Enikő Felföldi

Minority Rights, Cultural Identity of Minorities, and Cultural Rights in International Law

Act LXII of 2001 on Hungarians Living in Neighbouring Countries (Status Law, Benefit Law) mentions the importance of the awareness of the national self-identity of Hungarians living in neighbouring countries already in the preamble[1]. This objective is sought to be achieved – considering the provisions of the act – among others –, chiefly through the promotion of culture and education. However, these are fields, in which international law, through a network of bi- and multilateral conventions, explicitly or implicitly also makes it possible for the kin-state of the minority to carry out legal and financial measures. In the course of the examination of the compliance of the Benefit Law with international legal criteria, the European Commission for Democracy through Law/Venice Commission[2] also declared it as a principle that the kin-state may grant preferential treatment to the persons belonging to minorities in the fields of education and culture, conditional upon the fact that this must be in conformity with the law in so far as "this must be justified by the legitimate aim of fostering the cultural links and there must be a reasonable proportionality between the legitimate aim pursued and the means employed to obtain it."

We know little about what the expression "awareness of identity" means in practice concerning the minorities and how it appears on the level of international law. As a main rule, the Status Law wishes to strengthen the ties of Hungarians living beyond the borders in the spheres of education, science and culture, referring in its text to having regard to and applying the already existing international documents. However, given that the group in concern qualifies as a minority, neither direct nor indirect law concerning this can be disregarded.

Right to identity

"The *right to identity* is the central category of collective autonomy based on the ethnic principle that brings individual freedom into the limelight. At the same time, it is a universal human right as well, the subjects of which can be individuals,

[1] "Parliament – In order to ensure that Hungarians living in neighbouring countries form part of the Hungarian nation as a whole and to promote and preserve their well-being and awareness of national identity within their home country…

– Based on the initiative and proposals of the Hungarian Standing Conference, a co-ordinating body functioning in order to preserve and reinforce the awareness of national self-identity of Hungarian communities living in neighbouring countries… Herewith adopts the following Act…"

[2] Report on the Preferential Treatment of National Minorities by Their Kin-state adopted by the Venice Commission (Strasbourg, 22 October 2001) – see <http://www.venice.coe.int/docs/2001/CDL-INF(2001)019-e.html>; in Hungarian: <http://www.htmh.hu/velence/htm.>

groups or communities alike. The right to identity can usually be conceived as a right of freedom, which can continuously be pursued. The cultivation, development and preservation of identity take place through culture[3]." In multinational societies, collective and group identity most often receives the meaning of the relationship between majority and minority, and collective cultural rights become ethnic, minority rights. Belonging to a cultural community and the acceptance of this belonging is, at the same time, an individual cultural and political right.[4]

The UNESCO Project Concerning A Declaration of Cultural Rights[5] defines *cultural identity* as the aggregate of those factors on the basis of which individuals or groups define and express themselves and by which they wish to be recognized; it embraces the liberties inherent to human dignity and brings together, in a permanent process, cultural diversity, the particular and the universal, memory and aspiration. Choosing one's cultural identity also includes the freedom of choosing one's collective identity; therefore, participation in the collective cultural rights of the community is a person's individual human right as well.

In everyday life, the definition of cultural community often merges into ethnic community – although in a sociological and cultural historical sense we are talking about a much wider category – and as a result of this, the issue of culture and especially that of cultural rights is inevitably and stressedly transferred into the sphere of politics. Every difference between cultural and political rights disappears in a way that the first ones merge into the latter ones. This becomes especially pointed in multinational states, where the existence of the majority and the minority is either assumed or outright emphasised. In these cases, *collective cultural rights become national minority rights*. The same happens when the cultural community is identified with the religious community. When this takes place, the general system that ensures the protection of human rights, as individual features, and collective rights, and the road opens up in front of conflicts. It is at that point that the expression of collective cultural rights transforms into the relationship of majority and minority and forms in itself a latent and possible source of the conflict of interests. The state protects the interests of the majority interpreted as the majority nation. The interests of the minority can be expressed less and with more difficulty, which gives rise to the feeling of insecurity; then, cultural identity becomes a mere pretext and assumes the function of political identity[6].

[3] Kartag-Ódri, Ágnes. A csoportidentitás és a kisebbségi kulturális jogok [Group Identity and Minority Cultural Rights]. *Regio*, 1998/1. 151.

[4] Bíró, Gáspár. *Az identitásválasztás szabadsága* [Free Choice of Identity]. Osiris–Századvég Kiadó, Budapest, 1995. 217.

[5] Meyer-Bisch, P. Les droit culturels: une catégorie sous-développée des droit de l'homme, Cahiers du centre interdisciplinaire d'ethique et des droits de l'homme. Université de Fribourg, 1991, and Avant-project de Declaration sur les droit culturels on the web page of the UNESCO.

[6] Bíró, Gáspár. Minority Rights in Eastern and Central Europe and the Role of the International Institutions – in: *Searching for Moorings East Central Europe in the International System*, J. Laurenti (ed.), New York, UN Association of the U.S.A., 1994. 97.

