the Court has a role, not only in providing practical guidance and assistance as to how a judgement might be met, but through the Committee of Ministers providing political oversight of States compliance with their treaty obligations. At a recent meeting with the Council of Europe, European NHRIs committed themselves to deepening their interaction with the Committee of Ministers on execution of judgments through its Department of Execution of judgments. We have a key role in independent oversight of this implementation given our work on the national level and we intend to exercise this mandate in our work.

A further aspect to the question of "subsidiarity", is the role of the Court in providing authoritative and evolving interpretation of the Convention. There are some suggestions that States and/ or domestic courts ought to be able to refer matters of interpretation of the Convention to the Court for an interpretive judgement. This is one matter being considered under the Interlaken Declaration.

All this points to the fact that while primary responsibility for applying the Convention and remedies lies with the domestic courts the numbers of findings of violations by the Court shows that there remains either a lack of understanding of convention standards by the domestic court or an inability of national authorities, backed up by the domestic court, to guarantee the right in question. By definition the domestic court has not granted a remedy to the applicant as the case will not reach Strasbourg unless domestic remedies are exhausted. Thus many judgements of the Court have reached a different interpretation to that the domestic courts. Many of these judgements have subsequently been implemented by other States - either through legislative reform or through interpretation by domestic courts.

An example of how the Court should function, in its role of strategic interpretation of the Convention, is *Salduz v. Turkey.* [486] *There* the ECtHR found that the denial of legal assistance to a detainee during police custody was a violation of Article 6. The Turkish Government, when defending the case in Strasbourg, referred to the case law of the Court and maintained that in assessing whether or not the trial was fair, regard should be had to the entirety of the proceedings.[487] The Government emphasised that the applicant's statement to the police was

[485] See for example **Can the European Court's Pilot Judgment Procedure Help Resolve Systemic Human Rights Violations? *Burdov* and the Failure to Implement Domestic Court Decisions in Russia** By Philip Leach, Helen Hardman and Svetlana Stephenson *Human Rights Law Review (2010) 10(2): 346-359 for an anlyisi of the effectiveness of the pilot judgment process*

[486] *Salduz v. Turkey* (App. 36391/02) [2008] ECHR 1542.

[487] *Ibid.* at para. 49 and 59. In relation to the present case the Government maintained that when the applicant was taken into police custody, he was reminded of his right to remain silent and that during the ensuing criminal

not the sole basis for his conviction and drew attention to several Turkish cases in which the Court had declared similar complaints inadmissible. It also noted that the legislation had been changed in 2005.

These arguments are similar to those advanced by some States arguing that 'subsidiarity' means trusting national courts to follow ECHR principles. The Court in *Salduz* held that the domestic restriction on the right of access to a lawyer fell short of the requirements of Article 6.

According to the President of the Supreme Court of the Netherlands,immediately after the *Salduz* judgment was delivered, the Netherlands Supreme Court amended its case-law.[488] In the United Kingdom, the Courts used the *Salduz* case to strike down a domestic law in *Cadder v. Her Majesty's Advocate (Scotland*)[489]. In that case, the UK Supreme Court unanimously ruled that the previous domestic authority could no longer survive in the light of the judgment in *Salduz.* Lord Hope, invoking the principle of subsidiarity, stated that *"In this case the court is faced with a unanimous decision of the Grand Chamber. This, in itself, is a formidable reason for thinking that we should follow it. […]*[490] The Supreme Court also noted that *"the majority of those member states which prior to Salduz did not afford a right to legal representation at interview (Belgium, France, the Netherlands and Ireland) are now recognising that their legal systems are, in this respect, inadequate.*[491] Thus the ruling in *Salduz* had a positive impact on domestic legal orders.

