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By Helga Molbæk-Steensig*

ABSTRACT

The topic for this article is the narrative of discrepancies between the minority rights that the European Union (EU) demands of potential candidate states, itself, and the current member states. Several scholars on the Western Balkans have noted that EU conditionality towards the Balkans; first within the Regional Approach and since the Stability and Association Process (SAP) have demanded the establishment of collective minority rights and active state duty for their protection, while the EUs internal approach to minority rights is based on the principle of non-discrimination. In this article, I will review whether this narrative has root in a real double standard. Second, I will look into why either the narrative or the double standard has been established, and finally whether it is a reasonable policy or narrative to cultivate. The article will start out with an introduction to the differences between individual and collective rights, and positive and negative state duties. Following this, there will be a chapter on the traditional use of collective rights Yugoslavia before the wars. Third will follow an account and analysis of the human rights regimes currently in use within the EU. Fourth will be a section describing the demands concerning minority rights that the EU has for SAP members. Finally, there will be a conclusion comparing the use of individual and collective minority rights historically in Yugoslavia, currently in the EU, and in EU conditionality towards the post-Yugoslavian states.

The reason for asking this question is closely linked with EU soft power. The concept of EU conditionality towards third countries and potential future member states was first applied to the Western Balkans. If we consider the EU a force for peace and prosperity, which the EU certainly does itself and which the award of the Nobel Peace prize also suggests, then the preservation of its soft power is important. In Joseph Nye's conceptualisation, soft power is getting others to do what you want by making them want what you want. When UK diplomat Robert Cooper analysed EU soft power specifically, he found it to rest on three things, protection, recipe for success, and participation. If a double standard is present between EU domestic policy and conditionality as the authors displayed above suggest, then the EU is not sharing its recipe for success with candidate states, and is undermining the option of participation for SAP states by making it harder to become member states. Such a situation could dent EU soft power and thereby its potential positive influence on human rights development within and outside the union.

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Introduction: The different kinds of human and minority rights

In human rights' terminology, there is a differentiation between positive and negative human rights. Human rights generally deal with how states treat their citizens. Only states, not individuals, can be brought before the various human rights courts. When individuals violate the rights of others it is still the state that is responsible if it fails to prevent the violation or investigate it.[1] Negative human rights denotes things that states have a duty not to do, while positive rights denotes something that the states have to do. Negative human rights are also referred to as first generation rights and are political in nature, while positive human rights are second generation and are economic and social in nature. In 1966, the UN announced two separate human rights covenants, which denotes the first and second generation rights, namely the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR). The rationale behind this division was that the ICCPR could be implemented immediately because it consisted of negative rights, while the ICESCR due to its positive nature would have to be implemented step by step as the states got the funds to fulfil their obligations. However, following this distinction, the UN General Assembly clarified in the Vienna Declaration for the world conference on human rights in 1993 that human rights are indivisible and interrelated and first generation rights do not have primacy over second generation rights.[2]

The division in negative and positive or first and second generation rights is somewhat problematic. First, negative rights are not without cost; states must make positive changes with substantial funding to ensure first generation rights for their citizens, because the state is responsible for violations committed by other citizens and not just for its own actions. The state's duty to maintain order becomes a human rights obligation with the emergence of first generation rights allocating resources to police and courts.[3] Second, the division into first and second generation rights have led some scholars and actors to assume that the second generation rights go further than the first generation rights and are therefore more optional, which in turn has led to the argument that hungry people do not care about the freedom of speech.[4] For decent human lives, the rights listed in the ICESCR are in many cases more important. Third, the division has led to a politisation of human rights with for example Ernst Forsthoff considering second generation rights to be socialist and incompatible with the liberal first generation rights.[5] This politsation is dangerous because it suggests a dichotomy that is most often not present, and it makes the second generation rights optional or even unthinkable for liberal states. It must here be established that there is no direct dichotomy between first and second generation human rights, but there may be a dichotomy between principles of entrepreneurial freedoms and ideas of free markets, and the second generation rights to work and fair wages. Entrepreneurial freedoms are, however, not human rights. Similar to how political and civil rights can be construed as restrictions in a state's otherwise utilitarian actions[6], the right to fair wages[7] and the prohibition of slavery[8] are restrictions on the kinds of businesses that can be conducted, but they are not in conflict with other human rights.

