Migrants as Minorities: Integration and Inclusion in the Enlarged European Union*

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Abstract

The developing migration and asylum law and policy of the European Union aim to construct a common normative framework to address the admission and residence of diverse categories of third-country nationals in EU territory. The principles of minority protection, however, are absent from EU law, with the exception of some references in the new Constitutional Treaty and the incorporated Charter of Fundamental Rights, although they have been employed, to a certain degree, in a prescriptive and pragmatic way in the context of the accession of new Member States. However, increased EU attention to the concept of integration in recent Council policy pronouncements and newly adopted legal measures, aimed almost exclusively at lawfully resident third-country nationals, provides a space where migration policy and minority protection principles may engage more directly. This article undertakes a preliminary assessment of the points of convergence and divergence in these two sets of principles, and argues that greater convergence would result in a more coherent EU policy on integration.

Introduction

The European Union’s involvement in both wider migration and minority protection issues is a relatively recent development. While free movement of EU

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nationals for the purpose of employment and residence comprises one of the rationales of the EU project, the gap in legal competence concerning the status and treatment of third-country nationals entering and resident in the EU has only begun to be filled since May 1999 (when the Amsterdam Treaty amending the EC Treaty entered into force), by the measures adopted under the auspices of the developing asylum and migration policy. Previously, only certain aspects of visa policy had been communitarized, while the bulk of activity undertaken by EU Member States in these fields took place at the intergovernmental level, firstly within Schengen arrangements, and subsequently within EU structures in the context of co-operation under the former justice and home affairs (JHA) mechanism set up under the Maastricht Treaty. The developments of the last 15 years should be contrasted with the earlier position in the 1980s when Member States jealously guarded their competences in this field. In 1985, for example, Member States intervened quickly before the Court of Justice to challenge the adoption of a measure proposed by the European Commission on the migration and integration of third-country nationals, which would have required Member States to provide information on their activities in these areas.¹

In comparison to the rapidly developing EU migration and asylum law and policy, the concern of the EU with the protection of minorities is circumstantial. Despite the narrow understanding by many Member States of the groups that may be subject to a special legal minority protection regime within their territories, the 15 old EU Member States made ‘respect for and protection of minorities’ a requirement of EU membership for the new Member States,² which was then monitored in the regular reports of the European Commission on their progress towards accession and the Council’s accession partnerships (Hoffmeister, 2004, p. 93). Moreover, limited references to minority protection are now found in the Constitutional Treaty,³ and in the Charter of Fundamental Rights, incorporated into Part II of the Treaty, which includes, in its non-discrimination clause, ‘membership of a national minority’ as a prohibited ground of discrimination and also declares that ‘the Union shall respect cultural, religious and linguistic diversity’.⁴

While Member States continue to retain competence in this field, the integration of third-country nationals has now become a significant aspect of the developing EU migration policy, as is evident from the adoption of Council

³ Treaty Establishing a Constitution for Europe, OJ 2004 C 310/1. See the first part of Article I-2, which declares the EU’s values: ‘The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities’ (emphasis added). The entry into force of this Treaty is now rather a remote prospect, however, given negative results in the French and Dutch referendums in June 2005.
⁴ Charter of Fundamental Rights of the European Union, OJ 2000 C 364/1, Articles 21(1) and 22.
conclusions on immigrant integration policy in the EU in mid-November 2004, and the emphasis on integration in the Hague programme on strengthening freedom, security and justice in the EU adopted by the European Council earlier that month. Moreover, different legal concepts of integration have been developed in a number of measures agreed by the Council in this field and are particularly prevalent in two recent directives on the right to family reunification and the status of third-country nationals who are long-term residents.

The integration of third-country nationals is arguably the principal area where migration questions and principles of minority protection intersect in EU law and policy. While integration has so far been discussed by the EU mainly in the context of migration, the broader understanding of minorities being developed in international and regional human rights law demands the devotion of greater attention to the infusion of minority protection principles at the EU level. There should logically come a point where the integration of the migrant ends and minority protection begins. The question is not merely academic, but has significant implications for the rights and security of residence of persons belonging to migrant groups.

This article is divided into three parts. Firstly, it discusses the more enlightening understandings of minorities and the principles of their protection under two human rights instruments: Article 27 of the International Covenant on Civil and Political Rights (ICCPR),\(^5\) one of only two legally binding provisions at the universal human rights level explicitly concerning the protection of minorities;\(^6\) and its interpretation by the Human Rights Committee (HRC), the body responsible for monitoring the implementation of the ICCPR by states parties (i.e. contracting parties); and the Council of Europe’s Framework Convention for the Protection of National Minorities (FCNM),\(^7\) an important aim of which is to translate the political commitments, adopted within the framework of the Organization for Security and Co-operation in Europe (OSCE),\(^8\) into legal commitments (Council of Europe, 1995, para. 10). Secondly, the article maps the increasing attention devoted to integration at the EU level, and endeavours to illustrate that an inclusive concept of integration still prevails, despite the evident tendency by some Member States to construct a more exclusionary conception and to infuse it into EU law. The third part of the article addresses the points of convergence and divergence regarding

\(^5\) 16 December 1966, 999 UNTS 161.