An example of the dynamic interpretation of the Convention can be found in light of cases relating to the rights of transgender persons to recognition of their gender identity.[492] The case of *Christine Goodwin v. United Kingdom*[493] concerned a post-operative male to female transgender person who was unable to change her gender on a number of official documents. The Government maintained that the lack of recognition of the applicant's new gender identity did not entail a violation of Article 8 given the 'margin of appreciation' left to States in respect of the issue and the fact that there was no generally accepted approach among the Contracting States on the issue. The Government disputed the applicant's assertion that scientific research and "massive societal changes" had led to wide acceptance or consensus.[494]

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proceedings his lawyer had had the opportunity to challenge the prosecution's allegations therefore his right to a fair hearing had not been violated.

[488] European Court of Human Rights, *'Dialogue between Judges'*, Speech of Mr. Geert Cortens, President of the Supreme Court of the Netherlands, Strasbourg, 29 January 2010

[489] *Cadder v. Her Majesty's Advocate (Scotland)* [2010] UKSC 43. Whilst the Scottish High Court's decision, to allow for the questioning of suspects by the police for up to 6 hours without legal assistance, was entirely in line with previous domestic authority, this could not persist in light of the *Salduz* decision.

[490] *Ibid.* at para. 46.

[491] *Ibid.* at para. 49.

[492] Jacobs, White, & Ovey, *The European Convention on Human Rights*, (5th ed.) (Oxford University Press, 2010) at p.383

[493] *Christina Goodwin v. United Kingdom* (App. 28957/95) (2002) 35 EHRR 447.

[494] The Government submissions are outlined in paras. 64 to 70. In regard to the refusal to issue a new national insurance (NI) number the Government argued that an employer had no means of lawfully obtaining information from the DSS about the previous sexual identity of an employee. Furthermore it submitted that the uniqueness of

It also denied that the applicant had suffered practical and actual detriment and humiliation on a daily basis akin to the judgment in *B. v. France*.[495]

In relation to the argument that there was no consensus amongst Contracting States, the Court considered it more significant that "*There was clear and uncontested evidence of a continuing international trend in favour of not only increased social acceptance of transsexuals but also of legal recognition of the new sexual identity of post-operative transsexuals."*[496] While the applicant's situation did not attain the level of daily interference suffered by the applicant in *B. v. France,* the Court emphasised that *"the very essence of the Convention is respect for human dignity and human freedom."* It stated that under Article 8 "*protection was given to the personal sphere of each individual, including the right to establish details of their identity as individual human beings."* [497] While the Court did not underestimate the important repercussions which any major change in the national insurance system would inevitably have[498], it found that, "*No concrete or substantial hardship or detriment to the public interest had indeed been demonstrated as likely to flow from any change to the status of transsexuals […].*[499] Having regard to the above considerations, the Court found that the Government could no longer claim that the matter fell within their 'margin of appreciation'. If one merely relied on national courts to uphold ECHR principles this judgment would not have been issued.

Over subsequent years all but two States have introduced gender recognition laws. Of those two remaining States, the UK's Gender Recognition Act 2004 (which was enacted on foot of *Goodwin),* is now been studied by the Irish Government who have committed to introducing gender recognition legislation. Following an Irish Court decision in 2007, the Irish Human Rights Commission has been instrumental in advancing human rights protection in this area relying on the precedents of *Goodwin* and other cases to make legislative proposals to Government. Here we have an example of where a NHRI takes Strasbourg jurisprudence and employs its legislative and policy functions to make a cogent case for law reform. This is an example of how subsidiarity should work locally. Ideally all States would amend their laws swiftly so that a person in the situation of Ms Goodwin can have her Convention rights recognised in each Contracting State across Europe without the need to have recourse to

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the NI number was of critical importance in the administration of the system, and for the prevention of the fraudulent use of old NI numbers.

[495] *B. v. France* (App. 13343/87) (1994) 16 EHHR 1.

[496] *Christina Goodwin v. United Kingdom* at para. 84.

[497] *Ibid.*at para. 91.The Court went on to hold that, "In the twenty-first century the right of transsexuals to personal development and to physical and moral security in the full sense enjoyed by others in society could no longer be regarded as a matter of controversy requiring the lapse of time to cast clearer light on the issues involved."

[498] *Ibid* at para. 91. Not only in the field of birth registration, but also for example in the areas of access to records, family law, affiliation, inheritance, social security and insurance. The Court also noted that the Government were currently discussing proposals for reform of the registration system.

