

The Protection of National Minorities and the Concept of Minority in the EU Law

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Abstract: The paper deals with the question how and in what manners the contemporary EU law and institutions operate in the system of national minority protection. It examines in greater details the concept of minority (the relation between the identity and identification of minority) in the conditions of multi-level governance and attempts to predict the options of the further development in this area.

Key-words: national minority, ethnic minority, nation state, EC/EU law, protection of national minority, identity, minority recognition, ECJ case law

1. Introduction

The aim of this paper is to discuss the concept of national and ethnic minorities as it is reflected in the EC/EU law. The concept of minority expresses how the legal regulation reflects the existence of minority, what is understood by the notion „minority“ and what criteria are used in order to identify certain social groups as minorities. It is beyond any doubt that the primary and principal problem of the contemporary systems of minority protection is not the question of range and contents of rights guaranteed, ergo which particular rights might be guaranteed to the members of minority group, but who is entitled to exercise these rights and who is endowed to determine the personal scope of the minority rights. In other words, the essential problem of minority protection is the question who is the subject or beneficiary of this protection (an individual or a group and what kind of group?) and who is entitled to determine such personal scope of the protection and recognize particular social group as a minority one (should it be the state, the group in question itself or the individual who identifies himself to be a member of such a community?).

The crucial importance of these questions derives from the very fact that the system of minorities protection forms a natural part of human rights protection both on the universal level (art. 27 of the International Covenant on Civil and Political Rights), and regional level (the Framework Convention on the Protection of National Minorities, the Charter of Regional and Minority Languages) as well as in the domestic legal orders of many states. There are international legally binding documents that provide the ethnic and national minorities with

specific rights in order to protect the cultural, language and religious uniqueness of the minorities, however, none of these documents offers any explanation what should be understood as the “minority” and does not solve the puzzle whether the states have such discretion to decide who is the subject of minority rights or whether the states are obliged to guarantee these rights to anyone who calls for such a protection. It represents thus a dilemma between the idea according to which it is the sovereign state that is allowed to freely decide what particular social communities are recognized as minority groups and are entitled to obtain the specific protection, and the view according to which it is an individual that can make so called “identity option”, i. e. to freely choose to enjoy the specific rights regardless of the fact that the state has recognized the group, the individual belongs to, or not. It could be simply illustrated as the problem that ranges from the subjective identity, via individual self-identification to objective identification of the collective entity.

It is necessary to mention that the problem of minority concept in this sense, i. e. the problem of minority identification, represents phenomenon which is connected with the positive protection of minorities, with the protection based on the existence of specific rights belonging solely to the minorities or minority members. The negative protection of minority members through the principle of non-discrimination does not invoke the question of concept and *a priori* identification so acutely. The protection of an individual in this system is specified negatively: the state does not have to do anything which discriminates or excludes an individual on the grounds of his/her affiliation to a certain minority group, regardless of the fact whether such a group is recognized by the state as a specific legal or social „segment“. The protection of minority members actually has an indirect affect: the non-discrimination principle aims to avoid the situation when the individuals surrender their identity under the straits of an unequal treatment by the state. The legal regulation however does not stimulate nor invigorate the preservation or maintenance of specific cultural, linguistic, religious and other differences within the nation state. Therefore the non-discrimination principle represents only the indirect protection, the objective of which is to guarantee general equality among individuals. It does not allow to protect the national and ethnic minorities positively, i. e. as a protection of minority differences (Taylor 1995: 798 ff.).

However, when the legal regulation starts to guarantee the positively formulated specific rights (linguistic, cultural, educational etc.), regardless of whether these are directed to individuals or groups of individuals, the problem of rights exclusiveness occurs (Gál 2000: 7 – 8). The state is then obliged to make specific measures directed towards the preservation of the diverse identities and the individuals or the communities are entitled to call for such measures.

In other words, the standard fundamental rights and freedoms do not open the problem of an *a priori* identification of their subjects. Anyone irrespective of his/her social affiliation is entitled to enjoy all these rights. If someone is derogated on the basis of minority membership, he/she can bring an action for violating the rights and discrimination. The state is therefore obliged not to interfere and to protect against interferences from others; there are no obligations for positive fulfilment. As for the specific measures by which the state takes the minority under protection and makes steps in maintaining the minority tradition and culture, the positive rights of minority members are already involved (Bossuyt 1999: 12).