\(^7\) 1 February 1995; ETS No. 157; entry into force 1 February 1998. The Convention has been ratified or acceded to by 37 states parties.

\(^8\) OSCE activities have focused on the work of the High Commissioner on National Minorities (HCNM), since this position was established in January 1993 (see «http://www.osce.org/hcnm/».
minority protection principles and the emerging EU policy on integration, and the prospects for policy convergence in the future. It is argued that such convergence is important to instil coherency into the EU norms concerning the integration of third-country nationals.

I. Protection of Minorities in Human Rights Law

Understandings of Minority

Arriving at a widely accepted legal definition of a minority group, distinct in terms of its ethnicity, culture, language and religion, has long been the holy grail of international lawyers working in the field of minority protection. It has been easier to reach a consensus of what minority protection should entail than to adopt an objective understanding of which group should be afforded this protection, although it has been argued strongly in this context that ‘for an intended regime of law, the lack of definition results in unforeseeability and unreliability, i.e. poor law [whereas] good law requires clarification of the subject of entitlements along with delimitation of the content of their rights’ (Packer, 1999, p. 232).

The Council of Europe’s FNCM contains no definition of the term ‘national minority’. The explanatory report to the convention explains that ‘it was decided to adopt a pragmatic approach, based on the recognition that, at this stage, it is impossible to arrive at a definition capable of mustering general support of all Council of Europe member States’ (Council of Europe, 1995, para. 12). From their declarations and reservations on ratification, it is clear that some states parties understand ‘national minority’ very narrowly. These states parties have emphasized that the regime of minority protection is applicable only to historically established or specific groups of persons residing in their territories and who hold their citizenship. On ratifying the convention in January 1997, Estonia asserted that the minorities covered are those persons who are resident in its territory, maintain long-standing, firm and lasting ties with Estonia, and are distinct from Estonians on the basis of...
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their ethnic, cultural, religious or linguistic characteristics but who also hold Estonian citizenship, thus excluding much of the significant Russian population from the convention’s application.11 Austria, Latvia, Luxembourg, Poland and Switzerland also define the term ‘national minorities’ in terms of their citizenship. The reluctance to accept a legally binding uniform definition is clearly a result of the sovereign sensitivities of states. These narrower conceptions of ‘national minority’, therefore, exclude recently arrived migrant workers, and also long-term resident non-nationals, including those who have been present in a country for two or more generations. But such understandings still constitute the ‘minority’ standpoint given that more than half of the ratifying states parties have not adopted a formal position on this issue.12

The restrictive legal understanding of minorities by certain countries in Europe should be contrasted with the more empirical approach adopted by the HCR, responsible for interpreting and monitoring the implementation of the ICCPR. Article 27 ICCPR declares:

In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language.

Although this provision does not contain a definition of minority, a ‘working definition’ can be effectively deduced from the HRC’s general comment on Article 27.13 The HRC emphasizes that the existence of a minority in a state party is to be determined objectively. Moreover, persons belonging to minorities need not be citizens of a state party or permanent residents, but can include temporary residents, such as migrant workers and even visitors.14 To reinforce the position that the rights of non-citizens and minorities are inevitably intertwined, the HRC notes also in its general comment on the position of aliens under the ICCPR that the status of non-nationals in a state party may engage Article 27 issues.15 While doubt has been cast on this broader approach (Pentassuglia, 2002, pp. 59–62), preferring an extended interpretation affording minority protection only to those non-citizens who already belong to a recognized minority in the state party defined in terms of its citizenship, this

11 This position is clearly disputed in the Russian Federation’s declaration on its ratification of the convention in August 1998 stating it is not possible under the convention for states to make unilateral reservations or declarations concerning the definition of the term ‘national minority’.
12 I am grateful to John Packer for drawing my attention to this point.
13 General Comment No. 23: The rights of minorities (Art. 27), UN Doc. CCPR/C/21/Rev.1/Add.5 (8 April 1994), «http://www.ohchr.org/english/bodies/hrc/comments.htm». While not legally binding, general comments are recognized as authoritative interpretations of human rights treaty provisions (Nowak, 1993, p. xxiv, para. 21).
14 General Comment No. 23, paras 5.1–5.2.
15 General Comment No. 15: The position of aliens under the covenant (1986), «http://www.ohchr.org/english/bodies/hrc/comments.htm» (para. 7).
does not accord with the HRC’s insistence that the existence of a minority is a matter for objective evaluation. If non-citizens are indeed covered by the working definition, it is argued that a large influx of non-citizens belonging to a minority group cannot enter a state party and claim the full protection of Article 27 on the grounds that ‘there is the necessity of some degree of stability in the minority group as well as some form of historical development in the state in question as a distinctive group’ (Burchill, 2004, p. 189). Nonetheless, ‘the underlying logic of all human rights – to respect the dignity of all human beings – strongly implies that also non-citizens who are substantially inside the polity should enjoy minority rights’ (Packer, 1999, pp. 266–7). But some state parties would clearly not be in agreement with the more extensive approach. The most acute example is found in France’s reservation to Article 27 ICCPR, which goes so far as to declare that no minorities exist in its territory, emphasizing that the non-discrimination principle in the French Constitution is sufficient to protect persons possessing different characteristics to those of the majority.16

