

# MINORITIES PROTECTION AFTER THE RESOLUTION OF EUROPEAN PARLIAMENT OF 13 NOVEMBER 2018

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## Abstract

*This paper intends to analyze EU law evolution on minorities protection, highlighting its particularities through a summary but unavoidable incursion into the system of Society of Nations, United Nations, Council of Europe and OSCE (formerly CSCE).*

**Keywords:** *protection of minorities, Resolution of 13 November 2018, OSCE, EU law.*

## 1. European Parliament's role in the protection of "right to difference": From the "Arfè" Resolution to the Resolution of 13 November 2018

With regard to minorities protection in EU law, the doctrinal contributions<sup>1</sup> are relatively recent as they date back to the early 1980s of the last century. Referring to the first resolutions of the European Parliament in this area<sup>2</sup>, they focus mainly on the evolution that the protection of minorities has recorded since the aforementioned resolutions until reaching

the (partial) innovations introduced by the Lisbon Treaty<sup>3</sup>. Although these studies converge with regard to the importance to be given to acts adopted in progress by European institutions starting from the fundamental resolution "Arfè" of 16 October 1981<sup>4</sup>, it is rare to find within them the clear distinction, of an internationalistic nature, between the principle of "non-assimilation" aimed at safeguarding, through the assumption of international obligations by states, the cultural identity of the minority group and the principle of "non-discrimination" to be recognized to persons

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<sup>1</sup> A. Van Bossuyt, L'Union européenne et la protection des minorités: une question de volonté politique, in Cahiers de Droit Européen, 46, 2010, pp. 425ss.

<sup>2</sup> P. Thornberry, International law and the rights of minorities, Oxford University Press, Oxford, 1991, pp. 25ss. F. ERMACORA, The protection of minorities before the United Nations, in Recueil des Cours, 1983, IV, ed. Brill, The Hague, pp. 247ss. F. MIHANDOOST, B. BADAJANIAN, The rights of minorities in international law, in Journal of Politics and Law, 9 (6), 2016, pp. 16ss.

<sup>3</sup> See the Resolution of the European Parliament of 11 February 1983 on measures in favor of minority languages and cultures, in OJ, C 68 of 14 March 1983, and the Resolution of the European Parliament of 30 October 1987 on minority languages and cultures ethnic and regional communities in the European Community, in OJ C 318 of 30 November 1987

<sup>4</sup> Signed on 13 December 2007 and entered into force on 1 December 2009.

belonging to said group<sup>5</sup>. Part of the doctrine<sup>6</sup>, after having limited itself to emphasizing the non-obligatory effectiveness of these resolutions, however, has neglected the fundamental logic to which they are inspired, i.e. the recognition, of a "right to difference" of the overall minority group understood. In fact, in-depth information on the role to be recognized to the principle of non-assimilation, understood not in a broad and generic sense (including, therefore, also of the principle of equality and non-discrimination), but focused on the diversification between majority and minority of population and on minority's group fundamental right to avoid its dispersion within the majority, with consequent loss of identity.

The concept of "discrimination" against minorities and their languages, in fact, is inspired not by the need to ensure respect for the principle of substantial equality towards individuals, as could be considered to a superficial examination of such acts, but rather to the opportunity to safeguard, with a view to non-assimilation, the "historical identity" of minorities themselves, understood as a collectivity.

In assessing this evolution, we will dwell in particular on the recent Resolution of the European Parliament on minimum standards for minorities in EU<sup>7</sup> with which this institution intended to send a warning to the other European institutions and in particular to the Commission, hoping for the adoption of a series of "special protection measures" in favor of minorities, as if to

reaffirm the insufficient level of protection currently granted to minority groups in the European juridical space.

## **2. The distinction between the principle of "non-assimilation" and "non-discrimination" in the international minority regime**

First of all, it is necessary to highlight the distinction between two principles which, although deeply connected, present substantial differences: the principle of "equality and non-discrimination" and of "protection of minorities" in the strict sense, concerning the necessity to adopt special measures of protection in favor of minorities. The rationale behind these-which can justify a differentiated treatment with respect to the majority-is represented by the non-assimilation of the minority group, understood as "conservation of characteristics, traditions and values proper to each minority" and is aimed at safeguarding the minority group from the risk of losing its cultural identity and the consequent danger of absorption by the majority of population<sup>8</sup>.