These specific, positive rights, that actually enable the members of minorities to receive a preferential treatment, shall aim at maintaining their characteristic traits and tradition. This is the basis of art. 27 of United Nations Covenant on Civil and Political Rights that guarantees such positive and specific rights only in general, and the Council of Europe Framework Convention on the Protection of National Minorities of 1995 or the UN Declaration on the Rights of Members of National, Ethnic, Religious and Linguistic Minorities of 1992 which already brought a systemized catalogue of these specific rights.

As has been already mentioned, the concept of minority in any of the systems of specific protection is directly connected with the question of relation between the objective identification of the minority group and its identity or identity of its individual members respectively. It is sometimes deduced that this problem derives from the absence of a generally accepted and legally binding definition of minority (as mentioned above, the legally binding provisions of international documents do not provide any definition, although they use the notion „national or ethnic minority“). It is sometimes assumed that this absence allows the states to present and use their own definitions or own concepts of national minorities and that the idea of international protection is thus delusive.

The existing interpretations of art. 27 of the Covenant and the Framework Convention have nevertheless brought certain partial answers to the question what the minority is, what criteria to use in order to qualify particular groups as minorities and whether these criteria lie within the discretion or the margin of appreciation of the state. The approach of the Advising Committee to the Framework Convention can serve as a suitable example. The Committee have already stipulated that the existence of minority is independent on the decision of the state, on the contrary it is a matter of fact based on the objective existence of a minority. At the same time the minority does not necessarily be a group numerically inferior to the rest of the population, however the most cardinal is the fact this group finds itself in the non-dominant position. According to the Committee there is no need for the minority members to be neither citizens of the relevant state, nor the permanently settled inhabitants on the state's territory. Not only the category of the so-called autochthonous minorities, but the category of the new minorities (including the migrant minorities) enjoy the rights of national minorities.

The supra-national integration creates entirely new conditions for the conceptualization of national minorities. It is an environment in which the concept of minority may differ both from the concepts created in the international law and the ones formulated in the domestic legal orders. The surrounding of the supra-national organization - above all – blurs the boundaries of the entity that has formed the framework for traditional definition of national minority, i. e. the nation state. Promoting the EC freedoms, especially the free movement of persons has caused the increased mobility within the EC member states and the phenomenon of the settlement of persons of diverse national or ethnic origin in different member states. This challenges entirely new questions associated to the existing concepts of minority protection, especially questions on whether the existing system of protection that has been promoted in the international as well as domestic law becomes out-of-date and whether it is compatible with the new conditions in Europe being integrated, or what modifications it can acquire in the process of European integration. Simultaneously the supra-national institutions and the EC law have qualitatively different instruments at their disposal to affect the member states in comparison to the established international organizations and to the instruments of international law.

This paper will therefore focus on the question, how the concept of minority appears and could modify itself in the conditions of supra-national integration and what the specific features of the minority concept are in the environment of the European integration.

2. The Minority Protection in the EC/EU Law

The concept of minority in the EC/EU law presumes there is a particular system of minority protection in the EC/EU law. Before the further inquiry to the concept of minority it is necessary to make an initial analysis of the system of protection itself.

The protection of national minorities within the EU is characterised by a certain paradox or is based on the double, biased standard respectively. On one hand the protection of national

minorities represents one of the important issues of foreign and external policy of the EU, on the other hand the protection of minorities played a marginal role to the recent time: in the internal agenda of the EU or the EC, hence in the framework of *aquis communautaire*. Whereas the issue of minority protection and respect to them formed a basis for the recognition of newly formed states in the Eastern and South-Eastern Europe (Declaration on the Guidelines for Recognition of New States in Eastern Europe and the Soviet Union, Declaration on Yugoslavia of 16. 12. 1991) and first of all formed an integral part of the so-called Copenhagen criteria laid down during the meeting of the European Council in Copenhagen in 1993, the issue of minority protection played only a negligible role in the internal agenda of the EC/EU. Actually until the mid-1990s the specific minority protection had not been considered a topic worth of attention in the European integration. The only exception represents the resolutions adopted by the European Parliament in 1981, 1983, 1987 and 1994 in which the EP appealed to the member states and European institutions to create the system of specific measures in favour of linguistic and cultural minorities (Toggenburg 2000: 5 – 6).