Protection Principles

Examination of the provisions on minorities in the ICCPR and FCNM demonstrates that effective protection requires adherence to a number of principles: equality and non-discrimination; assisting persons belonging to minorities to safeguard and develop their distinct characteristics; creating opportunities for their effective participation in society; and recognizing diversity as a resource and a stabilizing and positive feature in society.

Effective protection of minorities requires adherence to the principle of equality and non-discrimination, but also supports the adoption of positive measures to assist members of minorities to safeguard and develop their distinct characteristics. These measures, however, should not disadvantage the majority population, and persons belonging to minorities can benefit from these measures only in accordance with established democratic and human rights principles. Articles 4(2) and (3) of the FCNM call for the promotion, in all areas of economic, social, political and cultural life, of full and effective equality between persons belonging to the minority and those belonging to the majority, which entails the adoption of special measures, provided that these do not violate the principle of non-discrimination (Council of Europe, 1995, paras 39–41). States parties are also under an obligation to take positive measures ‘to promote the conditions necessary for persons belonging to national minorities to maintain and develop their culture, and to preserve the essential elements of

16 The reservation can be accessed from the website of the UN High Commissioner for Human Rights, «http://www.ohchr.org/english/countries/ratification/4_1.htm».
their identity’. Forced assimilation is expressly prohibited and states parties are obliged to protect persons belonging to national minorities from any action aimed at such assimilation. More specifically, the FNCM also envisages, in those areas inhabited by national minorities traditionally or in substantial numbers and where there is a real need (or sufficient demand), adoption of special measures for the use of a minority language at the local administrative level, or opportunities for the teaching of or instruction in that language. The latter obligation, however, is to be implemented ‘without prejudice to the learning of the official language or the teaching in this language’, a provision that is justified in the explanatory report on the basis that ‘knowledge of the official language is a factor of social cohesion and integration’ (Council of Europe, 1995, para. 78). The convention also contains a separate section emphasizing that the rights and freedoms flowing from the principles in the instrument are to be exercised in accordance with respect for the rights of others as provided in domestic laws, international agreements and the European Convention on Human Rights (ECHR).

The HRC emphasizes that minority protection is not the same as the non-discrimination and equality provisions in Articles 2(1) and 26 ICCPR, and thus criticizes implicitly the position of the French government in its reservation noted earlier. The HRC also underlines the positive nature of the obligations of states parties. While the rights in Article 27 ICCPR are individual rather than collective, the HRC argues ‘they depend in turn on the ability of the minority group to maintain its culture, language or religion’. Consequently, positive measures may be necessary to assist the group in protecting its identity, despite the fact that Article 27 is phrased in essentially negative terms, but only to the extent that such measures do not violate the non-discrimination provisions in the ICCPR.
under the Covenant, provided that they are based on reasonable and objective criteria’. Because this statement suggests that more enduring or permanent measures are probably excluded, the HRC does not appear to go as far as the advisory opinion of the Permanent Court of International Justice in Minority Schools in Albania, issued in the context of the inter-war minority protection regime, which underlined that, in addition to equality in law in terms of the application of the non-discrimination principle, equality in fact ‘may involve the necessity of different treatment in order to attain a result which establishes an equilibrium between different situations’.

Another important element of minority protection is the need to ensure the effective participation of members of minority communities in decisions that affect them. Article 15 of the FCNM obliges states parties to create the necessary conditions for ‘the effective participation of persons belonging to national minorities in cultural, social and economic life and in public affairs, in particular those affecting them’. There is no explicit reference to political participation, although this poses no difficulty for those states parties, which only consider persons belonging to national minorities in terms of possessing their citizenship with rights to vote and to stand for election. However, the political rights of foreigners are also the subject of a separate Council of Europe instrument, the Convention on the participation of foreigners in public life at local level, which has been ratified by the Nordic countries, Albania, Italy and the Netherlands. The principle of effective participation has been identified by the HRC as particularly important in the use of economic resources by indigenous groups, although it is argued that this principle is of more general applicability despite the absence of HRC jurisprudence in this area (Burchill, 2004, p. 196).

Given that the two instruments under discussion are concerned with the protection of distinct groups in society, it is hardly surprising that they view cultural diversity as a positive feature, which should be supported and nourished and which contributes to the host society’s stability. Consequently, any conception of integration supporting assimilation is definitely rejected. The preamble to the FCNM declares that ‘a pluralist and genuinely democratic society should not just respect the ethnic, cultural, linguistic and religious identity of each person belonging to a national minority, but also create

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25 General Comment No. 23, para. 6.2. See here also Article 1(4) of the International Convention on the Elimination of All Forms of Racial Discrimination (UN G.A. Res. 2106 (XX) of 21 December 1965), which explicitly permits ‘temporary’ positive discrimination.


