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Tendencies of Minority Protection in the Law of the European Union

Though the need for protection of national minorities occurred in the 19th century, its legal frameworks were established only in the first quarter of the 20th Century, after the First World War. In the Middle Age the issue of nationalities did not exist, “it would be more appropriate to say that several “collectivities” coexisted which enjoyed a special status.”² (For example privileges of collective nobility and settlers, who applied their own legal order etc.) Its roots can be found in the agreements made in the course of reformation and counter-reformation (for example Peace of Augsburg, 1555). The efforts for minority protection are in connection with the establishment of nation states. “The nation state construction was imported according to the French model in Central-Eastern Europe, speeded up, and it was introduced without any cohesion, creating new sources of tension.” (...) “As an offset of the Balkan wars, and of the territorial changes caused by the First World War, the modern international legal form of minority protection appeared. At this time the international community, and in its name an international organ controls that the rights of a population as a minority or the rights of an individual belonging to the minority are infringed or not.”³ This organization was the League of Nations, the minority protection system of which did not survive the Second World War, though the jurisdiction of the Permanent Court of International Justice between the two world wars is still normative, and it is referred by the new international conventions too. After World War II, the institutional system of minority protection was not favoured to be established. As far as the United Nations’ human rights’ protection system is based not only upon individual (e.g. International Covenant on Civil and Political Rights of 1966) and but also on collective rights, (e.g. International Covenant on Economic Social and Cultural Rights of 1966) some countries implement minority protection into their legal system upon collective rights, others on individual rights. Among the ratified

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² KOVÁCS, Péter: *International Law and Minority Protection - Rights of Minorities or Law of Minorities?* Akadémiai Kiadó, Budapest, 2000, p. 10.

³ KOVÁCS, Péter: *Public International Law (Nemzetközi közjog)*. Osiris, Budapest, 2006, pp. 316-317.

treaties the European Convention on Human Rights (1950) is one of the most important ones. Its article 14 says: “*The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.*” (The Additional Protocol about the general prohibition of discrimination signed on 4 November 2000 can be mentioned here too) or the International Covenant on Civil and Political Rights, in which Article 27 says: “*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 practice their own religion, or to use their own language.*” In minority protection, international law has got very few chances to do anything, because the will of states do not always harmonize in the course of ratification of the treaties. This is due to the historical-ethnic-political characteristics. However international law makes it possible to conclude bilateral agreements, of course by consensus. The approach of the problem of national minorities has been changing since the beginning of the '90s, the reason of which shall be the wars in the ex-Yugoslavia and not at least the series of bloody ethnic cleansing, which alarmed the international community that ignoring problems does not solve minority issues. After the Cold War, the unsolved national, ethnical, minority problems came to the surface. At the beginning of the '90s, first of all in the Council of Europe several international treaties were concluded (European Charter for Regional or Minority Languages 1992, Framework Convention for the Protection of National Minorities 1995), and bilateral agreement was made, for example the Treaty on Understanding, Cooperation and Good Neighbourliness between Romania and the Republic of Hungary (1996), of which aim or content dealt with the national minorities protection. The UN General Assembly Resolution 47/135 on 18 December 1992 about the Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities and the Arbitration Commission of the Conference on Yugoslavia (commonly known as Badinter Arbitration Committee) laid down: “*respect of rights of peoples and minorities (...) is imperative norm of the general international law*”⁴, and minorities have got the right to make *their “identity recognised”*.⁵ Besides all these also not contractual, i.e. soft law documents, recommendations were created, among which the Council of Europe Parliamentary Assembly Recommendation 1201 (2003) says that either local or autonomous administration, or special status could be granted to the minorities. The main international treaties of minority protection influenced considerably the legal development of the European Community and the European Union. First of all the human rights issue refers to the minority protection and it

⁴ Advisory opinion of 29. 11. 1991, RGDIP, 1992, 265. o.

⁵ Advisory opinion of 11. 01. 1992, RGDIP, 1992, 267. o.

became part of the Union *acquis*. Today's development in law forecasts the entire recognition of minority protection, of course with respect to the diversity of ideas.