In human rights terminology, there is also a distinction of particular importance to minority rights, between collective and individual rights. Individual rights are

[1] European Convention on Human Rights (ECHR) Article 13.
[2] Vienna declaration and programme of action 1993: Article 5
[3] Tomuschat 2009: 24
[4] Ibid.: 19-21
[5] Ibid.: 21-22
[6] Ibid.: 25
[7] ICESCR Article 7
[8] ICCPR Article 8

granted individuals because they are human beings, while collective rights are granted specific, often disadvantaged, groups. Examples of collective rights are Article 18 in the African Convention on Human and Peoples Rights (ACHPR) on special protection for families with children and the elderly,[9] or the granting of a minority a specific number of seats in parliament.[10]

Yugoslav tradition of collective minority rights

Yugoslavia was, and the post-yugoslavian countries are, a complex region when it comes to nationalities and minorities. In the Yugoslavian constitutions, there were a distinction between the constituent peoples, and the national minorities. This categorisation was instrumental in deciding which cultural rights which groups of people were granted. At the time of the establishment of the Socialist Federal Republic of Yugoslavia (SFRY) the six republics existed, but only five constituent peoples were recognised, the Slovenes, Croats, Serbs, Montenegrins, and Macedonians.[11] SFRY principally viewed all peoples and nationalities within the federation as equals, but only the constituent peoples had the right to self-determination,[12] and while all nationalities had the right to free use of their languages[13], only the languages of the republics were official and could be used in law and court.[14] When Muslim as an ethnicity became recognised in 1961, it granted the group more cultural rights, which increased to include self-determination with the recognition of Muslims as a constituent people in 1968.[15]

Thus, in the SFRY both individual and collective minority rights were employed. The principle of equality of all citizens despite ethnicity or nationality, which was present in the constitution from 1946 and following amendments in 1963 and 1974[16] is an individual right. There were, however also collective approaches to minority rights, such as the protection of culture and use of language[17] or the autonomy of the two Serbian provinces Kosovo and Vojvodina in which there were large groups of Albanians and Hungarians respectively. Soon after SFRY's break with the Soviet Union (USSR) efforts were made to better the conditions for national minorities in SFRY. Bilingual administrations were established in Kosovo and in Rijeka, Zadar and parts of Istria for Serbo-Croatian along with Albanian and Italian respectively.[18] Other minorities could apply for and habitually received federal funding for schools or classes, newspapers, folklore groups and theatre performances in their languages.[19] These kinds of policies are collective rights approaches to minority protection. They are more extensive and useful to the minorities than individual rights, but as with all differential treatment, there is a risk of some groups gaining lesser rights than others. As mentioned earlier the large group of Slavic Muslims living in the BiH republic were not recognised as a national minority nor as a constituent people before the 1960s. Similarly, the Roma never gained any collective minority rights within the SFRY. This is an example of how the individual right of non-discrimination does not harmonise perfectly with the positive collective minority rights of cultural protection. For years, the Bosniak minority was kept from even registering as a minority group and the Roma, perhaps the least privileged group in the SFRY were cut off from minority protection of any kind, even though the federation had gone to great

[9] ACHPR art 18(3-4)
[10] Croatian Constitutional Act on Human Rights and Freedoms and the Rights of Ethnic and National Communities and Minorities Article 17
[11] Linklater 2003: 50
[12] SFRY constitution 1946 Article 1
[13] Ibid. Article 13
[14] Ibid. Art 120
[15] Bideleux & Jeffries 2007: 330
[16] SFRY constitution 1946: Article 21, SFRY constitution 1963: Article 33, SFRY constitution 1974: Article 154.
[17] SFRY constitution 1946: Article 13.
[18] Shoup 1963: 74
[19] Ibid: 75

lengths to legally protect and promote minority rights. Similarly, the division of ethnic groups into constituent peoples and national minorities with homelands outside the federation kept Kosovo-Albanians who are the majority within Kosovo from gaining the legal right to self-determination.