28 5 February 1992; ETS No. 144; entry into force 1 May 1997. The convention contains an optional state obligation in Article 6(1) granting foreign residents the right to vote and to stand for election in local authority elections after five years of lawful and habitual residence.
appropriate conditions enabling them to express, preserve and develop this identity'. Furthermore, cultural diversity is seen as ‘a source and a factor, not of division, but of enrichment for each society’. While Article 27 ICCPR contains no such explicit pronouncements, its *raison d’être* is to enable the minority to continue to flourish as a distinct entity within the state party. Indeed, the HRC concludes its general comment on Article 27 by effectively supporting a conception of integration which celebrates the distinctiveness of the minority group in and its contribution to society:

[A]rticle 27 relates to rights whose protection imposes specific obligations on states parties. The protection of these rights is directed towards ensuring the survival and continued development of the cultural, religious and social identity of the minorities concerned, thus enriching the fabric of society as a whole.\(^\text{30}\)

The application of Article 27 ICCPR and the FCNM implies a strong conception of integration whereby states are obliged to ensure that persons belonging to minorities, citizens as well as resident foreigners, can retain and develop their distinctive characteristics, defined normally by reference to their culture, language, religion or ethnicity. At the same time, these instruments recognize that obligations exist on the part of such persons, with the assistance of the state, to adapt to a certain degree to the host society, but without assimilating, and in accordance with democratic and human rights principles.

**II. Integration in the Developing EU Migration Law and Policy**

It has been contended that ‘the integration of migrants is not a legal concept’, even though some states have attempted to address this question in their legislation or are planning to do so (Kälin, 2003, p. 271). However, this position is changing in the EU with the adoption on 19 November 2004 of Council conclusions on immigrant integration policy in the European Union\(^\text{31}\) and the introduction of explicit references to integration in recently adopted secondary legislation under Title IV of Part III of the EC Treaty. While this part of the article is confined to an analysis of these legal or quasi-legal developments, it should be emphasized that these are also connected to integration activities undertaken by the EU outside the immediate migration field under the open method of co-ordination mode of governance, such as the European employment strategy and the strategy for social inclusion, which are considered elsewhere in this special issue.\(^\text{32}\) These activities are also discussed in the

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\(^{29}\) FCNM, Recitals 6 and 7 respectively.

\(^{30}\) General Comment No. 23, para. 9.


\(^{32}\) See the article by Gabriel Toggenburg.
European Commission’s June 2003 communication on immigration, integration and employment and the follow-up document, the first annual report on migration and integration in June 2004.

The Council conclusions on immigrant integration policy follow on from the European Council conclusions on 4–5 November 2004, which adopted the Hague programme on strengthening freedom, security and justice in the EU that will set the agenda for the next phase of policy-making in the migration and asylum fields. Earlier, in June 2003, the Thessaloniki European Council had understood ‘integration policies … as a continuous, two-way process based on mutual rights and corresponding obligations of legally residing third-country nationals and the host societies’ and, while recognizing that the primary responsibility for the elaboration and implementation of integration policies should rest with the Member States, it called for a coherent European framework within which the definition of common basic principles on integration should be envisaged. The Seville European Council also asserted that ‘the integration of immigrants lawfully present in the Union entails both rights and obligations in relation to the fundamental rights recognised within the Union’. The emphasis in both Thessaloniki and Seville that integration constitutes a two-way process is an important principle taken up in the Hague programme and the conclusions on immigrant integration policy.

The landmark conclusions of the Tampere European Council in October 1999, which set in train the raft of asylum and migration measures adopted since the entry into force of the Amsterdam Treaty, called for a common approach to be developed ‘to ensure the integration into our societies of those third country nationals who are lawfully resident in the Union’. The Tampere conclusions also underlined the need for the EU to ‘ensure fair treatment of third country nationals who reside legally on the territory of its Member States’ and called for ‘a more vigorous integration policy [that] should aim at granting them rights and obligations comparable to those of EU citizens’. The conclusions continued that ‘the legal status of third country nationals should be approximated to that of Member States’ nationals’ and that third-country nationals who are long-term residents ‘should be granted in that Member State a set of uniform rights which are as near as possible to those enjoyed by EU citizens’. The European Council also endorsed ‘the objective that long-term legally resident third country nationals be offered the opportunity to obtain

39 Presidency Conclusions, Conclusion 18.
the nationality of the Member State in which they are resident’. While these
statements were given a positive reception by the other EU institutions and
civil society in general, the Tampere conclusions stopped short of advocating
full equality for third-country nationals with the nationals of Member States.
This position is now manifested to some extent in the two measures adopted
on legal migration concerning family reunification and long-term residents,
which are discussed below. In July 2001, the Commission also proposed a
directive on the conditions of entry and residence of third-country nationals
for the purpose of employment, which included a limited provision granting
the latter equal treatment with Member State nationals in specifically defined
areas, but this did not receive the full support of Member States.

