THE PRINCIPLE OF NON DISCRIMINATION
AND THE PROTECTION OF NATIONAL MINORITIES
IN THE EUROPEAN JUDICIAL SPACE

Jana Maftei*
Varvara Licuța Coman**

Abstract
This study aims at analyzing and scientifically interpreting the provisions in this matter that are comprised in the European documents, reflecting the manner in which the European legislation and the mechanisms created by these regulations offer protection to national minorities by applying the principle of non discrimination.

Key words: national minorities, non discrimination, European Union.

1. Introduction
The subject of the human rights in general, and the issue of the individual rights belonging to minorities in particular, has represented a constant and progressive preoccupation within the European Union. The activity of the European Union in fighting against discrimination has been materialized in establishing an elaborate and efficient legislative frame.

In the present paper we will try to clarify the meaning of some terms, concepts and notions and to present the content and special juridical dimension specific to the protection of the national minorities in strong connection with the application of the principle of non discrimination.

2. Reference marks regarding the concerns of prevent discrimination and protection of minorities
The socio-judicial and political context was marked by significant developments in the last twenty-five years which generated the acute necessity to establish an efficient legislative frame to realize the fundamental political standards of the European Union: ensuring compliance with human rights and promoting these rights, underlining equality and recognizing the principle of non discrimination.

In the above mentioned period of time, the historical horizon of Europe was marked by new dimensions wanting to prefigure the success of

* University Lecturer Dr., “Danubius” University from Galati, Law Faculty, janamaftei@univ-danubius.ro
** University Assist PhD in Progress, “Danubius” University from Galati, Law Faculty, varvara.coman@univ-danubius.ro
its grandiose project: the integration—expressing the common desiderata through one voice in terms of liberty, democracy, respect of the human fundamental rights and liberties.

In the context in which starting with 2007 the European Union comprises 27 member states and the linguistic landscape includes 23 official languages, two aspects have been underlined: on the one hand, as a result of this extension without precedence a series of institutional reforms have been undertaken and, on the other hand, in the spirit of the common values, the Union had to adapt its policies according to the specific of each of the member states.

But this project will be completely and truly realized only in the context in which it will be able to maintain and promote unity through diversity, the cultural accomplishments of the Europe being tightly connected to the linguistic and cultural patrimony of each member state.

Taking into consideration the above mentioned, it can be stated that Europe is facing a major challenge with social implications, namely creating a legislative frame that would ensure the maintenance of balance and democracy by ensuring a full participation of each citizen to the economic and social life, promoting the universality of the human condition and legal rights connected to it and the practical application of the principle of non discrimination.

The history of the concerns related to the protection of minorities is characterized by the evolution in the regulations from particular to general, initially aiming at the ethnical or religious minorities so that later, the judicial norms have accomplished a universal character. At present, there are many institutions and legal norms in this domain.

The notion of minority and minority rights are closely interdependent with the principle of non discrimination and this is the reason why this study will present a parallel analysis of these two. Being in essence the negative form of equality of rights, the non discrimination has progressively imposed itself as an essential element in the treaties and declarations of human rights, being ambivalent. The concept expresses, on one side, the personal right of a human being, inherent to his/her nature and on the other side a constitutive element of the national, European and international judicial frame.¹

It can be asserted that the spread of nationalism in the 19th century generated the development of the notion “national minority” in the international law. Ernest Gellner thought that “nationalism is ‘a political principle which maintains that whatever principles of authority may exist between people depends on their legitimacy on the fact that the members of the group concerned are of the same culture’”.²

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In Europe, prior to the 19th century there was the idea according to which humankind was organized into nation politically and from the point of view of the state in nations regarded as being groups united by language, history and the common traditions and that each nation could, in a legitimate manner, solicit the establishment of its own state, idea that was never accepted as a judicial basis for the organization of an international society.

Given the fact that the geo-political reality was not the same with the ideals of the political leaders and in order to balance these discrepancies, at the beginning of the 20th century the central and eastern European states had to commit to respecting “the national minorities” living on their territory, allowing them to keep their cultural features.

At the international level, a number of treaties in this context were concluded, context in which the judicial valence of the concept of “minority” was strongly connected to ethnically conception of the nation, the minorities being considered to be parts of a nation that they created but in a “wrong state”, meaning by this a state that represented another nation than theirs. The terms “nation” and “minority” have appeared in similar context to the aces of a coin and this fact is expressed by the expression “national minorities”.

