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Who is Managing Ethnic and Cultural Diversity in the European Condominium? The Moments of Entry, Integration and Preservation

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Abstract

This article aims to provide an insight into the legal background against which ethnic and cultural diversity is managed inside the EU. It explores how responsibilities for diversity management are distributed within the EU system, and considers the role of the overarching constitutional value of 'cultural diversity'. It is argued that the 'moments' of entry (characterized by a quasi monopoly of the Union with regard to EU citizens and a potentially increasing EU role with regard to third-country nationals), integration (characterized by a strong interactive engagement of players, Union and Member States alike) and preservation (characterized by a quasi monopoly of the Member States) form the key layers of interaction between the Member States and the EU in the policy areas relating to minority and migration issues. Each layer involves a different set of concerns and a distinct balance between national and supranational involvement, but jointly they map the growing European dimension inherent in the management of diversity.

Introduction

Sovereignty over minorities, once vested exclusively in the state, is no longer concentrated in one sphere of governance. Therefore, minority protection is not only a 'competence matter' but forms part of a 'polycentric diffusion which characterizes an increasingly large share of public tasks and functions' (Palermo and Woelk, 2005, pp. 6–7). Indeed, the very idea of hermetic 'competence matters' no longer corresponds with our complex European legal reality. We live in a *Staatenverbund* – made up of 25 *stati comunitari* (Manzella, 2003) – and

are confronted by an interwoven, interdependent constitutional background that reduces the scope of policy areas ascribed to a single political player and an exclusive legal level of government. However, the fact that the notion of 'competence matter' is losing relevance does not mean that the very idea of legal 'competence' has become redundant. On the contrary, a complex system of multilevel governance leads to a renaissance of the idea of 'competences'. The issue of legal competence arises with the potential threat of being overruled by other players within the *Staatenverbund.* The EU system offers a reliable – even if *prima facie* non-transparent – distribution of competences. Competences are distributed rather than 'diffused' among the various players in the EU system. With respect to this distribution, the Member States remain the 'master of the treaties' (independently from the question whether the draft Constitutional Treaty enters into force or not, see Puttler, 2004). The relevant question in this context is no longer 'who is in charge of which policy area?' but rather 'which means can be used to which degree and for what purpose?'.

In this sense 'competence watching' is an important and very modern sport for administrative and legal players within the EU. This is also true for the areas of minority protection and different forms of migration. Even if this article tends to disagree with a picture of 'diffused competences' it agrees with the idea that the European multilevel structure provides for new channels of interaction, exchange and cross-fertilization. The acceptance of competence limits within the European multi-level construction can lead to creative policy responses and initiatives. It is no coincidence that the idea of 'mainstreaming' has come to the fore – especially in areas such as anti-discrimination or social inclusion. 'Mainstreaming' is a very European response to a complex patchwork of competences. The steadily growing layer of EU law and EU politics also changes the traditional 'competence matters' of minority protection and migration law. European integration increasingly underlines the interdependence between these two issue areas and links them to other policies, such as cultural, regional, language or social policy, or the integration of EU citizens. These policies should be regarded as an expression of one single interlinked and overarching effort of 'diversity management', namely the effort to integrate diversity within unity.

This tendency brings the interdependencies, interactions and similarities between the different addressees of these policies – old minorities, new minorities, migrants and mobile EU citizens – to the fore.[1] It has an obvious potential to spark cross-fertilization of the legal tool boxes used *vis-à-vis* minorities and migrants. This linkage effect of EU law can be explained by the principle of enumerated powers, which leads to the fact that EU action is integrated in different policy areas. Moreover, new ways of European interaction

[1] See the articles by Gwendolyn Sasse and Ryszard Cholewinski in this special issue.

between the states and the Union, such as the open method of co-ordination (OMC), foster the transversal nature of social inclusion and the protection of diversity. Furthermore, the concept of EU citizenship links questions of intra-European migration with classic forms of minority protection. Last but not least, the new involvement of the EU in the treatment of third-country nationals can be regarded as the first sign of a salient European civic citizenship, which provides newcomers with a set of supranational rights, thereby decoupling them from the level of national law.

This article aims to provide an insight into the background against which ethnic and cultural diversity is managed inside the EU. It explores how the responsibilities for diversity management are distributed within the EU system and considers the role of the overarching constitutional value of 'cultural diversity'. It is argued that the 'moments' of entry, integration and preservation form the key layers of interaction between the Member States and the EU in the policy areas related to minority and migration issues. Each layer involves a different set of concerns and a distinct balance between national and supranational involvement, but jointly they map the growing European dimension inherent in the management of diversity.

I. Two Inverted Diversity Pyramids (the IDP Model)

An overall description of diversity management in the European condominium should not build on a differentiation of strictly separated groups of addressees. Such an approach could suggest that Member States are responsible for the protection of their old minorities, whereas the Union is responsible for the integration of EU citizens, and that the treatment of migrants is increasingly a shared task. However, this conclusion is misleading, if not incorrect. An alternative approach distinguishes between different groups of measures addressing specific needs. Such an understanding avoids possibly arbitrary categorizations of human beings, a misperception of the legal reality and some artificial differentiations characterizing the academic discourse. Nevertheless, the differences between the various groups of addressees are not ignored in the model proposed below.

