

PLACE NATIONAL MINORITIES IN THE MANAGEMENT SYSTEM OF THE EUROPEAN UNION

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Abstract

This article is analytical review of selected issues from national minorities in the legal system of the European Union. Thus, it is very likely that the emergence of new states on the map of Europe in the early 20th century caused the international problem, which was the relationship of certain states with their citizens belonging to national, ethnic, language and religious minorities. The Charter of Fundamental Rights (CFR) was proclaimed together with the Treaty of Nice in February 2001, as a document with the nature of a political declaration, constituting an inherent part of the Treaty signed in the year 2004, establishing Constitution for Europe (in the form of the second part of European Union Constitution). The catalog of rights protected by CFR is extensive and they are of heterogeneous nature. The Charter combines both the rights that can be found in other international documents e.g. European Convention for the Protection of Human Rights and Fundamental Freedoms. The mass migrations of economic background at the turn of the 19th century lead to the formation of ethnically foreign population groups in many countries. Therefore, the foregoing study will discuss the most significant questions concerning in: the notion of “ethnic minorities” in the doctrine of international law; the issues of institutional and legal warranties of protecting national minorities in the European Union; the issue of jurisdictional mechanisms of protecting national minorities in the European Union.

Key words: minorities, European Union, institutions, rights.

Classification JEL: M12 – Personnel Management; M29 – Other; M140 Corporate Culture, Social Responsibility.

1. Introduction

Since 1989, minority protection has become a priority of international organizations and a major issue in international relations. 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 favorable protection of minorities, with the protection based on the existence of specific rights belonging solely to the minorities. It should be emphasized during the Cold War, minority rights were *de facto* considered to be a domestic issue. Internationalization of minority rights was prevented by the bipolar structure of the global system. The protection of an individual in the global 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 section. Management in business and organizations means to coordinate the efforts of people to accomplish goals and objectives using available resources efficiently and effectively. Management comprises planning, staffing, organizing, leading or directing, and controlling an organization or initiative to accomplish a goal. Resourcing encompasses the deployment and manipulation of human resources, financial resources, technological resources, and natural resources. Managing in my opinion this is one of the key current concept targeting the public sphere, of engaging actors in the different areas and at different levels, the implementation of joint activities at the interface with the public. In this sense, the role of minorities in the public sphere enforces a thorough analysis of their place in the legal system of the European Union. In turn, “multi-level governance” is where to solve certain issues requires cooperation of state actors, local and private sector actors and social. The term “globalization” *ex definitione* came into popular

usage in the second half of the 1980s in connection with the huge surge of Foreign Direct Investment (“FDI”) by transnational corporations (“TNSs”). P. J. Simmons and Ch. de Jonge Oudraat emphasize: “New players, thorny problems, spillover effects, and the magnitude of cross-border flows together inflate the difficulty of coherent action at almost all levels of international affairs. [...] At the same time, these offshoots of escalating interdependence strongly influence the direction in which globalization will move either toward tighter teamwork in meeting multiple challenges or toward division the stakes are rising,” (*Simmons & de Jonge Oudraat, 2001, p. 8*). G. Z. Peng and P. W. Beamish in their article entitled: “*The Effect of National Corporate Responsibility Environment on Japanese Foreign Direct Investment*” wrote that corporate governance is an increasingly important factor which impacts FDI decisions (*Peng & Beamish, 2008, p. 677*). D. Kugelmann in his article entitled *The Protection of Minorities and Indigenous Peoples Respecting Cultural Diversity* suggested: “When the nation state developed, the human beings living in a state were seen under political criteria as a nation. In some state traditions the term ‘nation’ carries connotations of a community shaped by common descent, culture and history and often by a common language as well,” (*Kugelmann, 2007, p. 235*). 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. In my opinion the protection of minority members 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 European Union (EU) and its institutions consider minority rights, alongside human rights, as a part of truly democratic and politically stable societies (*Preece, 1997, p. 349*). It is noteworthy that the EU adopted different sets of criteria for its “old” members who joined the union during the Cold War and for the new aspiring members of the post – Cold War era.

Every European state that has more than a million inhabitants features minority groups; only “mini-states” such as Luxembourg, Malta, San Marino and so forth do not have minorities. Almost three quarters of European minorities reside in the EU, although two quarters only since the accession of Eastern countries to the Union in 2004. In the 15 old EU-Member States the situation varies from state to state. The percentage of people belonging to minorities in these states varies from 1% in Germany, to 20% in Spain. Furthermore, Belgium, with its three language communities, has a minority segment of 90%. The number of minority groups is very different in these states. Most states have between three and six groups, while in Italy there are twelve. Even France and Greece, which for the most part negate the presence of minorities on their territories, have seven. The 12 new States which became members of the EU in 2004 and 2007 have, except for Malta and Cyprus, at least four minority groups each, but most of them have ten. Some Eastern countries are relatively homogenous national states, such as Poland and Hungary, in which the percentage of people belonging to minorities is only 3-4%, but other states have a percentage of 10-20%, while Estonia and Latvia have 30-40%. In February 1992, twelve Western European states signed the Treaty of European Union (also known as the Maastricht Treaty, TEU)², which stated that the signatory states confirmed “their attachment to the principles of liberty, democracy and respect for human rights and fundamental freedoms and the rule of law”, and resolved to carry out a coherent foreign policy and security policy “reinforcing European identity and its independence”. M. Dybowski, in turn, defines “fundamental rights” as “initially belonging to the sphere as different as possible from the Community law (*Dybowski, 2007, p. 71*). They are to distinguish the legal system “claiming” being competent to set the Community law and

² Treaty of European Union (92/C 191/01), Official Journal of the European Communities, eur-lex.europa.eu/JOHtml.do?uri=OJ:C:2008:115:SOM:EN:HTML

they are – in the understanding of a domestic court – of strictly constitutive nature, as formulated in the Principal Statute (Constitution). The only coherent definition of “fundamental rights”, adopted during the works of Community institutions was presented in the explanatory declaration to the report of Legal Community of the 28th day of February 1973, drafted by the Member of European Parliament L. Jozeau-Marginč. It reads: “the term of ‘fundamental rights’ is applied to rights and freedoms supported by positive guarantees, these rights and freedoms can be formulated in writing, within constitutions, or form a part of continuous constitutional tradition, whose survival is secured by the legislator and the jurisdiction.”³ Art. 6 pass. 1 TEU provides that the general principles of Community law are the fundamental rights originating from the common constitutional traditions of the Union Member States, whereas the European Commission in its bulletin of the 13th day of September 2000 on the CFR decided that “the main purpose of fundamental rights is making it possible to control the existing authorities on every political level.”⁴