The Hague programme makes the link between the successful integration of
lawfully resident third-country nationals and stability and cohesion in society,
and identifies a number of objectives grouped around three areas: elimination
of obstacles to integration; better co-ordination of Member State and EU poli-
cies in this field; and identification of common basic principles to underpin a
coherent European framework on integration for future EU initiatives. The
subsequent Council conclusions on immigrant integration policy identify 11
basic common principles of integration, which reiterate but also expand the
principles listed by the European Council in the Hague programme.

- Integration is a dynamic, two-way process of mutual accommodation
  by all immigrants and residents of Member States.
- Integration implies respect for the basic values of the European
  Union.
- Employment is a key part of the integration process and is central to the
  participation of immigrants, to the contributions immigrants make to the
  host society, and to making such contributions visible.
- Basic knowledge of the host society’s language, history and institutions
  is indispensable to integration; enabling immigrants to acquire this basic
  knowledge is essential to successful integration.
- Efforts in education are critical to preparing immigrants, and particularly
  their descendants, to be more successful and more active participants
  in society.
- Access for immigrants to institutions, as well as to public and private
  goods and services, on a basis equal to national citizens and in a non-
  discriminatory way, is a critical foundation for better integration.

40 Presidency Conclusions, Conclusion 21.
41 COM (2001) 386, 11 July 2001, draft Article 11(1)(f) (i.e. access to vocational training; recognition of
diplomas and other qualifications; social security, including healthcare; access to and supply of goods and
services made available to the public, including public housing; and freedom of association).
43 Hague Programme, Point 1.5 (integration of third country nationals).
Frequent interaction between immigrants and Member State citizens is a fundamental mechanism for integration. Shared forums, inter-cultural dialogue, education about immigrants and immigrant cultures, and stimulating living conditions in urban environments enhance the interactions between immigrants and Member State citizens.

The practice of diverse cultures and religions is guaranteed under the Charter of Fundamental Rights and must be safeguarded, unless practices conflict with other inviolable European rights or with national law.

The participation of immigrants in the democratic process and in the formulation of integration policies and measures, especially at the local level, supports their integration.

Mainstreaming integration policies and measures in all relevant policy portfolios and levels of government and public services is an important consideration in public-policy formation and implementation.

Developing clear goals, indicators and evaluation mechanisms are necessary to adjust policy, evaluate progress on integration and to make the exchange of information more effective.

These principles are explained further in an annex to the conclusions, and are considered critically in the section below where the possible intersectionality of EU migration law and policy with minority protection principles is examined. At best, however, EU policy statements, particularly those in the Council conclusions, are only ‘soft law’. Indeed, the conclusions emphasize that ‘the development and implementation of integration policy is … the primary responsibility of individual Member States rather than of the Union as a whole’ and that ‘the precise integration measures a society chooses to implement should be determined by individual Member States’. The conclusions also emphasize that the common basic principles on integration are not supposed to have a binding character. In this respect, their aim is to assist Member States in formulating integration policies by offering them a simple non-binding but thoughtful guide of basic principles against which they can judge and assess their efforts. They can also use these basic principles to set priorities and further develop their own measurable goals. It is up to the individual Member States to determine whether these principles assist them in formulation of policies for other target groups for integration.

The emphasis on the primary role of Member States is correct given that currently there is no express EU legal competence regarding the integration of third-country nationals, although it might be possible to imply such a

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44 Conclusions on immigrant integration policy, Conclusions 3 and 5.
45 Conclusions on immigrant integration policy, Conclusion 8a.
competence from Article 63(3)(a) TEC which mandates the Council to adopt measures on immigration policy relating to conditions of entry and residence. The Constitutional Treaty, however, makes an explicit reference to the integration of lawfully resident third-country nationals and, if adopted, future EU competence in this field would be aimed at providing incentives and support for the actions of Member States rather than harmonization of their laws. Further development of the Hague programme is provided for in the Commission’s action plan of May 2005, which translates it into specific measures and which inter alia calls for the establishment of a European framework on integration, ‘based upon the common principles endorsed by the European Council ensuring respect for EU values and upholding non-discrimination’.

