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Beiträge

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

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

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

1. Consolidating elements making existing values more explicit

Starting with the consolidating elements, one can immediately point to the new language of the Treaty of Lisbon. What was previously acknowledged is made explicit by the Treaty:[1] "respect for human rights, including the rights of persons belonging to minorities" is a value on which "the Union is founded". The new Article 2 of the Treaty on European Union (TEU) provides evidence that this value is

> common to the Member States in a society in which pluralism, non-discrimination, tolerance [...] prevail.[2]

The Treaty stresses the value of diversity also in the context of the general objectives of the Union: the latter shall

> respect its rich cultural and linguistic diversity, and shall ensure that Europe's cultural heritage is safeguarded and enhanced (Article 3 para 3 TEU).

The fact that the term "minorities" is mentioned for the first time in EU primary law, reminds us that what is referred to as "diversity" in the Treaty can be both diversity between and diversity within Member States.[3] In

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

[2] See Article 2 TEU.

[3] In this context, compare with Article 167 Treaty on the Functioning of the European Union (TFEU, the former Article 151 EC Treaty). For a discussion of the notion of 'diversity' see Toggenburg 2004 and von Bogdandy 2007.

fact, the new Treaty language gives an example of how Member States can express their commitment to their internal diversity. For the first time, the Treaty explicitly mentions that Member States can translate the Treaties into additional languages "that enjoy official status in all or part of their territory" and register a certified copy in these languages with the archives of the Council.[4] Once it entered into force, the EU Charter of Fundamental Rights (herafter "Charter") became a legally binding part of EU primary law which also has implications for the diversity commitment of the European Union: Article 21 of the Charter explicitly underlines that discrimination on grounds such as ethnicity, language, religion or the like is prohibited, while Article 22 emphasises that the "Union shall respect cultural, religious and linguistic diversity". Even if the unwritten general principles of EU law might already have covered this legal reality, the new Treaty language provides for a substantially increased transparency and clarity in this regard.

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

Apart from these consolidating changes brought about in the Treaty language, the Treaty also provides for more operational innovations. This is especially true for the area of anti-discrimination where the Treaty of Lisbon renders the above mentioned 'revamped' diversity commitment operational. In Article 10 of the Treaty on the Functioning of the European Union (the former EC Treaty; hereafter TFEU), the EU is set under an obligation to

> combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation

not only in the context of its anti-discrimination policy but whenever "defining and implementing [any] of its policies and activities".[5] This newly introduced horizontal obligation goes further than the – now legally binding – Article 21 of the Charter. In the latter provision, the Charter merely prohibits the Union to discriminate on the grounds of "ethnic origin", "language", "religion", "membership of a national minority", "disability"

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

[5] The EU's anti-discrimination policy is enshrined in Article 19 TFEU (the former Article 13 TEC).

or "sexual orientation". The new horizontal clause[6], however, enables and, at the same time, obliges the Union to actively "combat" discrimination in all circumstances. Thereby, the clause calls for an active engagement for more equality rather than a mere avoidance of discrimination.[7]

Whether, and to which degree, this new horizontal clause enshrines an "embryonic positive duty" to introduce measures of affirmative action aimed at the provision of substantial equality is too early to tell.[8] What can be said is that the new horizontal obligation has the potential to play a relevant role with regard to the direction, content and equality driven creativity of Union legislation (and consequently national legislation when implementing Union legislation). Most importantly, as argued by the former Spanish, Belgium and Hungarian Trio-Presidency in the context of the Roma, Article 19 of the TFEU provides a clear cut normative backbone for a consequent mainstreaming approach across a variety of policy areas.