[499] *Ibid*. The Court further noted that "*as regards other possible consequences, the Court considered that society might reasonably be expected to tolerate a certain inconvenience to enable individuals to live in dignity and worth in accordance with the sexual identity chosen by them at great personal cost."*

Strasbourg. Otherwise we have a form of "repetitive application" even though the Respondent State may differ.

Many cases which in the past were opposed by domestic governments, and caused concern have now been implemented and integrated into domestic legislation and policies, and indeed are seen as an accepted part of modern society- for example transgender rights as in Goodwin being a case in point. Similarly following Dudgeon v the UK homosexuality between consenting male adults was decriminalized. These are just two short examples of how "subsidiarity" can and should work. No doubt there are many similar examples from each Council of Europe state as to how court judgments have been implemented in the domestic law and practice.

The real concern for the future is that in order to fix the problem for the Court and to prevent the nearly inevitable melt down we might go too far to promote subsidiarity. Or rather we will confuse good subsidiarity with what I will call "False Subsidiarity" or bad subsidiarity. That is to use the concept of subsidiarity to protect the nation state and its institutions from "interference" by international standard setting bodies . This is of particular concern where the Convention has not properly integrated and protected at nationally, but also, as some of the examples above show, where generally national authorities have good regard to implementing Convention rights, but where particular issues may still arise. I am afraid that significant numbers of politicians, media organisations and others in the UK are demanding that our Government take such an approach. This creates a risk for the protection of human rights as the Chair of the Council of Europe falls to the UK in November. We will have to be vigilant that proposals emerging in the next few months and years do not erode the success of the ECtHR in protecting Rights in Europe.

The importance of the role the Court as the fundamental guarantor of Convention rights cannot be gainsaid. This must mean the right of access to the Court by individuals, where cases have been fully explored by the domestic authorities but they failed to protect the right in question. While it is incumbent on domestic authorities to ensure that they give effect to the case law of the Convention- as other countries did in these examples, the examples also show that reforms of the Court, and in particular the desire to reduce the caseload of the court through different filtering mechanisms, must at the same time continue to allow well-founded cases to be brought before the Court, and thus ensure that the right of individual petition remain at the"cornerstone of the Convention system."[500]

In conclusion, the current focus on the issue of subsidiarity is an opportunity for States to focus on how to better enable protection of Convention rights at the domestic level, through legislation, policy and practice, including administrative and judicial practice. It is primarily

[500] See Interlaken Declaration and Action Plan.

through these approaches that violations, and by definition applications to the Court will decrease, and ultimately protection of the rights of individuals in Europe be better realised. In tandem, the Committee of Ministers needs to address the States whose non-implementation of systemic problems are causing the backlog. The role of the Court , as the essential guarantor of human rights must be preserved and strengthened, to enable the court to adjudicate where states are unable a or unwilling themselves to protect individual rights. To this effect member states need to support the Court's capacity to consider, in a timely manner, the well-founded applications made to it. The right of individual petition must remain the cornerstone to the convention system and we must ensure that subsidiarity ensures rather than hinders this fundamental principle.

The Court's Reform after Interlaken and Izmir: Progress and Challenge

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1. Introductory remarks

I am very pleased to participate in this seminar and I would like to thank the hosts and organisers for their invitation.

The views which I shall express are my own and should not be taken as those of the Court.

The title of my presentation is not meant to suggest that before Interlaken and Izmir there was no meaningful progress in, or challenge to, the Court's reform.

In fact, already when the preparatory work on Protocol No. 14 had just begun, the Court set up various working parties, whose task was to reflect on how to handle its ever-increasing caseload and develop the existing Convention procedures and its internal working methods. This has become a continuing, creative process and a daily exercise, which since 2005 has been centralised and carried on by the Court's Committee on Working Methods, supported by the Working Party on the Pilot Judgment Procedure, which acted in 2008-2009, and the Reform Group set up to ensure the follow-up of the action plan launched at the Interlaken Conference and endorsed in Izmir.