The non-binding character of the Council conclusions, however, should be contrasted with the recent measures relating to third-country nationals and their family members adopted under Title IV of Part III of the EC Treaty, particularly the directives on the right to family reunification and the status of third-country nationals who are long-term residents. In these measures, three perspectives on the relationship between law and integration have been identified:

1. a secure legal status will enhance the immigrant’s integration in society; a strong residence status and equal treatment are instruments for integration;
2. naturalisation (or a permanent residence status) should be the remuneration for a completed integration; …
3. the lack of integration or the assumed unfitness to integrate are grounds for refusal of admission to the country. (Groenendijk, 2004, p. 113)

Clearly, there is a disparity between the first and third perspectives. While the first perspective appears to find considerable support in the Hague programme’s section on integration and the Council conclusions, and is also strongly supported by a lengthy legal tradition in EU law where it constitutes an important rationale for the free movement of workers principle, the third restrictive perspective is a recent innovation, which has been transplanted by Member States into these two measures from their domestic laws or legislative proposals. This perspective has also found its way into the Council conclusions

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46 Treaty establishing a Constitution for Europe, Article III-267(4).
47 COM (2005) 184, 10 May 2005, at p. 9. The Council approved the action plan at its meeting on 2–3 June 2005 (Council Doc. 8849/05 (Presse 114)).
where ‘individuals who await to be admitted’ as well as those who are already residing in Member States, are identified as a legitimate target group for integration policies.49

The first perspective is evident in a number of provisions of the long-term residents’ directive. The preamble underlines that ‘the integration of third-country nationals who are long-term residents in the Member States is a key element in promoting economic and social cohesion…’ and also that equality of treatment of long-term residents with Member State citizens in a wide range of economic and social matters constitutes ‘a genuine instrument for the integration of long-term residents’.50 This perspective is also implicit in Article 12(3) of the directive concerning protection against expulsion where Member States, before deciding to expel a long-term resident, are required to have regard to the level of a person’s integration in the country, such as duration of residence in the territory, the consequences of the expulsion for that person and his or her family members, and the links with the country of residence or the absence of links with the country of origin (Groenendijk, 2004, p. 122).

The third perspective is prevalent in Articles 4, 7 and 8 of the family reunification directive. Article 4(1) lists the family members who can join the third-country national in a Member State, but adds that, by way of derogation, a Member State may require a child aged over 12 years and who arrives independently from the rest of his or her family to meet a condition of integration provided in that Member State’s national legislation on the date of implementation of the directive. Article 4(5) grants discretion to Member States, with a view to ensuring better integration and the prevention of forced marriages, to ‘require the sponsor and his/her spouse to be of a minimum age, and at maximum 21 years, before the spouse is able to join him/her’. Member States may also refuse family reunification to children over 15 years of age (Article 4(6))51 and require third-country nationals to comply with integration measures as a condition of family reunification (Article 7(2)). Article 8 of the directive is an optional provision permitting Member States to impose a waiting period of up to two years for family reunification, although, by way of derogation, this period can amount to three years in those instances where the legislation on family reunification of a Member State on the date of the directive’s adoption takes into account its reception capacity. The European Parliament has challenged three of the controversial provisions in this directive before the Court

49 Conclusions on immigrant integration policy, Conclusion 6.
50 Long-term residents’ Directive, Recitals 4 and 12.
51 See also Recital 12 of the family reunification Directive, which explains that the inclusion of this possibility ‘is intended to reflect the children’s capacity for integration at early ages and shall ensure that they acquire the necessary education and language skills in school’.
of Justice. The irony regarding these three provisions, which were inserted by Member States to comply with their national laws or legislative proposals, is that two of them have now been abandoned by the Member States concerned. The Austrian law concerning the waiting period (quota) for the admission of family members has since been invalidated as unconstitutional by the Constitutional Court on the grounds that it was an infringement of the right to family life, while the provision on integration conditions for children as young as 12 years of age, included in German immigration law and challenged by the Länder before the German Constitutional Court (but for different reasons), did not find its way into the revised law, which entered into force on 1 January 2005 (Groenendijk, 2004, pp. 120–1).

Both directives also contain the other perspectives on integration. The preamble to the family reunification directive emphasizes in a number of places the importance of the presence of family members for the integration of third-country nationals in the Member State concerned, thus highlighting the first perspective, whereas the third perspective appears in the long-term residents’ directive in provisions that allow Member States to make compliance with integration conditions a requirement for the acquisition of long-term resident status or compliance with integration measures as a condition for taking up residence in another Member State. Peers has identified the integration measures in the long-term residents directive as potentially in conflict with Article 27 ICCPR and European standards on the protection of minorities because these standards ‘require states to preserve differences, while the directive permits (but does not require) member states to insist on assimilation’ (Peers, 2004, p. 160).

The discourse on integration in the EU in the migration context is mainly concerned with the status of lawfully resident third-country nationals. But the European Commission has also considered the importance of integration for third-country nationals residing without authorization, particularly those who cannot be returned to the country of origin for legal, humanitarian or practical reasons (Commission, 2003, p. 26).

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society of Member States, and thus confirms the first perspective referred to above, there is no legal requirement for or expectation of them to do so. Indeed, the Court of Justice recently found little merit in the argument that national provisions on changing surnames, which discriminated against children who held the nationality of two Member States, could be justified on the basis of promoting the integration of those children into their Member State of residence, although the Court does recognize that the demonstration of a certain degree of integration by EU citizens may well be important for accessing social entitlements when resident in other Member States.