What dangers does this contain? WWII showed an example to this and the international community sought to take steps against this as early as 1948. In the course of the preparatory works of the UN document entitled Convention on the Prevention and Punishment of the Crime of Genocide, *linguistic and cultural genocide* was discussed together with physical genocide and was considered a grave crime against mankind. Upon the adoption, however, a few nation states from among the great powers rejected Article 3 concerning linguistic and cultural genocide, and it was not included in the final text of the Convention[7]. Under the ad hoc committee draft[8], cultural genocide can be summarised as follows: "cultural genocide means any deliberate act committed with the intent to destroy the language, religion, or culture of a national, racial or religious group on grounds of the national or racial origin or the religious belief of its members such as: prohibiting the use of the language of the group in daily intercourse or in schools, or the printing and circulation of publications in the language of the group; destroying or preventing the use of libraries, museums, schools, historical monuments, places of worship or other cultural institutions and objects of the group[9]."

Linguistic genocide can take place actively, through the destruction of the language but without the destruction of the speaker (as opposed to genocide of physical character) or passively, by allowing the extinction of the language. According to Cobarrubias[10], the state may use the following strategies with respect to minority languages: 1. attempting to destroy it; 2. allowing its extinction; 3. co-existence – without support; 4. partial support for defined linguistic functions; 5. recognising the minority language as an official language. Even co-existence without support usually leads to the extinction of minority languages.

The use of minority languages can be prohibited openly and directly through legislation and imprisonment in the way as it happens today in Turkey in the case of the Kurds. However, also covert, indirect prohibition through ideological and organisational methods can lead here, which is present in the educational systems of most European and North-American countries[11]. The covert method

[7] Omitting this definition from international documents only means that a natural person cannot commit cultural genocide under the 1948 Genocide Convention, which does not exclude that this could be established based on universally recognised principles of international law and does not concern in any case the international responsibility of the states. – Bruhács, János. A kisebbség védelme az ENSZ rendszerében [The protection of minorities in the system of the UN], *Acta Humana*, 1993. No. 12–13. 72.

[8] UN doc. E/447.

[9] Gehér, József. A kulturális népirtás fogalma és tilalmának jogi lehetőségei [The Concept of Cultural Genocide and the Legal Possibilities of its Prohibition], *Regio* 1991/3. 199.

[10] Cobarrubias, Juan. Ethnical issues in status planning. in: *Progress in language planning*. International perspectives, Cobarrubias–Fishman (eds.), Berlin, Mouton, 1983. 41–85.

[11] Most immigrant and refugee minorities, with the teaching of their language and the use of their language in everyday life not being ensured, are in this situation in any country of the world; it is through this that linguistic genocide might happen even in the case of the most developed democracies according to the definition of the UN. – Skutnabb–Kangas, Tove. Oktatásügy és nyelv [Education and Language]. *Regio*, 1998/3. 8.

of eliminating the languages occurs when the state seemingly grants human rights to the minority, with the exception of those that would be the most important with respect to the reproduction of the minority as a distinct group – namely, linguistic and cultural human rights – in the hope that this will result in the assimilation of the minority. This is the preferred strategy in most Western countries, which is also manifest in the fact that they reject the recognition of the binding, support-oriented linguistic rights, and especially in the field of education, in international and European conventions. Most of the Communist states in Eastern Europe applied the opposite strategy: they granted certain linguistic and cultural rights but refused granting several economic and political rights. They hoped that this would lead to the voluntary melting of languages and cultures, in the process of which, the elite of the minorities followed by the whole community would melt into the majority nation, with the purpose of obtaining more political power and material resources. The application of both methods aimed at reducing the number of the potential nation-establishing ethnic groups[12].

In democratic and pluralist societies, ethic, religious, political and all other minorities not only have a right to express their own identity but also their positive discrimination is present in the majority-minority relationship. The realisation level of collective identities depends on several factors. Among others, the low level of tolerance, the narrowing down of "rapprochement" needed for a compromise (the minimum claims of one party are considered a maximum concession by the other), the fact that opposition between nations might complement the conflicts of group identities might, etc. render their situation difficult. Amongst specific circumstances, the request of the group, the bearer of the cultural identity, is necessary to be transformed into an abstract concept and handled separately, avoiding thus the debate about how cultural rights can turn into ethnic policies.

If any community has its own and independent system of cultural institutions, it follows that they also have the right to autonomously administer this system. The internal norms of collective solidarity, however, do not belong neither to the field of politics nor to that of law. If we accept that the freedom to choose one's cultural identity also means the freedom of choosing group identity, as cultural community, and that participation in cultural collective rights or abstaining from them is a right of the individual, then the acceptance of majority or minority cultural identity is not automatic: it is a conditional choice of the individual whether he takes part in a given culture.