At present the European continent is in fact differentiated ethnically linguistically, culturally and religiously. National minorities are present in the areas of almost all countries. It is worth adding that in accordance with various estimations national minorities constitute from 9.6% to 16.2% of European population and inhabit from 8% to 19.3% of the continent’s surface (*Porębski, 2006, p. 52*). Therefore, the issues of acceptance and rights of national minorities should not be treated incidentally. Unfortunately, it happens so in many EU countries, which can be confirmed for instance by lack of statistics regarding this domain in many states. Nevertheless, such data are not gathered in: Belgium, Denmark, the Netherlands, Spain, Finland, Ireland and Germany, whereas France and Greece do not recognize the existence of national minorities in their territories. What is interesting, in the contemporary Europe the only states where national minorities do not occur are Iceland and Portugal (*Janusz, 2011, p. 101*). Meanwhile, in most of these states the law on personal information protection is indicated as the cause of statistic gaps. Data obtained from these countries are of only approximate character and they were collected through enforcement by EU in the form of obligation to observe the European Charter of Regional or Minority Languages⁵, as well as of the European Framework Convention on National Minority Protection⁶. In the context of the issues under discussion it is worth noticing that in other countries the number of persons included in minorities in mid 1990s ranged from 0.4% of the total state population (Germany) to 47.5% (Latvia). Thus, it can be assumed to be highly probable that in absolute numbers the least persons belonging to minorities lived in Slovenia (11 747 persons), in Ireland (30-42 thousand persons) and Sweden (45 thousand.), and the most – in the European part of Russian Federation (19 963 persons) and in Ukraine (13 842 persons), (*De Witte, 2000, p. 40*).

The smallest number of minority groups was in turn in Ireland and the Netherlands – one group in each of these countries, whereas the largest number of these groups was in Russia – 43 groups and Romania – 21 groups. It was only at the turn of the 20th century the ethnic image of Europe changed. It was affected in. a. by the systemic and territorial changes in Europe that took place after the year 1989, ethnic conflicts in 1990s, subjective treatment of ethnic minorities in international and domestic relationships. Undoubtedly, protecting the rights of persons belonging to ethnic minorities has always constituted one of the debatable questions both in interstate and international relationships. An important step towards

³ The European Parliament, Working Documents 1972-73 of the 6 th day of March 1973, PE 30. 941/fin, Doc. 297/72.

⁴ COM (2000) 559 final, p. 5.

⁵ Dz.U. (Journal of Laws), No. 137/2009, item 1121.

⁶ Dz. U. (Journal of Laws), No. 22/2002, item 209.

extending the protection of minority groups outside the exclusively religious area was the Congress of Vienna in 1815 that is how the Congress reflected the new image in the form of the subject set of issues. Besides, the Vienna congress guaranteed in. a. the rights of Polish people which were under the rule of Prussia, Austria and Russia. Disintegration of the bipolar system, as well as transformations taking place in the world and in Europe after the year 1989 caused the formation of a few ethnic minority rights protection systems in Europe.

Three causes of the formation of national minorities are usually mentioned: historical, political and sociological. The historical reason is the result of formation of states in Europe on territorial-ethnic basis, i.e. by means of unifying the territories inhabited by related ethnic-cultural tribal groups. What is interesting, the superior political cause is constituted by international decisions taken especially after the end of military conflicts. Consequently, it seems that during peace conferences and in result of international settlements the borders of states or colonies were established, considering the interests of particular states making such decisions. Therefore, the ethnic and language borders, as well as the needs of inhabitants of particular territories were disregarded. The mass migrations of economic background at the turn of the 19th century lead to the formation of ethnically foreign population groups in many countries. Thus, it is very likely that the emergence of new states on the map of Europe in the early 20th century caused the international problem, which was the relationship of certain states with their citizens belonging to national, ethnic, language and religious minorities. It should be noted that during a June 1990 meeting organized by the Conference on Security and Cooperation in Europe (CSCE), which included both the old and potential members of the EU, as well as the United States and Canada, and which took place in Copenhagen and focused on the Human Dimension of the Organisation for Security and Cooperation in Europe (OSCE), the participants adopted the Document of the Copenhagen Meeting (hereafter called the 1990 Copenhagen Document). However, this document contained provisions to ensure the rights and freedoms for individuals belonging to national minorities. It did not define a meaning of “national minority” and did not specify how it should have been determined whether the individuals were qualified as a national minority. The 1990 Copenhagen Document’s section IV (32) states that “persons belonging to national minorities have the right freely to express, preserve and develop their ethnic cultural, linguistic or religious identity [...] free of any attempts at assimilation against their will.”⁷

In 1992 the OSCE installed a High Commissioner on National Minorities (HCNM). His task is to prevent conflicts. The HCNM is part of the system of cooperation and consultation of the OSCE Member States, dealing with the legal and political situation of national minorities as a whole. In the EU for the first time the postulate of observing the rights of minorities was formulated in the so-called Copenhagen criteria. The Copenhagen criteria – the criteria the fulfillment of which enables a European state to apply for membership in the European Union. It is worth adding that the European Council summit in Copenhagen that took place between 21st and 22nd day of June 1993, specified the following criteria for an aspiring state: achieving the stability of institutions guaranteeing democracy, rule of law, observing human rights, as well as respect and protection for the minorities; functioning of

⁷ Document of the Copenhagen Meeting of the Conference on the Human Dimension of the CSCE, 29 June 1990, www.minorityrights.org/762/international-instruments/document-of-the-copenhagen-meeting-of-the-conference-on-the-human-dimension-of-the-csce.html. Participating countries were Austria, Belgium, Bulgaria, Canada, Cyprus, Czechoslovakia, Denmark, Federal Republic of Germany, Finland, France, German Democratic Republic, Greece, the Holy See, Hungary, Iceland, Ireland, Italy, Liechtenstein, Luxembourg, Malta, Monaco, the Netherlands, Norway, Poland, Portugal, Romania, San Marino, Spain, Sweden, Switzerland, Turkey, Union of Soviet Socialist Republics, United Kingdom, United States of America, and Yugoslavia.

market economy, existence of the potential that could keep up with the competition and the Union market forces, ability to accept the obligations resulting from membership, including fulfilling the goals of the Political, Economic and Currency Union; the independent criterion - acceptance of the state will not inhibit the European integration.

In connection with the planned extension of EU, the summit of the European Council in Copenhagen in 1993 defined the criteria, meeting of which was to enable the European states to apply for membership. In the first group of the criteria the rule of law was indicated, as well as the stability of institutions guaranteeing democracy, observing human rights and protection of minorities. In spite of the fact that the criteria contained only a general mention of minorities, however, in the pre-accession reports the obligations in this respect were distinctly referred to national minorities. At these criteria the policy of “double standards” was revealed. The duty of protecting national minorities was addressed to the aspiring states, but it was not required from member states. In effect, some of them (France and Greece) still ignore the existence of national minorities in their territories. In practice, the Copenhagen Criteria were legitimized by reference to the norms previously elaborated by the Council of Europe (COE) and OSCE. I think that these norms were poorly defined and highly debated among the EU members and have not been tightly followed by the member states of these organizations. For example, Greece and France did not recognize the existence of minorities at all. In addition, these norms contain conflicting provisions. Although both the COE and the OSCE kept an emphasis on the individual aspect of minority rights, they also claimed that minority rights could be exercised only collectively (*Hughes & Sasse, 2003, p. 34*).