The European Union did not want that minority protection should belong to its competency, but as human rights appeared in the Community law, the rights of minorities were emphasized too. From the '80s, the European Parliament urged for the minority legal protection within the Community, first of all the conclusion of the European Charter for Regional or Minority Languages. In the Union it was thought that the minority protection was regulated by the general prohibition of any discrimination, and it was proved by the jurisdiction of the Court in Luxemburg. By the accession of Middle-Eastern European countries, the issue appeared in concrete legal documents too, first of all among the accession criteria of new states. Among the Copenhagen accession criteria the obligation of "*respect and protection of minorities*" have already appeared.⁶ Article 6 of the EU Treaty says, that the Union is based upon the respect of freedom, democracy, human rights and fundamental freedoms; and it is based upon the principles of constitutional state, which principles are common in the member states and which are assured by the Convention on Human Rights; and as they derive from the constitutional traditions of member states, the Union respects them as general principles of the Community law. Lisbon Treaty created a new 1A Article: "*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. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail.*" Moreover the Treaty of Lisbon goes further and according to Article 6, Section 3, the above mentioned rights form the basis of the Union only, and they are not followed and respected as the general principles of the Community law, but they form the basis of the *Union's law order*. Within the European Council in December 2000 the Charter of Fundamental Rights of the European Union, was adopted which has also been integrated into the Constitution, but till the coming into force of the Treaty of Lisbon it remains a political declaration. Title III Article II-81 mentions within the prohibition of discrimination 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, (...) shall be prohibited*. In Art. II-82 *The Union shall respect cultural, religious and linguistic diversity*. Article 6, Section 1 recognizes the Charter of Fundamental Rights, which „ *shall have the same legal value as the Treaties.*" Article 6, Section 2 lays down that "*The Union shall accede to the*

⁶ European Council in Copenhagen 21-22 June 1993, Conclusions of the Presidency. Nr: 180/1/93

European Convention for the Protection of Human Rights and Fundamental Freedoms.” As a consequence of all these, the minority protection or in other words the protection of persons belonging to minorities already forms parts of the Union’s *acquis* through the protection of human rights. Article 13 of the Treaty establishing the EC empowers the Council to fight against discrimination upon race or ethnical origin, and the Council 2000/43/EC directive about equal treatment. The directive gives an explanation about how to interpret discrimination in the Union’s law, how to distinguish direct and indirect discrimination. It recognizes the need for affirmative actions to realise equal treatment entirely in order to fight successfully against discrimination “*based upon race or ethnical origin.*”⁷ With regard to minority protection, Preamble 17 is important too: “*The prohibition of discrimination should be without prejudice to the maintenance or adoption of measures intended to prevent or compensate for disadvantages suffered by a group of persons of a particular racial or ethnic origin, and such measures may permit organisations of persons of a particular racial or ethnic origin where their main object is the promotion of the special needs of those persons.*”⁸ According to this, the European Parliament emphasized in more and more documents (resolutions) the need for a protection of minorities, but it is true that mainly for the newly joined Middle-Eastern European countries. For these states it was precisely prescribed before the accession, sometimes by pointing out the minorities, to take necessary measures, such as assurance of the equality in front of the law, termination of discrimination and segregation,⁹ the adoption of an Act on minorities, respect of subsidiarity and cultural autonomy or the maintenance of higher education of minorities by means of appropriate financial background.¹⁰ Beside these acts, the work of experts worths mentioning in the activity for a deeper minority protection: proposals, declarations are made, which reflect the opinion and recommendations of the European lawyers, minority researchers, politicians, and representatives of non-governmental organisations. Among these, the conference on 30 and 31 January 2004 organised by the European Commission and the European Academy Bolzano (EURAC) is outstanding, where the Bolzano Declaration on the minority protection in the enlarged European Union was proclaimed. The aim of this declaration is „to address how the importance of the integration and protection of minorities (which are acknowledged at the political level) could be transformed into concrete legal instruments inside the framework of the newly enlarged and re-designed European Union.” (...) „Though neutral in its opinion, the declaration highlights what is

⁷ Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, Article 5.

⁸ *A nemzeti és etnikai kisebbségi jogok nemzetközi forrásai-International Sources of National and Ethnic Minority Rights-Les sources internationales des droits des minorités nationales et ethniques.* (trilingual edition) eds: BALÁZS Katalin; ÓDOR Bálint. Magyar Országgyűlés-Hungarian National Assembly-Assemblée nationale hongroise, Budapest, 2006.

⁹ Regular report from the Commission on Hungary’s progress towards accession.

¹⁰ Report on the extent of Romania’s readiness for accession to the European Union.

politically and legally possible within existing policy and demonstrates how the protection of minorities can be strengthened in a consistent manner.”

Further Reading:

KOVÁCS Péter, *International Law and Minority Protection - Rights of Minorities or Law of Minorities?* Akadémiai Kiadó, Budapest, 2000

BALÁZS Katalin; ÓDOR Bálint (eds.), *A nemzeti és etnikai kisebbségi jogok nemzetközi forrásai - International Sources of National and Ethnic Minority Rights - Les sources internationales des droits des minorités nationales et ethniques.* (trilingual edition) Magyar Országgyűlés-Hungarian National Assembly-Assemblée nationale hongroise, Budapest, 2006.