Some differences between migrants and old minorities are obvious. Migrants and the members of a new minority see a danger in being stigmatized as being 'different', whereas persons belonging to an (old) minority group see a danger in not being recognized as being 'different' from the majority (Faßmann, 1997, p. 216). Migrating EU citizens, in turn, have different needs and worries. Nevertheless, there are similarities between the latter, migrants from outside the EU, new minorities and old minorities. This is true with respect to both their personal situation and the challenges posed to the country at stake. In

legal terms this *de facto* similarity translates into the common need to balance elements of unity (solidarity with the common needs and values, economic interests and the legal system of the host state and the host society) with elements of diversity (sharing social and other benefits with those belonging to a 'minority' and recognizing their special needs and values). Moreover, there is an increasing awareness of the fact that 'new' and 'old' are expressions of a rather relative and arbitrary parameter, namely the lapse of time. This distinction immediately points to those groups that are no longer new and not yet old. The notion of the 'integrated alien', as invoked by some judges at the European Court of Human Rights (in order to provide persons who grew up in their host states with a protection against expulsion comparable to that enjoyed by nationals),[2] is just one legal expression of the fact that, on the one hand, the lapse of time matters and, on the other hand, it does not lend itself to convincing legal categorizations. Furthermore, migrants rarely turn out to be a temporary phenomenon. They have to be offered a perspective of integration into the society of their host state, a policy which has to involve elements of 'minority protection' in order to avoid 'integration' ending in 'assimilation'.

Migrants can become new minorities, new minorities can become old minorities, and non-citizens can become citizens. In order to remind us of the fact that needs, political expectations, constellations and self-perceptions are in a permanent state of change, the model proposed here talks of three different 'moments' of diversity management. The label 'moment' does not, however, imply a temporal, linear or stringent evolution from one moment to the next. These three 'moments' of European diversity management co-exist and signal that various forms and means of integration are available for various needs and circumstances. The first moment to look at is the 'moment of entry' with regard to a certain territory and the settlement there. Rules on entry, free movement and residence within the European and/or the national territory are subsumed here (area I in Figure 1). The second, even more diverse set of measures can be grouped under the 'moment of integration' (area II). 'Integration' is here referred to in its broadest sense as a highly heterogeneous policy area comprising political and normative intervention against discrimination in different spheres, measures aiming at integration into various social contexts, such as the labour market, the educational system and social security and, finally, certain measures helping to preserve and foster group identities as long as such measures do not require permanent positive action by the public entity in support of minority groups. The policy area where measures of the latter kind are applied is labelled the 'moment of preservation' (area III). These measures focus on exclusive minority rights. The addressees of such measures are not considered in terms

[2] See the concurring opinion of Judge Pettiti in *Boughanemi* v. *France*, application no. 22070/93, judgment of 24 April 1994.

of a group that needs to be integrated but rather as a co-constitutive element of society. The public entity will take the group's character into consideration and may provide for constitutional power-sharing through forms of cultural or territorial autonomy. Most minorities never reach this advanced layer of protection. Moreover, those few minorities who do reach this level will normally not have passed through the layer of 'entry'. This could lead to the conclusion that the 'language of moments' fails to describe reality. Nevertheless it is submitted here that it is the latter language which can help to identify 'interlocking policy paradigms' between the phenomena of migration and minorities – an interaction which undoubtedly does form part of modern reality.

The distribution of competences and responsibilities between the EU and its Member States with regard to these three main levels of diversity management can be illustrated by two inverted pyramids symbolizing the Member State and the EU level of governance. The upright pyramid represents the EU and the inverted, bold and more dominant pyramid symbolizes the Member States. With regard to the measures grouped under the moment of entry, the Union plays an important role that is set to become even stronger in the future (see area I-EU). As for the second layer of measures, pertaining to the moment of integration, the European condominium builds on close co-operation between

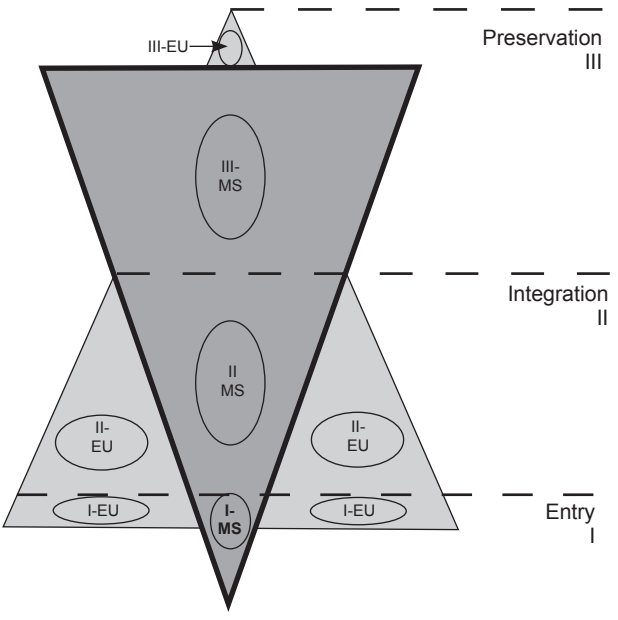

Figure 1: Two Inverted Diversity Pyramids
Source: Author's own data.
Note: For reasons of clarity the pyramids are shown here as two-dimensional figures, i.e. triangles.

the two layers of governance in a vast range of policy areas. In fact, this is the area where the two pyramids are at their widest and overlap to a significant degree. Here the Union provides a solid set of hard law provisions in the area of anti-discrimination and is developing an expanding spectrum of initiatives in the area of social cohesion and the integration of immigrants (area II-EU). At the same time this is an area where all the Member States have developed a dense network of legal measures and policies (area II-MS). The co-operation between the EU and its Member States is here one of legal prescription (as in the case of anti-discrimination) and soft co-operation (as in the case of co-financing of relevant projects or the open method of co-ordination in the area of social inclusion). Finally, the third layer of measures, namely those providing for group rights and measures of constitutional power-sharing, is entirely dominated by the Member States (area III). It is up to the Member States (area III-MS) to decide whether they want to provide minorities with such a privileged status. However, if they do so, they have to accept certain rules imposed by EC law and eventually expand the personal scope of such measures to EU citizens (area III-EU).

