

**Policy Department C
Citizens' Rights and Constitutional Affairs**



**ON THE STRUCTURAL AND METHODOLOGICAL
ISSUES IN THE FIELD OF FUNDAMENTAL AND
MINORITY RIGHTS AFTER THE EASTWARD
ENLARGEMENT**

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**Directorate-General Internal Policies
Policy Department C
Citizens Rights and Constitutional Affairs**

ON THE STRUCTURAL AND METHODOLOGICAL ISSUES IN THE FIELD OF FUNDAMENTAL AND MINORITY RIGHTS AFTER THE EASTWARD ENLARGEMENT BRIEFING PAPER

Résumé:

According to available data there are at least three concerns endangering maintenance or deepening of fundamental legal values of the European Union in the new member states:

- a) political radicalisation activating rightist, leftist, anti-Semitic, anti-racist, nationalistic and anti-European ideas;
- b) weak anti-discrimination policies despite persisting strong prejudices in the public especially against Roma and other ethnically, sexually, handicapped or socially segregated groups;
- c) spreading of hate-speech and Holocaust-denial as a sign of intolerance in public life and discourses without judicial consequences.

The ethnically more heterogenic Union has to face a colourful reality instead of supposed performance of 'accession and membership criteria' concerning democracy, human and minority rights. A 'Political Europe' may be build on a 'constitutional patriotism' or a common European identity, respecting and systematically monitoring the situation as regards fundamental and minority rights in member states striking a balance with instruments that aim at 'exporting human rights'. In order to avoid the emergence of further dividing lines among new and old member states, protection of human rights and minority policies requires much more preventive, non-judicial measures, such as ex-ante impact assessments in legislation, regular, improved monitoring of the implementation of fundamental rights and impact surveys on legal practices at EU and national level, in particular in the new member states.

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Authors: **Professor Judit Tóth, University of Szeged, Hungary**

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Copies can be obtained through:

M. Jean-Louis Antoine-Grégoire

Tel: +32 2 2842753

Fax: +32 2 2832365

E-mail: jean-louis.antoine@europarl.europa.eu

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1. WHAT IS THE TOPICALITY OF THIS DOMAIN?

Since 2004 the European Union has been enlarged by ten new, post-communist states from Eastern and Central Europe (ECE). This has enriched the Union with a region that has a discontinued history with millions of ethnical and national minorities facing a mixture of myths and high expectations towards European integration as an automatic solution for old tensions and shortcomings. Its liberal market economy as well as its democracy and rule of law are weak. Discourses on the future of the Union (Constitutional Treaty, Reform Treaty) have so far not activated minority groups to find consent with the leading European elite on how to govern a more and more ethnically heterogenic Union society with the aim of achieving better living standards, development, solidarity and social coherence. Eastward enlargement means that 71 minority communities with a total population of at least 11.2 million have been added to the 30 million people of 58 minority groups. Further 15 million persons speaking minority languages have been added to the 40 million persons within the old member states.¹ As this represents almost ten percent of the total population in the enlarged EU, minority issues have become an crucial part of internal and regional affairs.² Due to the low percentage of immigrants, refugees and settled foreigners of third countries and the fact that the presence of autochthon ('traditional') minorities is more visible in ECE countries, migration and integration policies have been separated from minority and national community building and diaspora policies in new member states.³ Through inter-state conflicts rooted in historical frictions and grievances (on mass penalisation, victims of German and Russian occupation, exchange of population, deportation, right to mother language)⁴, this could mean a new dividing line among member states beyond the differing legal commitments concerning anti-discrimination and minority rights (see the Annex).⁵

2. WHAT ARE THE LAYERS OF HUMAN AND MINORITY RIGHTS POLICY?

The present system of fundamental rights protection within the EU has developed on an ad-hoc basis, mainly through the European Court of Justice's (ECJ) case law. Lately, growing attention has been paid to providing specific human rights instruments in the Union through the adoption of the Charter of Fundamental Rights, the catalogue of fundamental rights in the Constitutional Treaty and the Union's adhesion to the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR). While the focal actors have

¹ <http://www.mercator-education.org/minority-languages/facts-figures> (18.10.2007).

² Tóth, J. 'Relations of Kin-state and Kin-minorities in the Shadow of the Schengen Regime' *Regio*, 2006:9; 18-46.

³ Vizi, B. 'Hungarian Minority Policies and European Union Membership. An Interpretation of Minority Protection Conditionality in EU Enlargement' PhD dissertation, Katholieke Universiteit Leuven, 2006.

