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## THE CONCEPT OF NATIONAL MINORITY RIGHTS

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At the very beginning it is important to define the main components that constitute the whole theory and idea as such of the minority rights. The concept of minority expresses how the legal regulation reflects the existence of minority, what is understood by the notion ‘minority’ and what criteria are used in order to identify certain social groups as minorities. Regarding the definition of the concept ‘minority’, until now there is no generally accepted definition, neither at the international level nor at the European one. It appears to be a certain agreement on some particular elements of the definition, though they are not fully accepted and interpreted in the same way. There are several important reasons concerning this phenomenon. The first one is that states are in fear of consequences after the recognition of minorities which may lead to secessionist movements. This can put at stake the territorial integrity of the State. Though, some rather successful efforts in this field were made by different representatives in order to make clarifications regarding the definition of ‘minorities.

According to these facts the Permanent Court of International Justice (PCIJ), the UN Sub-Commission and some prominent authors attempted to define the concept ‘minority’. The Court stated that this concept has rather minoritarian character which makes it relevant in the meaning of ‘minority’. According to the court a ‘community’ is: a group of persons living in a given country or locality, having a race, religion, language and traditions of their own and united by this identity of race, religion, language and traditions in a sentiment of solidarity, with a view to preserving their traditions maintaining their form of worship, insuring the instruction and upbringing of their children in accordance with the spirit and traditions of their race and rendering mutual assistance to each other. Apart from the definition given by the Court, this guideline shows the requirement of numerical condition which means the group that is in minority in comparison with the prevailing part.

**Keywords:** minority, community, legal regulation, international institutions, international framework.

**Formulation of the problem.** The relevance of the presented thesis contains steady growth and necessity of the elaboration within international institutions the issue of the protection and legal assistance for the national minorities. Following the development of human rights in general and minority rights as its

special field set up a firm base for the establishment of international framework, which principal goal is the protection and surveillance of national minority rights. The prior aim of the presented work is to cover and open up from different angles the phenomena of minority's existence, its functional relation with the society, legal regulation and the transmission to the real dimension of actual measures, taken by the governmental bodies in its political line towards national minorities.

**Analysis of the study of the problem.** Thanks to the two trends, the concept of culture has been considered from different points of view. Two ideas, opposite in nature, were formed – universalism and relativism, which are essentially directions of universalism and relativism. Universalism emphasises a system of unity beyond any diversity. This means that, despite the existence of different cultures, they should be united at the global level, acting as a single entity. And, following the concept of relativism, it emphasises the system of diversity – focusing on the specificity of the individual or community. Since all communities and individuals have their own internal characteristics, they should be considered according to their differences. As a result, it is necessary to define the concept of cultural identity, where one should distinguish between the individual dimension and the collective dimension. It can be seen as the personification of culture.

**The purpose of the article.** The issue of 'national' minorities was necessarily discussed during the work on the Council of Europe Framework Convention for the Protection of National Minorities [23]. The Government of the Federal Republic of Germany considers national minorities to be population groups that meet five criteria: their members are German citizens; they differ from the majority of the population in that they have their own language, culture, history, i.e. their own identity; they wish to preserve this identity; they have traditionally lived in Germany and live in places of traditional settlement. National minorities are identified by the institutions of the nation state and are defined by citizenship.

This also seems to become a problem whether so called 'new' minorities should be considered as minorities and protected by national and international law. As to the current widespread migration process, asylum seekers, refugee and employee floods, if they share the same religion or tradition, they may try to be accepted as a minority in the state they immigrated to. The recent developments in the UN point in the direction that minority rights can be applicable to the 'new' minorities, although with restrictions and modifications concerning the concrete contents of those rights.

**Presenting main material.** Before analysing some of the doctrinal proposals, it is necessary to refer to certain UN documents that may potentially be relevant to this issue. It is useful and appropriate to quote Article 27 of the International Covenant on Civil and Political Rights: '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 own group, to enjoy their own culture, to profess and practise their own religion, or to use their own language.'

Many authors have come up with a specific definition. Among them there are two which are always taken up in any discussion of the concept 'minority' and which are consequently well known. The definitions are made by two Special Rapporteurs of the UN Sub – Commission, called Capotorti and Deschens. The definition presented by Capotorti constitutes a part of his 1977 Study on the Rights of Persons Belonging to Ethnic, Religious or Linguistic Minorities' group numerically inferior to the rest of the population of the State, in a non-dominant position, whose members – being nationals of the State – possess ethnic, religious or linguistic characteristics differing from those of the rest of the population and show, if only implicitly, a sense of solidarity, directed towards preserving their culture, traditions, religion and language'.