GÁL Kinga, *Minority Governance in Europe.* Open Society Institute, Budapest, 2002

EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW – COMMISSION EUROPÉENNE POUR LA DÉMOCRATIE PAR LE DROIT, *The protection of national minorities by their kin-state – La protection des minorités nationales par leur Etat-parent.* Council of Europe Publishing, Éditions du Conseil de l'Europe, Strasbourg, 2002

Annex:

European Council in Copenhagen 21-22 June 1993, Conclusions of the Presidency

(...)

“Membership requires that the candidate country has achieved stability of institutions guaranteeing democracy, the rule of law, human rights and respect for and protection of minorities, the existence of a functioning market economy as well as the capacity to cope with competitive pressure and market forces within the Union. Membership presupposes the candidate's ability to take on the obligations of membership including adherence to the aims of political, economic and monetary union.”¹¹

(...)

Council Directive 2000/43/EC

of 29 June 2000

implementing the principle of equal treatment between persons irrespective of racial or ethnic origin

(...)

CHAPTER I

GENERAL PROVISIONS

Article 1

Purpose

The purpose of this Directive is to lay down a framework for combating discrimination on the grounds of racial or ethnic origin, with a view to putting into effect in the Member States the principle of equal treatment.

Article 2

Concept of discrimination

¹¹ European Council in Copenhagen 21-22 June 1993, Conclusions of the Presidency. Nr: 180/1/93

1. For the purposes of this Directive, the principle of equal treatment shall mean that there shall be no direct or indirect discrimination based on racial or ethnic origin.
2. For the purposes of paragraph 1:
 - (a) direct discrimination shall be taken to occur where one person is treated less favourably than another is, has been or would be treated in a comparable situation on grounds of racial or ethnic origin;
 - (b) indirect discrimination shall be taken to occur where an apparently neutral provision, criterion or practice would put persons of a racial or ethnic origin at a particular disadvantage compared with other persons, unless that provision, criterion or practice is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary.
3. Harassment shall be deemed to be discrimination within the meaning of paragraph 1, when an unwanted conduct related to racial or ethnic origin takes place with the purpose or effect of violating the dignity of a person and of creating an intimidating, hostile, degrading, humiliating or offensive environment. In this context, the concept of harassment may be defined in accordance with the national laws and practice of the Member States.
4. An instruction to discriminate against persons on grounds of racial or ethnic origin shall be deemed to be discrimination within the meaning of paragraph 1.

Article 3

Scope

1. Within the limits of the powers conferred upon the Community, this Directive shall apply to all persons, as regards both the public and private sectors, including public bodies, in relation to:
 - (a) conditions for access to employment, to self-employment and to occupation, including selection criteria and recruitment conditions, whatever the branch of activity and at all levels of the professional hierarchy, including promotion;
 - (b) access to all types and to all levels of vocational guidance, vocational training, advanced vocational training and retraining, including practical work experience;
 - (c) employment and working conditions, including dismissals and pay;
 - (d) membership of and involvement in an organisation of workers or employers, or any organisation whose members carry on a particular profession, including the benefits provided for by such organisations;
 - (e) social protection, including social security and healthcare;
 - (f) social advantages;
 - (g) education;

(h) access to and supply of goods and services which are available to the public, including housing.

2. This Directive does not cover difference of treatment based on nationality and is without prejudice to provisions and conditions relating to the entry into and residence of third-country nationals and stateless persons on the territory of Member States, and to any treatment which arises from the legal status of the third-country nationals and stateless persons concerned.

Article 4

Genuine and determining occupational requirements

Notwithstanding Article 2(1) and (2), Member States may provide that a difference of treatment which is based on a characteristic related to racial or ethnic origin shall not constitute discrimination where, by reason of the nature of the particular occupational activities concerned or of the context in which they are carried out, such a characteristic constitutes a genuine and determining occupational requirement, provided that the objective is legitimate and the requirement is proportionate.

Article 5

Positive action

With a view to ensuring full equality in practice, the principle of equal treatment shall not prevent any Member State from maintaining or adopting specific measures to prevent or compensate for disadvantages linked to racial or ethnic origin.

Article 6

Minimum requirements

1. Member States may introduce or maintain provisions which are more favourable to the protection of the principle of equal treatment than those laid down in this Directive.

2. The implementation of this Directive shall under no circumstances constitute grounds for a reduction in the level of protection against discrimination already afforded by Member States in the fields covered by this Directive.

(...)