⁴ For instance, Budapest expressed surprise why the Slovakian Parliament "approved" the Benes Decrees (12 October 2007). The former President of Czechoslovakia, Mr. Benes, upon proposal of the Government adopted a dozen of decrees from May to October 1945 [Decree No. 5 (19 May), No. 12 (21 June), No. 16 (19 June), No. 27 (17 July), No. 28 (20 July), No. 33 (2 August), No. 60 (24 August), No. 71 (19 September), No. 81 (25 September), No. 88 (1 October), No. 108 (25 October) and No. 137 (27 October) of 1945], in which ethnic German and Hungarian citizens were collectively labelled as war collaborators, war offenders and unreliable persons without individual evaluation or due procedure, but purely on the base of belonging to the given ethnic group. For this reason their citizenship was deprived, their financial and civil law transactions made in 1938-1945 were abolished and invalidated, their property and real estate was nationalised or deprived, jobs were ceased, they were forced to leave the homeland or living place, and they were excluded from agricultural allocation. Naturally these legal documents are out of force but mutual and fair discovery of actions in the past, apology for victims and surviving persons as well as compensation of grievances – as it was accomplished in recent 16 years in Hungary – has been officially urged by Hungary in bilateral meetings.

⁵ See for instance, the declaration made by Poland in a Note Verbale, handed down at the time of deposit of the instrument of ratification of the Framework Convention on Minorities on 20 December 2000: Taking into consideration the fact, that the Framework Convention for the Protection of National Minorities contains no definition of the national minorities notion, the Republic of Poland declares, that it understands this term as national minorities residing within the territory of the Republic of Poland at the same time whose members are Polish citizens. The Republic of Poland shall also implement the Framework Convention under Article 18 of the Convention by conclusion of international agreements mentioned in this Article, the aim of which is to protect national minorities in Poland and minorities or groups of Poles in other States.

traditionally been the courts - the European Court of Human Rights, the ECJ and the national courts - a new actor has entered the stage in 2007: the Fundamental Rights Agency (FRA).

Membership in the EU requires among other criteria that the candidate country has achieved stability of institutions guaranteeing democracy, the rule of law, human rights and respect for and protection of minorities. The Commission's *'Regular Reports on candidate countries' progress towards accession*, which drew on all available sources of information including reports by the UN and other international organisations as well as NGOs, underlined concerns on issues - for instance in the case of Bulgaria and Romania in 2006 – such as corruption, judicial reforms, the treatment of persons in custody and institutions, the disabled and minorities, particularly Roma. Additionally, the reports also recognised that there was a need to improve social inclusion of the Roma and combat all form of intolerance.⁶ In spite of the fact that these concerns require complex, at least mid-term action plans and multilevel measures of governance the candidate countries acceded to the Union soon after the last report was issued. Yet nobody can believe that accession alone may solve such deep-rooted problems of social, economic and public policy nature. With regard to this the European Parliament urged for further efforts of acceding states⁷ highlighting the processing character of accession, instead of being a formal momentum. In essence, however, we can observe that while the enlargement, pre-accession process is conditional in legal and political terms, the evaluation system does not operate anymore once accession has taken place.

Roma communities constitute the biggest minority in the Union. However, numerous assessments of their situation in member states show that Roma continue to suffer marked discrimination and social exclusion, encountering difficulties in gaining equal access to education, health care, employment, social services, housing and legal protection. Roma women or Roma children have to face multiple discrimination or disadvantages in accession to fundamental rights and security in member states.⁸ Yet, discrimination, racism and xenophobia are incompatible with the principles upon which the EU is founded [Art 6 Treaty on European Union (TEU), Art 13 Treaty establishing the European Community (TEC), Art 20-21 EU Charter of Fundamental Rights].

The Reform Treaty will confirm the common values:⁹

(a) respect for human dignity, freedom, democracy, equality, the rule of law, human rights including the rights of persons belonging to minorities;

(b) maintaining of pluralism, non-discrimination, tolerance, solidarity and gender equality;

(c) offering its citizen an area of freedom, security and justice without internal frontiers including free but not unlimited freedom of movement, prevention and combating crime, protection of citizens' rights outside of the Union;

⁶ EU Annual Report on Human Rights 2006 (Council of the European Union – European Commission), p. 68.

⁷ For instance, the EP „emphasises the need for both countries to continue to consolidate the ongoing reform of their justice systems, by further enhancing the transparency, efficiency and impartiality of the judiciary, and to demonstrate further substantive results in the fight against corruption, with special emphasis on the fight against organised crime in the case of Bulgaria; stresses the utmost importance of taking all the measures required to combat the trafficking of human beings and to substantially enhance the degree of social inclusion of Roma communities, especially with regard to housing, health care, education and employment”; European Parliament resolution on the accession of Bulgaria and Romania, 14 June 2006, point 6.

⁸ European Parliament resolution on non-discrimination and equal opportunities for all - a framework strategy, 14 June 2006.

⁹ Conference of the Representatives of the Governments of the Member States, Presidency of the IGC (5 October 2007), Draft Treaty amending the Treaty on the European Union and the Treaty establishing the European Community (CIG 1/1/07), see TEU Art. 2, 3 (2)-(3), (5), Art. 4 (2), Art 6(3).

(d) strengthening social inclusion, social justice and protection of rights of the child as well as solidarity among generations;

(e) respect for cultural and linguistic diversity, national identities and constitutional traditions in member states and safeguarded cultural heritage.