Deschens, on his turn, introduced the following fruit of his work: a group of citizens of a State, constituting a numerical minority and in a non-dominant position in that State, endowed with ethnic, religious or linguistic characteristics which differ from those of the majority of the population, having a sense of

solidarity with one another, motivated, if only implicitly, to be a collective will to survive and whose aim is to achieve equality with the majority in the fact and in the law.

There are presented other variations of the definition which to a greater or lesser extent deviates from the abovementioned. For instance, Fawcett suggests: a group in a country which possesses and has common will – however conditioned – to preserve certain habits and patterns of life and behaviour which may be ethnic, cultural, linguistic or religious, or a combination of them, and which characterize it as a group. Further such a minority may be politically dominant or non-dominant.

This definition does not provide any reference to the nationality or the non-dominance, which appears to be important in order to make a precise and accurate definition.

Besides, on the European level were also elaborated the notions and common ideas on the designation of the minority issue. Primarily it came to the hands of the Council of Europe and the OSCE. The Parliamentary Assembly made a substantial proposal of definition in its Recommendation 1201 of 1993, dealing with ‘national minorities’ concept. The understanding was the following: “separate or distinct groups, well defined and established on the territory of a state, the members of which are nationals of the state and have a certain religious, linguistic or other characteristics which distinguish them from the majority of the population” [1].

This definition as the main disadvantage has no reference to the non-dominant position and unnecessarily it adds a threshold for the groups to consist of.

The European Commission for Democracy through Law, an advisory body of the Council of Europe, also proposed the definition as a part of the proposal for the European Convention for the Protection of Minorities, as following: for the purpose of this Convention, the term minority shall mean a group which is small in number than the rest of the population of a State, whose members, who are nationals of that State, have ethnical, religious or linguistic features different from those of the rest of the population, and are guided by the will to safeguard their culture, traditions, religion or language; any group coming within the terms of this definition shall be treated as an ethnic, religious or linguistic minority; to belong to a national minority shall be a matter of individual choice and no disadvantage may arise from the exercise of such choice.

Another body that faced the same problem while dealing with the definition was the Council of Ministers in September 1993. The Committee reached the foregoing conclusion that no agreement on a definition proved possible. It also made such an interesting point on the fact that the case of determining ‘minorities’ is closely connected with the kinds of rights that would be allocated to these minorities. The more far reaching the rights might be, the narrower the states would want the definition to be. This implies that states are in fear of the recognition of minority rights which can lead to escalation of nationalistic and secessionist movements. In the end The Commission introduced certain basic criteria on which minorities should be determined: the group should be less numerous than the rest of the population of the state, the members of the group should reside in the state and have either a nationality of or close and long lasting ties with the state, they should have ethnic, religious or linguistic features differing from those of the rest of the population and finally they should have expressed the wish to be recognized as a minority in the sense that the members of the group should have the will to preserve collectively their distinctive collective identity.

Regarding one important thing – close ties with the state – The Human Rights Commission has expressed in its General Comment to the Article 27 of ICCPR, reflecting a broad approach, that the length of the residence in the state is irrelevant, which means that the new minorities as well as old minorities, omitting the factor of nationality, need special protection because of their vulnerable position [1].

In the 19th century the notion of culture became independent and signifies the moral and intellectual qualities through which people could distinguish themselves. Aspects of cultural identity are various: religion, habits, education, language, traditions. Cultural identity is important as it gives the individuals and communities a sense of belonging, concerning their human dignity. By this way individuals feel the sense of personal integrity and that they can represent themselves and be recognized.

During the time the value and the stream of cultural diversity suffered huge improvements and changes. In the 1960s the anti-colonialism was one of the main freedom movements that led to claims for

the recognition of the cultural identities of the communities. In 1970s arose a general emancipation movement. Cultural identities were no longer considered to be a threat but instead a value in a democratic society which would be based on pluralism and multiculturalism. In the 1980s this development continued with political and social movements such as feminism, gay liberation and black power. Values such as freedom, equality and solidarity became central notions. Minorities in particular started to stand up for themselves arguing that they were confronted with the dominant culture. Since the 1990s, started the process of globalization which in the one hand put everything into international level, but on the other hand gave roots to the cultural regionalism and nationalism, where the local development took place. For instance trying to create a common European culture, there are still minorities that feel not attached the European cultural identity.