I wish to emphasize that the national minority problem became one of the five main components of the EU's 1993 Stability Pact⁸. In 1995, the COE adopted a Framework Convention for the Protection of National Minorities (hereafter called the 1995 Framework Convention).⁹ My point of view is that the 1995 Framework Convention did not set national minority, but throughout the text it uses this term to refer to certain ethnic, cultural, linguistic, and religious groups, which are presumably in a disadvantageous position vis-a-vis other dominant groups. The 1995 Framework Convention uses both group- or individual-based terminology and requires protection of minorities and individuals belonging to minorities. Some countries did implement minority protection policies after the EU started to exercise pressure on them (*Dorodnova, 2000, p. 23*). It would be oversimplification to assert that EU pressures led directly to minority protection policies, because there were other factors in place that could contribute to changes in state policies. For instance both Estonia and Latvia view national minorities as a threat to their domestic cultures and prefer assimilatory policies toward them. For the Russian minorities in Estonia it is still more difficult to get citizenship than for the Turks in Germany. For instance, in the mid-1990s the Social Democrats of Romania allied with nationalist parties during the parliamentary elections. This enabled the nationalist parties to take part in the Romanian parliament. When the EU hinted to Romania that this development would be an obstacle for Romania's EU membership, the ruling Social Democrats turned their back on the nationalist parties.

⁸ The European Union: Human Rights and Fight Against Discrimination, pamphlet no. 14 of the UN Guide for Minorities, www.ohchr.org/Documents/Publications/GuideMinorities14en.pdf.

⁹ Council of Europe, Framework Convention for the Protection of National Minorities, Strasbourg, 1995, conventions.coe.int/Treaty/EN/Treaties/Html/157.htm. FCPNM is open to both member and nonmember states. On the ratification status, see: “The Council of Europe's Framework Convention for the Protection of National Minorities,” pamphlet no. 8 of the UN Guide for Minorities, www.ohchr.org/Documents/Publications/GuideMinorities8en.pdf, accessed 21 January 2009; and Council of Europe Parliamentary Assembly, Recommendation 1492 (2001): Rights of National Minorities, assembly.coe.int/Documents/AdoptedText/ta01/EREC1492.htm.

In the context of the ongoing discussion is worth mentioning here that in November 1996, a new government without nationalist members started to function in Romania. What is important the Democratic Alliance of Magyars in Romania (UDMK) participated in the government between 1996 – 2000. In 1997, a Department for the Protection of National Minorities, attached to the prime minister, was headed by a member of the UDMK. As a result, Romania's relations with the EU improved, and in 2007 Romania was allowed to join the EU. Moreover, even active political participation of the minority party and pressures from the EU did not lead to changes in some key constitutional provisions of Romania regarding minorities. For instance, Romania still does not grant characteristic status to any ethnic group. As a consequence the constitution of Romania guarantees the development of ethnic identity to individuals belonging to the national minorities. However, Bulgaria refuses to apply international minority rights provisions to its Muslim citizens. In addition to parliamentary elections in 2001 resulted in the establishment of a coalition government that included the National Movement and the Movement for Rights and Freedoms (DPS), a party supported mainly by Bulgarian Turks. What is more the DPS had been banned earlier. The Bulgarian state still does not officially recognize minorities. Bulgaria was allowed to join the EU in 2007.

Undoubtedly, the present protection system for persons belonging to national minorities is determined first of all by the Lisbon Treaty that has been in force since 1st December 2009¹⁰. It does not contain regulations concerning national minorities, but in this matter it refers to the Charter of Fundamental Rights (CFR) signed on the 7th day of December 2000¹¹. CFR, like United Nations Declaration of the 10th day of December 1948¹² bans any discrimination, in. a. on the basis of race, skin color, ethnic origin, genetic features, language, religion, membership in an ethnic minority, birth. EU heralds respecting cultural, religious and language diversity. A significant breakthrough in guaranteeing fundamental rights to an individual is giving binding force by virtue of Lisbon Treaty to CFR with regard to all the Union states, including Poland and Great Britain. The EU citizens will be able, referring directly to the Charter, to claim the rights they are entitled to on the basis of European Communities (EC) laws before EU courts, as well as the courts of Member States. The Charter strengthens the EU axiology, because it constitutes the catalog of modern democratic states and protects their internal sovereignty (in sensitive areas CFR refers to domestic regulations). It is worth adding that the CFR provisions simultaneously prove that its authors were also aware of the implications resulting from the litigation around the universalism and relativism of human rights. For the Preamble reads as follows: „The Union contributes to maintenance and development of these common values with respecting the diversity of cultures and traditions of European nations, as well as the national identities of member states and organization of their public authorities on the national, regional and local level”. Thus, in this idea we are dealing both with a compliment to universalism (community of values), and to relativism (historical, cultural and national differences).

Due to the imprecise determination of national minorities in their practical functioning of Europe, there is still a need to undertake research in this area. In this paper I take up the thesis main that national minorities integrate social, legal and economic aspects of development issues European countries. Also answer the question whether this principle was

¹⁰ Dz.U. (Journal of Laws), No. 203/2009, item 1569.

¹¹ Journal of Laws EU, 2007, C 303/01. The binding force of the document was granted to it by the Lisbon Treaty signed on the 13th day of December 2007 (Journal of Laws EU, 2009, C 07/306 of 17th December 2009), which came into force on the 13th December 2009.

¹² United Nations General Assembly Resolution 217 A (III).

confirmed in organizational activities in European countries? In order to find answers to the research questions will use various methods of research. Against this background, specially meaningful dogmatic method, which allows the analysis of the functioning of the most important issues of national minorities in Europe. As a result, developing the work I use primarily by analysis firm. I have been used primarily acts which were used to verify the auxiliary hypotheses.

In my assessment proclaiming CFR was as much of importance that it responded to the need of regulating fundamental rights of an individual in the situation of lack of a worked out doctrine of these rights in the EU system. In a sense it was a compromise answer, considering various views with reference to the matter of human rights in European societies, a manifestation of moderation towards the extension of 2nd generation human rights catalog, as well as fears of growing community structures” (*Menkes, 2001, p. 27*). As the above survey shows, the variety of ideas about ethnic minority protection in EU is relatively big. This raises questions about how national minorities should be defined and protected and what role EU and its institutions have in this process. Therefore, the foregoing study will discuss the most significant questions concerning in. a. the notion of “ethnic minorities” in the doctrine of international law; the Minority Protection in the EC/EU Law; the issues of institutional and legal warranties of protecting national minorities in the European Union; the issue of jurisdictional mechanisms of protecting national minorities in the EU.