In addition, it also intends to give key guarantees for the implementation of these values:¹⁰

(a) the Union recognises the rights, freedoms and principles set out in the Charter of Fundamental Rights of 7 December 2000,

(b) it accedes to the European Convention for the Protection of Human Rights and Fundamental Freedoms, taking into account the Union's competences as defined in the Treaties,

(c) it develops a special relationship with the neighbouring countries, aiming to establish an area of prosperity and good neighbourhood based on close and peaceful relations and co-operation as defined in agreements,

(d) the Union institutions maintain an open, transparent and regular dialogue with representative associations and civil society.

EU institutions have repeatedly rejected and condemned all manifestations of discrimination, racism and racial, xenophobic hate violence. The Union within the limits of competences conferred on it by the Treaties determinedly pursues a clear policy of fighting these phenomena inside and outside of the EU¹¹. However, the promotion of coherent and consistent policies in support of human rights and democratisation within the EU is not evaluated objectively; neither the question whether the accession criteria in the field of democracy, rule of law, minority and human rights are progressively developed in member states. Although this method is applied with respect to gradually achieved social or cultural rights in the context of the UN and Council of Europe, at European Union level the key internal instruments are not so rich. Some of those are important, however, such as:

(a) The *European Parliament* plays a role in the improvement of political culture, conflict-management, fact-finding and publicity related to human and minority rights inside the Union. Recently, the EP report on the implementation of the Racial Equality Directive (27 September 2007) stressed that more needed to be done to implement the directive in full, notably on issues such as legal redress, the burden of proof in discrimination cases, awareness-raising and the independence of equality bodies in each member states. Parliament also placed emphasis on adequate and reliable data collection and monitoring; it highlighted that ethnically disaggregated statistical data could be essential in demonstrating indirect discrimination and informing the effects of anti-discrimination measures. Parliament reiterated the political, social and legal desirability of putting an end to the hierarchy of protection against the different grounds of discrimination, and welcomed the Commission's intention to put forward a proposal for extending the scope of the Directive to all other grounds of discrimination, as stated in its Annual Legislative Programme for 2008. Another important EP instrument exists in the form of the annual reports on the situation of fundamental and human rights inside and outside the EU.¹²

¹⁰ Draft Art.6 (1)-(2), Art 7a, Art 8b (2) TEU.

¹¹ For instance, recently in the Declaration by the Presidency on behalf of the European Union on the occasion of the International Day for the Elimination of Racial Discrimination on 21 March 2007.

¹² Cf. with further references Geyer, F., 'A synthesis of former European Parliament Resolutions in the field of fundamental rights', Briefing Paper prepared for the Directorate General for Internal Policies, Directorate C Citizens' Rights and Constitutional Affairs, European Parliament, October 2007.

(b) The *EU Annual Report on Human Rights* gives a panorama on the world and addresses in certain aspects of human rights also the situation within the Union in a mixture; this is the case e.g. as regards racism, xenophobia, non-discrimination and respect for diversity¹³ although the main emphasis is put on external relations.

(c) *Infringement procedures* against member states for late or incomplete transposition of directives, for instance for failure of transposing the Racial Equality Directive (2000/43/EC) constitutes a severe part of *post facto* legal protection. It is based on in-depth studies examining national provisions and legal practices.

(d) In 1997 the European Monitoring Centre on Racism and Xenophobia (EUMC) was established as an agency of the EU. Through its European Racism and Xenophobia Information Network (RAXEN) it has gained certain experiences in monitoring growing racist, xenophobic and anti-Semitic sentiments in accession and new member states. Monitoring by its successor agency, the Fundamental Rights Agency (FRA), covers a broader sphere of fundamental rights,¹⁴ making aggregated or grouping data available together with good practices in the EU.

(e) *Numerous programmes and reports* on tolerance, equal treatment, social coherence are financed out the EU budget, including networks of independent experts. The Council Decision of 19 April 2007 on the specific programme “Fundamental rights and citizenship” as part of the general Programme “Fundamental Rights and Justice” covering the period of 2007 to 2013 can be mentioned in this respect as well as Decision No. 1904/2006/EC of the European Parliament and of the Council establishing for the period of 2007 to 2013 the programme “Europe for Citizens” to promote active European citizenship.

Taking the existing key instruments of “human rights export” in external relations into account, inconsistencies between the internal and external legal, diplomatic and political toolkit on human rights and democratisation efforts with a view to regularity, structure and up-to-date publicity can be observed. The wide external set of instruments contains:

(a) *Common strategies* aim to set objectives and increase the effectiveness of EU actions through enhancing the overall coherence of the Union’s policy.

(b) *Common positions* define the approach of the Union to a particular matter of general interest of a geographic or thematic nature. Member States must ensure that their national policies conformity.

(c) *Joint actions* address specific situations where action by the Union is required. Appointments of EU Special Representatives to contribute to peace settlements and post-conflict reconstruction in a number of regions or countries are considered in this category.