In other words, only until the Amsterdam Treaty there had been no provision in the primary law, except the general prohibition of discrimination, that would have guaranteed the minorities specific rights and specific protection. The reluctance of the member states to commit themselves to the minority protection was reflected also in the Amsterdam Treaty. The treaty incorporated to the art. 6 par. 1 all the requirements coming from the Copenhagen criteria (i. e. the freedom, democracy, respect to human rights and fundamental freedoms and the principle of rule of law), with the only exception in the very requirement - the protection and respect to national minorities – which is absent in the treaty. These attitudes can be therefore characterised in the way that „so far the Union considered the minority protection as an export article which is not suitable for its domestic use“ (de Witte 2002: 139).

On the contrary, the European law has been substantially based on the principle of non-discrimination that finally found its reflection in the specific competence of the EC in the Amsterdam Treaty. The art. 13 enables the EC to „take an appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation“. On the basis of this article the EC adopted the Council directive 2000/43/EC implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, that gave further concrete form to the principle of equal treatment irrespective of the race or ethnic origin.

Similarly, during the process of adoption of the Charter of Fundamental Rights of the EU the member states abandon the variant suggested by the EP to include specific rights of minorities (which would go beyond the non-discrimination) into the catalogue of fundamental rights (Schwellnus 2001: 8). Therefore, there are only two articles dealing with minority issues: art. 21 that prohibits discrimination on the basis of the membership to the national minority and art. 22 that stipulates that the EU respects cultural, religious and linguistic diversity. The reference to the rights of national minorities occurred then – on the basis of Hungarian proposal – in the preliminary art. 2 of the European Constitutional Treaty according to which „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“.

It is possible to assert that the system of minority protection in the EC law has been developed during the 1990s as a dual system: while in its foreign and external policy the EC/EU spread the concept of positive protection through specific rights of persons belonging to national minorities, in its internal agenda the EC/EU continued to promote the negative protection through the principle of non-discrimination.

This ambivalent attitude can be clearly illustrated in the art. 11 of the EU Treaty which incorporated - among the basic principles of the EU foreign policy - the principles derived from the Helsinki Final Act and the Paris Charter of the OSCE including the requirement of specific minority protection, and in the content of the European Commission's assessment reports on the preparedness of the CEECs to access the EU. The European Commission stimulated the accessing countries in these reports to ratify the European Council Framework Convention and the Charter of Regional and Minority Languages as catalogues of specific minority protection, while a line of member states at that time had not signed or ratified these catalogues (Belgium, France, Luxembourg, the Netherlands and Greece). The EC/EU itself has not adopted in the *acquis communautaire* any instruments aiming at the positive protection of minorities, or any monitoring mechanisms in order to motivate the member states to sign and ratify the respective treaties.

Therefore, after the accession of the CEECs in 2004 the question whether the EC/EU attitude towards the minority protection would not be changed arose at the end. It is beyond any doubt that the requirement for specific minority rights has been exercised by the EU up to now in the case of the remaining accessing states such as Turkey, Croatia, Romania, Bulgaria and Macedonia. However, it is not clear so far whether such requirement will find its place directly in the internal agenda of the EC/EU, i.e. in the *acquis communautaire*.

3. The Prohibition of Discrimination, the Specific Rights and the Concept of Minorities

It was evident from the previous chapter that the prevailing approach in the European law is represented by the principle of equality and non-discrimination. The EC/EU law – unlike the legal regulation adopted in the Council of Europe – avoided the concept of positive minority protection through guaranteeing specific rights granted exclusively to the members of national minorities.

On the contrary, the prevailing approach has been influenced by the idea that general prohibition of discrimination contradicted the exclusive and specific rights for minority members. For example, while Finland and Sweden were entering the EU in 1995, both states had to apply for a special exception and explicit recognition of their specific duties to the *Sami people*. So-called Sami Protocol comprises the annex to the accession treaties and represents a part of the primary law. According to the protocol the exclusive rights that protect the Sami minority represent an explicit exception to the general prohibition of discrimination. In other words, the EU has pledged that this specific treatment of the Sami people would not be considered the breach of non-discrimination principle. Moreover the EU recognized that this exception may extend to any other specific rights for the *Sami people* formulated in the future, if such rights are connected with the protection of traditional life of *Sami people*. Similar regime was granted to the specific autonomous status of Finnish minority on Aaland Islands (Toggenburg 2004: 24).