The prohibition of assimilation, therefore, sets itself as the primary objective not to promote an undifferentiated treatment, but to protect the "diversity" of the minority group. Hence the clear distinction with the principle of formal and substantive

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<sup>5</sup> Resolution of the European Parliament of 16 October 1981 on a Community Charter of regional languages and cultures and a Charter of the rights of ethnic minorities, Rapporteur Gaetano Arfè, in OJ, C 287 of 9 November 1981.

<sup>6</sup> J. Burgers, *The Right to Cultural Identity*, in J. BERTING (eds.), *Human rights in a pluralist world*, ed. Praeger, Westport-London, 1990, pp. 251 ss.

<sup>7</sup> European Parliament resolution of 13 November 2018 on minimum standards for minorities in the EU (2018/2036 (INI)).

<sup>8</sup> With the opinion of 6 April 1935 on minority schools in Albania (Publications de la CPJI, Series A/B n. 64, p. 4 et seq.) It was stated that the application of the principle of equality of treatment cannot lead to make a minority group lose its identity towards the majority of the population

equality<sup>9</sup>, under which different situations cannot be treated identically and whose purpose is to remove the causes that generate a similar inequality in order to create the conditions for an undifferentiated treatment with no exceptions<sup>10</sup>. While, therefore, the use of "differentiated protection measures" is addressed to minority rights as such<sup>11</sup>, or as a community. The implementation of the principle of non-discrimination is based on the recognition of rights of persons (individuals) belonging to a minority.

Another crucial aspect concerns the old question of whether the protection of minority group identity, in application of the principle of non-assimilation, materializes in the recognition of collective rights proper to the minority or if-equal to what happened in the system of the Society of Nations with the Minority Treaties - this protection is pursued through the provision of precise guarantee obligations imposed on states. Some authors have brought the question back to the problem of the existence or non of a collective right recognized to minority groups<sup>12</sup> by solving it in various ways without, however, asking oneself before whether there can be a protection of minorities identity that is independent of the existence or otherwise of collective rights.

It is therefore necessary to ask whether minority groups can receive adequate protection of their identity when an international obligation is imposed on states where these groups exist and, therefore, also independently of the existence of

recognition in their favor of a specific right<sup>13</sup>. It will be on these aspects that, starting from the evolution that the protection of minorities has registered at a global level and at a regional level during the twentieth century.

### **3. Minorities protection and cultural diversity in the system of the League of Nations, United Nations, the Council of Europe and OSCE**

In the knowledge that it is not possible to exhaust the complex question of means by which international law ensures the protection of human person, we have chosen to recall only the principles and the most important provisions which, within the framework of the law of the Society of Nations, in that of the United Nations, Council of Europe and, more recently, the Organization for Security and Cooperation in Europe (OSCE), note in the field of minorities protection and cultural identity. Indeed, it is quite easy to understand whether EU law is inspired by the principles that inform the aforementioned systems or if, on the other hand, it deviates from them.

At a global level, in relation to the international minority regime at the time of the League of Nations, it should be remembered that the period 1919-1939 was characterized by the absence of international norms for the protection of human rights. The only exception was represented by the

<sup>9</sup> N. Feinberg, *La juridiction et la jurisprudence de la Cour Permanente de Justice Internationale en matière de mandats et de minorités*, in *Recueil des Cours*, 1937, I, ed. Brill, The Hague, pp. 660ss.

<sup>10</sup> D.H. Miller, *The drafting of the Covenant*, New York, 1928, II, pp. 130ss.

<sup>11</sup> Among the particular hypotheses in which minorities are considered "comme des entités collectives" we recall the art. 9 and the art. 10 of the Treaty with Poland, concerning "financial contributions for carrying out educational, religious or charitable activities" and "financial contributions to Jewish schools".

<sup>12</sup> In positive sense see: K. Vanderwal, *Collective human rights: a western view*, in J. BERTING et al (edited by), *Human rights in a pluralist world*, ed. Praeger, Wesport-London, 1990, pp. 96ss, which is affirmed that: "can be regarded as human rights, albeit a special sub-category of human rights".

<sup>13</sup> J. Donnelly, *Human rights, individual rights and collective rights*, in J. BERTING (eds.), *Human rights in a pluralist world*, ed. Praeger, Wesport-London, 1990, pp. 56ss.

treaties on minorities of which, however, only a small number of beneficiaries could be worth. The rules contained in them were aimed not only at prohibiting any discrimination of individuals, but also above all at protecting certain minority groups from the risk of being assimilated to the majority of the population with consequent loss of their identity.