The definition of culture is possible from a number of aspects and from the angles of several branches of science, with several hundreds of definitions

[12] In the countries applying covert linguistic oppression, there will remain less minority language speakers in 2–4 generations than in countries openly oppressing languages: for example, the Kurds speak in Kurd and resist linguistic oppression, while the once Spanish-speaking population in the US and the Finnish or Sami speakers in Sweden have greatly assimilated. Often, it is more difficult to fight covert aggression. – Skutnabb-Kangas, Tove, op. cit. 10.

existing today. From a legal perspective, the conceptual factors of culture, under Article 1 of the above-mentioned Project Concerning a Declaration of Cultural Rights of the UNESCO, are those values, beliefs, languages, arts and sciences, traditions, institutions and ways of life – all of them including both material and intellectual works – by means of which individuals or groups express the meanings they give to their life and development. Since the 1970s[13], the concept of culture includes all forms of mass communication (from papers through fashion to the culture of the way of living), "information culture" as well, with the purpose that everybody could have his own choice in the spirit of the respect for freedom and human rights[14].

It follows from the complex nature of the concept of culture that *direct cultural rights* can, in theory, be defined in a variety of ways, i.e.: a) political, economic, social or cultural in the narrowest sense; b) individual and collective; c) minority and majority, d) and rights protected by international or domestic legislation or simultaneously by both. These rights acquire their content by way of the definition of their relationship with the factors included in the definition – i.e. the object of the law (values, way of life...), its subject (individual, group...) and objective (realisation, development...).[15]

General/direct cultural rights are linked to a given definition and mean that a person has the right to express his own culture, which he manifests as a belonging to a specific group that members respect because of their individual cultural interest or as common cultural values. Accordingly, these rights can be categorised as follows:

1. right to take part in cultural life, including the right to join a culture; the right to choose concerning the belonging to one or more cultures; the right to express the chosen cultures; the right to participate in cultural achievements; the right to international cultural co-operation; the right to obtain information; the right to express cultural democracy;
2. right to creation and artistic self-expression, including the right to intellectual property;
3. to the freedom indispensable for scientific research and the benefits of scientific progress and its applications', with a special emphasis on economic and ethnic connections[16].

Indirect cultural rights also originate from the right to culture and include the following[17]: the right of an individual to choose or reject belonging to the community or identity; the right to belong to one or more identities and the right

[13] Council of Europe document adopted on 11 April 1972: The Arc-et-Senans Final Declaration on the Future of Cultural Development.

[14] Document adopted by the European Ministers responsible for Cultural Affairs at their 4th Conference in Berlin in May 1984: European Declaration on Cultural Objectives.

[15] Kartag–Ódri, op. cit. 157.

[16] This, in reality, is a variety of the classical solution of the International Covenant on Economic, Social and Cultural Rights.

[17] Council of Europe Declaration on Multicultural Society and European Cultural Identity, Palermo, 1990.

to several scales of values; the right of every culture to be respected; right to dynamic identity or its rejection; right to universality; right to be protected against cultural "ethnocide", which includes the protection of life circumstances and environment and the right of minorities to positive discrimination.

The establishment of the place of cultural rights in the general system of human rights

Cultural rights belong among the internationally recognised human rights, into the so-called second generation, together with economic and social rights[18]. The rights that belong here have certain specific features as compared with first generation (e.g. right to life and personal freedom, freedom of speech, etc.) and third generation human rights[19]. Accordingly, the characteristics of these rights – in comparison with traditional and basic human rights – are as follows:

- besides self-evident reserve and intervention of the state – which assumes an exclusive character concerning primary rights –, the *intervention and active attitude of the state* is required so that these rights could prevail;
- while political rights and basic freedoms function as rights due the individual, social, economic, educational and cultural rights form collective rights. That is, they are due not individual persons but a wider or narrower community. With this definition, cultural rights become restricted to the field of minority rights and, through this, the issue is transferred to the political sphere and narrows down. One of the recent international draft documents (the above-mentioned UNESCO project on cultural rights) offers the most acceptable solution. This identifies a person or (!) group as the subject at the definition of culture. It is a characteristic of third-generation human rights that primarily defined groups are their subjects – consequently, second-generation rights can be perceived as "in-between" generations, *to which communities and individuals are simultaneously entitled*;
- the content of civil rights can be precisely defined as opposed to the *loose formulation* of social rights, which is not favourable to the enforcement of the latter ones;

[18] The UN International Covenant on Economic, Social and Cultural Rights – Law-Decree no. 9/1976; and The Limburg principles on the implementation of the international covenant on the economic, social and cultural rights, in: Human Rights Quarterly, Vol. 9. No. 2. 122–136. – scientific principles of interpretation regarding the homogeneous application of rights.