The practice of the states mentioned at the beginning of the 20th century the existence of bilateral conventions recognizing the rights of some minority groups. In 1930, in a Consultative opinion issued on July 31st regarding the emigration of the Greek-Bulgarian communities, the Permanent Court of International Justice decided based on the regulations included in the conventions concluded at the end of the two wars between the two states, managing to shape the frame of the notion of community in the following terms: “the existence of a collectivity of people living in a country or commune, having their race, religion, language and traditions and are united by the identity of this race, these religions, this language and these traditions by a feeling of solidarity, in order to preserve their traditions, to maintain their cult, ensure the instruction and the education of the children according to the genius of their race and help each other”.

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3 Regarding the development of the notions of “nation” and “people” at the end of the 18th century, see for example Hobsbawm, E.J., Nations and Nationalism since 1780: Programme, Myth, Reality, Cambridge University Press, United Kingdom, 1990
6 Noiriel, See, La tyrannie du national. Le droit d’asile en Europe (1793-1993), Paris, Calmann-Lévy, 1991, pp. 95-100; Ringelheim, Julie, Considerations on the International Reaction to the Kosovo Crisis, in Revue belge de droit international XXXII(2) 1999, pp. 475-544
There were also other attempts of clarifying this concept (in 1950, the Sub-Commission on Prevention of Discrimination and Protection of Minorities, the Report of the Francesco Capotorti Sub-Commission in 1976, the J. Dechenes Report in 1985 etc.) before the Commission of human rights, but none of these was adopted.

Along time, the governments of all states have been confronted with the problems of national minorities. Despite this fact, on the international scene, the main instruments for protecting the human rights didn’t provision, until 1990, special norms regarding this category. There is only one exception by inserting a provision in the International Covenant on Civil and Political Rights that stipulates in article 27:

“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.”

The Universal Declaration of Human Rights on December 10th, 1948, prior to the adoption of the two international covenants approached the issue of minorities only in the content of the general rule of equality of rights for everyone, irrespective of their race, color, sex, language, religion, political opinion etc., national or social origin, wealth, birth or any other statute.

Convention on the Elimination of All Forms of Racial Discrimination in 1965, adopted under the aegis of the UN, establishes in article 1 the meaning of the collocation “racial discrimination” as being “any type of distinction, exclusion, restriction or preference based on race, color, descent or national or ethnic origin, which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life” but does not provision specific or separate rights for minorities.

At an European level, the attempts to protect the personal rights of those being part of national minorities have been concretized for example in the obligations of the states such as the ones inserted in the Conference on Security and Cooperation in Europe- Final Act in Helsinki 1975, according to which: “The participating States on whose territory national minorities exist will respect the right of persons belonging to such minorities to equality before the law, will afford them the full opportunity for the actual enjoyment of human rights and fundamental freedoms and will, in this manner, protect their legitimate interests in this sphere”.

After 1990, the states’ interest for the peaceful and constructive solving of problems involving the minorities has materialized in a series of

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documents or projects within the Europe Council, each defining in a way or another the notion of minority, such as the *European Charter on Regional or Minority Languages*, adopted in Strasbourg in 1992. They were prior to the adoption in 1995 of the only multilateral judicial document in this domain, the *Framework Convention for the Protection of National Minorities*. In its text there is no clear explanation of the meaning and the scope of the term in discussion, the application of the provisions in the Convention generating the necessity to delimitate the categories of people to which the norms in the convention are addressed. Some states have adopted definitions while others have presented the European Commission lists of ethical groups the normative act would apply to.

3. The protection of rights of people belonging to national minorities in the European Union

The European construction is based on democracy and compliance with human rights. Representing values and fundamental principles of European construction, the equality of rights and non discrimination are based exactly on the existence of diversity and the necessity of ensuring an equal treatment for everyone, avoiding discrimination in exerting the fundamental rights and liberties based on their diversity.\(^\text{10}\) As a basic concept of the socio-judicial and political discourse, respecting the human rights at European level is one of the fundamental political standards of the European Union, expressly formulated by the European Council in Copenhagen in 1993.\(^\text{11}\)

Although none of the community treaties included provisions with specific character but not general either regarding the protection of the human fundamental rights, starting with the Maastricht Treaty it is stated that “The Union shall respect fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms signed in Rome on 4 November 1950 and as they result from the constitutional traditions common to the Member States, as general principles of Community law.”