In the application of these collective and individual, negative and positive minority rights in the SFRY, the practical changes in the lower levels of the communist party and in everyday life were harder to achieve than the dictation of norms. Party commissions were criticised for not accepting or promoting minority members to a great degree, and the practical administration of minority rights in schools failed in many cases.[20] Issues with implementation of minority rights is a well-known obstacle also outside the SFRY. A state can decide to end discrimination for jobs within the state, but detecting and combatting discrimination between private citizens is more problematic. It can be difficult to determine when discrimination takes place between private persons, and depending on the court system and principles of right to action in place, it may prove challenging for citizens to bring discrimination cases before the courts. Similarly, collective minority rights can lead to disgruntled majority populations who argue that the principle of non-discrimination has been abandoned.

Minority rights approach within the European Union

The EU's approach to minority rights for existing member states is rooted in the EU's own charter of rights, the CFREU's Article 21.

1. *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 shall be prohibited.*
2. *Within the scope of application of the Treaty establishing the European Community and of the Treaty on European Union, and without prejudice to the special provisions of those Treaties, any discrimination on grounds of nationality shall be prohibited.*[21]

Thus, within the EU, traditional principles of non-discrimination on ethnicity, gender, religion and so forth is coupled with a prohibition on discrimination according to nationality. This is a cornerstone in EU integration and the freedom of movement for workers. The Treaty on the Functioning of the European Union (TFEU) has a provision on the positive duties of the EU institutions to further the principle of non-discrimination. This suggests that although this individual minority right looks like a negative right, the states and institutions also have to take positive action to make sure that it applies outside the administration itself. The TFEU gives the Council when unanimous competences to cooperate with the European Parliament (EP) using the special legislative procedure to take *"appropriate action"* to combat discrimination.[22] Additionally, the Commission can act according to the ordinary legislative procedure to adopt principles to incentivise member states to combat discrimination without actually harmonising laws.[23] This suggests several things. First, the TFEU opens for several approaches to take action against discrimination suggesting that it is an important goal for the union. Second, the wording concerning what kind of action can be taken is vague, suggesting that at the time of writing the TFEU the EU had not yet decided on a definite approach. Third, the exclusion of harmonising legislation by the ordinary legislative

[20] Ibid.:78

[21] CFREU Article 21.
[22] TFEU art 19(1)
[23] Ibid.: art 19(2)

procedure, which allows for qualified or simple majority rather than unanimity, suggests that minority rights protection is a sensitive subject in cooperation between states. The EU itself adheres to the principle of non-discrimination, but enforcing it within member states and agreeing to positive legislation to combat it between private citizens is a more sensitive matter.

The above only deals with the positive duty aspects of the largely negative individual minority right of non-discrimination. The policy space available in the TFEU Article 19 is already limited in this least controversial type of minority protection.

The TFEU's Article 19 provides the procedures for legislating towards non-discrimination in the EU and the CFREU's Article 21 provides that the ethnic rights fall within the principle of non-discrimination. This focus in the treaty texts has led several scholars to claim that the EU is hypocritical in demanding collective minority rights protection in candidate states while relying only on the principle of non-discrimination for itself.[24] While it is certainly the case that existing EU member states have issues with enforcing both individual and collective minority protection, largely for the reasons provided above that collective rights can be unpopular and perceived as unfair, it is not true as Hughes and Sasse or Schwellnus claims that minority protection is not part of the acquis.[25]

The discrepancy between the claims of Schwellnus and others and the acts on minority protection in the acquis that I have found may lie in the use of terminology. The basis for EU policy on ethnic groups is indeed the principle of non-discrimination, but that does not mean that it does not entail legislative and other duties for the union and the member states, nor that it is an obstacle to introducing collective minority protection. In EU terminology, the goal of inclusion and equal treatment of all people regardless of sex, ethnicity, religion, ability, and so forth is reached through policies of non-discrimination and policies of anti-discrimination. In this terminology, non-discrimination can be seen as the fundamental right to not be discriminated against while anti-discrimination measures are used when systemic oppression keeps a group from enjoying the freedoms guaranteed under the principle of non-discrimination.