[19] According to certain opinions, despite endeavours of co-operation aiming at the solution of globalisation problems, one cannot reach the conclusion that the catalogue of human rights has expanded to include the so-called third generation of human rights (e.g. right to peace, development, healthy environment). The reason is that these rights cannot fully prevail within the framework of the given state, that is, they cannot be formulated as an inherent right of the individual valid with respect to the given state but they inevitably require the participation and particular agreement of several states. – Bokorné Szegő, Hanna. Az emberi jogoktól való időleges eltérés, illetve az emberi jogok állandó jellegű törvényes korlátozása [Temporary Deviation from Human Rights and the Legal Restriction of Permanent Character of Human Rights]. *Acta Humana*, 1995. No. 18–19. 30.

- besides this, first-generation human rights primarily formulate general rights, while in the case of the second generation the circle of those entitled and the natural consequence of the rights is the *opportunity for special rights*;
- while civic and political rights put restraint on the power of the state for the sake of the protection of the individual and prohibit certain actions on the part of the state, the rights of the second generation *aim at the protection of entitled communities* and the legislative activity of the state is a prerequisite of their realisation. Consequently, these rights are realised not only through their incorporation into the constitution – it is a rare exception when a constitution contains provisions regarding them at all (e.g. the Spanish Constitution) – but the content, subjects and the instruments of protection of the given rights is *defined through the adoption of separate laws*;
- legislation in itself is not enough for the realisation of these rights. None the less, *safeguarding them is rather expensive* and economic difficulties can hinder feasibility;
- it also follows from all this that these rights *are realised continuously and gradually*: the states merely assume responsibility for "making efforts at" and "seek to" ensure them. A fortiori example of this could be that the right to education was included in the human rights protection system of the Council of Europe and specified in the European Charter for Human Rights (Article 2 of Protocol 1, 1963), with the expressed purpose of ensuring it a more efficient protection mechanism;
- by today, the international diffusion of these rights have intensified because while traditional human rights are integrated into the internal legal order of the states, second-generation rights face a situation in which states seek to achieve their elimination from their unique jurisdiction and establish the *standards of their minimum protection on the international level*. The reason for this is that the state is obliged to undertake and also guarantee the protection of these rights at the same time, so the confusion of these two functions needs to be prevented;
- as far as the *control* of the safeguarding of economic, social and cultural rights is concerned, there exists the *report mechanism* only – with the exception of certain proceedings of the International Labour Organisation and the system of collective complaints defined in the protocol of the European Social Charter –, while in the case of civil and political rights, beyond this, a person has the opportunity to enforce his right and turn to judicial or judicial-like bodies. At the same time, it means *indirect judicial application* when the judiciary interprets political rights in the light of economic, etc. rights – the legal practice of e.g. the Court of Human Rights is like this – the reciprocal relationship of certain human rights is manifest in this (as well).

It is impossible to interpret economic, social and cultural rights on an objective base ignoring values, as they are rather relative; that is, they are dependent on

some relation in any case[20]. Traditionally, this group did not belong in the catalogue of human rights. The right to education was the first to make it into a constitution in the 19th century as a freedom, according to its formulation, and not as a right. It only happened later that it extended to the freedom of science and the right to freely enjoy cultural values, as well as to the group of obligations of the state concerning education[21]. Although they do not figure among human rights, cultural rights form a part of human rights the same. It is for this reason that Paragraph 1 of Article 27 of the Universal Declaration of Human Rights of 10 December 1948 can proclaim the following: "Everyone has the right freely to participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits." The formulation does not precisely define what falls under cultural rights, so it can be interpreted both as an individual and a collective right; these rights usually include, in the case of a given community, "distinction, identity through which relatedness becomes manifest, the right to autonomy and the right to universality[22]."

If we consider cultural rights personal rights, they generally become manifest in the right to diversity: right to cultural self-definition. What follows from this is the freedom to choose one's culture and language and the right to education, cultural heritage and religion. The character of a collective right stems from the fact that the individual is also placed into his own social environment: the group can freely choose those conditions, on the basis of which it seeks to realise its own cultural rights within the framework of the state. Practically, the right due the individual can only be enforced in a society through the group, in the system of reciprocal rights and duties among the groups. This interrelation of universal and individual is realised regarding every single person in the case the state to which he belongs makes this possible. International law plays an increasingly greater role in this by exerting external pressure on the state so that it would ensure these rights for all those concerned. This involves a step of quality on the part of the states, since the recognition of collective rights takes it granted in the case of minorities that they are recognised as legal personalities.

"The ambivalent nature of cultural rights originates from the same character of their basic principle – for culture is a symbiosis of partial and universal.

[20] Szamel, Katalin. A gazdasági, szociális és kulturális jogok értéke (Emberi jog, állampolgári jog, alanyi jog, szabadság vagy valami más?) [The Value of Economic, Social and Cultural Rights (Human Right, Civic Right, Inherent Right, Liberty or Something Else?]. *Acta Humana*, 1993. No 11. 27.