The evolution of European regulations continued with the express inclusion of some provisions in the Amsterdam Treaty that gave the EU the competence in what concerns the fight against discrimination on criteria such as race, ethnical origin and faith that in fact represent the constitutive elements of the judicial and academic definitions of national minorities. These criteria represented the basis of the initiation of the community action.

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plan for fighting against discrimination between 2001-2006, starting with the adoption of Council Decision 2000/750/CE that had three main objectives: the assistance in analyzing and evaluating the degree of discrimination and the nature of discrimination existent in the EU, as well as the efficiency of measures for combating discrimination; help building the capacity of the competent actors in combating discrimination in member states and, at the level of the EU; promoting and disseminating values and practices in combating discrimination to those applying the law and to the opinion makers. The ethnical origin and religion represent, in the same time, the central element of the Directive 2000/43/CE on equal treatment, document that ensures the implementation of the principle of equal treatment among individuals.

Directive 2000/78/CE on equality in employment and occupation and implements the principle of equal treatment of employees and in schools, irrespective of the sexual orientation and age but includes religion and faith among these criteria, mentioned as a feature that can characterize a national minority group. Actions developed aiming at promoting and respecting the rights of the national minorities and diminishing the social exclusion of these minorities were comprised in the PROGRESS Program 2007-2013 for employment and social solidarity.12

The Charter of Fundamental Rights of the European Union proclaimed by the Council, Parliament and Commission, signed on December 7th 2000, adopted on December 12th 2007, acquiring judicial character together with the coming into force of the Lisbon Treaty on December 1st 2009, incorporated in the primary law of the EU, comprises important markers of protection and guarantee these rights, by the EU institutions and by the member states. The dispositions of article 22 in its content impose the respect of cultural, religious and linguistic diversity. This article follows the one regarding the interdiction of discrimination of any type, including the one based on reasons such as race, color, ethnical origin, language, religion. If these elements represented the basic criteria for defining a minority group, in article 21 there is a provision that expressly interdicts discrimination based on belonging to a national minority. We have to underline the fact that the Lisbon Treaty reasserts the principle or protecting the human rights as a fundamental principle of the Union and its adoption created the legal base for the protection of minorities at a European level. The necessity of knowing the problems regarding the respect of human rights in the EU was the basis of the Council’s Decision on December 13th 2003 establishing a specialized institution that would develop the European

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Monitor Center for Racism and Xenophobia and four years later was established, in accordance with Regulation no.168 on February 15th 2007 of the Council, The European Union Agency for Fundamental Rights (FRA). According to article 4 in the Regulation, the Agency’s tasks are the following:

a. collecting, recording, analyzing and dissemination of information and pertinent data, objective, reliable and comparable including the results of research and control that are communicated by the member states, the EU institutions as well as the organs and agencies of the EU, research centers, national organisms, nongovernmental organizations, third countries and international organizations and, especially, competent organs of the Council of Europe;

b. establish, in cooperation with the Commission and the member states, methods and norms for ameliorate the comparability, objectivity and reliability of data at European level;

c. realize or facilitate research and scientific investigation, preparatory and feasibility studies or to collaborate to these including, when necessary and at the Parliament’s request, the Council or the Commission, on condition that this request is compatible with its priorities and work schedule.

The activity of the Agency of fundamental rights runs according to a multi-annual frame- program and to the provisions of the Charter of Fundamental Rights of the European Union and the Anti discrimination Directives. Through Council Decision of February 28th 2008 the Multi-annual Frame for 2002-2012 was adopted, including the discrimination of people belonging to minorities among the theses. In the report13 made following a survey at a European level (EU-MIDIS, The Survey of the European Union on Minorities and Discrimination) which was aimed at the degree of implementing the European Directive on Racial Equality, because the ethnical and national minorities, as well as the immigrants are the most vulnerable categories in what concerns racism, xenophobia and intolerance, many parameters were analyzed: the experience of discrimination as a gypsy, the reports of discrimination, the awareness of their rights and the mechanisms of complaint, the perception of discrimination, the experience of a crime and racial crimes, reports of crimes by the victim, contact with the law enforcement authorities and the custom authorities. According to the results, the medium average of discrimination (according to the parameters analyzed) is 47%, almost half of the gypsy population was affected by the ethnical discrimination, the highest level being recorded in the Czech Republic (64%) and the lowest in Romania and Bulgaria. Analyzing the answers of the participants at the survey, the conclusion is obvious: there are states in which the phenomenon of discrimination is widely spread (Poland,