2. The minority protection in the EC/EU law

The EU has put in place a legal framework to fight discrimination, racism and xenophobia and contributes financially to programmes that support activities aimed at combating these phenomena on the ground. The EU raises minority issues in its political dialogues with third countries and cooperates actively at United Nations (UN) fora to promote and protect the rights of persons belonging to minorities. According to the TEU¹³, the “Union is founded on the value of respect for human dignity [...], equality [...] and respect for human rights, including the rights of persons belonging to minorities” (Article 2 TEU). Article 3 TEU commits the Union to promote these values, combat social exclusion and discrimination, respect its cultural and linguistic diversity, safeguard and enhance Europe’s cultural heritage and uphold and promote its values in its relations with the wider world. The Treaty also states, in Article 6 TEU¹⁴, that the Union recognises the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union, including the prohibition of discrimination on the basis of membership in a national minority (Article 21 of the Charter). Similarly, during the process of adoption of the Charter of Fundamental Rights of the EU the member states abandon the variant suggested by the European Parliament to include specific rights of minorities (which would go beyond the non-discrimination) into the catalogue of fundamental rights. 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”. The EU and its bodies, as well as the Member States when implementing union law, are bound by these provisions. However, they do not provide the EU

¹³ OJ 2008/C 115/01.

¹⁴ OJ 2000/C 364/01.

with powers to adopt measures beyond those areas over which the EU has competence. In non-EU areas, it is up to EU Member States to ensure the protection of fundamental rights, through the application of their own legislation and implementation of their international obligations (Toggenburg, 2004, p. 45).

Moreover the EU Agency for Fundamental Rights (“FRA”) is based in Vienna and carries out its tasks independently. In addition to it cooperates with other national and international bodies and organisations, in particular with the Council of Europe. Personally I believe the FRA provides the relevant institutions and authorities of the EU and its Member States, when implementing EU law, with assistance and expertise relating to fundamental rights in order to support them when they formulate courses of action within their respective spheres of competence. While the Agency focuses on the situation of fundamental rights in the EU and its 27 member States, candidate countries and countries which have concluded a stabilization and association agreement with the EU also can be invited to participate. Furthermore the Agency is not empowered to examine individual complaints or exercise regulatory decision-making powers. It does not monitor the situation of fundamental rights in EU countries for the purposes of Article 7 TEU (which provides for the possibility of action against a Member State in case of serious fundamental rights violation), nor does it deal with the legality of Community acts and their legal transposition by Member States into national law. The FRA collects and analyses official and unofficial information and data on fundamental rights issues within the EU. I’m of the opinion that given the differences in data availability and quality across the EU, the Agency is also developing methods and standards to improve data quality and comparability. The Agency regularly publishes reports and publications covering minority issues. Recent publications include the following reports: 1) Housing conditions of Roma and Travellers in the EU – Comparative report¹⁵, 2) European Union Minorities Discrimination Survey¹⁶, 3) Antisemitism: Summary overview of the situation in the EU 2001-2008¹⁷, 4) Homophobia and Discrimination on Grounds of Sexual Orientation and Gender Identity in the EU Member States: Part II – The Social Situation¹⁸. Furthermore a growing membership has been part of the development of European integration from the beginning. In many of the current candidate countries and potential candidates, persons belonging to minorities have been identified as being among the most vulnerable, which is why minority issues are a crucial element in the context of the EU enlargement process.

I feel strongly that 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. Besides 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*. My point of view is that 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

¹⁵ http://www.fra.europa.eu/fraWebsite/home/pubcr-roma-housing_en.htm.

¹⁶ http://www.fra.europa.eu/fraWebsite/home/infocus09_0712_en.htm.

¹⁷ http://www.fra.europa.eu/fraWebsite/products/publications_reports/pub_cr_antisemitism_en.htm.

¹⁸ http://www.fra.europa.eu/fraWebsite/products/publications_reports/pub_cr_homophobia_p2_0309_en.htm.

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. *Nota bene* until the mid-1990s the specific minority protection had not been considered a topic worth of attention in the European integration. Firstly, the only exception represents the resolutions adopted by the European Parliament (EP) 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. Secondly, the newly established European Parliament Intergroup for Traditional National Minorities, Constitutional Regions and Regional Languages will be in the position to take advantage of the new scenario created by the Lisbon Treaty and be aiming to test out to what extent the Treaty will have a real effect in the promotion of regional/stateless languages and national minorities. European Bureau for Lesser-Used Languages (EBLUL) will act as the Secretariat. In its last meeting in December the Intergroup, with EBLUL's briefing, discussed the impact of the Lisbon Treaty resulting in a joint statement. The Intergroup stated that it looks forward to the development and implementation of autochthonous national minority and linguistic rights in the EU and its Member States. What is more the group also mapped out its plan for the next five years where it will work formally with international organisations and use all the tools at the Parliament's disposal to implement rights and to help end discrimination against national minorities, stateless nations and their languages.

The Lisbon Treaty is innovative in that it refers to the „respect for the rights of persons belonging to minorities” (Arts 1.a), that the EU „shall respect its rich cultural and linguistic diversity” (Art.2.3). In addition, the attached, and now binding, Charter of Fundamental Rights „prohibits any discrimination on any ground such as [...] language [...] membership of a national minority” (Art 21.1). While the EU still lacks the comprehensive, binding national and linguistic minority system of protection needed, the Treaty does give grounds for appeal on all acts and legislation emanating from the EU, but not to domestic state legislation. Organisations working on minority protection will themselves be exploring how Lisbon affects their rights. Among the innovations brought by the Lisbon Treaty, lies the addition of “respect for the rights of persons belonging to minorities” to the list of basic values on which the EU is founded, pursuant to Article 2 of the TEU. This represents a notable shift in the legal discourse of the EU which, for most part of its history, accorded only minor attention to the minority question.

This started to change with the fall of the Berlin Wall: as well-known, minority protection was included among the Copenhagen criteria that are the criteria for admission established in 1993 in prevision of EU enlargement to the East. Yet, the EU CFR, adopted in 2000, does not recognise any specific right to members of minorities, beyond protection against discrimination based on membership of a national minority (Article 21). It confines itself to vaguely stating that the “Union shall respect cultural, religious and linguistic diversity” (Article 22), without specifying whether the diversity at stake is diversity *between* member states or within states.

This cautious formulation is revealing of the traditional reluctance of various old member states towards the notion of minority protection, which in turn prompted accusations of double standards: the EU was criticised for imposing minority-related obligations on candidate countries while not applying similar requirements to old member states. This situation became increasingly untenable after the 2004 and 2007 enlargements, which saw many countries with substantial minority groups joining the EU. The Lisbon Treaty finally provided an opportunity to amend the TEU in order to acknowledge that respect for minority rights were part of EU fundamental values. Whether this reference to minority rights in the

Treaty will remain a declaration of good intention or whether it will mark the start of a new era of better integration of minority protection concerns within EU action, however, remains to be seen.

3. Charter of fundamental rights and European Convention for the protection of human rights and fundamental freedoms

The register of rights protected by CFR is extensive and they are of heterogeneous nature. The Charter combines both the rights that can be found in other international documents e.g. in TEU, Treaty establishing the European Community (TEC), European Social Charter, in the European Convention for the Protection of Human Rights and Fundamental Freedoms of the year 1950 (ECPHRFF), as well as powers rooted in the constitutional traditions of the Member States. The aspect of the Community joining ECPHRFF has been raised many a time by Polish and foreign scholars dealing with the problems of European integration. This accession is regulated in. a. in art. 59 ECPHRFF and in art. I-9 pass. 2 of the Constitutional Treaty which provides: “The Union accedes to the European Convention for the Protection of Human Rights and Fundamental Freedoms. Accession to the Convention does not breach the powers of Union specified in the Constitution”.¹⁹ This means that the obligations arising from ECPHRFF shall refer to the EU only to the extent to which it is empowered to act.

