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THE PRINCIPLE OF PROTECTION EFFICIENCY AND MINORITY RIGHTS IN EU LAW

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RESUMEN:

La protección de las minorías es de gran importancia en el constitucionalismo contemporáneo. En este ámbito aparecen diversos aspectos de la protección individual y grupal a nivel nacional y supranacional, así como en el marco de los Convenios del Consejo de Europa. La protección de los derechos de las minorías que está estrechamente relacionada con la dignidad humana se caracteriza por la complejidad normativa. El principio de eficiencia sustantiva y funcional de la protección de los derechos humanos debe aplicarse también a las minorías.

ABSTRACT:

Minority protection is of great importance in contemporary constitutionalism. A variety of aspects of individual and group protection appear in this field on the national and supranational level as well as in the framework of the Council of Europe Conventions. The protection of minority rights, which is closely connected with human dignity, is characterized by normative complexity. The principle of substantive and functional efficiency of the human rights protection has to be applied also with regard to minorities.

PALABRAS CLAVE: *Minoría, Consejo de Europa, Derechos Humanos*

KEYWORDS: *Minority, Council of Europe, Human Rigths*

1.- THE MULTIPLICITY OF FUNDAMENTAL RIGHTS GUARANTEES IN EUROPE AND THE GENERAL PRINCIPLE OF FREEDOM

Europe is characterized by the existence of multiple fundamental and human rights protection systems: the national constitutions, the European Convention of Human Rights, Council of Europe conventions related to specific fields of protection, the EU Fundamental Rights Charter, universal instruments of protection, primary and secondary EU law, ordinary national legislation, etc.[1].

This multiplicity of protection at various levels is based on the common idea to protect efficiently the individual, in a substantive and a functional way. This idea is a consequence of the basic principle of freedom of the individual which results from the supreme value of human dignity and, connected with this, from the necessary anthropocentric orientation of the relation between public power and individual.

This basic idea is not only relevant for State power, it is valid also for supranational systems such as the EU which replace, at least in part, the State as the traditional pattern of social organization. It seems quite consequent that the exercise of power on individuals is necessarily linked to the

[1] See ARNOLD, R.: *Fundamental Rights Review in Europe: Substitution or Standard Control?* In: PALERMO, F.; POGGESCHI, G.; RAUTZ,G; and WOELK, J. (eds.): *Globalization, Technologies and Legal Revolution*, Nomos, pp.189-198.

existence of instruments to protect their freedom against undue and excessive power impact. The concept of *contrat social* points out that the original fact is the individual's freedom which is given up, as far as it is necessary, for the organization of the society what includes the exercise of institutional power. Giving up freedom for a determined finality means to keep up freedom insofar as limitation of freedom is not required by this finality. In other words: freedom exists as a principle, society organization by the establishment of institutions and the exercise of power, that is the expression of the institutional will with binding effect on the individual, are exceptional and require therefore legitimation. Legitimation is given if the institutional will intends to preserve and to promote society in terms of good governance, in conformity with the idea of justice, human dignity and the principle of freedom as such. Limitation of freedom must therefore fully respect the principle of freedom by not exceeding the indispensable degree of limitation, by conserving the «essence» of freedom as expressed particularly in the various fundamental rights provisions and by a strict observance of the supreme value, dignity.

The institutional will is expressed by the exercise of public power, no matter by a State or by a supranational organization disposing of the ability for normative orders. The *contrat social* which is essentially based on the principle of freedom of the individual is a safeguard for this freedom as it is a contract. This means that freedom was given up voluntarily and that the due relation between freedom and institutional finality is the essential contents of the contract. Historically, written safeguards for the observance of this contract have been formulated, fundamental rights in constitutional texts. A later development has been to institutionalize guardians of these rights, therefore guardians of the contract, judges and, in a more advanced phase, constitutional courts.