The subsequent United Nations system did not take into consideration the aspect of collective entities protection as such; said omission was justified by the alleged (especially by the United States) superfluity of a reformulation of art. 1 of the UN Statute and the provisions of the Universal Declaration of Human Rights that already recognized the right of every person (including members of minority groups) not to be discriminated against for reasons of race, language and religion. In this regard, it must be observed that the classification, starting from 1945, of the rights of minorities within the genus of person rights, has implicitly led to a clear *deminutio capitis* connected to the non-consideration of the principle of non-assimilation; situation that will last for about twenty years.

It was only after several years, moreover often on the basis of soft law acts, that at world level even the protection of minority groups as such, or with respect for their identity, would be the subject of a dedicated discipline<sup>14</sup>.

The principle according to which persons belonging to a specific minority are recognized as "cultural" rights is found for

the first time in the well-known art. 27 of the International Covenant of Civil and Political Rights of 1966. It represents the first legally binding norm of the post-World War II period, which recognizes rights to the generality of minorities and no longer only to certain minority groups. The aforementioned provision, extending the assumption already contained in art. 27 of the Universal Declaration of Human Rights according to which every individual has the right to take part freely in the life of the community, states that persons belonging to ethnic, religious and linguistic minorities cannot be deprived of the right to have their own cultural life, profess and practice one's religion, use one's own language, in common with the other members of one's group<sup>15</sup>, which would give the contracting states the obligation to take all the necessary positive measures to protect minorities identity<sup>16</sup>.

A particularly significant stage in the process of affirming the obligation to protect minorities identity is represented by the Declaration of the rights of persons belonging to national or ethnic, religious and linguistic minorities, adopted by the General Assembly of the United Nations on December 18, 1992 with Res. 47/135 that in art. 1 highlights the existence and identity of these minorities. States favor the creation of suitable conditions to promote these identities and adopt the necessary legislative provisions for this purpose<sup>17</sup>. On closer inspection, the choice to maintain a specific international discipline on minorities

<sup>14</sup> A. Liebich, A la recherche d'une solution introuvée, in A. LIEBICH, A. RESZLER (a cura di), L'Europe centrale et ses minorités: vers une solution européenne?, Graduate Institute, Geneva, 1993, pp. 198ss.

<sup>15</sup> R. Ben Achour, Souveraineté étatique et protection internationale des minorités, in Recueil des Cours, 1994, I, ed. Brill, The Hague, pp. 424ss

<sup>16</sup> General Comment No. 23 on minority rights, formulated in 1994 by the Office of the High Commissioner for Human Rights.

<sup>17</sup> On the contrary, the subsequent articles (in particular those from 2 to 7 of the Declaration) focus on the principle of non-discrimination but, in obvious analogy with the aforementioned art. 27 of the 1966 Pact, specify that the rights recognized by the Declaration can be exercised "individually as well as a community with other members of their group" (Article 3).

protection following the consolidation of a supranational protection system for human rights, should favor the identification of the ratio in the desire to specifically protect the identity cultural group of the minority group, with simultaneous provision of protection obligations for states, aimed at preventing its dispersion within the majority of population.

Lastly, with reference to other important acts that, at a global level, are relevant for the protection of minorities while not expressly dedicated to this matter, it is necessary to recall the UNESCO Convention on the protection and promotion of diversity of cultural expressions concluded at Paris 20 October 2005 which, highlighting the "importance of cultural diversity" for the progressive realization of human rights, in art. 2 reaffirms the principle under which "the protection and promotion of cultural diversity presupposes respect for human rights, fundamental freedoms such as freedom of expression, information and communication as well as the ability of individuals to choose their own cultural expressions". As opposed to EU law in which the appreciation of "cultural diversity" is left to Member States will, in this act an exhaustive definition of this concept is provided and, on the other hand, it is given to emphasize the principle of respect and appreciation of the diversity of cultures, by virtue of which the culture of each community (and therefore also of a minority group) has a value and a dignity that must be respected and preserved. It

basically implies the recognition to groups of that right "to diversity", to "non-assimilation" that permeates the system minorities protection as collective entities and that differs from the system of protection dictated in favor of individuals who, as already pointed out, is based on the principles of equality and non-discrimination.