II. The Moment of Entry

The European Commission acknowledges that 'European societies are multi-cultural and multi-ethnic'.[3] The degree of that diversity which, according to the European Commission, is 'a positive and enriching factor', depends to a significant degree on the kind of immigration policy implemented. Therefore, the control of borders, the decision who can enter a territory and reside there lies at the heart of the management of ethnic and cultural diversity. Traditionally, these issues have been a core expression of state sovereignty. With regard to intra-European mobility this competence has increasingly been transferred to the supranational level. As a result, Member State borders have lost their function as the definitive marker of unity and diversity. This is most obvious in the case of EU citizens.

EU Citizens

Free Community movement was initially granted as a privilege for those EU citizens who act as market citizens. Consequently it excluded, for example, retired people settling in another Member State. The European Court of Justice soon started to compensate for this rather piecemeal view on mobility by interpreting the fundamental freedoms more widely, thereby framing various

[3] European Commission, Explanatory Memorandum attached to the proposal for a Council framework decision on combating racism and xenophobia, COM(2001) 664 final of 28 November 2001.

forms of EU migration in economic terms. In the Court's view 'tourists, persons receiving medical treatment and persons travelling for the purpose of education' are 'to be regarded as recipients of services', who therefore benefit from the protective shield of EC law.[4] In the early 1990s norms of secondary law extended the right of residence to 'inactive' groups such as students or persons who ceased to be economically active.[5] In 1992 the Maastricht Treaty established with Article 18 EC the overall 'right to move and reside freely within the territory of the Member States' as a proper right of citizens. In 2004 the directive 'on the right of the citizens of the Union and their family members to move and reside freely within the territory of the members states' consolidated the various pieces of EU secondary law on free movement and residence and integrated the vast jurisprudence of the Court into one single legal text.[6] The directive confirms that all Union citizens have a right of residence, provided they have 'comprehensive sickness insurance cover' and have sufficient resources 'not to become a burden on the social assistance system' of the host state.[7] However, expulsion may not be the 'automatic consequence' of recourse to the social system of that state.[8] Moreover, after five years of legal residence in a Member State, EU citizens acquire the 'right to permanent residence' irrespective of any economic conditions.[9] The right to free movement remains 'subject to the limitations and conditions laid down in this Treaty and by the measures adopted to give it effect',[10] but the directive takes up the case law when stating that restrictions on the right of entry and the right of residence on the grounds of 'public policy, public security or public health shall comply with the principle of proportionality and shall be based exclusively on the personal conduct of the individual concerned'.[11] Thus, there is no legal space left for a national 'migration policy' *vis-à-vis* EU citizens and their family members. Only with respect to citizens from the new member countries have the old EU members retained the possibility of upholding or introducing 'national measures' restricting the

[4] ECJ, case C-118/75, Watson and Belmann, judgment of 7 July 1976, in ECR I-1185, para. 16. With respect to tourists, see especially ECJ, case *Ian William Cowan* v. *Trésor public*, judgment of 2 February 1989, in ECR 1989, p. 195.
[5] Council Directive 93/96/EEC of 29 October 1993 on the right of residence for students, in OJ L 317, 18 December 1993 pp. 59 and 60 and Council Directive 90/365/EEC of 28 June 1990 on the right of residence for employees and self-employed persons who have ceased their occupational activity, in OJ L 180, 13 July 1990, pp. 28–9.
[6] See Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States, in OJ L 158 of 30 April 2004. The new Directive must be transposed into national law by 30 April 2006.
[7] Art. 7 Directive 2004/38/EC. Member States are not allowed to 'lay down a fixed amount' but have to 'take into account the personal situation of the person concerned'. Art. 8 para. 4 Directive 2004/38/EC.
[8] Art. 14 paras 1 and 3 Directive 2004/38/EC.
[9] Art. 16-21 Directive 2004/38/EC.
[10] Art. 18 EC.
[11] Art. 27 Directive 2004/38/EC.

free movement of workers. However, such measures are possible only under certain conditions and cannot remain in place beyond 2011.[12]

Admittedly, since only less than 2 per cent of the EU population lives in a state other than their home state, intra-European mobility has not reached a level that would make the migration of EU citizens a major driving force of diversity in Europe. However, one could imagine regional developments gaining a diversity-relevant dimension. With respect to political rights and the specific situation in Luxembourg, this has been acknowledged in the directive on local elections.[13] There one reads that it is the intention of EU citizenship 'to enable citizens of the Union to integrate better in their host country', but that at the same time 'it is in accordance with the intentions of the authors of the Treaty to avoid any polarization between lists of national and non-national candidates'. Member States with a proportion of foreign EU citizens exceeding 20 per cent of the total number of citizens on 1 January 1996 were given the right partly to derogate from the directive.[14] Another diversity-relevant dimension of the free movement of EU citizens can be seen in the fact that it serves the interests of those members of (old) minorities who seek close contacts to their kin state, a traditional objective of international minority law.[15] In this sense the border between Italy and Austria, for example, has to a large degree been 'neutralized' by the European common market, providing the German speakers in South Tyrol (who are EU citizens) with closer contacts to their former homeland Austria.

The EU's competence ends, however, where it comes to deciding who is entitled to hold citizenship. The enabling supranational status of EU citizenship is (and this has been left untouched by the draft Constitutional Treaty) an appendix to national citizenship.[16] Member States therefore retain the legal means indirectly to withdraw or grant European mobility and residency rights. Consequently, they can decide on the 'European status' of members of certain minorities, be they located within their territory (e.g. the Russians in the Baltic states) or outside their territory (e.g. the Hungarians in the neighbouring countries of Hungary). As this margin indirectly includes access to the European labour market, the Member States co-determine whether these

[12] See Art. 24 of the Act of Accession, in OJ L 236 of 23 September 2003. The '2+3+2' regime has been considered as far exceeding what is necessary to achieve harmonious integration of the new EU citizens into the EU's free movement regime and as being in contradiction with 'the very spirit of citizenship as general non-discrimination rule' (see Reich, 2004, pp. 25–6).