It results from these preliminary reflections that the exercise of power with binding effect on individuals is confronted with the principle of freedom. Therefore each system which institutionalizes the exercise of power on individuals is based on this principle regardless if it is written or not by the law of this system. It is therefore consequent that judges formulate fundamental rights in systems without a written fundamental rights catalogue, often in form of general principles as it happened in the European Communities system[2], sometimes by establishing a link to other written catalogues,as in France in 1971[3] or in Great Britain in 1998 through the Human Rights Act[4].

This same idea is applicable to the phenomenon that judges, in particular constitutional judges develop further the written body of fundamental rights in a Constitution by extending their contents or even by formulating new aspects of existing rights. The principle of efficiency of fundamental rights protection leads to an enlargement of the written and formulated rights. This traditional activity does not exceed interpretation in a well understood sense which seeks to apply the basic principle of freedom inherent, as explained above, in all institutionalized power systems with impact on individuals.

[2] See BERNITZ, U.; and NERGELIUS, J. (eds.): *General Principles of European Community Law*, 2000.

[3] DECISION N° 71-44 DC DU 16 JUILLET 1971, REC., P. 29.

[4] http://www.legislation.gov.uk/ukpga/1998/42/contents.

2. - THE PRINCIPLE OF FUNCTIONAL CONCENTRATION OF RIGHTS

If this fundamental scheme is kept in mind, a collateral phenomenon can be better understood, the phenomenon of the *functional concentration of rights* which means that rights of a certain legal order are interpreted and conceived in the light of the interpretation of rights stemming from a different order. The general principle of freedom has an intrinsic tendency to absorb existing rights concepts even if they belong to a different normative system. This is perhaps one of the reasons of *judicial dialogue* with the effect of adaptation, approximation and so-called cross-fertilization. These phenomena can be justified in the perspective of the existence of the general principle freedom in power-related systems. If this principle is general, the specific formulation is not of primordial importance but is exposed to extensive interpretation, to conceptual harmonization with different legal orders, to further normative development of the contents on major social changes etc.

It is decisive that all these processes serve the realization of the basic principle of freedom, by contributing to the substantive and functional efficiency of the individual's protection. Substantive efficiency in this sense means to cover all present and future, existing and emerging threats to freedom. Functional efficiency is dedicated to uphold the full function of the freedom safeguards, in particular by a due application of proportionality as a highly capable instrument of adequately balancing freedom and public interests as well as by the guarantee of the very essence of fundamental rights[5].

3. - MINORITY PROTECTION THROUGH THE FUNDAMENTAL RIGHTS CHARTER OF THE EU - AN EXAMPLE

a) The Complexity of Minority Protection Law

Minority protection is normatively complex: individual and collective rights, programmatic norms, objective constitutional principles, regional and international instruments constitute a functional body which should protect efficiently a minority. Minorities are important social factors in societies which can have the tendency to assimilate with the majority or to maintain their specificities which constitute a group of persons as a minority. Many countries in the world and also some of the member States of the European Union are distinctly of a multi-ethnic character. For peace and justice within the society respect and protection of minorities are indispensable[6].

b) Normative Differentiation of Minority Protection: the complementary tendencies of individualization as subjective rights and of objectivization as constitutional programs

Minority protection can appear in various normative forms: as individual or collective rights, as objective normative programs with binding or only recommending character, in direct reference to minorities (as article 21 of the Charter or article 2 of the Treaty on the EU) or ethnic groups, a term which seems to be a synonym for minorities (as in article 19 of the Treaty on the Functioning of the EU), or only in indirect reference to them protecting for example the «multiplicity of cultures, religions and languages» (as article 22 of the EU Charter) or even through the classical rights such as nondiscrimination,

[5] See ARNOLD, R.: *Substanzielle und funktionelle Effizienz des Grundrechtsschutzes im europäischen Konstitutionalismus,Essays in Honour of Friedhelm Hufen*, C.H. Beck, 2015