(d) *Démarches and declarations* are usually carried out in a confidential manner, either in “Troika” format or by the Presidency of the EU. Further, the EU can make public declarations calling upon a government or other parties to respect human rights. For instance between July 2004 and June 2005 the EU made human-rights related demarches and declarations to more than 60 countries.

(e) *Conflict prevention and crisis management operations* carried out by the European Union within the framework of the European Security and Defence Policy (ESDP).

¹³ See EU Annual Report on Human Rights, 2006 (European Commission and the Council) point 4.15.

¹⁴ Council Regulation No. 168/2007 (15 February 2007).

(f) *Dialogue and consultations with third countries* on democracy, rule of law and human right issues. In addition, *human rights clauses* together with controlling possibilities have been inserted into agreements with third countries. Especially the *European Neighbourhood Policy* has included numerous minority-related political and legal instruments promoting tolerance, a peaceful multi-ethnic community life and regional security.

(g) *Guidelines on EU policy towards third countries on specific human rights themes* (e.g. *suppression of death penalty, torture or violation of children rights*) can be performed through EU actions within *international or regional human rights fora*, for instance the United Nations, the Council of Europe, the Organisation for Security and Co-operation in Europe.

(h) *Observation missions at elections*; since 2000 the EU has been present in at least 40 elections.

(i) Project funding, particularly through the European Initiative for Democratisation and Human Rights (*EIDHR*). In the period 2007-2010 it follows five priorities: enhancing respect for human rights in regions at most risk; strengthening the role of civil society in promoting democratic reform, peaceful conciliation, participation and human rights; supporting actions and international or regional framework for the protection of human rights, justice and democracy, in accordance with the EU Guidelines; and building confidence in and enhancing the reliability and transparency of democratic electoral processes.¹⁵

To sum up: while various diplomatic, development and legal instruments build on the inseparable and effective unity in promoting human rights including antidiscrimination and democratisation in external affairs,¹⁶ the high level of respect for human rights and democratic values *within the EU* is taken for granted in each member state. For the “ready-made accession and membership criteria”, a shift of human rights and minority policy is not accomplished. Instead of re-active counter-measures (i.e. *post facto* legal and political measures or judicial disputes) a complex, yet effective toolkit is needed including preventive, non-judicial measures, conflict-management, mediation, *ex ante* impact assessments in legislation, regular monitoring of implementation and impact surveys of the legal practice at EU and at national level, in particular in new member states (this toolkit will be addressed in more detail in chapters 4 and 5). This broad set of instruments has to build on anti-discrimination provisions - which form the strong core of every human right and minority policy -, being supported by “soft law” measures addressing social inclusion and preservation of cultural or linguistic heritage and diversity. The strong core should be systematically monitored, while supportive measures should be gathered and disseminated in different ways as good and effective examples.

3. WHAT ARE THE MAJOR CONCERNS AFTER ENLARGEMENT?

Drawing from country reports submitted to the competent bodies of the UN treaties¹⁷, the major concerns with regard to the situation of human rights in contemporary new member states are as follows:

¹⁵ European Instruments for Democracy and Human Rights (EIDHR) Strategy Paper 2007-2010.

¹⁶ Communication - COM(2001) 252 (May 2001) from the Commission to the Council and the European Parliament.

¹⁷ Committee on the Elimination of Racial Discrimination, 69th session (Geneva, 31 July to 18 August 2006) Estonia – 6th and 7th periodic reports; European Commission Against Racism and Intolerance, Third Report on Estonia, adopted on 24 June 2005; Committee on the Elimination of racial Discrimination, 70th session (Geneva, 11 January 2006) Czech Republic – 6th and 7th periodic reports; Committee against Torture, 37th session (Geneva, 16 June 2004 and 14 February 2005) Hungary – 4th periodic report (September 2006); Committee on the Elimination of Discrimination against Women, 37th session (New York, 15 January and 2 February 2007) Poland – 4th, 5th and 6th periodic reports.

(a) Occurrence of Right wing extremism, openly racist media programmes, newspapers, hate speech articles, hate crimes against Roma population, immigrants and minority groups as well as neo-Nazi musical groups and concerts of extremism; the musical groups and their followers can publicly operate without civil, penal law consequences or public order interventions of the police. Frequent governmental changes limit the effects of already incoherent policies.

(b) Segregation in public education for Roma¹⁸ – and in some countries also migrants', non-citizens' and other minority's - children through schooling criteria for mentally disabled students. Setting up special schools or classes for these children is sometimes based on the pretext of their own cultural identity. Segregation of Roma in the field of housing and exclusion from employment is frequent, compensation for victims and sanctions for the discriminator not regulated. Discriminations in health care of Roma population, including forced sterilisation, have been revealed, while clear and compulsory criteria for *informed consent* of Roma women are absent. Detailed information on family planning and access to contraceptives is not ensured for Roma women.