Moreover differences in the formulations included in CFR compared to other treaties may, however, raise doubts with reference to the manner of interpreting particular rights. Aware of these risks, the authors of the Charter explain that: “within the scope in which this Charter contains rights corresponding to the rights guaranteed in the European Convention for the Protection of Human Rights and Fundamental Freedoms, their meaning and range are the same as those of the rights granted by this Convention” (art. 52 CFR). On the basis of art. 52 CFR the rights that have their sources in the Community treaties can be executed only within the limits indicated in these treaties. Disposition of this CFR regulation on referring to ECPHRFF and the clause of interpreting the Charter in accordance with the European Court of Human Rights in Strasbourg (ECHR) does not, however, eliminate-in my view- the possibility that the specific rights clash when there is a contradiction between the provisions of ECPHRFF and the Charter (case *Matthews v. United Kingdom*, Application no. 24833/94, § 63, ECHR 1999; case *Loizidou v. Turkey*, Application no. 15318/89, ECHR 1996, § 43).²⁰ To maintain consistence, one should aim at excluding them, e.g. by means of teleological interpretation, so that they do not have negative effects with reference to other rights.

4. The notion and significance of “national minorities” in the doctrine of international law

To start with the notion “fundamental rights” is ambiguous, as it occurs with reference to an individual’s constitutional rights and is encountered in the international law of human rights. Usually the terms “human rights” and “fundamental rights” are used alternatively. What is important A differentiation by R. Alexy makes this particularly clear: he refers to the fact that most of the fundamental rights are in fact principles and not rules. The underlying structure of fundamental freedoms is finality; not conditionality. Fundamental rights do not make “if-then-statements” but impose aims on their addressee (*Alexy, 1996, p. 17*). Besides T.

¹⁹ See the document of Constitutional Treaty, source:

<http://www.ms.gov.pl/files/docs/Traktat%20Konstytucyjny%20291004.pdf>.

²⁰ Parliamentary Assembly of the Council of Europe, Strasbourg-8th of June 2000, Doc. 8767, p. 2.

Tridimas in his article entitled: Judicial Review and the Community Judicature: Towards a New European Constitutionalism emphasizes the importance of European Court of Justice (ECJ). He writes that the contribution of ECJ to the development of the European law is extraordinary, as a matter of fact, in certain respects it is a novum in the history of legal systems (Tridimas, 2001, p. 119). Moreover the representatives of the Community law agree that the “fundamental rights” constitute the result of the ECJ jurisdictional activity. H. G. Schermers in turn, believes that the boundary between the “fundamental rights” and “ordinary fundamental rights” is indiscernible and differentiated in terms of the time and place of their application (Schermers, 1990, p. 225). In Polish science C. Mik vastly presented the relationships between “human rights” and “fundamental rights”, “individual rights” and “citizens’ rights” in EC. Finally, he came to the conclusion that with regard to the extensively understood “fundamental rights” the classic principle of indivisibility should be applied in connection with the terminological differentiation occurring there (Mik, 2000, p. 444). In my opinion, the notion of “fundamental rights” includes “human rights” *sensu largo*, that is not only those that have their source in the primary law, but also the rights arising from constitutions of Member States (the so-called “civil rights”) and from international treaties that Member States are parties to. J. Banach-Gutierrez defines the “fundamental rights” as: “human rights”, which, as non-transfer-able rights, provide protection to all the people, or, as civil rights that work only for the benefit of their own citizens (Banach-Gutierrez, 2005, p. 23).

The notion of national minorities is necessarily discussed in the context of the above mentioned Framework Convention, which is applicable only to national minorities. The government of the Federal Republic of Germany considers national minorities to be groups of the population which meet five criteria (Hoffmann, 2005, p. 89): their members are German nationals; they differ from the majority population insofar as they have their own language, culture and history, meaning their own identity; they wish to maintain this identity; they are traditionally resident in Germany and they live in the traditional settlement areas. National minorities are identified by the institutions of the nation state and they are defined by citizenship. However, any national minority has ethnic or linguistic characteristics differing from the majority. In spite of its certain tradition, the international regulation of „national minority” protection *prima facie* is still a complicated legal issue. *Nota bene*, that is caused by many reasons.

However, the regulations concerning that protection belong both to international law and internal legislation of particular states, which leads to differences and tension between them in this area. Meanwhile, the diversity of ideas as to particular national minorities (like, for instance, their diverse cultural character, social and political position etc.) also does not make it possible to present a uniform definition of “national minorities”. It has to be emphasized, however, that the development of international regulations in Europe concerning the protection of the “minorities” is, actually, the outcome of both minority protection in a country’s area and maintaining the condition of preserving sovereignty and territorial integrity. What is interesting, international documents and domestic regulations *per se* burden the minorities with the duty of loyalty towards the state of residence and citizenship. There is the consensus in the international arena, saying that introducing minority protection cannot challenge the principles of territorial integrity and national unity of a state. In my view states fear that recognizing the minorities and their demands may cause threat to actual territorial integrity of the state. Undoubtedly, the contemporary European law regards the protection of national minority members on one hand as protection of the universal human rights, whereas on the other, as special regulations concerning the rights of persons belonging to national minorities. The characteristic situation of persons belonging to national minorities is

manifested in the attitude of the minority towards the majority. That means inequality, not only numerical, but also social, cultural etc. Therefore, providing members of minorities with necessary conditions to preserve and develop their identities requires a more privileged treatment of them (“positive discrimination”) than just securing formal equality by way of the principle of equality towards law and non-discrimination.

Currently there is no universally recognized definition of “national minority”. Lack of that definition is caused by the fact that contrary to e.g. citizenship, it is impossible to legally indicate the state of human national consciousness. Regardless of the approach (historical, political-scientific, sociological or legal), national minorities are: of different ethnic origin, remaining in a definite numerical ratio of a minority to the rest of a state’s population, aiming at cultivating separate national and cultural features, possessing a representation of their interests towards the state authorities. Besides, minorities may be distinguished by separate tradition, culture, religion and language (*Kwaśniewski, 1992, p. 9*). In this context Mikołajczyk has an interesting point that the term „national minority” should be applied with reference to groups that can be identified with a particular state territory; in the case of ethnic minority the element of territoriality does not exist (*Mikołajczyk, 1996, p.16*). Thus, it can be assumed to be highly probable that creating a system of legal protection for national and ethnic minorities in assumption is to prevent ethnic conflict. In my opinion an ethnic conflict is the ultimate, violent effect of opposition between groups, the parties of which are nations (ethnic groups) and where the cultural identity of the parties is more the matter than possessions, power or information.