Together with the process of internationalization of human rights started the process of intensification of the dialogue between the minorities and the state. The policy of the state had to correspond to new changes and address current problems existing in the society. Policies of the government intended to reduce the social and political causes respond to the term 'responsive policies'. The approach that predominates in them tends to inclusiveness to the needs and demands of every social group, which is typical for the pluralist democratic approach. The rulers according to this approach seek to know what are the demands of the dissatisfied groups, they may even seek to foresee their concerns and consequently they may be ready to maintain dialogue with those groups. They may also be ready to negotiate and cooperate with the groups in pursuit of mutual benefits. The democratic instruments are: the recognition either of material or of perceived conflicts, reciprocal communication and compromise, a disposition to share, to some extent, material resources, prestige positions and even power. It should be stressed that responsiveness does not necessarily entail weakness or unilateral concessions; therefore it does not necessarily satisfy any claim. Taking into account the roots of the conflict, responsive policies can involve many different policy fields (culture, religion, education) as well as the very distribution of public power. As for the juridical rank and degree of institutionalization, they can be enforced in the form of constitutional engineering policies, as common legislation, or even as simple administrative decisions [3].

In order to explain the abovementioned, we should refer to the most outstanding example of the responsive approach – the 'consociational' model of Arend Lijphart. He analyses institutions that induce the protection, possibility of expression and decision of organized minorities in plural societies. These institutions are directed towards enabling the elites of those groups to participate in power. One of such institutions is federalism, which tends to reduce the levels of ethnic violence. However, political integration is not always based on the institutionalization of minorities' rights and power. Other opportunities rest on attempts at co-optation seeking the assimilation of minorities into majority in exchange for economic and prestige advantages.

Multiculturalism as the nowadays most outstanding phenomenon describes the increasing diversity of culture, race and religion of citizens in liberal democracies. In a normative sense this term is used to indicate the idea that the correct legal and political response to increasing cultural diversity is to adopt policies of public accommodation, a response to the presence of increasingly diverse social groups and minorities. Coming to a direct conclusion from the previously mentioned, state response in particular could include **assimilation**, **toleration** and **non-discrimination** [8]. Models of minority protection often use a range and mix of these policies. Let us have a brief characteristic of each policy regarding minority's treatment.

The first one is assimilation which requires that minority groups should reject those characteristics that distinguish them from the mainstream national culture. Sometimes it could be forced, especially in cases where a minority is prevented from wearing its preferred form of dress or speaking its language in public life. Rather prominent in this issue appears to be the case of French abolishment of wearing burkas in public places, which can be considered as a step towards full assimilation and dissolution in the majority's culture. This case will be referred to later in the work.

Tolerance implies accepting different cultures without considering differences as having special value. In the frame of the this model the key role plays the principle of 'liberal toleration' whereby minorities can

manifest their particular difference in private sphere, but organizes public life in accordance to the civil and political rights. It implies that these rights, such as freedom of religion and of speech, provide a framework within which individuals can manifest some of their differences in public sphere. This model is seldom provides specific state support to ensure that minorities have the resources they need to continue and flourish. It is also frequently supplemented by strategies of non-discrimination in such areas as employment and education. The liberal policy of tolerance implies that minority communities can freely develop themselves and act as they wish without being punished, as long as they do not interfere with the majority culture. According to Raz, in practice, it often means limited possibilities for these minority communities to use public spaces and media. Consequently, most cultural activities of these minority groups are financed out of the sources of these minority communities themselves. Tolerance need to be more than the affirmation of pluralism, it should include a sense of solidarity. This implies that the majority is limited in interfering in the views, beliefs and commitments of the minority. We can also face such kind of tolerance as ignorance. It covers the case when the community involved is not recognized as an equal participant of the State structure. And also tolerance can result into the active support of the way of living of the minority, mainly through three institutions: the educational system, the media and the law. The latter example is often based on non-discrimination.

The model of non-discrimination ensures that minorities are not penalized in the abovementioned areas. It shifts the issue of personal identity and difference from private sphere into public. It will also impact on majorities as well as minorities because it involves access to public goods. Regarding this I would like to put an example of the vision of Ronald Dworkin [4]. He argues, considerations of right's claims must take priority over alternative considerations when formulating public policy and distributing public benefits. Thus, for example, a minority's possession of rights against discriminatory treatment should trump any and all considerations of the possible benefits that the majority would derive from discriminating against the minority group. Similarly, an individual's right to an adequate diet should trump other individuals' desires to eat lavish meals, despite the aggregate gain in pleasure these individuals would derive. Treating rights as trumps is a means for ensuring that all individuals are treated in an equal and like fashion in respect of the provision of fundamental human rights.