(c) Guarantees against racial discrimination at local level are sporadic or totally absent as well as real integration programmes of excluded groups allowing for integration into mainstream society. Police discrimination against Roma, minority and migrant individuals¹⁹ and (intentional) cases of shooting, beatings or other violations are not impartially investigated or prosecuted. Proper training for prosecutors and chiefs of police are missing; so are independent bodies to monitor the police violence and compensation of victims.

(d) Large numbers of non-citizens and stateless persons are excluded from employment, social life and political parties. Further, ratification of UN Conventions relating to the status of stateless persons and reduction of statelessness (1954, 1961) is largely absent as well as early integration plans for non-nationals (e.g. language training). Naturalisation criteria require speaking the language of the majority.

(e) Transposition of the Racial Equality Directive into domestic law is formal or partial at most;²⁰ national action plans, administrative measures for equal treatment and equality of disadvantaged groups are missing. Lack of special anti-discrimination legislation is often substituted by mere modification of rules without parliamentary involvement. The result is a missing toolkit of complaint procedures.

(f) Statistics on minorities, Roma and non-nationals, are confused in comparison to the number of complaints and victims of segregation, racial discrimination or violent actions. The number of data collected by NGOs and minority organisations on Roma population is differing strongly from officially reported figures. For this reason the effects of governmental

¹⁸ The OECD has cautioned that Slovakia has too many Roma children placed in special elementary schools for mentally disabled children. It has advised Slovakia to stop providing financial incentives for schools whose pupils have special needs. However, it appreciates the introduction of assistant teachers and diagnostic tests. http://www.oecd.org/document/17/0,3343,en_2649_34487_38334929_1_1_1_1,00.html.

¹⁹ "I Can Stop and Search Whoever I Want" Police Stops of Ethnic Minorities in Bulgaria, Hungary and Spain. Open Society Institute, New York, 2007.

²⁰ In its reasoned opinion of June 2007 (Racial Directive on Equality infringement proceedings) the Commission noted that ethnicity is not mentioned among various prohibited discrimination grounds in the Latvian Law on Social Security. The Latvian government in its reply stated that ethnicity, while not explicitly mentioned in the Law, is covered by "other grounds". http://www.mk.gov.lv/doc/2005/IUMSILNts_100807_nostajaEK.doc. On the other side, in reaction to the Commission's reasoned opinion for failing to correctly transpose the Directive, the Slovenian government approved amendments to its anti-discrimination legislation (by the Act Implementing the Principle of Equal Treatment) on 23 August 2007, <http://www.mdds.gov.si/si/splosno/novice/novica/article/1939/5531/?cHash=c47e812b34>.

efforts cannot be properly evaluated. Prejudices tend to persist by avoiding the recognition of Roma or minority identity in official data collections.

(g) Persons in detention/pre-trial detention do not obtain free, relevant legal aid and fundamental safeguards during deprivation of liberty. Complaints about torture, inhuman or ill treatment of detainees are not impartially investigated.

(h) Within ultra-conservative family policies and/or tightened immigration controls, reported cases of domestic violence and abusive actions are played down or suppressed; awareness campaigns and training of law enforcement officials on domestic violence is absent. Furthermore, sexual harassment in working places and lower salary of up to 15-20% for women in comparison to their male counterparts is also a general appearance.

(i) The *non-refoulement* principle and the right to accession to asylum and international protection is not fully guaranteed at the border or in removal decisions; country-of-origin databases are not institutionalised. Shelter and social protection of victims of human trafficking is not properly or effectively provided.

(j) Lack of human rights and minority rights education at university level.

(k) Lack of publicity of state reports and statistics related to (alleged) violation of human rights cases, investigations of discrimination cases, etc. are missing.

Although prejudices and discriminative behaviour against Roma by the police have been observed and reported for years, concerns on racial profiling or wide discretion powers have not been strong enough to launch a comprehensive disciplinary process or training and awareness raising programs on anti-discrimination for policemen in Hungary. The ECRI warns against implementing racial profiling without adhering to three criteria (necessity, effectiveness and assessment of harm) and urges to set up a body - independent of the police and prosecution authorities - entrusted with the investigation of alleged cases of racial discrimination and racially-motivated misconduct by the police²¹.

Independent of these facts and human rights reports, a political crisis could enforce some developments. It came as a great surprise for the international public that from mid-September to early October 2006 there were street riots and demonstrations in Hungary and that there was yet another return to street disturbances between 23rd October and 4th November 2006, at the anniversary of the year 1956. The forms of these demonstrations ("Hot autumn in Hungary") were shocking but the basic fact still is that these events were the mildest forms of resistance in the new member states to those austerity measures demanded by the EU.²² The Hungarian Government set up a commission for the analysis of the events in Budapest in the time period of September-October 2006. Analysing political polarisation, social frustrations, misuse of right of assembly and severe human rights violation of the police keeping up public order, it proposed a set of governmental and law enforcement measures and – inter alia – an amendment to the Police Act.²³ The leaders of the police and the minister resigned, a few policemen were prosecuted and the Police Act was modified prohibiting the

²¹ General Policy Recommendation N°11 on combating racism and racial discrimination in policing, adopted by ECRI on 29 June 2007 – point 10.