[13] See Council Directive 94/80/EC of 19 December 1994 laying down detailed arrangements for the exercise of the right to vote and to stand as a candidate in municipal elections by citizens of the Union residing in a Member State of which they are not nationals, in OJ L 368, 31 December 1994, pp. 38–47.

[14] See Preamble and Art. 12 of the Council Directive 94/80/EC.

[15] With respect to trans-border mobility and trans-border contacts see, e.g., Art. 17 para. 1 FCNM.

[16] Art. I-10 para. 1 CE reads as follows: 'Every national of a Member State shall be a citizen of the Union. Citizenship of the Union shall be additional to national citizenship and shall not replace it'.

minorities can become migrant workers. Nevertheless, against the background of the very specific situation of the Roma with respect to official documents and nationality, it has been speculated whether 'under a broad reading of Article 13 EC, this provision could allow for the adoption of an instrument prohibiting a discriminatory application of rules relating to nationality' (De Schutter and Verstichel, 2005, p. 31).

Third-country Nationals

The treatment of third-country nationals is still dominated by the Member States. So far EU law has left it entirely to the discretion of Member States to rule on the entry and free movement of third-country nationals (with the exception of family members of EU nationals and citizens of the European Economic Area states). However, two new Council directives – one on the status of third-country nationals who are long-term residents,[17] the other on family reunification[18] – will partly change this picture (even if the former allows Member States much more leeway than the original Commission proposal intended, see Peers, 2004b). Under the new legal situation imposed by the permanent status directive, Member States have to grant third-country nationals a permanent residency status after five years of legal residency. This status is intended to approximate their legal standing to that of EU citizens. It provides for equal treatment in a rather broad range of areas[19] and guarantees a limited form of free movement. Second Member States have to provide long-term residents with a right to residence, but the first Member States require those applying for this legal status to provide evidence that they have a stable and regular income and sickness insurance.[20] Moreover, Member States 'may require' them 'to comply with integration conditions, in accordance with national law' (see below).[21] The second Member States may limit the total number of persons entitled to the right of residence, provided that such limitations had already been defined when the directive was adopted.[22] One might even argue that there is room to adopt such measures after this point in time.[23] Even if one recognizes that, since Amsterdam, the provisions on visa, asylum and immigration in the EC Treaty provide considerable competences

[17] Council Directive 2003/109/EC of 25 November 2003, OJ L 16, 23 January 2004, pp. 44–53. The Directive must be transposed by 23 January 2006.
[18] Council Directive 2003/86/EC of 22 September 2003, OJ L 251, 3 October 2003, pp. 12–18. The Directive must be transposed by 3 October 2005.
[19] For possible limitations, see Art. 11 Directive 2003/109/EC.
[20] The 'first' Member State is the Member State where a third-country national arrives first, and the 'second' where s/he moves to from the 'first' state.
[21] Art. 5 Directive 2003/109/EC.
[22] Art. 14 para. 4 Directive 2003/109/EC.
[23] See the rather opaque provision in Art. 63 para. 2 EC which allows Member States to derogate to a certain degree from secondary law (compare, e.g., Knauff, 2004, pp. 27–9).

for the European Community to rule on access to EU territory, there are constitutional brakes and political objections which ensure that the Member States do not lose control entirely over immigration from third countries.[24] The basic decision 'as to how many migrants coming [directly] from third countries can be admitted to each Member State to seek work in an employed or self-employed capacity remains a national decision'.[25] This was also spelled out in the draft Constitutional Treaty, which provides the mandate to develop a proper 'common immigration policy' which establishes 'the conditions of entry and residence [and] the definition of the rights of third-country nationals', while underlining that this 'shall not affect the right of Member States to determine volumes of admission of third-country nationals coming from third countries to their territory in order to seek work, whether employed or self-employed.'[26] Whatever happens to the ideas enshrined in the draft Constitutional Treaty, migration will remain a prominent issue on the agenda of the enlarged EU. This can be seen from the Hague multiannual programme for strengthening the area of freedom, security and justice, which was endorsed by the European Council in November 2004 and followed up by an action plan in May 2005.[27] The Commission plans to adopt an EU framework regulation on the collection of migration and asylum statistics in 2005 and to propose the establishment of a European migration monitoring centre in 2006.[28] Moreover it initiated in early 2005 a public consultation procedure on the management of economic migration into the European Union. This 'process of in-depth discussion' aims at the identification of 'possible options for an EU legislative framework on economic migration', including admission procedures, which will be presented by the Commission by the end of 2005.[29] At present, it is still open whether national resistance to this policy trend will persist.[30] Legally speaking, the EU has the potential to play a more significant role with regard to the entry of third-country nationals, and already plays a more or less exclusive role with regard to the entry of EU citizens.

[24] Title IV (Art. 61-9) EC, esp. Art. 63 para. 1 it. 3a and Art. 64 EC.
[25] See the Communication from the Commission 'The Hague Programme: ten priorities for the next five years', COM(2005) 184 final of 10 May 2005, pp. 8–9.
[26] Art. III-267 CE. Compare also Art. II-105 CE. Note that the Constitutional Treaty also provides a mandate for the Union in the field of 'conditions of employment for third-country nationals legally residing in Union territory' (see Art. III-210; see also Art. II-75). Whether the current Art. 137 para. 1 lit. g EC also covers access to the labour market is not entirely clear (see Knauff, 2004, p. 22).
[27] The Hague Programme is to be found in Annex I of the conclusions of the Brussels European Council of 5 November 2004. The action plan of the Commission identifies ten priorities on which it will focus in the next five years. Several of the priorities deal with migration issues (see COM(2005) 184 final).
[28] COM(2005) 184 final, p. 15.
[29] Green Paper on an EU approach to managing economic migration, COM(2004) 811 final, 11 January 2005.
[30] Note that the proposal for a Council directive on the conditions of entry and residence of third-country nationals for the purpose of paid employment and self-employed economic activities, COM(2001) 386 final, has failed due to resistance in the Council.