[21] On the historical development of these rights: Szabó, Imre. *Kulturális jogok* [Cultural Rights]. Közgazdasági és Jogi Könyvkiadó, Budapest, 1973; *Az állampolgárok alapjogai és kötelességei* [Basic Rights and Duties of Citizens]. Halász, József, Kovács, István and Szabó, Imre (eds.). Akadémiai Kiadó, Budapest, 1965. 295–323.; Szamel, Katalin. A művelődéshez való jog [Right to Cultural Education]. in: *Emberi jogok hazánkban*. Katonáné Soltész, Mária (ed.) Budapest, 1988. 309–332.; Bokorné Szegő, Hanna. A gazdasági, szociális és kulturális jogok nemzetközi megítélésének és szabályozásának mai kérdései [Current Issues of the International Judgement upon and Regulation of Economic, Social and Cultural Rights], *Acta Humana*, 1996. No. 22–23. 3–18.; Weller, Mónika. Gazdasági és szociális jogok Európában [Economic and Social Rights], *Acta Humana*, 1996. No. 22–23. 19 and cont.

[22] Meyer-Bisch, op. cit. 13.

Consequently, cultural rights are also characterised by the right to unique and universal at the same time. That is, both uniqueness and collectivity are included in it. A cultural right is also a human right only if its objective is the (self-) identification of the individual, which runs from individual to general and the other way around[23]."

One of the greatest dilemmas of the legal approach to economic, social and cultural rights is that in reality the extent of state undertaking can only guarantee their application, which is a relative standard from the point of view of human rights because this either leads to the state assuming too much on itself[24] or these rights admittedly remain dependent on economy. In this case, the content of guarantees of right enforcement are subject to changes and the guarantee system that serves for the enforcement of traditional civil rights – the administration of justice in the first place – cannot be adequate for the realisation of economic, social and cultural rights. This is present in international regulation as well. The 1966 International Covenant on Economic, Social and Cultural Rights does not oblige the states to do more than taking steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures (Article 2, Point 1). This, however cannot be interpreted in a way that the states have the right to postpone their undertaking for an indefinite time[25]. The states only recognise certain rights on the basis of the Covenant, including the right to education (Articles 13–14) and to take part in cultural life (Article 15). In the case of cultural rights, the wording characteristic of the rights of freedom is dominant and, for this reason, the emphasis is on the non-intervening approach of the state. Moreover, a right is instituted, in a scope surpassing this, exclusively according to the financial possibilities of the given state. Thus, for example, in the case of education, supporting the higher education and science through the granting of scholarships, should normative financing, a legally feasible and most widespread form, be able to ensure a certain inherent-right quality[26].

The enforcement of these rights, however, can be placed under restrictions that are defined by laws in an extent compatible with the nature of these rights and exclusively with an aim of promoting the general well being of democratic society[27].

[23] Meyer–Bisch, op. cit. 13l.

[24] Socialist states elevated the right to cultural education to the level of a civil right, which is guaranteed by the positive activity of the state. However, it was proved that this could not be maintained in the long run.

[25] The Limburg principles… Article 21., op. cit.

[26] With respect to social rights, there are efforts to establish the right to social security as an inherent right.

[27] The regulatory system of human rights makes a distinction between absolute rights and those rights that can be deviated from in the times of emergency or can be restricted amongst normal circumstances. Rights to be established gradually form a separate group. The protection of minorities (Article 27) figures among the rights that "can be deviated from in the times of emergency." However, the International Law Association (ILA), in conformity with its position, considers it an absolute right that could not be deviated from in the times of emergency, that is, temporarily, either.

The following fall under the exceptions to general restrictions: the extraordinary suspension of trade union rights; in the field of culture, the states undertake within a reasonable number of years, to work out and adopt a detailed plan of action for the progressive implementation, of the principle of compulsory education free of charge for all (Article 14), and to have respect for the liberty of parents to choose for their children schools and to ensure the religious and moral education of their children in conformity with their own convictions (Article 13).

The peculiar nature of second-generation human rights is revealed in the interpretation of the right to culture according to which the state has complete right to consider the nature and extension of its participation in education and teaching. "In general, this means that the state is not obliged to provide for or guarantee specific cultural development opportunities that ensure that every person could receive an education corresponding to his privileges[28]." The activities of the Committee on Economic, Social and Cultural Rights, which examines the reports of the states, aim at disclosing the nature of the States' undertakings and rights regarding second-generation rights. The principles of the Committee note in connection to some of the rights included in the Covenant, that they can be considered *inherent rights*, that is, claims in connection to them can be enforced through judicial means. The Committee[29], among others, regards the following rights as such: the liberty of parents to choose for their children schools (Article 13 Point 3), the liberty of individuals and bodies to establish and direct educational institutions (Article 13 Point 4), and the respect for the freedom indispensable for scientific research and creative activity (Article 15 Point 3). It is to be noted, however, that a process is taking place in the practice of the Court for Human Rights, in the course of which the difference between the application and enforcement of classical civic rights and economic, social and cultural rights has been reduced[30]. Besides this, the recognition that first and second generation rights form and indivisible unity, appears in several resolutions of the UN General Assembly as well[31].