²² The Euro-scepticism and anti-elite feeling has been rampant in the Czech Republic and it has led to political apathy and political paralysis leaving the country without government for a long time. The populists had a clear victory at the election of 2005 in Poland and 2006 in Slovakia, thus the slogans shouted in the streets in Budapest can be also heard from the Polish and Slovak governments, see Ágh, A., 'Bumpy Road ahead in East Europe: Post-accession Crisis and Social Challenge in ECE', in: Ágh, A. and Ferencz, A (eds) *Overcoming the EU crisis: EU Perspectives after the Eastern Enlargement*. Budapest, Together for Europe Research Centre and Foundation, 2007, 7-35.

²³ Report of the Special Commission of Experts on the Demonstration, Street Riots and Police Measures in September-October 2006. Summary of Conclusions and Recommendations (2 February 2007) Budapest, pp. 348.

usage of rubber bullet against street demonstrators. Furthermore the remedy procedure became stronger and an independent police complaints body was set up by Parliament scheduled to become operational as of 1st January 2008.²⁴ This story may demonstrate not only the crisis-reaction of governance in transition society but also “hard lessons of democracy in ECE” due to tenuous tolerance, social dialogue and political culture.²⁵ According to the evaluation of the President of Hungary, the *trust of citizens on constitutional democracy in our region has been fundamentally weakened*. Polarisation at political stage and appearance of radical movements, actions or organisations in public spaces do not call forth the erosion of constitutional democracy if the authority consequently respects human rights in legal disputes implementing legal guarantees for freedom and liberty. He warned the governing power against resolving mistrust, radicalisation, political extremism and polarisation by further limiting freedoms.²⁶

4. HOW CAN WE DEVELOP THE TOOLKIT AT NATIONAL LEVEL?

Heterogeneity of population has been increasing. Members of non-nationals, third-country nationals and autochthon minorities have become more visible as targets of discrimination. Political radicalisation, growing prejudices and social-economic transitions urge impartial, publicly available and regular monitoring on fundamental rights and equal treatment in new democracies, in particular following accession to the EU. Certain specific initiatives in new member states need the support of the EU to bridge the gaps in the internalisation of constitutional values and human rights commitments. In addition, they would contribute to establish the missing but necessary elements to the complexity of an effective toolkit for guaranteeing fundamental rights and minority policies in transitional societies. The following efforts can support the prevention of human rights violations as well as the monitoring of democratic progress and fundamental rights.

(a) *Respect for linguistic rights* can significantly reduce tensions in minorities and contribute to keeping up cultural diversity in the Union. Growing migration of EU citizens within the Union, the fact that active autochthon national minorities in ECE speak the language of another member state, the right to communicate in every official language of the Union with the EU institutions and finally the fact that 23 EU member states are signatories of the Charta on Minority Languages explain well why linguistic rights shall be ensured and monitored strongly.²⁷

(b) *Right to free access to public information*, statistics, legal text and judgments of high courts should be ensured and monitored. Shadow reports of NGOs, critics on statistical or police record systems by academics or trend analysis of jurisprudence are nowadays based on questionable (unavailable, incomplete, not cleaned or partly cross-controlled) data.

(c) *Independent institutions for the prevention of infringement or deficient guarantee of fundamental rights*, such as ombudsmen or other NHRI (human rights committees, councils

²⁴ Act XC of 2007 amending the Act XXXIV of 1994 on Police.

²⁵ Pennanen, E. article in *Helsingin Sanomat* www.hs.fi.

²⁶ ÖN-KOR-KÉP, 2007:8-9, p.3

²⁷ For instance, linguistic minority or linguistic community, language planning or management in the Czech Republic is controversial: more than 50 000 Vietnamese are not considered as ethnic minority due to the definition of autochthonous citizens; since 2000 there have been no Slovak schools while its community amounts to 200 000 persons; according to the census of 2001 there are only 12 000 Roma but in reality there are at least 200 000 persons; this means that their linguistic performance and ethnic declaration may be hidden. (Language Problems in Selected Linguistic Communities in the Czech Republic, Nekvapil – Sloboda – Wagner, Charles University, Prague - *11th International Conference on Minority Languages* 5-6 July 2007, Hungarian Academy of Sciences and University of Pécs, conference paper.

of the Parliament, mediation bodies or services of NGOs) should be introduced and supported in the spirit of the Paris Principles.²⁸ They can reconcile or find mutually accepted solutions in contrast to a domination of individual court litigation, in particular in discriminatory cases in which judges are not well prepared and fact finding takes longer time.