For the purposes of my presentation I have selected only a few, in my personal view most important, examples of progress in the implementation of the Interlaken action plan ("the Interlaken plan") and the Izmir follow-up plan ("the Izmir plan") that have a direct impact on the Court's ability to handle its case overload.

The Interlaken and Izmir Declarations speak of three actors involved in the play – the Member States, the Committee of Ministers and the Court stressing, at the same time, the

shared, common responsibility of the Court and the States for the effectiveness of the Convention system. While giving the full effect to the principle of shared responsibility as recognised in the Interlaken and Izmir Declarations[501] is certainly one of the most serious challenges faced by those involved the reform process, in my – limited in its size – presentation I will speak of the challenge as seen from the perspective of the member of the Court's Registry and my daily experience in handling cases.

2. Progress – what has been achieved in reaching the objectives set out in the Interlaken and Izmir declarations

One must admit that one and a half years that have elapsed after the Interlaken Declaration and Action Plan listing guidelines for the actions to be taken over 10 years, up to 2019, is a fairly short period, not sufficient to reach even the most important goals but just enabling the Court to approach some of them. However, significant developments have already occurred.

First, as regards **repetitive applications** (which at present stand at around 32,000, out of 155,500 cases pending before the Court[502]), the Interlaken plan stressed "the need for the Court to develop clear and predictable standards for the "pilot-judgment" procedure as regards selection of applications, the procedure to be followed and the treatment of adjourned cases …".

One year after this call, on 21 February 2011, the Plenary Court amended the Rules of Court, adding the new Rule 61. The rule contains a set of provisions clarifying the circumstances in which the pilot-judgment procedure is to be applied, its stages, the adjournment and resumption of examination of follow-up cases. It codifies certain particular features of a pilot judgment, such as directives on remedial measures in its operative provisions and a specific form of a friendly-settlement agreement in a pilot case. No doubt, this must be seen as an important step forward in developing one of the most efficient means used by the Court to handle large groups of cases. Saying that the pilot judgment is one the most powerful procedural tools at the Court's disposal I am not fully impartial. Indeed, as the Registry case-lawyer who prepared the *Broniowsk*[503]i case for the Court's first pilot judgment and then worked on the *Hutten-Czapska*[504] case, I have quite strong feelings about the importance of the pilot-judgment procedure in the Convention system. One of my feelings is that the Court has not yet exploited the full potential of that tool. Not necessarily through its own fault but,

[501] The High Level Conference on the future of the European Court of Human Rights, Interlaken 18-19 February 2010. "the Conference: … (3) Stresses that [the principle of subsidiarity] implies a shared responsibility between the States Parties and the Court".
The High Level Conference on the future of the European Court of Human Rights, Izmir 26-27 April 2011: "6. Recalling also the shared responsibility of both the Court and the States Parties in guaranteeing the viability of the Convention mechanism."
[502] The statistical data as of 30 September 2011.
[503] *Broniowski v. Poland* (no. 31443/96), judgments of 22 June 2004 and of 28 September 2005.
[504] *Hutten-Czapska v. Poland* (no. 35014/97), judgments of 19 June 2006 and 28 April 2008.

rather, because of the lack of sufficient commitment to resolving systemic problems identified in pilot judgments on the part of some States.

A series of such pilot judgments as *Rumpf v. Germany*[505], *Vassilios Athanassiou and Others v. Greece*[506] or *Finger v, Bulgaria*[507] delivered already after the Interlaken Conference clearly confirm the Court's determination to strike at the systemic problem of the excessive length of proceedings and lack of an effective remedy in that respect in several States – the problem which has for so long remained the principal source of repetitive cases. However, there are more "problem areas", such as prison conditions in several countries[508], where the procedure can, or even should, be applied.

Regardless of how the situation develops in the future, the necessary regulatory framework for pilot judgments is now in place. Under the relevant Rule it is not only for the Court to initiate the procedure of its own motion but also the parties are entitled to make a request to this effect.