It is possible to conclude that the prevailing approach of the EU was built on the assumption that the specific protection of minorities contravenes the non-discrimination principle and therefore, it has to be considered an exception specified in the primary law.

Similarly, there are several cases held by the European Court of Justice that illustrated this approach. Thus, the non-discrimination principle applied in the sphere of the free movement may contradict the existing specific protection of minority members. For example, in the case *Mutsch v. Public Prosecutors Office, Liege* (decision C-137/84 of 11/07 1985) the ECJ argued that the guarantee of certain linguistic rights exclusively to the particular members of national minority permanently settled on the territory of a member state contravenes the non-discrimination principle. This particular case arose in the situation when a Luxembourg citizen Robert Mutsch demanded the possibility to use the German language during the

criminal procedure in Belgium according to a special law that guaranteed this specific linguistic right to the German minority traditionally settled in the area of Liege. The ECJ adjudicated that it contradicts the principle of non-discrimination if this specific right is guaranteed exclusively to the members of German minority in Liege. The principle of non-discrimination requires to apply such regulation to all the people with the German national identity. The ECJ refused the arguments of the Belgian government that this measures were intended to protect the identity of this minority exclusively.

In the *Bickel and Franz v. Pretura Circondariale di Bolzano* case (decision C 274/96 of 24/11 1998) the ECJ stated that the purpose of the measures that aim the specific protection of ethnocultural minority settled in the province of Bozen, cannot justify the different treatment between the members of this minority and other persons who are not members of this minority but share the same linguistic characteristics. This case arose from the situation when the citizens of Austria and Germany demanded to use the German language before a criminal court as it was guaranteed to the German linguistic minority in Bozen.

These examples indicate that the traditional concepts of minority protection may contrast the objectives and instruments that are used in the process of the European integration. At least they demonstrate how the concepts of minority protection may vary in the environment of the European integration.

4. The Concept of Minority in the EC/EU Law

As mentioned above, the boundaries of the nation state as a traditional framework for recognition of national minorities blurred in the supra-national environment. The national entity that forms a dominant majority in the nation state may become a minority in the supra-national conditions. Is it however legitimate enough to regard this entity a national minority? Similarly, higher level of mobility of population within the EU may lead to diluting or thickening of the existing minorities or creating new minorities within the boundaries of the member states.

It naturally incites a question if these processes may change the concepts of minorities. As there is not only one concept of minority in the international law or domestic legal orders, there is no exclusive and the only one legally binding concept in the EC/EU law. The approaches in the EC/EU law actually oscillate between several alternatives. From the supra-national point of view there are four variants: 1. the titular nations of the member states may be considered minorities within the EU, 2. the minority may be the category of the so-called migrant workers, 3. the notion minority may comprise of the citizens from the third non-member states of the EU, 4. the existing national minorities recognized by the member states may be regarded as minorities within the EC/EU – the EC/EU law will only incorporate such a recognition.

4.1 Nation State as a European Minority

This concept brings the titular nations that form a dominant majority among the member states into the system of minority protection. It derives from the idea that the process of European integration itself represents a threat for the linguistic, cultural and national identity of member states. This approach is based on the assumption that the conditions of the integration threaten not only the national minorities settled within the member states, but the European nation state itself (Toggenburg 2003: 274). And it implicitly presumes that it is possible to define something like a dominant and prevailing culture and identity in the EU that endangers the national identities of member states.

Since the member states are the only subjects that formulate the primary law, this concept is reflected directly in the founding treaties. This concept has been incorporated into the art. 6 par. 3 of the EU Treaty that ensures the protection of national identities of member states and

it has been integrated into the art. 151 of EC Treaty according to which the Communities “contribute to the flowering of the cultures of the Member States, while respecting their national and regional diversity and at the same time bringing the common cultural heritage to the fore”.