As it was said, liberal response to the problem of minorities is multiculturalism. The concept of multiculturalism is tightly connected with the definition of the minority as to indicate such factors of differences as race, ethnicity, religion and language. This notion can be described as a society in which sizeable cultural communities exist next to each other and they are able to remain separate communities and keep distinct cultural identity against policies of assimilation. Multiculturalism is based on the idea that members of different cultural communities are aware of different cultures in their society and learn to appreciate and respect them. Such a change can lead to the disappearance of cultures through assimilation. Liberal multiculturalism is not against assimilation, as long as the basic principles of tolerance and respect are observed.

The matter of multiculturalism in contemporary world reveals the fact that more and more minority groups are claiming for the accommodation of differences in public sphere, for instance the rule-exemption as it is showed in a case *Mandla v. Dowel Lee* in which a young boy wanted to wear a turban to school, or another example, *Begum v. Headteachers and Governors of Denbigh High School*, where a Muslim school girl wanted to wear a robe to school. These cases show that nowadays individuals want their personal identity to be more substantially recognized. It raises many difficulties to the States in order how to respond to claims in relation to minority cultures or religions. Once we move from individuals to the groups we can also notice that there has been a significant change in the form and content of demands in recent times.

The liberal pluralism goes further than toleration and non-discrimination; it favours the public accommodation of minorities in public sphere. In contrast with the traditional liberal approach to minorities, the arguments in favor of multiculturalism introduce the idea that public recognition of the core features of a person's private identity is important to their sense of self-worth and autonomy.

### *The concept of national minority rights*

One of the major factors explaining the rise of politics of cultural recognition as well as more pluralistic policy responses to cultural diversity is the multifaceted process of globalization. In fact, two transformations which directly affect institution of national citizenship may be distinguished as the following: transnationalization of human rights idea and their institutionalization in international organizations, both governmental and non-governmental. It has established the status of 'universal personhood' to which rights are attached independently from formal state membership or nationality. And the second one is the proliferation of new rights which go beyond the classical modern political tradition. For instance, rights of equality and non-discrimination have been specified in the articles on individual rights to cultural identity and minority rights which oblige state governments to adopt approaches to the promotion of the identity of ethnic, national, linguistic or religious minorities on their territory.

The HR Committee in its general comment on Article 27 ICCPR has stated: "although the rights protected under article 27 are individual rights, they depend in turn on the ability of the minority group to maintain its culture, language or religion. Accordingly, positive measures by States may also be necessary to protect the identity of a minority and the rights of its members to enjoy and develop their cultural and language, and to practice their religion, in community with the other members of the group"[5].

An aspect which is closely related to the subjective requirement is the potential importance of an official recognition as 'minority'. In regard to the matter of recognition, Taylor advocated three forms of recognition. The first one is the recognition of the equal value of cultures as such. The second can be presumed as the recognition of cultural communities based on cultural elements such as language, religion. And the final form is the recognition of individuals and their cultural identity. Basically this does not necessarily require new politics of recognition, as existing policies of equal citizenship and human rights already protect individuals from being discriminated and excluded because of their cultural identity.

In this respect it can be remarked that whether or not a state recognizes the existence of minorities in national law, does not influence the scope of its obligations under international law and more specifically under article 27 ICCPR. The ambiguity appears to be in the distinction between the notion 'race' and 'ethnic' regarding minorities. The Sub-Commission has decided in 1950 to replace the term 'racial' by 'ethnic', the purpose of this change was that 'racial' is not scientifically justified criterion of distinction while 'ethnic' seems to be more appropriate as it encompasses all biological, cultural and historical features, whereas 'racial' refers only to innate physical features.

When discussing this point it should be considered the 1965 UN International Covenant on the Elimination of All Forms of Racial Discrimination: "In this Convention, the Term 'racial discrimination' shall mean any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect..." [6].

Further issue which should be elaborated upon is the matter of individualism or collectiveness of the rights granted to the minorities. Concerning this fact the fight for individual human rights also implies the fight for the individual rights of persons belonging to a minority. Kymlichka has developed an extensive liberal theory on collective rights for minorities. There he has demonstrated that many of the demands made by the communities can be consistent with the liberal principles of individual freedom and justice. Also he determines two main limitations: 'minority rights should not allow one group to dominate other groups and they should not enable the group to oppress its own members.

The direct protection of the minority's identity through special collective minority rights, which does not support traditional liberal thinkers, contains the following plot: 'the members of ethnic and national groups are protected against discrimination and prejudice, and they are free to try to maintain whatever part of their ethnic heritage or identity as they wish, consistent with the rights of others. But their efforts are purely private, and it is not the place of public agencies to attach legal identities or disabilities to cultural membership or ethnic identity.