III. The Moment of Integration

The moment of integration covers a wide range of ambitious measures accommodating migrants and minorities within a society.

EU Citizens

With respect to EU citizens who moved to another EU state and form 'minorities', the Union did not adopt a distinctive integration policy. The overall prohibition of any form of discrimination on the basis of nationality is meant to cover these groups. This prohibition is enshrined in Article 12 EC and the economic freedoms. With the interpretation of this prohibition and the emancipation of the legal notion of citizenship in Article 18 EC as an independent source of rights, EU citizens have increasingly gained a sort of constitutional guarantee of integration. The European Court of Justice is silently – beyond the realm of politics – developing a (piecemeal) blueprint for a European social Union which, for example, provides EU citizens with access to social benefits in the host state (beyond existing secondary Community law).[31] Hence the fundamental freedoms and EU citizenship guarantee discrimination-free access to economic and social rights. There are also cases where these legal means have been invoked in order to secure the preservation of the cultural identity of migrating EU citizens. In the *Konstantinidis* case, the freedom to provide services was invoked in a highly identity-sensitive area, namely the right to one's name. EC law led to the withdrawal of national German provisions according to which the spelling of the surname of a Greek citizen would not have been in line with the proper (i.e. Greek) pronunciation of the name.[32] In the *Garcia Avello* case, the Court underlined that the principle of non-discrimination has to be read from the perspective of substantive equality and therefore not only requires that comparable situations must not be treated differently but also that 'different situations must not be treated in the same way'. The Court did not accept the argument of 'integration', namely that a successful integration of Spanish citizens into Belgian society would require a homogenous system of attributing surnames. This does not mean that the Court disregards the need for integration of EU citizens. It shows that the Court refuses to accept an assimilationary reading of the notion 'integration'.[33] In

[31] ECJ, Case C-184/99, *Rudy Grzelczyk* v. *Centre public d'aide sociale d'Ottignies-Louvain-la-Neuve*, judgment of 20 September 2001, in ECR I-6193. This erratic decoupling of case law and politics also has its disadvantages, however (see Kanitz and Steinberg, 2003).

[32] The argument used was that the modified pronunciation exposed the Greek EU citizen to the risk that potential clients may confuse him with other persons (see ECJ, case C-168/91, *Christos Konstantinidis* v. *Stadt Altensteig*, in ECR I-1191, judgment of 30 March 1993).

[33] ECJ, case C-148/02, *Carlos Garcia Avello* v. *Belgian State*, judgment of 2 October 2003, not yet reported.

another context the Court accepted that it might be 'legitimate' for a Member State to make certain social advantages dependent on the fact that the respective EU citizens 'have demonstrated a certain degree of integration into the society of that State'. Such a condition, however, may not result in a *de facto* denial of the respective advantage.[34]

One can conclude that EU citizenship – which at first sight fosters only participation in the political arena by providing the 'right to vote and to stand as a candidate at municipal elections'[35] – does provide a rather efficient means for the integration of migrant EU citizens. However, since the 'integrating force' of EU citizenship applies 'only' to 'situations which fall within the scope *ratione materiae* of Community law', it does not offer 'full integration'.[36] A unique example of European legislation, which explicitly deals with the issue of identity preservation of EU nationals, is the directive on the education of the children of migrant workers. This directive obliges host states and Member States of origin to adopt 'appropriate measures to promote the teaching of the mother tongue and of the culture of the country of origin of the above-mentioned children'.[37] The overall lack of EU involvement in the area of identity preservation of EU citizens might be explained and justified by the fact that the typical migrant EU citizen will not share a common identity with a community of other EU citizens.

EU Citizens and Third-country Nationals

The policy field of anti-discrimination is dominated by the European layer of governance. Article 13 EC provides a prominent legal basis for taking measures 'to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation'. This far-reaching mandate is of legal relevance for *all* persons living in EU territory. Especially for third-country nationals, who are frequently victims of discrimination, this EU policy area is of the utmost practical importance. The EU filled this mandate through two anti-discrimination directives – the employment directive and the race equality directive – which the Member States had to transpose before July and December 2003 respectively.[38] The race equality directive especially is

[34] It seems that, in such circumstances, the states must look at the 'actual degree of integration'. ECJ, case C-209/03, *Dany Bidar*, judgment of 15 March 2005, not yet reported, para. 59-61.
[35] See Art. 19 para. 1 EC as well as Art. I-10 para. 2 lit. c and Art. II-100 CE.
[36] ECJ, case C-85/96, *Martinez Sala*, in ECR I-2691, judgment of 12 May 1998, para. 62.
[37] See Council Directive 77/486/EEC of 25 July 1977, in OJ 1977 No. L 199, 06 August, pp. 32–3. Note, however, that the directive serves 'principally to facilitat[e] … the… possible reintegration into the Member State of origin'; that it has met major resistance in the transposition process and that it has been described by the Commission as lacking in 'specifically binding force' (see Commissioner Reding, reply to written question E-1336/02, 8 May 2002, OJ 2002 No. C 277 E, 14 November 2002, p. 190).
[38] Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, OJ 2000 L 303, pp. 16–21 and Council Directive 2000/43/EC of 29 June 2000

of crucial importance for minorities (new and old alike) since it is very wide in material scope and induced significant changes in the Member States' anti-discrimination systems, for example to include an emphasis on indirect discrimination, the prohibition of harassment, the prohibition of discrimination in the private sector and regarding the access to and supply of goods and services. In correspondence with the directive's strong emphasis on enforcement and remedies, Member States had to designate bodies responsible for the promotion of equal treatment. In 2001 the Commission proposed defining a common criminal law approach to racism and xenophobia in order to ensure that the same behaviour constitutes an offence in all Member States. The proposal, although resubmitted for political consideration in early 2005, seems to have failed politically. The 'different attitudes towards freedom of speech' amongst the various Member States prevailed over the common concern for the fight against xenophobia.[39]