After all this, let us take a look at the development and regulation of international law with respect to the right to education. The right to education appeared in the course of the 19th century in connection to the freedom of conscience and religion, at first against the educational monopoly of the church. That is, it was a freedom in the beginning, which evolved into a right to education with the social demand appearing with the advancing of industrialisation. Therefore, the constitution of several states formulated that it had to be an

[28] Gomien, D. Rövid útmutató az Emberi Jogok Európai Egyezményéhez [Short Guide to the European Convention of Human Rights]. Európa Tanács Információs és Dokumentációs Központ, Budapest, 1994., 104–105.

[29] General Comment No. 3 (1990): the nature of State parties' obligations (Art. 2.) Para 1 of the Covenant E/C.12/1990. 8. Annex III., Point 5.

[30] On this, see Csonka Péter: Az Emberi Jogi Bíróság 1990. évi joggyakorlata [Legal Practice of the Court of Human Rights in 1990]. *Acta Humana*, No. 3. 19.

[31] For example, UN General Assembly resolutions nos. 40/114/1985, 41/117/1986.

undertaking of the state to ensure education to all (e.g. the Constitution of Belgium of 1831). This undertaking on the part of the state implied that the supervision of the education was carried out by the state and a relative state monopoly was established. In our days, the freedom of education emerges as a limitation of this monopoly (see the appearance of private schools).

The right to education expanded with regard to its content and, beyond the acquisition of basic knowledge, extended gradually to higher-level educational levels. Thus, for example, to professional trainings, adult education and the use of cultural opportunities outside the schools. It is for this reason that the right to culture, education and civilisation denotation is also frequent; however, their specific content is less fully developed. Besides the expansion of content, regulation was also transferred to a higher level: with the international regulation of human rights, it became a part of that.

The UN General Assembly included the right to education in the Universal Declaration of Human Rights of December 10, 1948; it confirmed the children's right to education, with a special emphasis on the right of children belonging to minorities[32]; the Convention against Discrimination in Education was adopted by the General Conference of the UNESCO in 1960 as the first universal document that included resolutions on education binding to the states[33]. Article 13 of the 1966 UN Covenant on Economic, Social, and Cultural Rights discusses this right in a more detailed fashion. The states, in the framework of the gradual realisation of the rights are to prepare from time to time reports presented to the Committee on Economic, Social, and Cultural Rights on their measures in this filed with a special emphasis on the measures and practice with respect to groups that are in a disadvantageous position, also including the minorities (as well as those with a low income, the rural population, the handicapped, the immigrants and the guest workers). Similarly, the 1965 International Convention on the Elimination of All Forms of Racial Discrimination (Article 7) formulates the right of particular groups to non-discriminative education. The principles of the Universal Declaration of Human Rights greatly influenced the experts of the Council of Europe during the elaboration of the European Charter for Human Rights adopted in 1960.

[32] Article 30: In those States in which ethnic, religious or linguistic minorities or persons originating from the indigenous population, children belonging to the indigenous population or the minorities in concern shall not be denied the right to enjoy their own culture, to profess and practise their own religion, or, in community with the other members of their group, to use their own language.

[33] Later on, UNESCO elaborated further documents concerning education based on this Convention and the states participating in the Convention, upon accepting it, also assumed the obligation of taking these documents into account. The following recommendations were elaborated: Recommendation concerning Technical and Vocational Education 1962, 1974; Recommendation concerning the Status of Teachers 1966; Recommendation on the Development of Adult Education 1976; Recommendation concerning Education for International Understanding, Co-operation and Peace and Education relating to Human Rights and Fundamental Freedoms 1974.

It is not the European Charter for Human Rights[34] itself but its first Protocol adopted on March 20, 1952 that mentions the right to education in its Article 2[35]: ... " No person shall be denied the right to education. In the exercise of any functions which it assumes in relation to education and to teaching, the State shall respect the right of parents to ensure such education and teaching in conformity with their own religions and philosophical convictions[36]." In connection to the right to education, this is the only international document that provides for the right to individual complaints using the proceedings of the Court of Human Rights.

The bilateral conventions concerning co-operation in the field of education often refer to the above-mentioned international documents or borrow the terms regarding certain elements they contain. Thus, for example, the preamble of a convention regarding the recognition of qualifications[37] that the convention is signed "in consideration of the Conventions the Contracting Parties signed regarding equivalency in the framework of the Council of Europe and UNESCO." Higher-level international regulations also appear in bilateral international regulation on the recognition of studies and diplomas: "in the spirit of the Lisbon Convention on the Recognition of Qualifications Concerning Higher Education in the European Region of 11 April 1997, moreover considering the success that the member states of the Council of Europe and the UNESCO have achieved regarding the harmonisation of international exchange of students and university professors...[38]"

The connections between cultural and educational rights and minority rights

On the level of universal international law, the rights of minorities are present as human rights. Already Article 27 of the International Covenant on Civil and

[34] For the detailed review of the Convention, see Bakai, András. Az Emberi Jogok Európai Egyezménye és a kisebbségi jogok nemzetközi védelme [The European Convention of Human Rights and the International Protection of Minorities]. *Acta Humana*, 1992. No. 8, 3–16., Dijk P. and Hoof, G.J.H. Theory and Practice of the European Convention of Human Rights, 2nd Edition, Deventer-Boston, 1990. – In the study, the regulation of the Convention is only touched upon concerning the right to education.