[6] SEE IN GERMAN LANGUAGE KROLL, FRANK-LOTHAR; AND NIEDOBITEK, MATTHIAS (EDS.), *VERTREIBUNG UND MINDERHEITENSCHUTZ IN EUROPA*, 2005 AND IN PARTICULAR THE CONTRIBUTION OF NIEDOBITEK, M.: *MINDERHEITENSCHUTZ IM EUROPÄISCHEN MEHREBENENSYSTEM*, IBIDEM, PP. 241 – 278.

freedom of religion, of expression, or of association., etc. It is a frequent phenomenon that the recourse to classic rights functionally substitutes specific minority protection rights. It is not very exceptional that constitutional law combines objective finality or program norms and subjective minority-related individual rights and even more frequently classic individual rights.

c) The definition of minority

Before analyzing the EU Charter on the minority protection issue there should be made a short reference to the term of minority.

In the classic view of *Capotorti* minorities are persons who differ from the rest of the population in a State in basic personal attributes such as ethnic origin, language, religion, cultural tradition etc., are numerically inferior and in a non-dominant position[7]. There must also be fulfilled the subjective element to maintain these characteristics as a group.[8]

The claim of a person to maintain these personal attributes only individually is not a question of minority rights in a strict sense but of invoking individual fundamental rights, in particular personality rights and non-discrimination.

Furthermore, citizenship of such persons is no longer the requirement for being characterized as a minority group enjoying protection under international law[9].

It shall be noted that there is no consolidated definition neither in national nor in international law. It is evident that national law, constitutional and ordinary law, can establish their own definitions. The essential is that the individual, without any discrimination for its personal attributes, its dignity, its fundamental rights and the exercise of these rights by the individual or by a group are respected.

EU law does not define the term of minority which it uses in particular in article 21 of the EU Charter and in article 2 of the Treaty on the EU. By article 19 of the Treaty on the Functioning of the EU discrimination is forbidden for reasons of «ethnic origin», a provision which is important for but not exclusively destined to minority protection. Also this term is not precisely defined albeit its meaning is less difficult to understand than that of minority.

It can be stated that each legal order has the right to define autonomously what a minority shall be. However, if it does not define it by itself it seems justified that the notion which has developed internationally shall be applied also within this specific legal order. This results from the fundamental intention of a legal order to harmonize, as far as possible, its internal concepts with those developed in a legal order superior to it as international law is for States as well as for the EU as a subject of international law. This tendency of interpretative approximation seeks to avoid conflicts between the two orders which might result from a divergent interpretation of the same term in each of them. This seems to be a consequence of the binding normative effect of the superior on the inferior order.

This tendency of approximation is an example also for the above-mentioned principle of functional concentration of rights, seen from the perspective of the definition of the rights holder.

d) EU law as an example for normative complexity of the minority rights protection

Minority protection in the European Union is a significant example for the complexity of fundamental rights protection in modern constitutionalism. Analyzing this phenomenon we can speak of various principles: first of all of the principle of

[7] See CAPOTORTI, Francesco: *Minorites, in Encyclopedia of Public Intrnational Law*, vol. III, Rudolf Bernhardt (ed.), 1997, pp.410-421, 410-411.

[8]See ARNOLD, Rainer: *Minderheiten, in: Staatslexikon. Görres-Gesellschaft* (ed.), 1987, 7th ed., vol. 3, pp. 1160 - 1167

[9] See UN Declaration of 1992 adopted by General Assembly resolution 47/135 of 18 December 1992, http://www.un.org/documents/ga/res/47/a47r135.htm

substantive and functional efficiency which has already been mentioned, secondly of the principle of *subjectivization*, which can be divided into an *individual* and a *collective* dimension, thirdly of the principle of *valorization*, further of the principle of *positive implementation*, and finally of the principle of *functional concentration*.

These principles which are important for the fundamental rights protection in general shall be examined in brief reflections.