On a European scale, with reference to the acts adopted in the Council of Europe, there are several similarities with the system of minority protection adopted worldwide by the United Nations. The European Convention on Human Rights (ECHR) in fact, is entirely inspired by the principle of equality and non-discrimination. In particular, art. 14 provides that: "the recognition of the rights and freedoms recognized in the present Convention must be guaranteed without any distinction based above all on sex, race, color, language, religion (...), belonging to a national minority"<sup>18</sup>. It is clear that the question of minorities is confined exclusively to the right of persons belonging to a national minority<sup>19</sup> not to be discriminated.

In ECHR, as in the Universal Declaration of Human Rights, an individualistic approach prevails which only in the early 1990s will present significant openings in the direction of recognizing minorities protection as such and of defending and enhancing the cultural identity of the community. Both the Framework Convention for the Protection of

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<sup>18</sup> Clearly inspired by both art. 14 of the European Convention on Human Rights, both in art. 27 of the International Covenant on Civil and Political Rights, is the Final Act of the Conference on Security and Cooperation in Europe, signed in Helsinki on 1 August 1975, which contains some elements of novelty regarding the protection of minorities, between whose goal is to develop cultural cooperation aimed at enriching the respective cultures in the awareness "of the merits and value of each".

<sup>19</sup> It is recalled that the only definition of "national minority" is that contained in recommendation 1201 of the Parliamentary Assembly of the Council of Europe (1993) concerning an additional protocol on minority rights to the European Convention on Human Rights, according to which they fall under this concept "groups of people in a State residing in the territory of the State in question, of which they are citizens; they maintain ancient, solid and lasting ties with the State; they have specific ethnic, cultural, religious or linguistic characteristics; they are sufficiently representative, albeit numerically lower than the rest of the population (...); they are motivated by the desire to preserve what constitutes their common identity, including culture, traditions, religion or language (...)".

National Minorities of 1 February 1995, and the European Charter for Regional and Minority Languages opened for signature in Strasbourg on 5 November 1992, move in this direction, as they are not confined to sanctioning the applicability of the principle of non-discrimination in favor of all those who belong to the aforementioned minorities, but contain provisions specifically set to protect minorities values of ethnic and cultural identities considered as a whole<sup>20</sup>.

In fact, among the inspiring principles of the aforementioned Charter, the "right to be different" is expressly described, defined as "inalienable and unavoidable" due to all those, "individuals and groups", who use a language distinct from the official language of the state<sup>21</sup>. The Framework Convention on the value of the cultural heritage of human society was opened for signature in Faro on 27 October 2005 the Council of Ministers with which all states party to the Council of Europe were invited to take measures suitable to support and promote cultural and linguistic diversity in the new global context, respecting (in addition to its own) the cultural heritage of others, as a common European cultural heritage.

With regard to CSCE documents (OSCE since 1994), it should be pointed out that in them we find different references to the principles of equality and non-discrimination aimed at protecting people. Among these, one of the most important is the document adopted at the end of the Copenhagen summit of 29 June 1990 in which the states in paragraph 30 stated that "questions relating to national minorities can only be satisfactorily resolved in a democratic political framework based on the rule of law" which guarantees full respect for

human rights and fundamental freedoms, equal rights and conditions for all citizens.

Having said this, the most important fact is that, in the system under consideration, it is above all at the principle of non-assimilation that states finally pay particular attention, stating in paragraph 32 that persons belonging to national minorities have the right (exercisable as an individual or in association with other members of their group) to freely express, preserve and develop their own ethnic, cultural, linguistic or religious identity and to maintain and develop their own culture. In the next paragraph, the aforementioned states are committed to protect minorities identity on their territory, in order to create the conditions for the promotion of this identity.

#### **4. The resolutions adopted by the European Parliament and the inertia of other Community institutions**

Within EU, as previously pointed out, it is from the 1980s that the first significant acts on the subject of minorities are detected. The aforementioned European Parliament's 1981 Resolution on a Community Charter of regional languages and cultures and a Charter of rights of ethnic minorities, although lacking in mandatory effectiveness, is clearly inspired by the recognition of a "right to difference" by the minority group and, therefore, to the principle of non-assimilation. From a careful reading it emerges, in fact, that the reference to the prohibition of "discrimination" contained in it is aimed at safeguarding "the historical identity" of minorities and not already ensuring the respect of the principle of equality towards individuals. It is

<sup>20</sup> Art. 7 n. 1, lett. e) and art. 7 n. 4 of the Charter of Regional and Minority Languages of 1992.