"Anti-discrimination legislation relies heavily on the willingness and capacity of disadvantaged individuals to engage in complex adversarial litigation. […] However, it is difficult for legislation alone to tackle the complex and deep-rooted patterns of inequality experienced by some groups. Positive measures may be necessary to compensate for long-standing inequalities suffered by groups of people who, historically, have not had access to equal opportunities."[26]

In line with the realisation that systematic oppression cannot be solved speedily without positive measures to better the conditions for underprivileged groups, the EU has produced resolutions, strategies, recommendations, communications and funding programmes for national initiatives.[27] It has however, to a large degree left practical legislation to the member states, because each member state has different minorities to consider. For ethnic groups such as the Roma that are present and face exclusion in several EU countries, the Commission has created specific funding options for member states improving conditions for Roma within the guidelines set out in the common EU integration strategy.[28] The European Parliament has also adopted a resolution urging all member states to

[24] Cerrutti 2014: 787 and Schwellnus 2006: 187
[25] Schwellnus 2006: 186, Hughes and Sasse 2003: 1-2
[26] European Commission: COM 224/2005: 6
[27] Ibid.: 10
[28] Report on the implementation of the EU Framework for National Roma Integration Strategies

become signatories to the Council of Europe's European Charter for Regional or Minority Languages (ECRML) and the Framework Convention for the Protection of National Minorities (FCPNM).[29]

Thus, the EU does use a collective approach to the issue of discrimination of ethnic minorities, and the procedures and the programmes it supports within the union are similar to the ones it advocates for and finances in candidate states. One could argue that while the EUs approach to equal treatment of ethnicities does include collective measures, it is not in the strictest sense minority *rights*. There is legislation, programmes and funding on the issue, but collective minority rights are not provided in the CFREU or in the treaties. In a response to this, I would however argue, that the EU has not required this in the candidate states either. The most recent EU member, Croatia, received praise for its Constitutional Act on Human Rights and Freedoms and the Rights of Ethnic and National Communities and Minorities (CAHRNM), which came into force in 2002 immediately followed by the country's elevation from SAP country to candidate state. These collective rights received great attention in the EU and the successful implementation of the CAHRNM was repeatedly noted as a prerequisite for progress in EU negotiations.[30] There is, however, a catch. The CAHRNM is despite the presence of 'constitutional' in its name, just a regular law adopted through the regular legislation process in the Croatian parliaments. The rights and tools it prescribes have the legal force of law, not constitutional force.[31] With this in mind, the legislation and programmes to better conditions for minorities are similar within the EU and in its conditionality towards candidate states.

In addition to its collective policies towards disadvantaged minorities, the EU has in place a distinction between national groups that is remarkably similar to the Yugoslavian system of constituent peoples and national minorities. In EU terminology there is a distinction between first, second and third country nationals. First country nationals refer to European citizens living in the country where they have their national citizenship, a German in Germany. Second country nationals are European citizens living within the EU but in another member state than where they have their national citizenship, a German in France, and third country nationals are people from outside the EU residing in an EU country, a Turk in France, or a Turk with permanent residency in France who has come to Germany for work. The prohibition of discrimination against second and third country nationals is prescribed in two distinct Council directives. The directive implementing the principle of equal treatment between persons irrespective of racial or ethnic origin[32] for first and second-country nationals, and the directive concerning the status of third-country nationals.[33]

European Union conditionality within the Stabilisation and Association Process concerning minority rights

The EU has changed fundamentally, as it has grown in size from the community of six nations in 1953 to today's union of 28 different countries and a number of lesser integrated potential member states. Its strategy for accepting new members has changed accordingly. In the first three enlargements, which brought the number of member states to twelve, the harmonisation with the acquis took place in a transition period after the new member had joined the union to ensure its ability to compete on the single

[29] European Parliament: Motion for a European Parliament Resolution on endangered European languages and linguistic diversity in the European Union

[30] European Commission: Croatia Progress Report 2005: 110

[31] Notification from the Croatian Constitutional Court U-X-838/2012: 11

[32] Council Directive 2000/43/EC: Article 3(2).