The topic refers to European Union law protection of minorities. However, the mentioned principles are transversal principles, constitutional in their nature and applicable for national fundamental rights protection as well as for supranational guarantee systems. To a certain extent they are also of significance for the European Convention of Human and Rights (ECHR) which is a constitutional instrument[10].

The first mentioned basic principle is the *efficiency principle* which is inherent in a constitutional order, as pointed out above. This principle is not only the basis for the fundamental rights protection in a State but also in the supranational order and can conceptually also be transferred to the ECHR.

The guarantee of substantive efficiency in this context means that minorities have to be protected in every respect which is necessary for the existence, the free deployment of the characteristic elements of a minority concentrated on language, culture, religion, etc. Substantive efficiency covers all the aspects which are necessarily linked to a minority. Functional efficiency means that the protection guarantee can only be restricted for legitimate general interests in conformance with proportionality[11] and can never be affected in its nucleus, its essence.

The principle of efficiency aims at reaching the finality of efficient protection and does not precisely predetermine the ways how to reach this scope.

The principle of *subjectivization* expresses the tendency to lay down individual rights of minority protections for the persons belonging to minorities. The modality of their protection can be the protection by subjective individual rights which can directly be invoked by the rights holders. This is the *individual* dimension of this principle which is complemented by the *collective* dimension expressed by the protection of minorities as a collective body, a social entity. An example for the individual dimension is article 21 of the EU Charter or article 19 of the Treaty on the Functioning of the EU, for the collective dimension article 2 of the Treaty on the EU.

The principle of *valorization* is based on the fact that subjective rights, fundamental and human rights, constitute (objective) values. They are part of the ideological basis of the constitutional order, «construction principles» of the constitutional system. Norms of more general content such as article 22 of the EU Charter which indirectly have a protective effect for minorities also belong to this category.

The principle of *positive implementation* is of great importance for the realization of minority rights. This embodies the positive dimension of the protection while the already mentioned rights have the character of defense against intervention into the spheres of freedoms and rights which are important for the minority members.

Positive implementation has various aspects: the realization by ordinary legislation or, at the level of the EU, by secondary law is indispensable for the situation of minorities. National legislation has to be adapted to the requirements of minority protection in the way that violations are excluded. However, beyond this, active protection has to be given to the minorities. In correspondence to their specific needs as language, education, cultural tradition, etc. the legislator has to act.

[10] CASE OF LOIZIDOU v. TURKEY (PRELIMINARY OBJECTIONS), (Application no. 15318/89), para. 75

[11] See ARNOLD, R. *El principio de proporcionalidad en la jurisprudencia del Tribunal Constitucional*, together with MARTÍNEZ ESTAY, J.I.; and ZUNIGA URBINA, F. in: *Estudios Constitucionales*, Santiago de Chile, 2012, pp. 65-116.

This implementation duty comprises positive discrimination, which means legislation in order to satisfy the above-mentioned requirements and establish structures of autonomy in particular in cultural matters as well as forms of political participation. It is necessary on the one hand to treat minorities and members of minorities in equal way as the majority in all the matters which concern all the people in a State equally. This is an evident consequence of the basic principle of equality and nondiscrimination. Insofar as specific qualities of a minority are concerned, legislation has to guarantee and to promote them in a particular way.

It has to be underlined that minority protection on the one hand requires nondiscrimination but on the other hand positive promotion for a minority needs. If a minority as a collective body wants to continue its identity, support by the State and the majority population is indispensable. It is needed to admit to the minority members to use their language (at least in private use), to exercise their religion, to adhere to their culture and tradition. For the minority as a collective body public power is obliged not to intervene in a detrimental sense but to foster the existence and development of it. It can be stated that positive implementation of the minority protection is a necessary complement to the individual and collective freedom to adhere to a minority and to carry out minority-related activities. For maintaining the minority character of a group the State has not only to refrain from interfering but also to actively support the group by its legislation and to some extent also financially. It is evident that the margin of appreciation how to fulfil the implementation task is rather large. However, the measures must be efficient and correspond to a satisfactory fulfilment.