What is interesting, nowadays two concepts of subject to minority protection occur: 1) of a social group, 2) of a natural person taking advantage of the rights that every individual is entitled to. The fact that the policy towards national minorities was based on human rights was contrary to its group character. This caused the emergence of an indirect category – treating a minority as a community of persons belonging to a minority. Undoubtedly, the problem of protecting minorities should be considered in three aspects: 1. of particular natural persons declaring separate ethnic membership; 2. of a community of natural persons creating a minority; 3. of a minority treated as a social group (*Wiessner, 1999, p. 57*). The authors dealing with the issues of protecting “national minorities” pay attention *ipso facto* to the significant question concerning specifying the appropriate term to define them. The term “national minorities” is applied to defining groups of citizens of a given state that differ from the predominant part of society in their awareness of national status (*Chałupczak & Browarek, 1998, p. 14*).

Minorities are usually a small percentage of citizens but in the regions of their residence they may constitute a majority of inhabitants. Generally, the view of Chałupczak that more than 270 ethnic groups live in Europe, and in Poland live the representatives of 14 national and ethnic minorities, seems to be justifiable (*Chałupczak & Browarek, 1998, p. 10*). Besides, this author claims that the demographic, organizational and political force of national minorities is different. Some representatives of groups form small, local communities, whereas others play a significant role in the country’s social life, as well as in international relationships. It is worth adding that aiming at working out the definition of minorities was visible in the works of governmental organizations. Meanwhile, at the beginnings of the functioning of League of Nations there existed a not very apt definition of “national minorities”: “The notion of minority is understood as a circle of persons of a different race, religion or language than the majority of the population of the state in question.

These minorities are thus of two kinds: a) they are citizens of another state; b) they are citizens of the state in question” (*Janusz, 2011, p. 50*). Thus, I regard as principally apt the statement of T. Białek, who supports the thesis that: “The notion of national minorities has

still been waiting for a generally accepted definition. Therefore, consequently, in none of the legally binding international document devoted to the protection of persons belonging to national minorities there is a legal definition of that term. The acts of international law refer to the notions of national or ethnic minority, or racial or national origin only through their indication without characterization and a certain tendency can be noticed, namely, that in the universal documents the expression “ethnic minorities” is used more frequently, while the European documents would rather use the expression national minorities,” (*Bialek, 2008, p. 22*). W. Czaplinski defined a “national minority” in the following way: “thus, it is a national group, tight and settled in one region of a country (the effect of which is its natural aiming at achieving autonomy) characterized by well-developed sense of internal unity, and at the same time trying to protect its own, separate features (language, culture, etc.),” (*Czaplinski, 1983, p. 156*). G. Janusz states that: “[...] the notion of ethnic minority can be understood as any ethnic group remaining in distinct minority in relation to the rest of the population in a country, not forming its own statehood in the area of its residence, characterized by aiming at cultivating its culture, tradition, language, religion or national consciousness as basic features determining ethnic separateness and distinguishing its members clearly or at least apparently from the remaining population in that state,” (*Janusz, 2011, p. 49*).

P. Pernthaler emphasized that: “a) a certain number of population, definitely distinguished from the whole society, or the predominant group. As characteristic features of minorities there will occur in. a. language, national status, religion, race, culture; b) a group in sociological sense, which, as such, is primarily or secondarily selected i.e. by placing it in front of majority. The notion “minority” would be further emphasized through additional characterization of the group (a minority group, national minority, nationality group, etc.),” (*Pernthaler, 1964, p. 11*). I share the view as to the definition of “national minorities”, expressed by J. Byczkowski in his study entitled. *National Minorities in Europe 1945-1974*: “The term ‘national minorities’ will be applied to all ethnic and nationality groups, as well as national fractions not having its own statehood in the area of the state in question, characterized by developed sense of ethnic-group separateness and aiming at its preservation, which is expressed in cherishing the language, traditions, beliefs, as well as in different forms of active emphasizing and demonstrating of this separateness” (*Byczkowski, 1976, p. 21*).

K. Kwaśniewski in turn, finds that: “Thus, the minority is constituted by a category or sub-group of a given social entity (group), isolated on the basis of a distinct (often territorial) criterion, which, due to its numerical force, cannot mark out the goals and means of action for this entity in a way mainly recognized by itself as the most appropriate. Majority is in turn such category of sub-group of an entity which, due to its numerical force, can mark out and accomplish goals as well as assume means of action regarded by it as the most appropriate,” (*Kwaśniewski, 1994, p. 20*).

F. Capotorti – the special reporter of the United Nations Sub-Commission on Prevention of Discrimination and Protection of Minorities defined “national minority” as: “A group which is numerically smaller than the rest of the state population, which is not in the predominant position towards it and whose members are distinguished in relation to the society by their ethnic, religious or language features” (*Capotorti, 1979*). C. Thiele in turn, while discussing “national minorities”, emphasizes that: “There is no universal definition of ‘minority’ in international public law and therefore there are no definite criteria of minority status” (*Thiele, 1999, p. 1*). E. Asbjørn writes on “national minority” that: “for the purposes of this study, a minority is any group living in the area of a sovereign state, which consists less than a half of the population of society. Members of a national minority have common ethnic,

religious or language features, differentiating them from the remaining part of the state population” (Asbjørn, 1993).

Consequently, it seems that in the European countries there is a prevalent tendency to use the term “national minority” or “national and ethnic minority”, which is mainly confirmed by the documents of international law in this domain. However, that is not a principle. The postulates to define this term are also contained in bilateral treaties and in certain international documents. Such a proposal is contained in the Instrument of Central European Initiative of Protecting National Minorities (of the year 1994.). According to art. 1 of that document: the term „national minority” denotes a group of persons numerically smaller than the remaining part of population in a given state, whose members, as citizens of a given state, have ethnic, religious or language features, differentiating them from the remaining part of population and are directed by the will to preserve their culture, tradition, religion or language. The instrument is like a political declaration by nature and is not of the nature of an international agreement, so it is not legally binding.

Summing up the divagations on the notion of “national minorities”, it has to be stated that lack of definition for the term “national minority” is not, however, a barrier in developing the system of protecting the minority rights. What is more, in the documents referring to these problems this state of affairs is accepted, because otherwise their adoption would not be possible. Like in 1930s, after the Permanent Court of International Justice in Hague it should be stated that the existence of minorities is a matter of facts and not a legal issue. At the same time, this means that the authorities of a particular state obtain a certain range of freedom in recognizing a given group as a national minority.

Nevertheless, some of the states officially establish which ethnic groups they regard *prima facie* as national minorities and as such, they are not protected by their law. This recognition system allows certain states to avoid introducing regulations protecting minorities by refusing their existence (as minorities) on their territories. European states can be divided according to the definition of the term “national minority” and the assumed solutions for protecting them, into two groups: a) those, where the term “national minority” is not applied and there is the equivalence nationality-citizenship, for which the notion “foreigner” is the opposition; b) those, where the term “national minority” is applied.