This concept is also present in some of the ECJ judgements. For example in the case *Groener v. Irish Ministry of Education* (decision C-379/87 of 28/11 1989) the ECJ acknowledged that the measures aiming at the protection of the member state official language represents a legitimate object for restrictions imposed upon the free movement within the EC. The ECJ followed the wording of the EC Treaty and deduced that it does not prohibit measures protecting and maintaining the national languages of member states as a part of national identity. Just to make the picture complete, this case resulted from the situation of a Dutch citizen Anita Groener who had applied for a position of a teacher of arts in a public school. To be successful Mrs. Groener had to prove her knowledge of Irish language she could not speak and argued that the knowledge is not necessary for teaching art. The ECJ argued that the Irish language is – according to the Irish constitution – regarded a first official language (beside English which is announced to be the second official language) and concluded that it is the legitimate competence of the member state to protect its own national language.

Such concept of minority, however, faces the problem how to define what is then the dominant and major identity in Europe. This approach would finally lead to the conclusion that every member state represents an endangered minority towards the rest of the member states, although the rest is not culturally homogenous. Therefore, this concept would absolutely disintegrate the existing concepts of national minorities as they were established in the international and domestic laws.

4.2 Migrant Workers as a European Minority

The economic integration with the freedom of movement created a situation of permanent migration of population of different ethnic or national origin. These individuals may form a minority in the sense they differ from the rest of the population of a domestic state by its own cultural and national identity they bring with them. They are often individuals who share their national identity and mother tongue with members of the existing minority permanently settled on the state territory. In other cases they form entirely new minorities the domestic state has not been confronted with yet. In most cases these persons come from various parts of the EU and they do not manifest the sense of a collective solidarity and do not demand the protection and maintenance of their identity.

As mentioned above, the European law protects such persons indirectly, through the principle of non-discrimination. In other words, the *acquis communautaire* obliges the member states to treat such individuals in the same way as their own nationals. The question, however, if it is necessary to apply the positive protection to these persons as well, may arose. As the ECJ decisions show there is a specific situation when such a positive protection already exists in the particular state. According to the ECJ the state is bound under these conditions to guarantee such specific rights to migrant workers as well.

In spite of the art. 5 of the Council Directive 2000/43/EC that does not exclude the possibility of affirmative actions taken by the member states, the EC itself has not adopted a special regulation that would protect such persons in a positive way, i. e. with the purpose to actively protect the identity divergences (the linguistic one in particular). The Council Directive 77/486/EC of 25 July 1977 is the only exception. This directive bounds the member states to offer the children of migrant workers the education in the language of the respective state in order to allow the children to integrate to the new environment on one hand, but on the other hand it prescribes the duty to guarantee the education in their mother tongue as well in order to keep the possibility for re-integration in the state of their origin.

4.2 Third-country, Non-member States Nationals as a European Minority

According to the figures of the European Commission there were approximately 13 million of third-country nationals residing in the member states of the EU in 2003. These groups of people represent a most heterogeneous groupings that usually – with some exceptions - lack a common national and cultural identity. Such exceptions might be a Turkish minority and other minorities from a line of Islamic countries. These new minorities are not considered national minorities by the EU member states and do not enjoy specific minority rights. Despite this fact there is an opposing tendency in Europe; for example as was already mentioned above, the Advising Committee, the monitoring body for the Framework Convention, criticized those states that had excluded such newly established minorities from the scope of the Framework Convention (the attitude of the Federal Republic of Germany to the Turkish minority became the greatest object of the critique).

This tendency is however evident in the EC/EU law as well. For instance the European Council came to the conclusion at its meeting in Tampere in 1999 that persons who had legally resided on the territory of particular member states for some period of time and own the permanent residence permits should enjoy beside the right to equal treatment other rights such as the right to reside on the territory of the EU and to obtain education in their mother tongues etc. (Toggenburg 2003: 277). On the basis of this initiative the directive on the status of long-term resident third-country nationals within the EU has been adopted in November 2003. However, the directive did not follow the recommendations of the European Council and did not bring the regulation of positive rights aiming at the preservation of cultural diversity of these persons, but only enlarged the protection through the non-discrimination principle (it lays to the member states the duty to guarantee the equal treatment in 8 particular areas: the access to occupation and enterprise, education, recognition of professional qualifications, in the area of social security, taxes, access to public services and public estates including housing) (Peers 2004: 157).