<sup>21</sup> See the Preliminary Report prepared by Lluís de Puig for the Permanent Conference of Local and Regional Authorities of 30 January 1986. On this point in doctrine see: S. PETSCHEN VERDAGUER, *Las minorias lingüísticas de Europa occidental: documentos (1492-1989)*, Parlamento Vasco, Vitoria, 1990, pp. 582ss.

precisely in order to pursue this purpose that, by means of this act, the European Parliament already from then on wished the adoption of special measures in favor of "minority language and cultures"<sup>22</sup>. These requests, which we regret to note, have also remained unexplained in the 1990s due to the continuing inertia of the Commission and the Council which, both in terms of primary<sup>23</sup> and secondary law, have not introduced any regulatory reference at international level to minorities rights<sup>24</sup>.

### **5. A bitter confirmation: the "not received" principle of non-assimilation in the EU Charter of Fundamental Rights, Directive 2000/43/EC and EU Court of Justice jurisdiction**

Unlike the Treaty of Nice of 26 February 2001 in which it was decided not to make any changes in the matter of principles applicable to minorities (so much so that this term does not even appear in it), the Charter of Fundamental Rights of the

European Union, always proclaimed in Nice on 18 December 2000, contemplates art. 21 the provision of prohibition of "any form of discrimination based, in particular" on membership of a national minority"<sup>25</sup>; thereby confirming the tendency to "confine" the issue of minority protection solely within the scope of application of the right of persons belonging to them not to be discriminated against<sup>26</sup>.

Even the immediately following directives 2000/43/CE<sup>27</sup> and 2000/78/CE respond to the purpose of making the principle of equal treatment effective, forbidding both in art. 2, any form of direct or indirect discrimination. In this regard, it is worth pointing out that the statements contained in the just-referred secondary legislation have for a long time remained unexpected since, after almost ten years, the European Parliament, with Resolution of 20 May 2008 on equal opportunities and non-discrimination in EU, still urged member states "to promote citizens" rights more

<sup>22</sup> See also the subsequent Resolution of 30 October 1987, Rapporteur Willy Kuijpers,

<sup>23</sup> this regard it must be observed as well as the change made by the Treaty of Amsterdam to art. 1, par. 1 TEU, it is limited to establishing that: "The Union is founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms, principles which are common to the Member States", without, however, having an explicit reference to minorities.

<sup>24</sup> With regard to the external level, by contrast, some association agreements are clearly more oriented towards the protection of minority groups outside the Union, including, by way of example, it is sufficient to recall here the one with the States of the Central and Eastern Europe and those of Hungary, Estonia and Poland. On the subject of the double standard adopted minorities as such. All the acts adopted in application of the then art. 7 par. 1 TCEE are, in fact, focused exclusively on the principle of non-discrimination of persons and not also of the community and pursue the sole objective of respecting the principle of equality, without saying anything about the enhancement of the diversity of the collective entities considered in themselves. In terms of deeds without binding efficacy, the only one worthy of note is probably the Laeken Declaration on the future of the European Union where Europe is described as "the continent of freedom, solidarity and above all diversity, which implies respect for the languages, culture and traditions of others ". Minorities, albeit with reference exclusively to those outside the EU borders, are expressly referred to when the idea of a Union open only to those countries that respect fundamental values such as respect for minorities and minorities is outlined. of the rule of law.

<sup>25</sup> F. Van Den Berghe, The European Union and the protection of minorities: how real is the alleged double standard?, in Yearbook of European Law, 22, 2003, pp. 162ss.

<sup>26</sup> F. Van Den Berghe, The European Union and the protection of minorities: how real is the alleged double standard?, op. cit.

<sup>27</sup> Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, OJ L 180, 19.7.2000, pp. 22-26.

effectively in accordance with directives 2000/43/EC and 2000/78/EC"<sup>28</sup>.