The shifting of the initiative for the institution of the pilot judgment procedure to the parties gives them an opportunity to influence more meaningfully the Court's decision on the selection of the pilot case. Also, it reflects, in a way, the shared responsibility principle. In cases where the Governments are already aware of the scale of the systemic problem (for instance, where numerous similar judgments have already been given) and are prepared actively to commit themselves to take rapidly a remedial action at domestic level, the respondent State's request for a pilot judgment may accelerate the procedure and, in consequence, the execution process. The applicants with similar cases may also pursue their Convention claims in a more consolidated manner by means of a "quasi" class action: instead of lodging each an individual complaint they may collectively bring the case concerning a systemic problem, join their forces and plead the pilot case more efficiently.

Second important development is the creation of the dedicated **Filtering Section** in the Court. In respect of filtering the Interlaken plan recommended that "the Court … put in place, in the short term, a mechanism within the existing bench likely to ensure the effective filtering". The Izmir plan, in respect of short-term measures, invited the Court "to evaluate the system of filtering by judges … who dedicate their working time to single-judge work for a short period, and to continue to explore further possibilities of filtering not requiring amendment to the Convention".

[505] *Rumpf v. Germany* (no. 46344/06), judgment of 2 September 2010
[506] *Vassilios Athanassiou and Others v. Greece* (no. 50973/08), judgment of 21 December 2010.
[507] *Finger v, Bulgaria* (no. 37346/05) , judgment of 10 May 2011.
[508] See *Orchowski v. Poland* (no. 17885/04), judgment of 22 October 2009; the issue of the application of the pilot-judgment procedure in Russian prison-condition cases pending the outcome of *Ananyev and Others v. Russia* (nos. 42525/07 and 60800/08).

The Filtering Section was set up in the Court at the beginning of 2011. The operation of the Section and its Secretariat is under a permanent review of the Court's Committee on Working Methods, which continues to reflect on the improvement of the internal procedures and submits its periodical reports and recommendations to the Plenary Court.

Most cases brought to the Court – an immense caseload of 96,700 applications[509] – have been assigned to the single-judge formation. The Filtering Section's Secretariat, which is a separate structure within the Registry, assists 20 judges appointed by the President as Single Judges for one year on a rotation basis in performing their judicial tasks.

In contrast to the past system, where all the judges tried plainly inadmissible cases, now only a limited number of them is involved, which obviously represents a considerable gain of judicial time that can be devoted to meritorious, deserving cases.

The Filtering Secretariat groups legal teams led by non-judicial rapporteurs responsible for opening case-files, conducting correspondence, processing applications and submitting draft reports to the judges for decision. For the time being, it comprises 5 selected high case-count countries with the particularly high proportion of unmeritorious cases - Russia (with its roughly 39,000 cases initially earmarked for the Single-Judge procedure), Turkey (with 8,500), Ukraine (with some 7,300 cases), Romania (with nearly 6,000) and Poland (with 5,500).

The primary task of the Filtering Secretariat is "sifting". That means screening incoming applications and ensuring that they are put on the appropriate procedural track: meritorious promptly referred to the Chamber or to the Committee and unmeritorious stopped at the "filter" for the future processing. The initial sifting greatly helps to identify early cases that are to be accorded priority or large groups of cases that may reveal a systemic issue. It is instrumental in implementing the Court's prioritisation policy.

The second task is to prepare unmeritorious cases for judicial examination – however, without detriment to the work on deserving applications which take precedence.

The first results are encouraging: as of 1 September 2011 nearly 22.000 applications were handled, and rejected, by the single-judge formation. This represents an increase of 15% in comparison to the same period in 2010.

Among many reform proposals on filtering that have emerged in post-Interlaken discussions, the most developed so far is to create a distinct body that would take over this function from the Court. Whatever shape this future structure will take, the Court already at the initial stage of the reform has created a dedicated case-processing service comprising experienced and

[509] As of 30 September 2011.

well-trained lawyers, which may give the necessary legal, administrative and organisational support for a possible new, "pre-Strasbourg" filtering mechanism operating outside the Court.