In fact, the Treaty presents an explicit example and obligation where diversity has to be taken into account. The Treaty puts an unprecedented emphasis on services of general economic interest by inviting Parliament and Council in Article 14 of the TFEU to establish principles and conditions to provide such services. The "Protocol on Services of General Interest" underlines that the shared values of the European Union regarding services of general economic interest include in particular

> the differences in the needs and preferences of users that may result from different geographical, social or cultural situations

as well as "equal treatment and the promotion of universal access and user rights".[9] These statements can form a solid basis for taking the specific needs of persons belonging to minorities into account, especially linguistic minorities, without imposing a disproportionate burden on the service providers, whether public or private. This would contribute to social cohesion and prevent the risk of discrimination in the organisation of services

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[6] Compare in this context also Article 9 TFEU. The latter provision obliges the Union to take various 'requirements' including "the fight against social exclusion" into account when "defining and implementing its policies and activities". In the context of the Union's overall objectives Article 3 TEU declares that the Union "shall combat social exclusion and discrimination, and shall promote social justice and protection", "promote […] social cohesion" and "respect its rich cultural and linguistic diversity".

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

[8] Compare Shaw 2005, 255ff.

[9] See Article 1 of Protocol No 26 (protocols have the same legal value like the Treaties). Compare also to Article 36 Charter of Fundamental Rights.

of general economic interest.[10] In fact, the Parliament had stipulated in the context of reforming the Equality Directives that

> service providers make adjustments and provide special treatment to ensure that members of minority groups that are experiencing inequality can access and benefit from the services provided.[11]

3. New Elements opening unprecedented avenues

The Treaty of Lisbon does indeed also provide for new policy possibilities. For instance Article 79 TFEU allows for EU integration policies vis-à-vis migrants. In this context, it is important to underline that such legislation defining

> the rights of third-country nationals residing legally in a Member State, including the conditions governing freedom of movement and of residence in other Member States[12]

or EU measures providing

> incentives and support for the action of Member States with a view to promoting the integration of third-country nationals residing legally in their territories[13]

are to be adopted under the ordinary legislative procedure. According to the Treaty of Lisbon and its revamped decision-making rules, this means that the Parliament is granted full co-decision powers and the Council decides by qualified majority voting.[14]

In the context of national minorities, such an operational policy provision is missing. So whereas the term "national minorities" for the first time in the history of the EU becomes a legally binding EU term[15], this innovation in terms and value commitment is not operationalized by a respec-

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[10] See EU Network of Independent Experts on Fundamental Rights (CFR-CDF) 2005, 44.

[11] See European Parliament resolution of 20 May 2008 on progress made in equal opportunities and non-discrimination in the EU (the transposition of Directives 2000/43/EC and 2000/78/EC), OJ 2009 C 279 E para 43/23-30.

[12] See Article 79 para 2 lit b TFEU.

[13] See Article 79 para 4 TFEU (no harmonisation is possible under this article). See also Article 153 para 1 lit g TFEU.

[14] See Article 294 TFEU. However, not all of the relevant policy areas allow for qualified majority voting in the Council. Most prominently, in the above discussed Article 19 para 1 TFEU (the former Article 13 TEC) the EU anti-discrimination policy still calls on the Council to act unanimously when introducing legislative action combating discrimination. However, just like the former Article 13 para 2 TEC, the new Article 19 para 2 TFEU does allow for co-decision and qualified majority voting when the Union is not issuing harmonising legislation but only supporting action taken by Member States.

[15] See Article 21 Charter of Fundamental Rights.

tive policy provision. By focusing on 'persons belonging to' minorities[16] (including persons belonging to national minorities)[17] rather than on 'minorities' themselves, the Treaty of Lisbon and the Charter of Fundamental Rights help prevent a misunderstanding, namely that the recognition of minorities would automatically go hand-in-hand with a necessity to accept and introduce group rights. The wording of the Lisbon Treaty makes the concerns of the EU clear: the individual right to equality of all persons that might due to their individual situation, such as their age or disability, or their membership in an ethnic, national, linguistic or religious minority, face special threats or have special needs.