The draft Constitutional Treaty embodies a duty on the part of the Union to combat discrimination 'based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation' when 'defining and implementing the [EU] policies and activities'.[40] This mainstreaming provision was meant to complement the prohibition of any 'discrimination based on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation'.[41] The latter provision would have been directly applicable with the Constitutional Treaty's entry into force and could have been invoked by any court within the EU as long as the matter concerned had fallen within the scope of EU law. However, it is difficult to understand that the draft Constitutional Treaty would have prohibited discrimination on the grounds of membership of a national minority and discrimination based on (minority) language without providing the Union with an explicit competence to combat these forbidden forms of discrimination and without obliging the Union to mainstream against these specific discriminations.[42]

This does not mean that the current or future Union is prohibited to mainstream in the interest of minorities and migrants or go beyond the

implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, OJ 2000 L 180, pp. 22–6 (see Bell, 2004).

[39] Negotiations were reopened under Luxembourg's presidency in February 2005 but failed in June 2005 (see the press release of 2 June 2005, available at «http:www.eu2005.lu/en/actualites/communiques/2005/06/02jai-rx/index.html»).

[40] See Art. III-118 CE.

[41] See Art. II-81 CE.

[42] 'Language' and 'membership of a national minority' are missing in the mainstreaming provision of Art. II-118 CE but also in the enabling provision in Art. III-124 CE (the latter takes up the wording of the current Art. 13 EC).

anti-discrimination approach. The EU network of independent experts on fundamental rights has rightly stressed that a consistent EU mainstreaming approach can efficiently take minority interests and identities into account in a wide range of EU activities, including, for example, broadcasting, the provision of services of general interest or with regard to safeguards for suspects in criminal proceedings.[43] This is particularly relevant for members of old minorities since these groups tend to list the preservation of their culture and identity as their main political aim. So far the EU's engagement in this respect is limited to certain financial stimuli focusing, in particular, on minority language projects.[44] Among the resources of the current European constitutional order for minority-related interventions are the EU's cultural or regional policy (De Witte, 2004).[45] Moreover, the regular monitoring exercise by the EU network of fundamental rights experts – in combination with the pending extension of the mandate of the European Monitoring Centre on Racism and Xenophobia (EUMC)[46] – will further consolidate the standing of the Charter of Fundamental Rights as a common frame of reference, even if it does not become a binding document.[47] The network of fundamental rights experts interpreted the Charter-based obligation of the Union to 'respect cultural, religious and linguistic diversity'[48] as an obligation to protect minorities (see critically on this, De Witte, 2004, p. 115). The draft Constitutional Treaty had added the respect for 'the rights of persons belonging to minorities' to the founding values of the Union without, however, providing the Union with any self-standing competence in the area of minority protection.[49] Minority rights in the stricter sense will remain a sovereignty issue of the Member States. The European level can only 'respect' these rights and could in the future provide a regular dialogue, facilitating the comparison of best practices and exerting soft political pressure.

[43] See the EU Network of Independent Experts on Fundamental Rights, Report on the situation of fundamental rights in the European Union in 2003, pp. 101–3.
[44] A detailed assessment is given in European Parliament, 'The European Union and lesser used languages', Education and Culture Series, EDUC 108 EN.
[45] See also a very recent change in the EU's language regime which allows Member States to provide minority languages with a pseudo-official European status (see Council Conclusion of 13 June 2005 on the official use of additional languages within the Council and possibly other institutions and bodies of the European Union, in OJ C 181, 18 June 2005, p. 2).
[46] See the proposal for a Council regulation establishing a European Union agency for fundamental rights, Brussels, COM(2005) 280 final, 30 June 2005.
[47] Note that the proposed mandate of the Human Rights Agency refers prominently to the Charter (COM(2005) 280 final, Art. 3, para. 2).
[48] Art. II-82 CE.
[49] Art. I-2 CE.

Third-country Nationals

Legally binding legislation extends certain rights of EU citizens to third-country nationals without dealing with the integration of the latter.[50] Even the directive on long-term residents leaves considerable leeway to states for the imposition of integration measures.[51] This has been considered as a permission to 'insist on assimilation' and as a possible violation of international minority rights standards (Peers, 2004a, p. 160). However, there is no commonly accepted right to identity preservation for new minorities in Europe. It can even be argued that it is exactly the issue of identity preservation which prevents states from accepting new minorities as addressees of international minority law. Nevertheless the EU got involved in the issue of immigrant integration on a legally non-binding policy level. In 2003 the Commission handed down its report on immigration, integration and employment.[52] In it, the Commission admitted that the characteristics of the host societies and their organizational structures differ 'and there are, therefore, no single or simple answers'. Nevertheless, 'much can be learned from the experiences of others'. The Commission identified a need for 'greater convergence' and proposed the fostering of co-operation and the exchange of information and ideas regarding introduction programmes for newly arrived immigrants, language training and the participation of immigrants in civic, cultural and political life within the newly established group of national contact points on integration.[53] Member States are beginning to recognize a role for the European Union in the development of integration policies *vis-à-vis* migrants. The European Council stated at the end of 2004 in its Hague programme that, for the successful integration of legally resident third-country nationals, a 'comprehensive approach involving stakeholders at the local, regional, national, and EU level' is essential in order to 'prevent isolation of certain groups' and in order to create 'equal opportunities to participate fully in society'. Most importantly, it calls for the establishment of 'common basic principles underlying a coherent European framework on integration' and a reading of integration that 'includes, but goes beyond, anti-discrimination policy'.[54] Two weeks later the JHA Council elaborated 11 'common basic principles for immigrant integration policy in the European Union'.[55] The first of these principles is the definition of 'integration' as a 'dynamic, two-way process of mutual accommodation by