It has to be emphasized, however, that the international standard in global dimension is the principle that persons belonging to minorities possess rights resulting from their minority status, individually and collectively with the members of their minority. The criterion of minority status seems to be significant. Currently, any person belonging to a minority is entitled to free decision about treating him/her as a member or non-member of a minority. Protecting the rights of minorities (and not only ethnic or national) evokes questions about the society we are living in and about the society we are going to live in the future. For protecting the national minorities is not only a matter of recognizing them and observing their rights, but especially the principles related to protecting “the weaker one” and maintaining the differentiation of social life.

5. Legal mechanisms constituting warranties of protecting national minorities in the EU

The EU is not competent to create law within the scope of human rights and *eo ipso* in the sphere of protecting the rights of persons belonging to national minorities. Lack of general policy regarding persons belonging to national minorities has been compensated by in. a. resolutions of the European Parliament, active works for multilingualism, appropriate

interpretation of treaty regulations, EU Council Directive 2000/43/EC²¹ concerning the principle of equal treatment of persons regardless of their racial or ethnic origin.

Another point is Member States' governments are required under EU anti-discrimination law (Directive 2000/43/EC) to enact national legislation which prohibits discrimination on grounds of race or ethnic origin in the areas of employment, education, social protection as well as access to goods and services. Furthermore the protection against discrimination in this area applies to everybody living in the EU, and not only to EU citizens. The Directive allows Member States to adopt positive measures. Member States are obliged to designate or set up an independent body, to help people who have been discriminated against on the grounds of their racial or ethnic origin to get advice and support to pursue their complaints. Most of these bodies are part of Equinet, the European Network of Equality Bodies, which develops cooperation and facilitates the exchange of information and good practice between the national organisations.

Another example of EU legislation to fight racism and xenophobia is the Council Framework Decision on combating certain forms and expressions of racism and xenophobia by means of criminal law (2008/913/ Justice and Home Affairs)²², which was adopted in 2008. Requiring domestic adoption of appropriate laws, it aims to ensure that racist and xenophobic offences are sanctioned in all EU Member States by effective, proportionate and dissuasive criminal penalties. The punishable offences include public incitement to violence or hatred against a group of persons or a member of such a group, defined by reference to religion, race, colour, descent or national or ethnic origin. Such incitement is also to be punishable if committed through public dissemination or distribution of tracts, pictures or other material. The public condoning, denial or gross trivialization of the Nazi crimes, crimes of genocide, crimes against humanity and war crimes, when the conduct is carried out in a manner likely to incite to violence or hatred, are also to be punished. For any criminal offences other than those covered by the Framework Decision, Member States are obliged to ensure that racist and xenophobic motivation is considered as an aggravating circumstance or, alternatively, that such motivation may be taken into account in the determination of the punishment. The Framework Decision provides for the liability of legal, as well as natural persons. Any person who is a victim of a crime referred to in the Framework Decision can initiate legal proceedings against the alleged perpetrator in accordance with national law, e.g., by reporting the incident to the nearest police station.

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 Protocol²³ 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. In addition to 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

²¹ EU Official Journal L 180, 19/07/2000, p. 0022- 0026.

²² OJ 2008/L 328/55.

²³ http://www.eng.samer.se/servlet/GetDoc?meta_id=1110.

the specific autonomous status of Finnish minority on Aaland Islands. 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.

Besides the European Court of Justice 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 apply such regulation to all the people with the German national identity. The ECJ refused the arguments of the Belgian government that these 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 ethno-cultural 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.

What is important 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. For instance 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. Moreover, 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. However, 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 faces the problem how to define what the dominant and major identity in Europe is. In my opinion, 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. In the context of the view that the jurisdiction of ECJ is the source of Community law, the question arises: what is the relationship between the fundamental rights and the jurisdictional activity of this Court. In the text under discussion, a special attention should be paid to the divagations of J. Plaňavová-Latanowicz, who claims that “jurisdiction is the same in relation to fundamental rights as the relationship between the codification treaties and the common law in the international law,” (*Plaňavová-Latanowicz, 2000, p. 76*).

It is worth adding that in the effect of democratic transformations that took place in the Central and Eastern Europe in 1989 a large change also took place in EU as to the way of perceiving human rights, and especially the protection of minority rights. What is interesting, since the beginning of 1990s in the EU area a positive system of human rights protection has been formed. That is caused by the awareness that failure to undertake these issues may constitute a threat to stability of the whole organization and negatively affect the functioning of free market. Since early 1990s EU has also been trying to persistently fight any *manifestations of intolerance and ethnic or racial discrimination*. An equally important indicator of these changes within EU is coming into force in May 1999 of the Amsterdam Treaty, whose article 13 concerns ban on discrimination and adopting in June 2000 of the directive on equal treatment regardless of racial or ethnic origin. In the area of raising matters of minority protection in EU the European Parliament plays a significant role. It is a supranational body, chosen in direct elections by inhabitants of member countries. In the context of the discussed issues it is worth noticing that the Parliament is not entitled to independent legislation and the resolutions passed by it are mainly of political importance. The European Parliament many a time has undertaken the issues of protecting minority rights during the last twenty years.

The Parliament Resolutions certainly are not of binding character and rarely bring measurable effects. It was only in the 1980s that the European Parliament treated the fight against racism and xenophobia in the member countries as well as the matters of language minorities seriously. In the subsequent years the European Parliament became the leading institution in the area of minority rights protection. In the EU the particular parliamentary committees prepared many reports on the subject. The European Parliament, in turn, issued many resolutions directly referring to fighting against in. a. anti-Semitism, racism and xenophobia in the EU. The Parliament is the only institution in the EU, whose members are chosen in direct elections by the inhabitants of member countries²⁴. The most important resolutions of the European Parliament concerning the situation and state of national minority protection include:

1. "Resolution of the 16th day of October 1981 on the Community Charter of Regional Languages and Cultures and on the Charter of Ethnic Minority Rights"²⁵, adopted on the basis of the so-called „Arfe Report”, prepared by the Italian special reporter, Gaetano Arfe;
2. "Resolution of the 11th day of February 1983 on Means to Support Language and Cultural Minorities", also prepared by G. Arfe;
3. "Resolution of the 30th day of October 1987 on Regional and Ethnic Languages and Cultures in the European Union"²⁶, also called the Kujpers Resolution, prepared by the special envoy Willy Kujpers. If it finds lack of progress in the field of promoting regional languages and cultures, the Parliament calls for introducing differentiated

²⁴ www.europarl.europa.eu.

²⁵ OJ 1981 No. C 287, p. 106. In this resolution the Parliament called upon the state, regional and local authorities to support promoting the development of regional cultures and languages in school curricula, public radio and television, their right to be used in public places, administration and at courts. In the resolution the Parliament summoned the member states to undertake appropriate actions in order to enable the members of minorities to learn their native languages on all available levels of education, especially the native literature and history. The immediate effect of the resolution was appointing the European Bureau for Lesser Used Languages located in Dublin, formally remaining a non-governmental organization, outside the organizational structures of EU and consisting of the representatives of all language groups residing on the territory of EU.