(d) *Impact assessment in legislation processes* should be established as a key instrument for the prevention of violation or neglect of fundamental rights. The methodology of legal harmonisation in accession processes was poor due to a shortage of experts in candidate countries; yet, as member states the fast adaptation to the 'Union playground' also has brushed aside this component of better regulation. Parliament, responsible ministries of codification and/or ombudsmen have to safeguard the systematic fundamental rights and minority protection impact assessment in legislation on the basis of good practices. This effort shall go together with setting up an open, more democratic legislation process including lawful lobbying, exchange of views with NGOs and stakeholders.

(e) *Co-ordination capacity of governance* should be upgraded cutting parallel programmes; financial support for social inclusion, community building, awareness-raising on anti-discrimination policy and minority protection should be enhanced.

(f) *National monitoring bodies and systems* (on legislative situation, court cases, public administration and public prosecutors) have to be established and be empowered to assess progress or lags in the protection of fundamental and minority rights within a given period of time. The before mentioned NHRIs, ombudsmen, parliamentary bodies or other independent institutions (contact points to FRA, COE, etc.) may also manage these systems on the basis of publicly defined methods of data collection and lawful sources including authentic statistics.

Naturally, the traditional judicial remedy system is also required to develop further with the aim of becoming fair, effective and timely. Judicial review on public administrative decisions including discrimination disputes is not unified in member states: dualistic, partly dualistic, monistic models coexist. However, a convergent trend can be detected²⁹ on the basis of

(a) adoption of special procedural provisions on court revision of administrative decisions in more and more member states, and

(b) common principles and minimal requirements developed by the European Court of Justice and the Court of First Instance, including reasoning, extended right to become a party/client in review proceedings, scope of judicial review, as well as to take account of violations of the ECHR.

Yet, judicial review is less developed in ECE countries, therefore its autonomy, capacity and efficiency should be upgraded in the future.³⁰

5. HOW CAN WE DEVELOP THE TOOLKIT AT EU LEVEL?

The adoption of Regulation No. 168/2007 of February 2007 establishing a *European Union Agency for Fundamental Rights* (FRA), constituted an *ouverture* of a new epoch: taboos on critics, crisis or disharmony over fundamental rights within each member state need to be

²⁸ The Principles Relating to the Status and Functioning of National Institutions for the Protection and Promotion of Human Rights, often referred to as the Paris Principles, were adopted in 1991 in Paris at an international workshop convened by the U.N. Centre for Human Rights, and subsequently endorsed by the Commission on Human Rights in 1992.

²⁹ Sommermann, K.P. 'Konvergenzen im Verwaltungsverfahrens- und Verwaltungsprozessrecht europäischer Staaten' *Die Öffentliche Verwaltung* 2002:4, 133-143.

³⁰ Rozsnyai, F. K. 'A közigazgatási bírászkodás európai dimenziója' *Jogtudományi Közlöny*, 2007:9, 383-394.

destroyed, if the EU intends to emanate rule-of law and human-rights values at international level through external relations. This role must not be endangered by controversial or hypocritical behaviour, in particular as regards cultural diversity, multicultural society and ethnical peace, upheld in declarations (law in book) but standing in stark contrast to the practice of member states. Double standards in racial and ethnical issues inside and outside the EU can be demolished by regularly published results of monitored progress as regards minority, migrants and Roma rights in all member states. For a credible Union, monitoring on fundamental rights and equal treatment shall be monitored by independent organisations.³¹

However, the newly established FRA inherited the experience of monitoring from the EUMC; it has to provide information, assistance and expertise on fundamental rights in order to support the union institutions when those take measures or formulate courses of action within their spheres of competence to fully respect fundamental rights. Thus FRA would become a co-ordination and scientific centre of methodology of statistics, research, evaluation and mediation in human rights, inter-ethnic conflicts, intolerance and equal treatment policy and regulation among the EU institutions, agencies and similar centres in member states. What are the necessary steps towards this direction in accordance with the Council Regulation³²?

(a) *Methodology of monitoring at EU level shall be unified and publicly determined on the basis of types and context of fundamental rights*³³. It requires:

- Definition of own principles of monitoring taking into account the human rights' monitoring principles: consistent way of information and data gathering leading to accurate information; *do not harm*, therefore security and protection must be provided for potential victims of violations or witnesses of violations (information givers); confidentiality and respect for personal data protection; respect for the mandate, mission and competence of the monitoring body; knowledge of the human rights/fundamental rights standards; observation of legal practice; consultation with officers; credibility of gathered information and description; background knowledge (culture, language, habits); impartiality and objectivity.
- Objectives of the given monitoring within the task of FRA, for instance to reinforce state responsibility to protect human rights and to prevent violation of rights - through improvement of behaviour of officers.
- Focus of the monitoring depends on whether a situation monitoring or a case monitoring is carried out. Situation monitoring means monitoring of human rights violations, drafting and passing of legislation, implementation of laws and policies or the establishment and progress of human rights institutions. An important piece of legislation concerns the national budget. Case monitoring includes monitoring the legal process undergone by a case, relief and rehabilitation services provided to a client (victim) and of other forms of intervention in a case.
- Scope of the monitoring: rights covered, target groups (such as ethnic minorities) or geographical scope (e.g. depressed regions or local communities) within a given time-frame.
- Sampling and data verification methods shall be also determined depending on the above mentioned items. For instance, research on racism raises a lot of

³¹ The European Court of Justice in case C-217/04 of 2 May 2006 underlines how the number of EU agencies is growing, while agency as such is in shortage of democratic legitimisation. See further Bauer, H., Huber, P., Sommermann, K.P. (eds.) 'Demokratie in Europa (Verfassungsentwicklung in Europa)' Mohr Siebeck, Tübingen, 2006.