III. Minority Protection and EU Integration Policy: Convergence and Divergence

While to date there is no explicit reference to the protection of minorities in EU migration law and policy, it is quite clear that strong resonances of the minority protection principles, highlighted in the first section of the article, can be identified in the EU developments concerning integration policy. Some significant differences remain, however, raising the question whether there is any prospect of convergence on both sets of principles at the EU level.

Regarding the target groups for integration, the EU policy measures take a broad inclusive approach. While competence for applying and implementing integration policies continues to rest with Member States, the November 2004 Council conclusions note that integration policies may target a diverse range of audiences:

[For example, from temporary workers to permanent residents and to the children of immigrants; from individuals who await to be admitted to those who are already residing; from immigrants who have acquired citizenship to long-established third-country nationals; and from highly skilled refugees to individuals who have yet to acquire the most elementary skills.]

While the reference to ‘individuals who await to be admitted’ reflects, as noted in the previous section, the third restrictive perspective of integration, it is noteworthy that immigrants ‘who have acquired citizenship’ are considered a

57 Indeed, integration in the Directive is strengthened by the grant to EU citizens of an unconditional right of permanent residence after five years of continuous residence in a Member State (Directive 2004/38/EC, Article 16 and Recital 18).
59 Case C-209/03, Bidar v. London Borough of Ealing, judgment of 15 March 2005, not yet reported, para. 57.
60 Conclusions on immigrant integration policy, Conclusion 6.
Migrants as Minorities

The target group for integration, thus encompassing EU citizens, who may also be subjects of specific minority protection regimes in certain Member States. This all-encompassing approach is essentially adopted in the Commission’s first annual report on migration and integration in June 2004, which is particularly interesting because of some specific references to minorities’ policy. This document distinguishes between the integration of ethnic or national minorities and long-term resident immigrants and the integration of newly arrived immigrants and refugees by noting that integration policies for the latter groups are similar, and also observes that the new Member States have long placed emphasis on addressing minority issues rather than on integrating newcomers (Commission, 2004, p. 17). But the report uses the terms ‘immigrants’ and ‘ethnic minorities’ interchangeably in a number of places, suggesting that the integration of both of these groups requires similar policy tools. Consequently, therefore, minorities and immigrants in EU integration policy are generally both inclusive concepts in terms of the persons to which this policy applies.

The application of the principle of non-discrimination is an important element of both minority protection and integration policies. The explanations in the annex to the Council conclusions emphasize that ‘if immigrants are to be allowed to participate fully within the host society, they must be treated equally and fairly and be protected from discrimination’, noting that EU law ‘prohibits discrimination on the grounds of racial or ethnic origin in employment, education, social security, healthcare, access to goods and services, and housing’.61 While this is clearly a reference to the race equality directive, which also prohibits discrimination against third-country nationals,62 the application of the principle of non-discrimination to this group is incomplete. The scope of the directive excludes distinctions on the grounds of nationality and is without prejudice to provisions and conditions relating to the entry and residence of third-country nationals.63

The principle that immigrants should participate in decisions affecting their interests is arguably more developed under the emerging EU integration policy. In addition to promoting participation in the host society through employment, education and the principle of non-discrimination, the Council conclusions emphasize that key elements of integration are the participation of migrants in various migrant–citizen forums, the democratic process and the formulation

61 Conclusions on immigrant integration policy, Annex, Point 6.
of integration policies and measures, particularly at the local level. The reference to the possible extension to migrants of political rights (the right to vote and stand for election) at local level is important. While EU citizens resident in other Member States have held the right to vote and stand as candidates in municipal elections for some time, electoral rights at the municipal level are also now being granted increasingly by both old and new Member States to third-country nationals (Commission, 2004, p. 19) although, as noted above, only eight Council of Europe Member States have ratified the Convention on participation of foreigners in public life at local level.

The principles of minority protection and EU integration policy both underline the fact that the authorities and the individuals concerned have continuing obligations. With regard to EU integration policy, this is recognized by the first common basic principle in the Council conclusions, emphasizing that ‘integration is a dynamic, two-way process of mutual accommodation by all immigrants and residents of Member States’. Importantly, this principle refers not only to the obligations of state society institutions but also to all persons resident in the state. The integration principles also impose further requirements on immigrants: the EU’s basic values are to be respected; basic knowledge of the host society’s language, history and institutions is viewed as ‘indispensable’ to integration; and while practices of diverse cultures and religions must be safeguarded, they should not conflict with European human rights or national law, which includes the prevention of ‘individual migrants from exercising other fundamental rights or from participating in the host society’.