²⁶ OJ 1987 No. C 318, p. 160.

recommendations in this domain for member states in the area of education, mass media, culture, public life and administration. It also calls for preparing more resources from the budget for this purpose. It also suggested changing the status of parliamentary group of Minority Languages to the official group functioning in the European Parliament.

“Resolution of 1994 on Language Minorities in European Union”²⁷, adopted on the basis of “Kililea Report”. This resolution emphasized the *EU member states should recognize their own language minorities and create a basis for development and protection of these languages*. The Resolution of 1994 also called for undertaking joint activities and interstate programs for promoting regional languages. Means for this purpose could mainly come from European Regional Development Fund. The Parliament found in fact that all the recommendations of the nature of “minorities” should also be applied to non-territorial, autochthonic minorities, which do not cause threat to the territorial integrity of a given state. The Parliament also called upon domestic governments to sign and ratify the European Charter of Regional and Minority Languages and recommended granting appropriate budget resources for the European Minority Languages Bureau.

The significance of the idea of protecting national minorities that came into being in 1990s in Europe does not exclusively involve ban on discrimination and title to take advantage of all civil rights. This concept is mainly based on special actions of the state, enabling individuals belonging to minorities both to preserve and develop their ethnic identity. These actions are legal and administrative privileges referring to broadly semantically understood cultural (religious, educational, language) rights. Other areas of such rights, such as, e.g. using a minority language in public offices, double topographic nomenclature, advantages in elections to local governments and parliament, are not included in this privilege. European regulations treat it very “cautiously”. On the other hand, however, the minority matters undergo international control.

Minority protection is not only a legal or political problem. It is also a moral (ethical) issue. Protection of national minorities is not only a matter of their recognition and observance of their rights, but mainly the principles related to protecting “the weaker one” and maintaining the diversity of social life. For the protection of national minority rights (and not only these of national or ethnic minorities) always brings about questions concerning the society the society and we live in we want to live in. Also those about the principles and means we must use to obtain the “society for all”. However, we must not forget that at present the EU is extensively committed to solving the problems concerning national minorities.

6. Conclusions

The analyses performed in the foregoing paper lead to the *following conclusions*:

- A. At present the European continent is ethnically, religiously, linguistically and culturally differentiated. In the area of almost all its states (except Portugal, Iceland and mini-states) there are national minorities. For centuries national minorities in Europe have lived in the shadow of the historical events of the 19th and the 20th centuries. Whether for humanitarian reasons or to protect the identity of national minorities, major European treaties.
- B. Settling inter-state wars have had to address minority issues to secure the peace. For this reason, national minorities have frequently been seen not only as obstacles to nation and state building but also as anomalies in international relations.

²⁷ OJ 1994 No. C 61, p. 110.

- C. The term “national minorities” is applied to define groups of citizens of a given state that differ from the predominant part of the society in the awareness of their national status. It must not be forgotten, however, that minorities usually constitute a small percentage of citizens, though in the regions of their residence they can constitute the majority of inhabitants. But, in contrast to the minority problems in the former East bloc, they do not generally appear on the agenda of the Organization for Security and Cooperation in Europe OSCE.

That is surprising, as these conflicts certainly ought to be a subject of concern to the OSCE. Consequently, we must investigate why the OSCE, which seeks to promote security in Europe and beyond, ignores Western European minority problems and why (with the single exception of the Roma issue which is not restricted to Central, Eastern or South-Eastern Europe) only minority issues in the former East have been discussed by the CSCE/OSCE. This is even more surprising given that a number of conditions for the CSCE’s preoccupying itself with Western European issues appeared to have been met in exemplary fashion. One is forced to this conclusion because this institution always emphasized with particular clarity the close relationship between international security and the protection of minorities and because its documents, unlike those of the established international organizations, had a special political character.

- D. The mechanism of protecting minority rights in EU is created by institutional, legal and jurisdictional warranties. The resolutions passed by the European Parliament concerning languages and cultures of regional and ethnic minorities in EU, which resulted in preparing an important document for ethnic and national minorities by the European Commission, the so-called *New framework strategy in the field of multilingualism*. A much broader reference to the matter of national minorities was contained in the draft document of European Commission: *Report on undertakings of European initiative for democracy and human rights in the year 2000*²⁸. The protection of fundamental rights in the *acquis communautaire* system, thanks to the hierarch of this legal system, as well as the position and role of the general principles of EC law constitutes a uniform, coherent and consistent system of regulations, harmoniously composed into the whole of *acquis*. Like the Community legal achievements, the set of these regulations underwent gradual extension, i.e. adjustment to the needs and functions of the Communities and the Union.

The fundamental rights of an individual did not play a significant role in the initial period of the European integration process. It was so, because, as we know, the Communities were formed first of all with the purpose of accelerating the economic growth after the World War II. The consequence of the lack of regulations concerning fundamental rights protection in the primary Community law was the *ad hoc* creation of regulations in this field, mainly by the jurisdiction of the ECJ whose jurisdictional interventions supplemented the Community law on the basis of general legal principles. The ECJ jurisdiction and the representatives of the European legal doctrine include the fundamental rights into the unwritten sources of Community law as a part of the so-called general principles of law.

- E. At the present time there is a tendency to regard such conflicts as exclusively a matter for the HCNM. This fails to do justice to minority problems in their totality, however, because it means that the OSCE is only looking at certain aspects – early warning, conflict prevention and conflict resolution. An added factor is that broad limitations are

²⁸ *Bericht über die Durchführung der Europäischen Initiative für Demokratie und Menschenrechte im Jahr 2000*, Brüssel, den 22. Mai 2001 {SEC (2001) 801}, p. 50.

built into the HCNM's mandate because he is not allowed to concern himself with conflicts within participating states or with those in which terror, violence or public approval of violence play a role. This means that the serious problems of Western countries – such as Turkey with the Kurds, Spain with the Basques or Great Britain with Northern Ireland – are removed from his area of responsibility. Thus the question posed in the title of this article could be answered by saying that minority problems in the West are indeed not (yet) subjects for the OSCE. They might become so in the future, however, if existing mechanisms are strengthened further and the barriers imposed in the past are removed.

We should admit in the OSCE's favour that the minority problems in the East are of course much more substantial in their dimensions and their potential for danger. At the same time it is clear that the HCNM is not the only one who is responsible for minorities. They always become an overriding issue for the OSCE when early warning and conflict prevention are no longer possible. This, for instance, is the case with the Kurds in Turkey. It seems only reasonable that the Parliamentary Assembly of the OSCE also concerns itself with violations of minority rights. At the moment it seems that one can observe some improvements in the human rights situation in Turkey. In the first instance, this is a success of EU policy and the mechanisms of the European Convention on Human Rights, to which the OSCE doubtless also contributed. Yet international pressure *de facto* must be maintained and Turkey must introduce legal reforms to bring it into line with the international minority standards. One can only hope that it will soon be possible to support Turkey in the establishment of a post-conflict human rights and minority protection order with a strong involvement of the HCNM. The same may be said for other minority conflicts in Western Europe.

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