It should also be noted that the Court of Justice of the European Union (CJEU) jurisdiction, prior to the stipulation of the Lisbon Treaty, appears rather misleading. With reference to the ruling made in the Grand Section on 22 November 2005 in the Mangold case<sup>29</sup>, in fact, the reference to the legitimacy of "specific provisions" could mislead recalling the concept of "special protection measures" and favoring recognition in the field of EU principle of non-assimilation. However, a careful examination of the sentence shows that the aforementioned provisions that admit "unequal treatment" in favor of individuals are aimed at promoting the principle of substantial equality and certainly not at enhancing the differences that characterize minority groups, thus substantially confirming the previous orientation focused on the recognition of the principle of non-discrimination only.

## 6. The limited changes regarding minorities protection introduced by the Lisbon Treaty

Unlike what some authors have claimed, we believe we can say that not even the Lisbon Treaty has introduced appreciable changes in the field of minority protection. If there is no doubt that either art. 2 TEU or art. 21 of the Charter of Fundamental Rights mention, for the first time at the level of primary law, minorities. It is also true that the aforementioned norms emphasize exclusively the principle of non-

discrimination, without adding anything in terms of protection of the minority group as such. The reference made by art. 2 TEU to the "rights of persons belonging to minorities", falling within the broader category of human rights, is nothing more than a mere clarification of what could already be inferred from the previous art. 6 par. 1 (in the version defined in Nice) in which human rights and fundamental freedoms were mentioned. Although in art. 2 TEU make reference to "pluralism" as the first character that distinguishes European society, in no way this concept is subsequently developed in TEU, neither in TFEU nor in the Charter of Fundamental Rights of EU. This gap is particularly indicative of a "regression with respect to the topic of advantageous situations in favor of spontaneously born collective subjects"<sup>30</sup>.

The current European legislation is, in fact, strongly focused on a concept of minority protection limited to the recognition of individual rights and "indifferent to the protection of social pluralism, if not as a reflection of the protection of individual freedoms", without any specific form of protection be reserved for collective subjects. Likewise, even the prohibition of "any form of discrimination based on belonging to a national minority" clearly recognizes the right not to be discriminated against by individuals alone, thus reducing the innovations introduced by the Lisbon Treaty.

Not even in art. 22 of the Charter of Nice seems to be able to recognize any innovative element since it merely states that "the Union respects cultural, religious and linguistic diversity", where the choice to use

<sup>28</sup> Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, OJ L 303, 2.12.2000, pp. 16-22.

<sup>29</sup> CJEU, C-144/04, Mangold v. Rüdiger Helm of 22 November 2005, ECLI:EU:C:2005:709, I-09981. In the same spirit see also: C-64/16, Associação dos Juizes portugueses of 7 February 2018, ECLI:EU:C:2018:117, published in the electronic Reports of the cases.

<sup>30</sup> M. Decheva, *Recht der europäischen Union*, ed. Nomos, Baden-Baden, 2018. C. BARNARD, S. PEERS, *European Union law*, Oxford University Press, Oxford, 2017.

the term "respects" seems emblematic of a "passive" will that, while not confining itself to sanctioning the principle of non-discrimination, it says nothing about the provision of positive behavior by states. The system of protection of minorities in EU law must be completed with reference to the provisions dictated in terms of cultural diversity, including art. 167 TFEU (formerly art. 151 TEC) which completes (with the part shown in italics) the previous version and states that the Union (previously the Community) "takes into account the cultural aspects of the action it performs (...), in particular in order to respect and promote the diversity of its cultures"<sup>31</sup>; and art. 3 par. 3 TEU which concerns the respect of cultural and linguistic diversity (with reference only to the internal dimension) and the development and safeguarding of European heritage.

### **7. The European Parliament Resolution of 13 November 2018 on minimum standards for minorities in EU**

In response to the "persistent discrimination" against those belonging to national minorities, the European Parliament, on 13 November 2018, adopted, with 489 votes in favor, 112 votes against and 73 abstentions, the aforementioned resolution to ask for common standards to protect the rights of all national minorities in EU<sup>32</sup>. In particular, after an extensive reconstruction of international and community legislation and an explicit reference to case T-646/13<sup>33</sup>, Parliament has

asked the European Commission to draft a legislative proposal concerning a directive that introduces minimum standards for minorities protection in EU, provide specific parameters and rules to prevent member states from discriminating against minorities and include a common legal definition of "minority", recommending to this end the adoption of the definition contained in the European Convention on Human Rights.

At point Q - referring almost exclusively to the principle of non-discrimination – the Parliament has critically observed that at present, the Union only has "limited effectiveness tools" to respond to the systematic and institutional manifestations of discrimination, racism and xenophobia and that, despite multiple appeals to the Commission, so far "limited measures" have been adopted to ensure the effective protection of "persons belonging to minorities" (point R).