[33] Council Directive 2003/109/EC: Article 3(1)

market.[34] Following the fall of the iron curtain in the beginning of the 1990s, the number of potential EU member states grew. In that same period, Turkey also approached the union for further integration. These developments led to a shift in public opinion within the EU and the emergence of the concept of the EU's absorption capacity. The concept entailed that in integrating new member states, it was not only the competition abilities in their home economies that were in question, it was also the momentum of integration for the existing EU member states.[35] For the enlargement strategy, this change in international relations and domestic opinion resulted in two things. First, it was decided that the harmonisation process would take place before accession rather than after, and second the Copenhagen Criteria were established to review the specific issues for post-communist states.[36]

Three EFTA countries, Sweden, Austria and Finland joined the union in 1995 before the full scale change to the new accession rules. The main theme for the 2004 enlargement was the application of the Copenhagen criteria. The acquis was divided into 31 negotiation chapters to ensure that all aspects of harmonisation were covered before accession. This approach was also the template for the 2007 and 2013 enlargements, although the number of chapters has risen to 35.[37]

Following the breakup of Yugoslavia, the EU first pursued bilateral relations with the newly formed states. It was not until after the war in Kosovo that the EU officially recognised the Western Balkans as potential candidate states for accession. Christian Pippan has suggested that this timing suggests that the conditionality approach for simple bilateral agreements established a few years earlier was not effective.[38] The Copenhagen criteria played a large role in relations with the post-Yugoslavian countries, but where the 2004 and 2007 candidate states had struggled most with the economic criteria, the political criteria received particular attention in the post-war states.

Stable institutions guaranteeing democracy, the rule of law, human rights and respect for and protection of minorities; A functioning market economy and the capacity to cope with competition and market forces in the EU;

The ability to take on and implement effectively the obligations of membership, including adherence to the aims of political, economic and monetary union.[39]

In the 1990s, the EU declared its intentions to develop bilateral relations with the new countries in the Western Balkans on the principle of conditionality to promote peace, stability, economic revival, rule of law and higher human rights standards particularly within the field of minority rights.[40]

In the conditions listed in the Council conclusions from 1997 to be fulfilled before negotiations for contractual relations (SAAs) could begin, there is a set of general conditions and lists of conditions specifically for each potential candidate. In the field of minority rights, both individual and collective rights were utilised as well as different degrees of positive duties for the states in order to achieve them. In individual minority rights can be mentioned general condition number 4, *"[…] engage in democratic reforms to comply with generally recognised standards of human and minority rights."* and 6, *"Absence of generally discriminatory treatment and harassment of minorities by public*

[34] Schütze 2012: 18-37
[35] Accession process EUR-Lex - l14536
[36] European Council: Press release Copenhagen 1993
[37] Szołucha 2010: 8
[38] Pippan 2004: 219
[39] The Copenhagen criteria – Press release Copenhagen 1993: 7A(iii) and Conditions for membership, europa.eu.
[40] Council conclusions 7738, 1997: annex III

authorities"[41]. Collective rights were to be extended to displaced persons,[42] and compliance was expected with the Dayton Agreement, which is based on collective ethnic rights.[43] The EU also demanded collective rights for specific population groups. Croatia was to better relations with the Serbs in Eastern Slavonia,[44] while the Former Republic of Yugoslavia, today Serbia, FYROM and Montenegro, had to grant additional autonomy to Kosovo.[45]

In April 2001, there was a change in the EUs conditionality policy towards the Western Balkans in that a review mechanism was established for monitoring compliance with the council conclusions from 1997.[46] The council conclusions on the Western Balkans in April 2001 were largely positive with special praise of FYROM's handling of the crisis with the local Albanians,[47] so the review mechanism was not established as a punishment or a scrutiny established following bad experiences. The mechanism consists of yearly country reports with recommendations conducted by the Commission on the basis of information gathered from the EUs own institutions and delegations in the area as well as reports by international organisations. It reviews if compliance is in line with the current level of integration with the EU and suggests improvements that can bring the country in question closer to EU membership.[48] In the case of a negative assessment by the Council, negative measures can be employed from postponement of new cooperation initiatives to part or full suspension of cooperation and funding.[49] In practice, however, the negative consequences of scrutiny have been rare and never amounted to more than postponement or rather threat of postponement of integration, specifically in connection with incomplete cooperation with the ICTY by Croatia in the early 2000s.[50]