It is important to underline that despite the fact that the Treaty of Lisbon does not introduce a new provision allowing the Union to develop an overarching policy in the field, it does introduce other innovations that can offer entirely new avenues. For instance the new obligation for the EU to accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) of the Council of Europe can be expected to augment access to justice within the European Union. This is here of relevance since it is widely recognised that the ECHR can also be used to defend certain minority rights.[18] A second example is the new instrument of the European Citizens' Initiative, that could also be used for proposals relevant to minority groups.[19] According to Article 11 para 4 of the TEU, not less than one million citizens who are nationals "of a significant[20] number of Member States" may take the initiative of

> inviting the European Commission, within the framework of its powers, to submit any appropriate proposal on matters where citizens consider that a legal act of the Union is required for the purpose of implementing the Treaties.

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

The Court of Justice of the European Union (CJEU) has accepted – long before 'minorities' became a term of EU primary law – that the protection of (national) minorities is a "legitimate aim" of the Member States

[16] Article 2 TEU.

[17] Article 21 Charter of Fundamental Rights.

[18] See Article 6 TEU. The relevance of the case law of the Strasbourg Court overseeing the ECHR is regularly reported on in the European Yearbook on Minority Issues.

[19] Hungarian minority groups seem to brainstorm on launching an European Citizens' Initiative on minority issues. See Balázs.

[20] According to Article 7 of the regulation No 211/2011 of 16 February 2011 on the citizens' initiative, this number equals to at least one quarter of Member States, thus currently at least 7 Member States.

and their policies.[21] Eventually, such a legitimate aim might even provide justification for national systems of minority protection to restrict EU-law driven Common market mechanisms, as long as such restrictions are proportional. In the area of language policies the Court made clear that EU law does not prohibit the adoption of a policy for the "protection and promotion of a language". However, the implementation of such a policy

> must not encroach upon a fundamental freedom such as that of the free movement of workers. Therefore, the requirements deriving from measures intended to implement such a policy must not in any circumstance be disproportionate in relation to the aim pursued, and the manner in which they are applied must not bring about discrimination against nationals of other member states.[22]

This provides the Member States with a certain leeway when protecting their minorities. However, it remains unclear how far this leeway reaches since it is a fact that so far EU law – if compared for instance with developments under international law – subscribes to a rather formal reading of the principle of equality.

And the doubts do not stop here. Admittedly, with the Lisbon Treaty's entry into force the EU institutions and the Member States "when they are implementing Union law"[23] are explicitly precluded from discriminating against persons belonging to linguistic, ethnic and religious minorities or on the basis of the "membership of a national minority". However, it is for instance not entirely clear when in a concrete case, a measure would be considered as discriminatory on the basis of membership to a national minority. Against this background one may doubt, whether the value of respecting "the rights of persons belonging to minorities" as now enshrined in Article 2 of the TEU is so crystal-clear that "Member States can discern the obligations resulting there from".[24]

In the future, the CJEU as the institution competent for the interpretation of the EU Treaties might provide some guidance in this regard. As the notion of 'national minority' has become a term of EU primary law through Article 21 of the Charter of Fundamental Rights, it is possible that certain principles of the Framework Convention for the Protection of

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[21] See CJEU *Bickel and Franz* case C-274/96, judgement of 24 November 1998, para 29.

[22] See CJEU *Groener* case C-379/87, Groener, judgement of 28 November 1989, para 19.

[23] Article 51 para 1 Charter of Fundamental Rights.

[24] The Presidium of the European Convention drafting the Constitutional Treaty – the forerunner of the Lisbon Treaty – advocated to have in Article 2 only a very short value provision representing "a hard core of values meeting two criteria at once: on the one hand, they must be so fundamental that they lie at the very heart of a peaceful society practicing tolerance, justice and solidarity; on the other hand, they must have a clear non-controversial legal basis so that the Member States can discern the obligations resulting therefrom which are [in accordance with Article 7 TEU] subject to sanction[s]". See Annex 2 of CONV 528/03 as of 6 February 2003, 11.

National Minorities (FCNM) may provide inspiration for the EU context. Given that the Council of Europe's FCNM has been ratified by 23 out of 27 EU Member States, corresponding to 85 per cent, the CJEU would be free to use this instrument as a source of inspiration if it is called to interpret the more concrete implications and reach of the rather general statement that the "rights of persons belonging to minorities" is a value "the Union is founded on" (Article 2 TEU as amended by the Treaty of Lisbon). Both the CJEU case law[25] and academic literature[26] acknowledge that common principles of EU law can also be drawn from international conventions that have not been ratified by all the Member States.