Czech Republic and Hungary) and states in which, according to the data in which the values are lower. This doesn’t mean necessarily a success of implementing the legislative measures or the campaigns against this type of treatment towards the national minorities but more that the victimized population does not have the real perception of the values of fundamental rights and liberties given by the legislation, did not benefit from specialized help or counseling in this sense or just do not care, considering that this treatment is something inherent to their existence (*modus vivendi*).

Although the survey concluded that the gypsies are confronted with the highest levels of discrimination, members of other minorities are also victims or some cats of discrimination in Europe. According to the mentioned report, the Muslim minority for example accuse discrimination based on ethnic reasons.

By the Resolution of the European Parliament on January 14th 2009 on the situation of the fundamental rights in the EU between 2004-2008, the attention is focused on the difference between the protection of the minorities and the anti discrimination policies but attracts attention also on the fact that in the community policy there are no common criteria or minimal standards for the rights of national minorities and that there is no common definition at the EU level for the ones belonging to a national minority. Also through this resolution was recommended the formulation of such a definition at a European level, based on Recommendation 1201 of the Council of Europe (1993); the definition of the term “national minority” represented and still represents an object of controversy, reason for which Georges Scelles asserted that: “...it is impossible to give a definition of this point”.14 Supporting this initiative, we propose the following definition: “by national minority we understand a representative group of people on the territory of a state, but inferior as a number to the majority population, whose members have the citizenship of that state but also ethnical features, religious, linguistic and cultural features that are different from the majority population”.

Within the EU measures for promoting the fundamental rights among which the program The European Initiative for Democracy and Human Rights that will, between 2007-2013 realize a detailed analysis of the stage in compliance with the human rights and democracy from the perspective of the global context, focusing on four aspects, among which the fight against racism and discrimination.

If Europe today could be characterized in a phrase, probably the most appropriate would be to use the following quote: “*Europe is a ethnical and cultural mosaic (...) Under the cover of national diversity there are additional layers, the ones of regional identities strongly connected in*

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history, the religious pluralism and a large number of ethnical or national minorities in almost every state. Being differentiated according to the dominant national cultures, they want the cultivation of their own identity, promoting traditions and using the maternal languages in all life domains”.15

Both the problematic of the national minorities as well as the discrimination represent a priority for the European Union. The efforts for ensuring the compliance and the promotion of human rights in general and national minorities in particular, started with the adoption of the Maastricht Treaty have known a special intensification especially after 1990, as consequence of the fall of the Berlin Wall and also with the decision to extend the EU towards the central and eastern part of Europe and imposing the candidate states to fulfill the criteria of respecting and protecting the minority rights.

The EU through its institutions has developed an intense activity in view of reducing the discrimination of the national minorities. The Parliament, the Commission and the Council have opened the way to creating a common judicial space for the national minorities by instituting a legislative frame that is very complex and efficient in achieving this objective.

The studies have indicated that different ethnic communities can live peacefully, sharing the same region or the same state as long as the diversity is accepted. But in reality, the situation is different. Respecting the differences, in modern Europe has two aspects: on one side, the consecration of non discrimination and equality of rights in the national legislation and international conventions and on the other side, the numerous cases of indifference by the community or the lack of the responsibility of public authorities for satisfying the necessity of the minorities, the seriously breaching the international protection standards of minorities and persecution.

4. Conclusions

Synthesizing the abovementioned, it can be asserted that the cultural pluralism has to be founded of the respect for the differences which implies the equal treatment, non discrimination but also promoting an active protection. Europe is facing a paradox and a complex process at the same time: the more the physical and judicial borders are eliminated, the more the necessity of promoting the feeling of belonging to a community is felt more acutely, the acceptance of diversity, of the interaction between cultures having a special importance. Although there was noticeable progress in implementing the protection policies for national minorities, we cannot argue that for this reason Europe has become a heaven.

15 http://www.gfbv.it/3dossier/eu-min/min-guide.html
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