[50] See Directive 2003/109/EC and Council Regulation 859/2003/EC extending the provisions of Regulations (EEC) No 1408/71 and (EEC) 574/72 to nationals of third countries who are not already covered by those provisions solely on the ground of their nationality, in OJ L 124, 20 May 2003, pp. 1–3.
[51] See Art. 5 para. 2 and Art. 15 para. 3 Directive 2003/109/EC.
[52] Communication on immigration, integration and employment, COM(2003) 336 final of 3 June 2003.
[53] COM(2003) 336 final, pp. 28–30.
[54] For a detailed discussion, see Cholewinski in this special issue.
[55] Annex attached to the press release regarding the 2618th Council meeting of 19 November 2004.

all immigrants and residents of Member States'. The main emphasis is very clearly on the integration of migrants into the respective societies and not on the preservation or protection of the migrants' identity, but it was conceded that 'full respect for the immigrants' language and culture … should be also an important element of integration policy' (principle 4). Moreover, it seems as if the Council recommends major investment in integration policy measures when calling for 'decent housing'. With regard to political participation, the Council recommends that, 'wherever possible', immigrants 'could even be involved in elections' (principle 9). There also seems to be a consensus between the Commission and the Council that the issue of immigration has to be taken into account in a series of other EU policies. The European employment strategy of 1997 and the social inclusion process of 2000 play an important role where the European layer of governance tries to co-ordinate co-operation between the Member States through the open method of co-ordination, and aims to reduce poverty and enhance social inclusion of immigrants.[56] From 2005 to 2010 the Commission will continue to fund integration projects in the Member States through the INTI programme,[57] deliver on an annual basis a report on immigration and integration, update its handbook on integration, develop a website dedicated to integration and propose the establishment of an 'integration fund'.[58]

IV. The Moment of Preservation

In its external relations the Union shows sympathy for constitutional power-sharing as a means of accommodating ethnic and cultural diversity. The development of a stronger 'regional dimension' is seen as a valid reply to ethnic diversity,[59] and a multi-ethnic country is expected to have a 'broad-based multi-ethnic' government.[60] This stance is reflected even more clearly in the EU's preconditions for the recognition of new states of the former Yugoslavia where it indirectly called for 'special status' for those minorities who form majorities in certain regions, Kosovo being the EU's primary concern. This notion of special status (which seems to have been inspired by the South Tyrolean autonomy,

[56] This is listed as one of the six key objectives for the coming two years in the joint report on social inclusion delivered 4 March 2004.
[57] INTI funds preparatory actions promoting the integration into the EU Member States of people who are not citizens of the EU. It amounts to €5 million for the 25 Member States for 2005.
[58] The integration fund is part of the proposed framework programme on the solidarity and management of migration flows (see communication establishing a framework programme on solidarity and the management of segration, COM(2005) 123 final, 6 April 2005).
[59] Communication on 'Developing closer relations between Indonesia and the European Union', COM (2000) 50 final, 2 February 2000, p. 9.
[60] See Art. 2 lit. a) of the Joint Action of the Council, 2001/875/CFSP, concerning the appointment of the Special Representative of the European Union (Afghanistan), 10 December 2001.

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see Caplan, 2002, p. 167), includes an educational system, which respects the values and needs of the grouping question, but also '(i) a legislative body (ii) an administrative structure including a regional force [and] (iii) a judiciary responsible for matters concerning the area which reflects the composition of the population of the area'.[61] With respect to the candidate states in central and eastern Europe, the Union initially also advocated a group-rights approach, although these references remained very general and were not followed up in any detail. In later monitoring reports during the accession process, the EU dropped the issue of collective minority rights (Schwellnus, 2006).

With respect to its Member States the Union holds no competence whatsoever to prescribe forms of constitutional engineering for the accommodation of ethnic and cultural diversity. Moreover, there is no political consensus on group rights among the Member States. In the 1980s and early 1990s there were attempts within the European Parliament to forge a consensus on an EC 'charter of group rights' which focused on collective rights and partly contained a right to autonomy. These initiatives were all doomed to fail (see, on this, Hilpold, 2001, pp. 453–62). The Council of Europe's Framework Convention on the Protection of National Minorities (FCNM) which follows an individual rights approach is seen as a compromise 'creating a minimum platform of commitments shared by all the organisation's members'.[62] The Commission is of the legal opinion that already under current primary law 'the rights of minorities are part of the principles common to the Member States, listed in the first paragraph of Article 6 of the Treaty on European Union' and that therefore 'both applicant countries and current Member States' are bound via EU law to respect the 'rights of minorities' (critical in this respect are De Witte and Toggenburg, 2004, p. 68).[63] However, the European Parliament has complained that 'there is no standard for minority rights in Community policy nor is there a Community understanding of who can be considered a member of a minority' and that the latter *lacuna* should be eliminated by building on the definition, laid down in Council of Europe recommendation 1201(1993).[64] In conclusion, one can say that even if one identifies in EU law an obligation for the Member States to respect minority rights, this duty does not include collective rights. The enlargement experience confirms that there is an ongoing 'transfer of standards' between the Council of Europe and the European Union (Hofmann and Friberg, 2004). However, this standard boils down to the FCNM

[61] See the EC declaration on Yugoslavia, available at «http://www.ejil.org/journal/Vol4/No1/index.html». Chapter II of the draft Carrington convention mentioned there can be found in Weller (1999, p. 80).
[62] Commission Communication COM (95) 567 of 22 November 1995, 'The external dimension of the EU's human rights policy: from Rome to Maastricht and beyond' (see section on 'national minorities').
[63] See the Commission's reply to written question E-2538/01, in OJ C 147E, 20 June 2002, p. 28.
[64] See point 7 of the Parliament report on the protection of minorities and anti-discrimination policies in an enlarged Europe, report A6-0140/2005 of 10 May 2005.

which does not include group rights. Therefore, the third layer of European diversity management, namely the provision of group rights and various forms of autonomy, is left entirely to the discretion of Member States.