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

The Treaties, as reformed by the Lisbon Treaty, do not provide for a new legislative competence specifically designed for protecting minorities.[27] In this sense Post-Lisbon equals to Pre-Lisbon: the Union holds no overall legislative competence to rule on the protection of (national) minorities. However, the innovations described above – especially in the area of discrimination – clearly emphasise the fact that the EU is equipped with "constitutional resources" that allow to develop EU secondary law in a way that respects and protects persons belonging to minorities.[28] Admittedly, since the new mainstreaming obligation builds on the enabling provision in Article 19 of the TFEU and not the prohibitive provision in Article 21 of the Charter, it does not cover discrimination on the grounds of language and membership of a national minority.[29] Nevertheless, the legislator can deal with a variety of issues that are of obvious relevance to persons belong-

[25] The Court "draws inspiration from [...] the guidelines supplied by international treaties for protection on which member states have collaborated or to which they are signatories", see CJEU, Opinion 2/94 – Accession to the European Convention on Human Rights, ECR I-1759 (1789), para 33. For a more recent example, see the Court's judgement of 18 December 2007 in C-341/05, para 90.

[26] See in detail Hoffmeister 2004, 90-93.

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

[28] This is well established among legal scholars (see, for instance, de Witte 2004, 111) as well as politics (see, for instance, the European Parliament Resolution on the protection of minorities and anti-discrimination policies in an enlarged Europe, OJ 2006 C 124/405, in particular para 49).

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

ing to (national) minorities. In this regard, the 2005 European Parliament resolution on the protection of minorities and anti-discrimination emphasised various competence bases in the EU Treaties – including provisions in the area of anti-discrimination, culture, education, research, employment, judicial cooperation, free movement and the common market. All of these proposals could be used for future minority-driven legislative initiatives, thereby strengthening the respective articles in the FCNM.[30] The idea of such an enhanced 'inter-organisational' cooperation between the EU and the Council of Europe was not only advanced by legal experts[31], but also corresponds to the agreement reached by the Heads of States of the Council of Europe in Warsaw in 2005. According to Guideline 5 on legal co-operation, greater complementarity between legal texts of the European Union and the Council of Europe can be achieved by striving to transpose those aspects of Council of Europe Conventions into European Union Law where the Union holds respective competences.[32]

6. Conclusion

In conclusion, one can say that the Treaty of Lisbon puts persons belonging to minorities in an unprecedented prominent position. The fact that also persons belonging to national minorities are now referred to in the Charter (that is in primary law)[33] is a timely clarification that the Union is concerned with persons belonging to minorities not only in the context of the Copenhagen criteria (thus in the context of its enlargement policy), but also in the framework of the vast variety of its internal policies. This insight will help doing away with the impression that, from an EU-perspective, the protection of persons belonging to such minorities would be "an export article and not one for domestic consumption".[34] At the same

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

[31] See Toggenburg 2006, 23-25. With regard to the FCNM, see de Schutter 2006.

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

[33] It goes underlined that the "legal value" of the Charter of Fundamental Rights is "the same" as the legal value of the TEU and TFEU (see Article 6 para 1 TEU) and consequently forms part of primary law even if not being an integral part of the Treaty texts.

[34] De Witte 2004, 3. For almost two decades, the EU mainly made its "respect for and the protection of minorities" explicit vis-à-vis candidate countries through the so called Copenhagen conditions. See Presidency Conclusions, Copenhagen European Council, 21-22 June 1993, para 7 (A iii).

time the legal resources for protecting minorities were not substantially increased by the Treaty. But the new diversity-commitment will have to be taken into account by the judiciary and the legislator in a plethora of contexts. In that sense the Lisbon Cocktail is served in a glass that is more half-full than half-empty.

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