The principle of *functional concentration* indicates a tendency to fill up the concept of the own legal order with elements of the parallel concept of a different legal order, especially of international law. In the field of fundamental and human rights the principle of *protection efficiency* implies also the tendency to concentrate protective elements which can be found in other legal orders within the own concept. These elements can exist in the written text or even more in jurisprudence. As rights are normally formulated in a general way they are widely open for absorbing new aspects for intensifying protection. This process of convergence goes on even regardless the traditional separation of national and international law or the fact that national legal orders are separated one from the other by State sovereignty. The vertical adaptation process from international and even more from supranational to national law is the implicit consequence of the superiority of these legal orders. As the judicial practice in Europe shows the interpretative adaptation of rights to concepts stemming from international law is not hindered for example for Germany by the fact that international treaties such as the European Convention of Human Rights are transformed into German ordinary legislation[12]. Nevertheless the Convention is used by the constitutional jurisprudence as an interpretation maxim also for constitutional law[13]. Rule of law is seen as incorporating international law as well, and the constitutional complaint of the individual can invoke violations of German fundamental rights if they are not interpreted in the light of the Strasbourg concepts[14]. Also in other countries the interpretation of the own constitutional order concentrates the optimum standards developed in international law or in different legal systems.

This is an ongoing process which mainly characterizes the phenomenon of judicial dialogue.

In the context of minority rights the interpretation of the relevant EU law, in particular of article 21 of the Charter and of

[12] See Art. 59. 2 Grundgesetz (Basic Law)

[13] BVerfG (Federal Constitutional Court) Görgülü case 2004 http://www.bverfg.de/entscheidungen/rs20041014_2bvr148104.html para.32-33

[14] BVerfG (note 13), para. 63

article 2 of the EU Treaty, have to be adapted to the substantive precepts of the highly important Council of Europe Conventions, the Framework Convention on protection of national minorities[15] and the European Charter for Regional or Minority Languages[16]. Both documents demonstrate the structural variety of guarantees, individual rights with a subjective and collective dimension, programmatic norms, and normative implementation programs. Subjective rights and objective values are combined with implementation duties.

4.- SOME CONCLUSIVE REMARKS

Minority protection is of growing importance around the world. Ethnic diversity in a State has to be duly respected and taken into consideration at a constitutional level. International and supranational Law have developed a variety of guarantees.

In the European Union article 21 of the Fundamental Rights Charter as well as article 2 of the EU Treaty and other provisions protect minority rights. Member States have to conform to the EU standard. Entry into the EU is only possible if minority problems are duly resolved. Minority protection is taken seriously also in external relations of the EU with third countries. Important influence on national and supranational standards is exercised by the two important Council of Europe Conventions, the mentioned Framework Convention and the Charter on regional and minority languages.

Modern European constitutionalism is based on the principle of efficiency of the fundamental rights protection which finds its expression in jurisprudence by the *effet utile* approach of rights interpretation. The finality to protect the individual as well as groups such as minorities in a substantively and functionally efficient way is basic. The modalities how to fulfil this finality can be different: subjective rights of the individual member of a minority or collective rights of the minority group are a subjective form of protection, binding or recommending programmatic norms conceive cultural, religious, and ethnic diversity as objective values which have to be protected against public power or even private intervention and to be promoted by implementation through ordinary legislation. Furthermore, there is an inter- and transnational adaptation process visible which tends to fill up the own protection concepts with the best elements from other legal orders, a sort of *optimization tendency*.

Minority protection is of particular normative complexity demonstrating aspects of all the dogmatic approaches in the field of fundamental and human rights. As a whole it confirms the thesis of the ultimate finality of the rights protection: its substantive and functional efficiency.

[15] http://www.coe.int/en/web/minorities/text-of-the-convention

[16] https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=090000168007bf44