Through the adoption of the aforementioned resolution, the Parliament highlighted the need for member countries to guarantee equal cultural, linguistic and educational rights to 8% of citizens belonging to national minorities in EU and emphasized importance to protect and promote regional and minority languages in education systems and media. It was also highlighted that the Community system for minorities protection should be accompanied by an evaluation of member states policies in this field. This is because minorities throughout EU are still subject to institutionalized discrimination and are subject to derogatory stereotypes and even their acquired rights are often limited or applied selectively (point X).

<sup>31</sup> M. Decheva, *Recht der europäischen Union*, op. cit.

<sup>32</sup> European Parliament resolution of 13 November 2018 on minimum standards for minorities in the EU (2018/2036(INI)).

<sup>33</sup> See the next case: T-646/13, *Minority SafePack* of 3 February 2017, ECLI:EU:T:2017:59, published in the electronic Reports of the cases, which the Court upheld the appeal brought by the Citizens' Committee against the Commission, annulling the latter's decision not to register the petition by which the Union to improve the protection of persons belonging to national and linguistic minorities and to strengthen cultural and linguistic diversity.

Certainly the most significant part with reference to the subject under examination is contained in point Y where, confirming the importance in the Community context of the recognition of the principle of non-assimilation, the Euro-Parliament states textually that: "there is a difference between protection of national minorities and anti-discrimination policies, that non-discrimination is not enough to stop assimilation, that effective equality is not limited to avoiding discrimination, but means guaranteeing minorities the enjoyment of their rights, including the right to identity, use of language and education, cultural and citizenship rights on an equal footing with the majority". It also notes in point V that "member states" national legislative systems show significant gaps with regard to minorities and indicate a low level of harmonization and symmetry".

However, in the conclusions, contradicting what was said about the need to protect minority groups as such, the European Parliament merely encourages the Commission and member states to safeguard EU citizens right belonging to minorities-who they are placed in a special category as far as the right to the means of appeal is concerned and have specific needs that must be met if they are to guarantee their full and effective equality - to "preserve, protect and develop their own identity, and to adopt the measures necessary to promote the effective participation of minorities in social, economic and cultural life and in public affairs". With the reference to the rights of individuals and not of the minority in itself considered, the European Parliament,

assuming an attitude of excessive prudence, has substantially caused its resolution to lose its content, marking a regression with respect to what was more incisively supported in the past.

## 8. Concluding remarks

Wanting to draw the strings of the survey carried out, it is possible to affirm that while the principle of non-discrimination of persons belonging to minorities-both at the world level and in Europe-has been given an adequate regulatory recognition in time, the same thing cannot hold to the principle of non-assimilation of the minority group. And indeed, the protection of minorities (cultural) identity at United Nations, Council of Europe and OSCE has gone from an initial tendency to conceive minorities protection as a matter of human rights, to the progressive awareness of the need for special protection measures for the minority group as it has been almost completely neglected by EU law.

The actions of the European Parliament, the only European institution really active in wanting to outline a system of minorities protection based on the enhancement of the identity of the minority group and the opportunity to preserve their differences were in vain. Even the "vaunted" innovations introduced by the Lisbon Treaty in articles 2 TEU, 21 and 22 of the Charter of Fundamental Rights of the European Union<sup>34</sup> constitute, in the opinion of the writer, mere specifications of the principle of

<sup>34</sup> For further details see: X. GROUSSOT, G.T. PETURSSON, *The EU Charter of the Fundamental Rights five years on. The emergence of a new constitutional framework?*, in S. DE VRIES, U. BERNITS, S. WEATHERILL, *The EU Charter of Fundamental Rights as a binding instrument. Five years old and growing*, Oxford University Press, Oxford, 2015. S.I. SÁNCHEZ, *The Court and the Charter: The impact of the entry into force of the Lisbon Treaty on the ECJ's approach to fundamental Right*, in *Common Market Law Review*, 49 (5), 2012, pp. 1566ss. T. TRIDIMAS, *Fundamental rights, general principles of EU law and the Charter*, in *Cambridge Yearbook of European Legal Studies*, 16 (3), 2014, pp. 364ss. H. VON DER GROEBEN, J. SCHWARZE, A. HATJE, *Europäisches Unionsrecht*, ed. Nomos, Baden-Baden, 2015, pp. 820ss.

equality and non-discrimination, but they add nothing in terms of specific protection of minority groups, which are at a time producers and users of the European intangible heritage. In fact, in them there is no express (or even implicit) reference to differentiated protection instruments, or ad hoc treatments aimed at avoiding a dispersion of the minority within the majority group<sup>35</sup>.