³² Council Regulation (EC) 168/2007 (15 February 2007) in particular Art. 4 (1), 12(6j), 14(5), 17(2b), 30 (3)a.

³³ Training manual on human rights monitoring: Office of the High Commissioner for Human Rights <http://www1.umn.edu/humanrts/monitoring/> (16.10.2007); Guzman, M. and Verstappen, B., 'Human Rights Monitoring and Documentation Series, Volume 1: What is monitoring?' Human Rights Information and Documentation Systems, International (HURIDOCs) 2001 <http://www.huridocs.org/> (16.10.2007).

methodological issues³⁴. First, the choice of a survey method depends on general criteria such as the characteristics of the target population and local criteria such as the geographical and structural context. Typically, general population surveys on victimization due to violence include comparatively small numbers of people from ethnic minorities, if ethnic background is considered at all. On the other hand, the face-to-face interview has been used only in a few studies on the experience of racism. Although this method allows for a great deal of flexibility, it is expensive and time-consuming, leading to a small sample size, while the setting where the interviews are done may also influence the answers. Furthermore, studies on racism may be criticized because of partly biased formulations of questions, omission of racist acts, low response rate, bias in study populations and missing descriptions of data collection. Sampling procedures in studies on racism among ethnic minorities often reflect administrative practices in a given country, which may exclude immigrants that have arrived in a country only recently.

- Good practices cover positive, supportive measures for equality, gradually provided rights (soft-law) separated from the hard core of fundamental rights. For instance, criteria of effectiveness are not the same comparing the right to legal redress and inclusive taxation measures in employment in favour of a segregated group.

(b) *Publicity of monitoring includes the requirement of availability of monitoring methods and results of monitoring.* For instance, a report on racist violence in 15 member states contains methodological introduction but the credible sources of data as well as the gathering of data are neither defined in general nor with regard to certain states in which statistical systems are weak or selective.³⁵ In addition, *country reports* shall be made available or published, for instance in an annex to the aggregated, in-grouping information in annual and thematic reports.

(c) Instead of meta-monitoring based on unscreened, not verified or comparative data coming from NGOs, media or even official organisations that frequently use circular references, an *openly determined unified data verification and/or estimation method* is needed. Especially thematic, rapid reports of actually outstanding and sensitive domains (political radicalisation, hate-speech, anti-discrimination provisions etc.) upon request of the European Parliament would require an authentic data basis. Diversity of national statistical or recoding system on fundamental rights issues maintains in the future, so standardisation of them is not probable at member state level.

(d) *Timeliness of monitoring reports* shall be generally required. For instance, annual reports or thematic reports shall be published within three months after the period of data gathering.

³⁴ Virtanen, T. 'Oh They Say It's a Foreigner Who Made Trouble' *Siirtolaisuus-Migration* 1996:2, 10-17; Virtanen, T. 'Racist Violence from the Part of Skinheads: The Expression of Hate in Finland', Helve, H. (ed.) *Unification and Marginalisation of Young People. Youth Research Programme. The Finnish Youth Research Society, Helsinki, 1998.* See further Virtanen, T. 'Methodological Issues in Research on Racism' <http://www.alli.fi/nuorisotutkimus/julkaisut/virtanen/1/4.html> (15.10.2007).

³⁵ Racist violence in 15 EU member states – A Comparative Overview of Findings from the RAXEN NFP reports 2001-2004, see Part I Chapter 3.

ANNEX (not translated)

Member State of ratification	Council of Europe 12th Protocol to ECHR (non-discrimination)	Council of Europe European Charter for Regional and Minority Languages	Council of Europe Framework Convention for the protection of national Minorities
1st group			
Cyprus	X	X	X
Finland	X	X	X
The Netherlands	X	X	X
2nd group			
Luxemburg	X	X	
Romania	X		X
3rd group			
Austria		X	X
Czech Republic		X	X
Denmark		X	X
Germany		X	X
Hungary		X	X
Slovakia		X	X
Slovenia		X	X
Spain		X	X
UK		X	X
4th group			
Sweden			X
Poland			X
Portugal			X
Bulgaria			X
Estonia			X
Ireland			X
Italy			X
Lithuania			X
Malta			X
5th group			
Greece			
France			
Latvia			
Belgium			