CHAPTER III

BODIES FOR THE PROMOTION OF EQUAL TREATMENT

Article 13

1. Member States shall designate a body or bodies for the promotion of equal treatment of all persons without discrimination on the grounds of racial or ethnic origin. These bodies may form

part of agencies charged at national level with the defence of human rights or the safeguard of individuals' rights.

2. Member States shall ensure that the competences of these bodies include:

- without prejudice to the right of victims and of associations, organisations or other legal entities referred to in Article 7(2), providing independent assistance to victims of discrimination in pursuing their complaints about discrimination,
- conducting independent surveys concerning discrimination,
- publishing independent reports and making recommendations on any issue relating to such discrimination.

CHAPTER IV

FINAL PROVISIONS

Article 14

Compliance

Member States shall take the necessary measures to ensure that:

- (a) any laws, regulations and administrative provisions contrary to the principle of equal treatment are abolished;
- (b) any provisions contrary to the principle of equal treatment which are included in individual or collective contracts or agreements, internal rules of undertakings, rules governing profit-making or non-profit-making associations, and rules governing the independent professions and workers' and employers' organisations, are or may be declared, null and void or are amended.

Article 15

Sanctions

Member States shall lay down the rules on sanctions applicable to infringements of the national provisions adopted pursuant to this Directive and shall take all measures necessary to ensure that they are applied. The sanctions, which may comprise the payment of compensation to the victim, must be effective, proportionate and dissuasive. The Member States shall notify those provisions to the Commission by 19 July 2003 at the latest and shall notify it without delay of any subsequent amendment affecting them.

Article 16

Implementation

Member States shall adopt the laws, regulations and administrative provisions necessary to comply with this Directive by 19 July 2003 or may entrust management and labour, at their joint request, with the implementation of this Directive as regards provisions falling within the scope of collective agreements. In such cases, Member States shall ensure that by 19 July 2003,

management and labour introduce the necessary measures by agreement, Member States being required to take any necessary measures to enable them at any time to be in a position to guarantee the results imposed by this Directive. They shall forthwith inform the Commission thereof.

When Member States adopt these measures, they shall contain a reference to this Directive or be accompanied by such a reference on the occasion of their official publication. The methods of making such a reference shall be laid down by the Member States.

(...)

The Bolzano Declaration¹²

(...)

Article 6 TEU (Treaty establishing the European Union) lists the basic values upon which the “Union is founded,” and which are, at the same time, “common to the member states.” This internal dimension is complemented by a clear external dimension, as Article 49 TEU refers to these principles in prescribing that only those European States “which respect the principles as set out in Article 6(1)” may apply for EU membership. These founding principles contain all of the political criteria of Copenhagen except the protection of minorities. The European Commission is of the opinion that “the political criteria defined at Copenhagen have been essentially enshrined as a constitutional principle” and that Article 6 TEU also comprises the protection of minorities. Indeed the practice of the Commission and the Council vis-a-vis candidate states confirms this view; nevertheless, a corresponding practice regarding member states is missing. The fact that the member states’ constitutional traditions with regard to minority protection differ significantly does not exclude the possibility that minority protection may be considered a common principle of European law. Neither does the fact that one-fourth of the member states have not yet ratified the Council of Europe’s Framework Convention for the Protection of National Minorities (FCNM). The Court of Justice has never considered itself limited to establishing common principles of law only at the lowest common denominator amongst the member states. Thus far, the Court has not taken a clear-cut position on the status

¹² Source (February 2, 2008):
www.eurac.edu/NR/rdonlyres/FA123734-21DE-47E6-BC28-1C41CB5278B9/0/dichiarazione_last.pdf

of minority protection under EU law; it has, however, recognized the protection of minorities as a “legitimate aim” of national policies. It is crucially important to enshrine the protection of minorities as one of the EU’s basic values in order to give substantive meaning and concrete effect to the “EU-speak” about inclusion, tolerance, and diversity. Article 2 of the constitutional treaty as drafted by the European Convention in 2003 lists the values of the current Article 6 TEU and describes them as being “common to the member states in a society of pluralism, tolerance, justice, solidarity and non-discrimination.” During the IGC at the end of 2003, the Italian Presidency went even further, proposing the amendment of Article 2 to include the following provision: “... respect for human rights, including the rights of persons belonging to minority groups.” Including minority protection among the EU’s constitutional values with such explicit language would be of considerable symbolic importance and would help to augment legal certainty. Even so, it would still leave the Union without a legislative competence in the area of minority protection. Neither would it extend the de facto scope of the sanctioning procedure as laid out in Article 7 TEU. The thresholds of this procedure are very high, and a material and persistent violation of basic minority rights already could trigger a sanctioning procedure under the existing circumstances.

(...)