As regards the causes that led to the absence of an effective regulation of this matter, it must be pointed out that these are not attributable principally or exclusively to, although certainly influential, resistance shown by some member states towards the provision of one specific system for protecting minorities within EU<sup>36</sup>. A prominent responsibility, on the other hand, is believed to be attributed to the European institutions themselves (with the exception of the Parliament) for which, with a view to balancing interests, minorities protection as such through the provision of differentiated treatment in their favor, cannot be reached, as stated by the same Community jurisprudence<sup>37</sup>, to the point of hindering the functioning of the common market, if at all possible pushing only to the recognition of the right of persons belonging to a not discriminated minority.

If on the one hand, therefore, no impediment is in principle interposed at Community level to the possible policies of minority group protection and of the enhancement and defense of its cultural identity undertaken by member states, on the

other hand—as on many occasions reiterated by CJEU jurisprudence<sup>38</sup>—they must "give way" when they could represent a clear obstacle to the free movement of people, goods, services and capital<sup>39</sup>, thus coming to collide with the mandatory principles laid down by the Treaties. To date, this seems to be the direction followed by EU law which, in order to avoid endangering "the autonomy of one's own legal system in pursuing its own purposes", excludes the applicability within it. This, although in principle worthy of protection, can irreversibly entail an "alteration of essential elements of the community structure".

In a period like the present one, characterized by strong anti-European and nationalist impulses, the delay towards full legal recognition of the status of minorities could inevitably find a concrete and unshakable justification in the fear of some member states to see their national unity threatened. Therefore, it seems difficult for the European Parliament to ensure that the other European institutions, together with EU states, become aware that the protection of minorities, so that it can be considered effective, cannot be limited only to recognition in favor of individuals they belong to the right not to be discriminated against, but must instead, also through the provision of conduct obligations for states and a sanctioning system, safeguard minority groups, preserving their identity against the risk of a progressive as well as inevitable assimilation.

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<sup>35</sup> T. Kerikmäe, *Protecting human rights in the EU. Controversies and challenges of the Charter of Fundamental Rights*, ed. Springer, Berlin/Heidelberg, 2014.

<sup>36</sup> K. Lenaerts, *Fundamental rights in the European Union*, in *European Law Review*, 6, 2000, pp. 598ss.

<sup>37</sup> CJEU, C-15/81, *Gaston Schul Douane Expeditie BV v. Ispettore dei tributi d'importazione e delle imposte di consumo di Roosendaal* of 5 May 1982, ECLI:EU:C:1982:135; I-01409, par. 33.

<sup>38</sup> CJEU, C-49/89, *Corsica Ferries France* of 13 December 1989, ECLI:EU:C:1989:649, I-04441 in point 8 it was specified that "any obstacle, even minor, to the freedoms themselves is forbidden". See also: J. RAITIO, *The principle of legal certainty in EU law*, ed. Springer, Berlin, 2013.

<sup>39</sup> F. Palermo, *The use of minority languages: Recent developments in EC law and judgments of the ECJ*, in *Maastricht Journal of European and Comparative Law*, 8, 2001, pp. 300ss.

In line with the wishes set out in the recent resolution of the European Parliament, it is hoped that in the immediate future the Euro-unitary order will not be limited, in a merely abstaining view, to prohibit discriminatory behavior towards minorities, but yes openly active in bringing about positive behaviors that can give greater substance to the spirit of EU, truly "united in diversity". What the European

Parliament wished to reaffirm with the examined resolution is, in fact, that "EU is a mosaic of cultures, languages, religions, traditions and history, which forms a heterogeneous community of citizens united by their common fundamental values; that this wealth of Europe cannot be taken for granted and should be protected and nourished"<sup>40</sup>.

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<sup>40</sup>CJEU, Opinion 1/9 of 14 December 1991, ECLI:EU:C:1991:490, I-01137. See also in argument: T. LOCK, *The European Court of Justice and international courts*, Oxford University Press, Oxford, 2015, pp. 86ss.

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