If Member States decide to provide for group rights, permanent state intervention guaranteeing the preservation of group identities in the areas of education, media, language laws, public service, the labour market or even constitutional forms of autonomy, they have to be aware of the fact that such systems have to conform to the EU's norms, most importantly the common market principles and the principle of proportionality.[65] The common market and the protection of minorities may show contradictory effects due to their different *raisons d'être*. The common market principles aim to establish one single market where all resources are accessible to all market citizens, whereas highly developed systems of minority protection aim to restrict access to certain resources, for example through group-specific subsidies.[66] Measures distributing rare goods can be put at risk under the European common market, since an extension of their personal scope to all EU citizens can undermine their *raison d'etre*. Conversely, measures which do not distribute rare goods and cannot be considered as 'quantity sensitive' – such as the provision of language rights before the courts – can be expanded to all EU citizens without losing their *raison d'être*.[67] However, even for 'quantity sensitive' rules of minority protection, the European layer of government does not represent a natural enemy (see, in detail, Toggenburg, 2005). Besides recognizing the potential problems of a contradiction at the level of technical norms, one has also to look at the values lying behind them. Whereas a confrontation between two legal rules can only lead to the inapplicability of one of them, contrasting values can be concurrent (Fernandez Esteban, 1995, p. 131). Therefore, the interaction taking place at the third level of European diversity management is not a one-way process leading to a reduction of protection at the national level.

Conclusion

From the very outset the European integration process was not meant to create a system of *'E pluribus unum'* as in the motto of the US constitution. Rather the Union is legally obliged to 'respect the national identities of its Member States' and therefore to maintain the existing diversity between the states.[68] This was also confirmed in the draft Constitutional Treaty, which

[65] This is of course different if a general exemption is available, such as for the Aaland Islands in the Aaland protocol, see OJ C 241, 29 August 1994, p. 352.
[66] This inherent tension has been studied in more detail on the context of the highly developed system of minority protection in the South tyrol (see, with relevant references,Toggenburg, 2005).
[67] Compare ECJ, Case 274/96, Bickel and Franz, in ECR I-7637, judgment of 24 November 1998.
[68] Art. 6 para. 3 EU.

established a motto for the integration process: 'united in diversity'.[69] One expression of that diversity *between* the states is the very specific stance each of the Member States takes *vis-à-vis* the diversity *within* the states, so *vis-à-vis* phenomena like minority protection, the status of migrants and the issue of multiculturalism. In this sense the value of diversity can be labelled 'self-restrictive' (see Toggenburg, 2004a).[70] In fact in terms of EU constitutional law the term is highly ambivalent.[71] It is best labelled as a 'meta-value' which merely recognizes the existing diversity of values (De Witte, 2005). The only functional diversity references are those within the policy areas of education and culture.[72] It is unclear whether the Community is also bound to promote 'cultural diversity on a non-territorial basis … to support multiculturalism' (De Witte, 2005). Such a reading would imply that the Union has to foster in its funding policy, not only national cultures or cultures of traditional minorities, but also immigrant cultures (Ahmed and Hervey, 2005). In any case, and despite the rather weak constitutional standing of the value of diversity, at the political level the label 'European diversity' is frequently used when addressing the protection of minority languages (Reding, 2002) or the integration of migrants (Prodi, 2003).

The discussion here has been concerned with the distribution of concrete constitutional means addressing diversity issues rather than the abstract notion of diversity. These competences hinge on three layers: first, the entry, free movement and residence of third-country nationals and EU citizens; secondly, the integration of EU citizens, migrants and minorities into the societies of the Member States; and, thirdly, the provision of group rights and forms of cultural and territorial autonomy in order to preserve the identities of minorities. The human composition and the cultural variety of a national territory and the ways in which this variety is approached are no longer exclusively decided at the national level. The management of diversity is distributed over various levels of governance. Whereas the moment of preservation is entirely dominated by the Member States, the moment of integration is characterized by close co-operation between players, the EU and its Member States. Finally, the moment of entry has the potential of being more and more shifted into the realm of the EU. However, there is no overall European consensus on the meaning of 'diversity', and consequently there cannot be a clear-cut European multicultural model.

[69] See Art. I-8 CE.
[70] Note that the failure of the negotiations on the framework decision on combating racism and xenophobia was explained by the EU presidency as emanating from Europe's constitutional diversity, namely the 'respect for the constitutional traditions of the Member States of the European Union' (see press release).
[71] At the national level diversity has a clear subnational dimension. Compare, in this context also, Indonesia or South Africa which both chose 'unity in diversity' as their respective constitutional mottos (cf., in this context, Toggenburg, 2004b).
[72] See Art. 149 and Art. 151 EC.

The peak of the EU pyramid in the model presented here does not symbolize a coherent normative principle but a rather technical prescription, namely the fact that the principle of proportionality has to be respected by the Member States. In this sense European diversity management is part of all three layers without, however, being anchored in an overarching ideological superstructure. Ultimately, this might suggest that Europe takes diversity seriously.

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