Last, but not least, development is the consistent application of the **prioritisation policy,** in response to the Interlaken plan, inviting the Court to "pursue its policy of identifying priorities for dealing with cases …".

On 16 February 2009 the Plenary Court adopted the prioritisation policy, establishing a new approach to the order of dealing with cases which, in accordance with Rule 41 as applicable up to 2009[510], was essentially chronological. The idea was to examine cases on the basis of their importance. To this end, the Court has, among other things, devised a system of case-warnings recorded in its database, a tool for monitoring not only the inflow of priority cases but also the progress in their handling. The priority scale starts from cases involving allegations of most serious violations and structural problems, cases assigned to the single-judge formation come bottom on the list. The number of priority cases being dealt with continually increases but, given the Court Registry's limited human resources, an inevitable consequence is that non-priority cases must be put aside. This, in turn, further builds up the already huge backlog and deepens the case overload crisis faced by the Court.

3. Challenge – principal obstacles to the reform process

The Court's heavy case overload, its backlog of pending cases and the persistent imbalance between its capacity to examine cases and the ever-increasing volume of incoming applications present the most serious, permanent challenges facing those involved in the reform. As mentioned before, there are already 155,500 cases on the Court's docket. According to rough estimates there will be 160,000 cases pending before the end of 2011. The gap between the influx of new applications and their disposal is increasing dramatically: 2,700 cases per month in 2011 as compared to 1,600 in 2011.

In reality, the Court's work is essentially a daily struggle to cope with thousands of individual petitions received from 47 countries.

After some 10 years of continuing discussion on the reform, including one amending Protocol, two high level conferences and considerable number of various reflection or discussion groups of experts, the problems facing the Court are essentially the same as diagnosed in 2000-2002, well before Protocol No. 14, Interlaken and Izmir – except that their scale is much larger. The Court still has too many cases and only launching a radical process of changes in the procedures aimed at a drastic reduction of its workload may improve the situation.

[510] The relevant amendments took effect, respectively, on 17 June and 8 July 2009.

The principal questions – and at the same time the challenges – to which neither Interlaken nor Izmir did give a satisfactory answer are as follows:

- how to reduce the Court's case-load to a manageable amount without affecting the right of individual petition?

- how to ensure that the cases dealt by the Court are the ones which have a meaningful impact on the effectiveness of the Convention system, in particular in terms of identifying and helping to resolve serious dysfunctions at national level?

4. Concluding remarks

My presentation will not provide the answer either. I would rather add a few more questions concerning future, possible measures:

1. Preserving the right of individual petition means direct access to the Court. Does access to the Strasbourg Court mean full judicial treatment for all the cases that come in, including those that do not contribute at all to the quality and strengthening of the human rights protection system under the Convention?

2. Are the existing admissibility conditions (including the significant disadvantage criterion introduced by Protocol No. 14 – which has so far not proven to be of much help in reducing the caseload) sufficient, given that despite the large and rising numbers of inadmissibility decisions and streamlining of procedures, it still takes too long to dispose of cases where there is no human rights issue and which indeed do not deserve judicial attention?

3. Is Article 41 in its present wording necessary or should it be amended or deleted to reflect the more and more present idea that the Convention system should be aimed at resolving human-rights problems at national level rather than compensating a particular individual?
In consequence, should the power to award just satisfaction be delegated to national authorities?

4. Should the Court be given discretion as to the cases in respect of which it conducts a full judicial examination?
In particular, should it have the power decline to examine (rather than, as at present, the duty to examine and the power to declare inadmissible) applications which did not require examination on the merits or raise a substantial issue?

Having witnessed for the last 15 years various reforms and seeing their so far limited impact on the Court's efficiency I personally believe that that the future Court should be more like a constitutional court, trying a reduced number of cases qualified for adjudication and concentrating on most important human rights violations. Perhaps, it should not even make

pecuniary awards under Article 41, except for costs of proceedings, leaving the compensation issue for the national courts.