In other words, this directive did not accept the concept of the so-called new minorities as the Advising Committee for the Framework Convention did. The European law therefore recognized such a category of population but without the guarantees of the specific rights.

4.4 Existing National Minorities (already Recognized in the Member States) as a European Minority

The system of the multi-level governance and the principle of subsidiarity do not exclude the possibility that the EC/EU law could incorporate the concepts of minorities from the member states' legal orders. In other words, it is possible that the European law would deal with the concept of minority in the same way as it was established in the member states' law.

There are two potential alternatives then. Either the European law will directly define what social group is to be a minority and it will derive from the same criteria already used by the member states and will actually create a new European standard of minority protection including the European catalogue of minority-specific rights. Or, the European law will only indirectly incorporate the concepts established in the member states and allow the member states to freely decide what groups are considered minorities and what particular rights are guaranteed, i. e. without creating the unified and the only one standard of minority protection on the supra-national level.

The contemporary conditions of the primary law plays into the hand of the second variant as the more probable one. This tendency in the European law will be supported by the recent accession of the CEECs that had adopted the specific protection of minorities under the influence of the EU itself. In other words, after the 1st May 2004 the internal agenda of the EU was caught up with the external policy. What was intended by the EU only for the export

became afterwards an internal commodity. These new member states will gradually attempt to implement such specific protection to the primary law – the most illustrative example was the Hungarian pressure to mention the minority protection in the preamble and initial article of the European Constitutional Treaty and to adopt a special charter of minority rights which would become a part of the Charter of fundamental rights of the EU.

This alternative might be actually compared to the process how the very principles of human rights protection penetrated the EC law: originally through the case-law of the ECJ, through the implementation in the primary law afterwards and finally through adopting the European catalogue of fundamental rights and freedoms. Therefore, it is probable that it will be the ECJ that will have to challenge such demands, and the question is if the ECJ will try to follow the same scheme, i. e. will try to incorporate the specific minority rights as the general legal principles shared by the national legal orders of member states.

However, even this variant is not absolutely trouble-free. Above all, it is very difficult to determine that such protection represents a generally shared value or principle recognized by all member states. The concepts of the protection itself vary in the member states from the Hungarian concept of minority self-governments that enjoy collective rights, via the concept of the majority of the member states that guarantee specific rights only to the members of the minorities officially recognized by the state, to the examples such as France that deny the concept of minority rights as such (France has ratified the International Covenant on Civil and Political Rights with the reservation to the art. 27 and has refused to sign the Framework Convention).

The diversity of the concepts of minority protection in Europe emerged in the process of implementation of the Framework Convention as well. Strictly speaking, there are four groups of the EU member states.

Some countries follow the opinion that any objective criteria enabling the recognition of minority group contradict the individual character of minority rights (Slovakia), other states deal with the general definitions of minority (Czech Republic, Hungary, Austria, Great Britain) and others bring the enumeration (*numerus clausus*) of the officially recognized minorities (Denmark), Finland, Germany, Italy, Slovenia, Sweden). And finally, there are states that declare no minorities settled on their state territories (France, Lichtenstein, Luxembourg, Malta and the Netherlands).

Beside this a line of the member states use various concepts of minorities. For example the Federal Republic of Germany distinguishes between the national and the ethnic minorities and recognizes only the Danish and the Sorbian national minorities and the Frisian and the Roma ethnic minorities. On the other hand it refuses to consider the persons of Italian, Polish or Turkish origin to form national or ethnic minorities. Slovenia, for example, divides the autochthonous and allochthonous minorities. Italy recognizes only the concept of linguistic minorities. In Great Britain there is the concept of the so-called racial groups that however involves the persons of Scottish, Irish or Welsh national identity as well etc.

The question whether such diverse concepts of minority groups and minority protection in the member states allow to draw the specific minority rights as generally shared legal principles still remains. It is noteworthy in this respect that the ECJ incorporated the protection of fundamental rights as general principles shared by all the member states only after all the member states have ratified the European Convention on Human Rights and Fundamental Freedoms.

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