[35] On difficulties of the drafting process, see Collected Edition of the "Travaux Préparatoires", Martinus Nijhof, The Hague, 1975. Vol. I.

[36] On the detailed interpretation of the regulation, see Weller, Mónika: Az oktatáshoz való jog a nemzetközi jogban [Right to Education in International Law]. *Acta Humana*, 1994. No. 17. 6–33.

[37] Government Decree no. 63/1999. (IV. 28.) on the Convention on the Recognition of Qualifications concerning Higher Education between the Government of the Republic of Hungary and the Austrian Government.

[38] The preamble of Government Decree no. 106/1998. (V. 27.) on the Convention on the Recognition of Studies, Diplomas and Degrees in Higher Education the Republic of Hungary and the Republic of Croatia between the Government of the Republic of Hungary and the Government of the Republic of Croatia states this and the same figures in Government Decree no. 148/2000. (VIII. 31.) on the Convention on the Reciprocal Recognition of Documents Proving the Qualifications Issued in the Republic of Hungary and the between the Government of the Republic of Hungary and the Government of the Slovak Republic.

Political Rights[39] refers to this: “In those States, in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language.” On the basis of the wording, linguistic, religious and cultural rights mean the minimum that is to be ensured under minority rights[40].

Although it had not been drawn up with respect to the protection of minorities, the UNESCO convention on the elimination of discrimination in education in theory grants more to minority education than the covenant on human rights. One of the main principles of the document is that it is free of any discrimination and the prohibition of prejudice also extends to the training for the teaching profession, as emphasised in Article 4, Point d) of the convention. According to Article 5: “It is essential to recognize the right of members of national minorities to carry on their own educational activities, including the maintenance of schools and, depending on the educational policy of each State, the use or the teaching of their own language[41].” Unfortunately, this regulation also has a “soft law” character and, together with the granting of the right, also restrictions appear: “and, depending on the educational policy of each State, the use or the teaching of their own language, provided however: (i) that this right is not exercised in a manner which prevents the members of these minorities from understanding the culture and language of the community as a whole and from participating in its – activities, or which prejudices national sovereignty; (ii) that the standard of education is not lower than the general standard laid down or approved by the competent authorities; and (iii) that attendance at such schools is optional.” This latter means that the eventual minority self-governments cannot force the members of the minority to attend these schools, nor can the state use this to exclude the minorities from other forms of education and segregate persons belonging to various groups.

[39] Minority rights are considered human rights under Article 1 of the Framework Convention for the Protection of National Minorities (Strasbourg, 1 February 1995, entry into force with Act no. XXXIV/1999) and several bilateral conventions, e.g. the preamble of the declaration on minorities annexed to the Hungarian-Ukrainian declaration on co-operation (Kiev, 6 December 1991, Declaration on the Principles of Co-operation between the Republic of Hungary and the Ukrainian Soviet Socialist Republic in Guaranteeing the Rights of National Minorities **–** entry into force with Act XLV/1995.; 1992.); Article 15 of the Treaty on Good-neighbourly Relations and Friendly Co-operation between the Republic of Hungary and the Slovak Republic (Paris, 9 March 1995; entry into force with Act no. XLIII/1997); and Article 2 of the Treaty between the Republic of Hungary and Romania on Understanding, Co-operation and Good Neighbourhood (Temesvár/Timisoara, 16 September 1996; entry into force with Act no. XLIV/1997).

[40] For its detailed analysis, see – Bruhács, János. A kisebbségek védelme az ENSZ rendszerében [The Protection of Minorities in the System of the UN]. *Acta Humana*, 1993. No 12–13, 66–72.; Tomuschat, Ch. Protection of Minorities under Article 27 of the International Covenant on Civil and Political Rights – in: Festschrift für Hermann Mosler, Berlin–Heidelberg–New York, 1983. 949 and cont.

[41] This type of formulation could deprive this right of its real content. However, restrictions can only and exclusively aim at ensuring that conditions included in Article 5 of the Convention could prevail in conformity with the rules of interpretation happening in consideration of the bone fide execution of the contracts and the aims of the contracts.

The states have to submit reports to the General Conference of the UNESCO on the accomplishment of what they had undertaken. In order to enhance the execution of international regulation, in 1962, an eleven-member conciliation and good offices commission was set up to be responsible for seeking the settlement of any disputes which may arise between states parties to the convention against discrimination in education. The Protocol on this entered into force in 1968 but scarcely did half of the states parties to the Convention ratify it. Hungary is not part of it either as of January 1, 2002.