I am aware that this statement is open to criticism from those who might see it as an attempt to undermine the right of individual petition. There is no such an attempt on my part – I think, however, that the Court's inability to deal with its caseload within a "reasonable time" has already undermined that right and that we can only preserve what is at present left of it, making a realistic assessment of the Court's situation.

Thank you.

The Statute for the European Court of Human Rights – a Utopian Concept or a Way to Strengthen the Control System

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First of all let me thank the organizers for the invitation – which was of course flattering – but more importantly for including the issue of the Statute of the European Court of Human Rights in the agenda of this year's seminar.

Those of you who had the opportunity to attend the seminar last year may remember that the concept of simplified procedure for the amendment of the Convention has been chosen as one of the leading themes. There have been no less than six interesting presentations as well as stimulating discussion on how to proceed with the idea of strengthening the system by introducing a flexible and effective way of adopting the procedure before the Court to changing circumstances.[511] There would be obviously no point in reproducing the whole background and history of this concept, but for the record and for those who might not be yet very familiar with the idea of "SAP" let me just very briefly present the following points:

For several years now (or even longer) there has been a debate within the Council of Europe on how to amend the control system in an effective and possibly prompt way. The experience of reforms introduced by Protocol no. 11 and 14 were somewhat worrying in the sense that it required a great deal of time and energy not only to prepare the changes (draft the amendments), but also to introduce them through an extremely time-consuming ratification procedure in all state parties of the Convention. A fundamental question had to posed and notably: is it really necessary to introduce all changes in the system in that way? Will the system survive another attempt to bring in minor amendments to the procedure within six

[511] Cf. presentations by J. Wołąsiewicz, K. Drzewicki, G. Matyushkin, B. de Cerjat, D. Kühne and A. Fischer, R. Pillay in: *Concepts of General Domestic Remedy and Simplified Procedure for Amending the Convention in the Post-Interlaken Process,* Warsaw 2010, pp. 117 *et seq.*

years between the opening to signature and entering into force of a new treaty? (*casus* of Protocol no. 14)?

Then another important issues were put forward: how to introduce amendments in a more flexible way while ensuring the efficient functioning of the system? Which procedural norms could be subjected to a simplified amendment procedure? Should not the state parties as founders of the system provide a legal basis for certain solutions developed in the Rules of Court? By the way, I used the word "founders" on purpose since some discussions about the ECHR control system in fact assume that the Court and the system "has always been there" and states were – say – allowed to submit themselves to its jurisdiction. Not exactly. The states created the system and they have been founding it also in terms of spending taxpayers' money for its functioning and just satisfaction for victims of violations. To put it in simple terms, there was and is a compelling need to reflect on how the states could better fulfill their duties as founders of the system to ensure its effectiveness. The conferences in Interlaken of 2010 and Izmir of 2011 confirmed that among other measures aimed at improving the performance of the system, the issue of SAP or 'a Statute' of the Court should be included in the agenda of inter-governmental work.

In essence, the idea of a Statute is about introducing a middle level of norms situated between the Convention and the Rules of Court. There are several ways to achieve it but in most scenarios it requires some re-building or re-shaping the legal architecture. If this exercise is supposed to make sense then the states would need to indicate which norms are apt for being modified in a simpler way. The concept also assumes that for the sake of clarity and consistency the group of norms concerning organizational and purely procedural matters is distinguished in a document named "Statute" which of course remains closely linked with the Convention. This idea was also perceived by many as a chance for assembling organizational and procedural norms from Chapter II of the Convention with some norms of the Rules of Court requiring "an upgrade" (i.e. providing them with the status of international law norms approved by states) as well as to identify and fill in potential lacunae in the current system of procedure.