However, there are also important divergences between the principles of minority protection, as understood in international human rights law, and the integration principles and policy advocated by the EU. An important element of minority protection is the emphasis that it constitutes a specific set of measures, which go beyond the non-discrimination principle and entail positive state obligations to assist persons belonging to minorities to retain and develop their distinct characteristics, defined usually in terms of their culture, language, ethnicity and religion. The emerging EU integration policy is less clear regarding this objective. Interestingly, the Hague programme does state

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65 Conclusions on immigrant integration policy, Conclusion 12. These values include ‘respect for the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law… respect for the provisions of the Charter of Fundamental Rights of the Union, which enshrine the concepts of dignity, freedom, equality and non-discrimination, solidarity, citizen’s rights and justice’. Conclusions on immigrant integration policy Annex, Point 2.
66 Conclusions on immigrant integration policy, Conclusion 12.
67 Conclusions on immigrant integration policy, Conclusion 16 and Annex, Point 8.
that integration ‘includes, but goes beyond anti-discrimination policy.’ The Council conclusions also underline the need to respect fully the language and culture of migrants, as an important element of integration policy, and to safeguard the right to practise their cultures and religions subject to compliance with human rights standards, without, however, making a clear commitment to take positive measures, which may of course involve the provision of substantial resources. This is in all probability the fault line, which distinguishes integration measures, as understood by the EU, from minority protection regimes, and which Member States appear reluctant to cross. It is arguable that genuine and successful integration requires this additional element and that, without it, EU integration policy actually focuses more on the adaptation, or even assimilation, of migrants to the host society rather than respecting, recognizing and celebrating cultural diversity, which it purports also to cover, though in somewhat rhetorical terms. Indeed, the restrictive perspective of integration that has crept into the two legal measures, discussed earlier, as well as into the Council conclusions, and which is supported by a small number of Member States, reflects this focus. A further illustration of the more restrictive approach is the growing tendency in some Member States to transfer the expense of introductory courses to migrants (Commission, 2004, p. 19; Groenendijk, 2004, p. 122; Michalowski, 2004) which reflects the high costs associated with integration policy, but which also, to a significant degree, conflicts with the common basic principles identified in the Council conclusions that integration is a two-way process involving both the migrant and the host society and that assisting and enabling migrants to acquire basic knowledge of, inter alia, the host society’s language is essential to successful integration.

Finally, minority protection principles are normally applied in respect of groups that have attained a more secure residence status in the host society. This is most evident in the practice under the Council of Europe minority protection regime, where some states parties ratifying the FCNM have declared that they are prepared to apply it only to certain distinct groups of citizens residing within their territories. While the understanding of minority is broader under Article 27 ICCPR, a degree of stability in the territory is also implied by this provision. The problem with the EU integration principles is that many of the migrants to whom they are supposed to apply do not have a secure residence status, thus reflecting a serious disjunction in the EU’s approach. On the one
hand, the dominant conception of integration in EU law and policy is that a secure residence status and equality of treatment with nationals clearly assist integration and thus contribute to greater social cohesion, security and stability in the country. On the other hand, since many lawfully resident migrants in Europe, especially less skilled foreign workers, are frequently excluded from the prospect of gaining a secure residence and are hardly treated on equal terms with nationals and other groups of migrants because of the restrictive employment and residence status acquired on their first admission (Cholewinski, 2004, pp. 82–3), these integration principles can never realistically apply to them in full. The employment and residence status of other groups of third-country nationals, such as asylum-seekers, is even more precarious. Consequently, it is very difficult to speak in terms of employment as ‘a key part of the integration process’ if such migrants do not have access to employment on equal terms with nationals. 

It is here that minority protection principles can contribute considerably to the current EU discourse on integration because of the general assumption that they are applicable to stable groups of persons in terms of their residence status.

Conclusion

It would seem that convergence of minority protection principles with integration policies is still some way off in EU law and policy. A significant stumbling block appears to be the narrow application of the former principles in some EU Member States to distinct groups of citizens, often defined in an historical context. This application is quite deliberate, reflecting the sovereign sensitivities to which the term ‘minority’ gives rise. In this sense, therefore, EU Member States feel more comfortable referring to immigrants and using the language of integration rather than minority protection.

Nonetheless, there is some convergence of the principles of minority protection with those that underlie EU law and policy on integration. But the EU’s apparent reluctance to move forward on the former, at least internally as opposed to instructing future candidate countries on how they should treat their own minorities, reveals a schism between two competing political forces: on the one hand, that which is ready to afford greater respect for and to celebrate the diverse composition of the EU and, on the other hand, the more parochial approach which focuses on the need to ensure immigrants adapt (some would

72 Conclusions on immigrant integration policy, Conclusion 11.
73 Most of the measures on asylum and immigration adopted since 1999, however, contain a provision granting third-country nationals some access to employment even if this access is subject to a waiting period or labour market test (Groenendijk, 2005, pp. 147–69).
74 See here Groenendijk’s telling observation on the shift in the Netherlands from ‘minorities’ policy (which applied to migrants with and without Dutch nationality) to ‘integration’ policy (Groenendijk, 2004, p. 113).
use the term ‘assimilate’) to the host society’s culture, which is most apparent in the more restrictive perspective on integration that has recently made some headway in legally binding EU measures. While EU policy on integration, as it is currently being defined, may well make the accommodation of these tensions possible, it can hardly claim to constitute a coherent approach. Greater regard to the principles of minority protection would provide this much-needed coherency.

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