A sub-committee of the Human Rights Committee is continuously occupied with the issue of minority rights but no general convention on the rights of minorities have so far been elaborated. Merely a recommendation has been adopted by the General Assembly of the UN in 1992, the "Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities[42]". This, in reality, is an independent formulation of principles retraceable to the International Covenant on Civil and Political Rights, considering the rather concise and not clear-cut formulation of Article 27. What is important from the point of view of linguistic, educational and cultural rights is that the states shall protect the existence and identity– among others, national and cultural –, of its various minorities and encourage conditions for the promotion of that identity. States shall take measures to create favourable conditions to enable persons belonging to minorities to express their characteristics and to develop their culture, language, religion, traditions and customs, and to learn their mother tongue. Positive discrimination shall appear at the planning and implementation of national policies and programmes, with due regard for the legitimate interests of persons belonging to minorities. Few actual elements appear with respect to the obligation of the states for co-operation, so it is much more important that the interest of other parties regarding minority issues has received a direct recognition through the formulation of this obligation.

The European Charter for Regional or Minority Languages[43] elaborated in the framework of the Council of Europe protects the existence, culture and linguistic rights of national minorities without having to define the concept of minority; accordingly, it does not grant individual or collective rights to persons who speak regional or minority languages: it protects the languages themselves. At the same time, it is concerned with the most important one of the special rights of minorities,

[42] In detail, see Bokatola, I.O. L'Organisation des Nations Unies et la protection des minorités, Bruxelles, 1992.; Bíró, Gáspár and Taubner, Zoltán. A nemzeti kisebbségek jogainak kodifikációs munkálatai az ET-ben 1992–92 [Codification Works on the Rights of National Minorities in the Council of Europe, 1991–92], *Társadalmi Szemle*, 1993/11. 24–34.

[43] 11 of the 27 members of the Council of Europe adopted it on 5 November 1992, with Hungary also singing it as the only East Central European country. For more details about the Charter, see Kovács, Péter. *A Regionális vagy Kisebbségi Nyelvek Európai Chartája*. Aláírás után, ratifikáció előtt … [European Charter for Regional or Minority Languages. Subsequent to Signing, prior to Ratification...]. MTA AJI, Budapest, 1993.

since in the case of European minorities, language is the most important guarantee for the preservation of identity[44]. It indicates 96 obligations of the state, most which are enumerated as alternatives. With respect to education in the mother tongue, the states undertake to make available in some form pre-school, primary, secondary technical and vocational, university, as well as adult and continuing education. The convention touches upon media in the mother tongue of the minorities in a similar fashion.

The workgroup of the Venice Commission drew up a draft[45] that sums up the rights and duties of national, religious and linguistic minorities. This points beyond the regulations of human rights conventions in force and its approach does not narrow down to individual rights but also emphasises the right of minorities as communities – together with their duties. It establishes that the international protection of minorities is a "vital component" of the legal protection of human rights and as such, it belongs in the field of international co-operation; that is, it is not simply an issue of internal affairs. The draft is less elaborate than the drafting of the Charter for Languages but this document also outlines an international supervisory mechanism: it stipulates for the establishment of an independent committee of experts to which the states shall regularly submit reports on the accomplishment of their obligations under the Convention. The committee would examine the reports and send them on to the Council of Ministers of the Council of Europe. At the same time, it would draw up recommendations for the participating states. In the case the participating states would individually declare their willingness to submit to these, the committee would have the right to examine filed complaints as well.

Summary

As it can be clearly seen, recent initiatives of the Council of Europe bring cultural rights to the limelight on the basis that categories falling outside law, like culture, need to acquire a legal expression and protection in circumstances of conflict. In our days, no universal or regional international document of binding character exists that would exhaustively deal with the special rights of minorities and/or those belonging to minorities. Merely a few conventions of great significance allude to the necessity that the states safeguard the maintenance of the characteristics of the minorities. No international obligation exists regarding the recognition of the collective right of type minorities, not even in a more restricted form of it (e.g. cultural autonomy). As set forth by Hanna Bokorné Szegő: "The fact that some international documents acknowledge that the enforcement of rights happens 'individually or collectively' (e.g. Article 10 of the Draft Convention

[44] In detail, see Kovács, Péter. La protection des langues des minorités ou la novelle approche de la protection des minorités?. in: *Revue générale de droit internationale public*, 1993. No. 2. 411–418.

[45] See <*http://venice.coe.int/site/interface/english.htm.*>

of the Venice Commission) is not identical with the recognition of the collective rights of minority communities. The reference to the 'collective' enforcement of rights is not more than a form of the enforcement of special rights and it is not identical with the recognition of collective rights as such. The demand for the recognition of collective rights can primarily be found on the level of political endeavours[46]. In the framework of current regulations, it is the principle of positive discrimination that is able to reconcile the individual and collective sides of human rights, as well as harmonise the principle of the equality of citizens with the right to diversity.

[46] In: A kisebbségek védelme az európai struktúrákban [The Protection of Minorities in European Structures], *Acta Humana*, 1993. No. 12–13. 79.