It needs to be underlined that the fundamental assumption of this concept is to make the system stronger and more flexible. Under no circumstances should this reflection process end up in weakening the core values of the Convention, the quality of legal protection and independence of the Court. There is hardly any controversy around these points of departure, however, some discussions on the Statute echo concerns as to the potentially negative influence of re-shaping the normative architecture on the Court's status and functioning. In my understanding the concept of the Statute does not aim at depriving the Court of its current powers and potential. Nobody could seriously thinking of dethroning the Court as the principal and sole judicial institution entrusted by the Convention to interpret and apply the treaty. Speaking in abstract terms, the idea of the Statute is rather an invitation for States to take a more pro-active role in adopting the control system to the changing circumstances. This cannot happen at the cost of Court's weakening as the whole exercise would be manifestly

counterproductive. It should therefore be expected that states and the Court would actively co-operate in the reflection process on how to improve efficiency and at the same time ensure appropriate balance between law-making and law-applying powers in the Convention system.

Now, this panel is about challenges to reform, so let's deal with the following question: **Does the idea of a Statute for the Court constitute a challenge?** In other words, is it not over-ambitious or too complex? Does it not come too early or too late to bring in some positive change to the system? Well, from what we can say on the basis of current development of the debate on this issue, the idea is neither Utopian nor bound to be successful. Without an intention to indicate all difficulties or dilemmas, I wish to share with you the following remarks as to what can potentially influence the future of this concept.

1) The hierarchy of priorities in reforming the ECHR system. As we know, the debate on the form and contents of the Statute has been so far performed within the Committee of Experts on a Simplified Procedure of the Amendment of Certain Provisions of the ECHR (DH-PS). The Committee met twice in 2010 and once – until now – in 2011.[512] It is common knowledge that there are several other issues in the agenda of the inter-governmental bodies dealing with the reform that have a higher priority, with the accession of the EU to the Convention being an obvious example. The member states of the Council of Europe work simultaneously on short-term and long-term proposals to reform the control system and it can be expected that the former ones take precedence. In particular the proposals not requiring an amendment of the Convention seem more feasible and accessible in comparison to those which assume treaty changes. In any event, the long-term perspective should not be lost sight for. Even if we admit that the discussion on the Statute have lower priority in comparison to the short-term changes, it does not imply the whole idea is unrealistic or not feasible.

2) The uniqueness of the proposal. The Statute/SAP is a concept which does not resemble any standard-setting or institution-setting exercise in the recent history of the Council of Europe. Obviously, the organization has considerable experience in drafting treaties, soft-law instruments and institutional arrangements. However, this is not just "another" treaty or recommendation, notwithstanding the importance of all these instruments. What is at stake is the future normative shape of the control system. The latter can probably survive without the concept of Statute/SAP, though it is hoped that states aim higher than only to keep the system formally working. In essence, it is the unique character of the proposal that contribute to its complexity and are seen by some participants to the debate as its greatest challenge or even threat.

3) Legal character of the Statute. After several years of debate we still do not actually know what should be the legal character of the Statute. One could argue that the more options we

[512] The DH-PS held its 3rd meeting on 19-21 October 2011. The Meeting Report is available on the website of the CDDH.

have on the table the better, since it provides us with wider choice and possibility to reflect on the best solution. In brief, among several modalities, one can identify two main options:
- Statute as a an annex to the Convention with a treaty status approved by a unanimous resolution of the Committee of Ministers,
- Statute as a resolution of the Committee of Ministers or the Conference of State Parties.
Both options have their pros and cons.[513] Even if the first modality seems to be preferred by most experts in the DH-PS, the issue is far from being resolved.

4) The contents of the Statute. So far the DH-PS identified preliminarily a group of provisions from current Chapter II of the Convention which could be subjected to simplified amendment procedure. There seems to be a prevailing view that at least several norms from the Rules of Court might be transferred to the Statute. However, the discussion on these points, including new normative elements to be included in the Statute, is still on a very early stage.

To sum up, the idea is under consideration and there remain many aspects to be determined or clarified. The mandate of the DH-PS expires in 2012. After the Committee's final report with possible modalities of SAP/Statute is submitted, time will come for a political decision as to the future of this concept. It is hoped that state parties to the Convention will ensure that the idea of the Court's Statute is accommodated in the agenda for the long-term vision of the control system.

[513] Cf. the report of the 3rd meeting of the DH-PS, paras. 17-22; see also the report of the 2nd meeting of the DH-PS, para. 11-12.

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