Conclusion

When it comes to human rights, collective positive minority rights is one of the most difficult ones to get lawmakers and populations on board with and to enforce. Beneficial programmes or rights for specific population groups that are by their history or their numbers disadvantaged, can be very unpopular with the majority population or other minorities. When establishing beneficial programmes for specific minorities there is also a risk that other minorities are forgotten. It is easier to get widespread support for individual and largely negative minority rights, such as the principle of non-discrimination. Despite these practicalities and implementation issues, there is broad support in human rights advocacy that collective minority rights may be the only way to ensure real equality when battling systematic discrimination.[51] The EU has declared the necessity of what it determines anti-discrimination measures for systematically oppressed groups, ethnic or otherwise.[52]

In connection with EU conditionality towards the Western Balkan states, the EU has based further integration and benefits from EU programmes, among other things on the countries' compliance with collective minority protection goals. This has led to some criticism that the EU is demanding more extensive minority protection in third countries and candidate states than in its member states. I will argue, that this is not the case. The EU has articles in place in its treaties[53] to legislate on

[41] Ibid.: Annex III contractual relations
[42] Ibid.: general condition 1.
[43] Ibid.: general condition 10
[44] Ibid.: Croatian specific conditions 1 and 2
[45] Ibid.: FRY specific conditions 2 and 3.
[46] General Affairs Council, 2342nd Council Meeting,Luxembourg, 9 April 2001, Press release 141: Items approved: I
[47] Ibid.: Items debated: 5
[48] Pippan 2004: 239
[49] Ibid.: 240
[50] Ibid.: 241
[51] FCPMR Article 4, Jovanovic 2005: 627
[52] European Commission: COM 224/2005
[53] TFEU Article 19

minority issues, it has declarations in place to pursue collective rights' approaches to systematic oppression, and it has programmes with funding in place to encourage member states to enact national legislation and benefits programmes for minorities. The EUs policy for encouraging member states to work for minority rights are remarkably similar to its conditionality towards the Western Balkans. The difference lies in the power dynamic. EU soft power is much stronger towards the candidate states because the carrot of membership and programme funding is greater than only programme funding, which is what existing member states can achieve. The EU could attempt to increase its legal options for negative consequences for member states that do not fulfil their obligations concerning minority protection.[54] However, if we look at the actual policy space available this is not possible under the current treaties, and given the mixed reactions to legal collective minority measures, it is unlikely that future treaties will be changed to allow it. With that in mind, strict conditionality towards future member states may be the best option for importing the tradition of collective minority rights into the EU.

In conclusion, I found that the narrative of the EU double standard is problematic. The practical situation is more complex than member states being let off easier than candidate states. The EU works on soft power, and it has repeatedly utilised this power for protection of minorities. The tools it utilises are the same towards candidate states and member states, resolutions, campaigns, funding programmes and other forms of nudging and suggestions for national legislation. The way the approach to candidate and member states differentiate is in the legal options for negative reinforcement. Member states can lose certain privileges only if it breaches the core values from article 2 in the TEU, and only after several votes in the Parliament and unanimity in the Council.[55] Whereas states under the SAP can have rights suspended by simple decision by the Council. So far, however, negative reinforcements of both kinds are rare, and the EU works for the most part through positive reinforcements. The double standard narrative is damaging because it suggests that either collective rights are only necessary in the Western Balkans because of the wars,[56] which deprives EU-based minorities from gaining benefits. Or it suggests that collective minority protection is not good policy anywhere, and the EU is just being difficult towards the future candidate states, which again deprives systematically oppressed minorities from the positive special treatment needed to give them equal opportunities to the majority citizens.

[54] For an analysis on this consult Pippan 2004.

[55] TEU Article 7

[56] Schwellnuss 2006: 187

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