According to Kymlichka, individual freedom is tied to membership in a community and in this rate collective rights can enlarge the freedom of individuals. Besides, group-specific rights could promote equality between the minority and the majority.

Apart from Kymlichka, Gazer [7] for example argues that the decision concerning collective or individual rights should be made by the State. This leaves to the State's business whether or not communities are supposed to integrate or remain as distinct entities. Johnson presents more general argument for collective rights. He states that if it is recognized that the individual's well-being is closely tied to membership in a community, then collective rights should be recognized as well. One of a collective right mentioned by him is the right to self-preservation. Green mentions several examples of the rights that communities can have towards the majority – limited autonomy in areas such as education, exemption from general obligations such as military service, recognition of specific practices with regard to marriage and support of a specific institutions.

Contrary to the above expressed opinion, Kukathas is critical on collective rights because, according to him, individual rights, especially the right to freedom of association, offer sufficient protection for minorities. The claim of minorities to live according to their cultural characteristics does not have to be respected because cultures as such are entitled to protection, but because individuals have the freedom to associate [8].

Galenkamp is brings forward another critical opinion about collective rights. From her part classical human rights, such as freedom of religion, of association and the right to education, offer sufficient protection of community identity. Placing communities into special position can make them more vulnerable to discrimination. Furthermore, by absolutizing cultures the individuals become locked up inside the community culture. She argues that collective rights for minorities are not necessary to do justice to differences between people [9].

Many modern societies are confronted with minority communities that demand recognition of their identity and accommodation of their cultural differences. Kymlichka has divided communities into 'national minorities' and 'ethnic groups'. National minorities are territorially concentrated communities that were previously self-governing societies incorporated within the larger state. Ethnic groups have arisen from voluntary familial immigration and are looser associations that wish to integrate into a larger society. The latter ones do not aim at developing separate, self-governing nation. This distinction originates from two main sources, as co-existence of more that one community within a State and the process of immigration.

**Conclusions:** These attempts contributed a lot to the development of the theoretical approach to the notion of minorities. Most of the time, the distinction was made between the objective and subjective factors. The objective factor includes such features of 'minority' as ethnic, religious or linguistic characteristics differing from those of the rest of the population, together with the condition of being a numerical minority, non-dominant and finally the requirement that the members of the group have the nationality of the state concerned. The subjective aspects demand that there is a sense of community and a collective will to preserve the distinctive characteristics.

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### **КОНЦЕПЦІЯ ПРАВ НАЦІОНАЛЬНИХ МЕНШИН**

На самому початку важливо визначити основні компоненти, які становлять усю теорію та ідею як таку щодо прав меншин. Поняття меншини виражає те, як правове регулювання відображає існування меншини, що розуміється під поняттям “меншина” та які критерії використовуються для ідентифікації певних соціальних груп як меншин. Щодо визначення поняття “меншина”, то досі не існує загальноприйнятого визначення ні на міжнародному, ні на європейському рівні. Здається, це певна згода щодо деяких окремих елементів визначення, хоча вони не повністю прийняті та інтерпретуються однаково. Є кілька важливих причин цього явища. Перша полягає в тому, що держави бояться наслідків після визнання меншин, які можуть призвести до сепаратистських рухів. Це може поставити під загрозу територіальну цілісність держави. Проте деякі досить успішні зусилля в цій сфері були зроблені різними представниками щодо внесення роз’яснення про визначення поняття “меншин”.

Відповідно до цих фактів, Постійна палата міжнародного правосуддя (РСІД), Підкомісія ООН та деякі відомі автори намагалися визначити поняття “меншина”. Треба зазначити, що це поняття має скоріше міноритарний характер, що робить його релевантним у значенні “меншості”. Відповідно до цього, “спільнота” – це: “група осіб, які проживають у певній країні чи місцевості, мають власну расу, релігію, мову, традиції та об’єднані цією ідентичністю раси, релігії, мови та традицій у почутті солідарності з метою збереження своїх традицій, збереження своєї форми поклоніння, забезпечення навчання та виховання своїх дітей відповідно до духу та традицій їхньої раси та надання взаємної допомоги один одному”. Крім визначення, ще має бути вимога чисельності, що означає групу, яка є меншістю порівняно з переважною частиною населення регіону, де проживає ця спільнота.

**Ключові слова:** меншина, громада, правове регулювання, міжнародні інститути, міжнародні рамки.