THE NEED FOR MINORITY LANGUAGE RIGHTS: SOME THEORETICAL AND INTERNATIONAL LEGAL CONSIDERATIONS

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Abstract. The study raises the question of whether it is necessary to recognize language rights, and responds with a series of philosophical, theoretical and anthropological arguments - sometimes quoting judicial formulations in favor of the recognition of language rights, especially minority language rights. It is a serious dilemma that, for historical-political reasons, states often give priority to linguistic homogenization and consider multilingualism, the use of minority languages, as outdated or even dangerous, incompatible with the modern nation-state model. The article discusses the two fundamental principles which best underpin the international recognition of minority language rights: the protection of diverse communities and their equal rights. The study points out that in the practice of the UN Human Rights Committee and the ECtHR discrimination in the use of minority languages is recognized only in a very narrow sense. It means that the minority language sub-rights of general human rights may be interpreted too narrowly, and that recognition of these sub-rights may be denied, and this leads to the conclusion that explicit safeguards are needed to secure that minority language rights, and the corresponding state obligations arising from them are precisely defined.

„*Modern is not what is fashionable or what is new, but only the idea in the light of which the greatest number of problems can be understood or made clear, or at least seen, from the vast wealth of experience which mankind has accumulated up to the mundane present.*" (Mátrai, 1938,)

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Languages, Language use and Language Rights, Justification for Different Forms of Protection

Language, as an envelope, defends vulnerable human existence, as do the walls woven by norms and customs surrounding civilized humanity. (Elias, 1987, 78) The use of language is an innate human ability and the main means of communication, which in itself justifies its protection. (Pupavac, 2006, 61) Language is a means of naming the objective world, of human communication, but also of social domination. (Bourdieu, 1991, 165) A Canadian court decision also points out that language bridges the isolation of the individual in society and that linguistic rights play a crucial role in human existence, development and dignity. (Manitoba, 1985, 744) A logical consequence of this anthropological approach is the protection of mother tongue use as (also) *a human right*, because if we accept that language is a fundamental element of personal identity, it might lead to the conclusion that all individuals should enjoy a secure and supportive language environment. (Dunbar, 2001, 94)

Language is a means of creating and expressing identity, distinguishing those who use it from others. It acts as a marker of cultural difference and identity, the latter being constructed through social interaction. (Zenker, 2018, 1-2) A language that is different from the majority and the culture based on it may not only be congruent with a distinct identity, but also represent the community that uses it.

The Permanent Court of International Justice stated in the Case of *Greco-Bulgarian* "*Communities*" that a minority community is

"*a group of persons living in a given country or locality, having a race, religion, language and traditions of their own, and united by the identity of such race, religion, language and traditions in a sentiment of solidarity, with a view to preserving their traditions, maintaining their form of worship, securing the instruction and upbringing of their children in accordance with the spirit and traditions of their race and mutually assisting one another.*" (Greco-Bulgarian „Communities", 1930)

In the Rights of Minorities in Upper Silesia (Minority Schools 1928) the Permanent Court of International Justice accepted that a declaration on behalf of a minority pupil on his origin or mother tongue required by law as a precondition to be admitted to a minority language school is not violating equal treatment. Consequently, members of the group should give evidence of their subjective view on their identity, if they would like to enjoy minority protection. Through this it is also secured that their subjective identification is not arbitrarily made, the subjective choice is intertwined with its objective ground. (The question is whether or not they feel free to admit their identity?)

The decision of the European Court of Human Rights in the case of Timishev v. Russia (Timishev, 2003), held that the concept of ethnicity, its origin, refers to a social group bound together by, among other things, a common language.

I think there is no need to find further arguments, the above mentioned considerations sufficiently justify the protection of language use as a *minority right*.

The languages that are the basis of language use are part of humanity's cultural heritage. Consequently, they are also covered by international cultural heritage protection. In 2003, the Convention for the Safeguarding of the Intangible Cultural Heritage, an international treaty for the protection of intellectual heritage, was adopted, within the framework of UNESCO, which states in Article 2 that the intangible cultural heritage□

„1. ... means the practices, representations, expressions, knowledge, skills – as well as the instruments, objects, artefacts and cultural spaces associated therewith that communities, groups and, in some cases, individuals recognize as part of their cultural heritage. This intangible cultural heritage, transmitted from generation to generation, is constantly recreated by communities and groups in response to their environment, their interaction with nature and their history, and provides them with a sense of identity and continuity, thus promoting respect for cultural diversity and human creativity. For the purposes of this Convention, consideration will be given solely to such intangible cultural heritage as is compatible with existing international

human rights instruments, as well as with the requirements of mutual respect among communities, groups and individuals, and of sustainable development.

2. The "Intangible Cultural Heritage", as defined in paragraph 1 above, is manifested inter alia in the following domains:
   (a) oral traditions and expressions, including language as a vehicle of the intangible cultural heritage;
   (b) performing arts;
   (c) social practices, rituals and festive events;
   (d) knowledge and practices concerning nature and the universe;
   (e) traditional craftsmanship."

The text of the convention focuses, somewhat strangely, on the oral traditions and forms of expression, which merely includes language as a vehicle of cultural heritage. This is due to the fact that there was no consensus among the founders to include language directly in the intangible cultural heritage. Some states feared that the direct designation of a language would give too much importance to the protection of minority languages, and some even concluded that this would lead to a tendency towards later secession (!). (Blake, 2015, 189) States have accepted the quoted wording as a compromise.

The preamble to the European Charter for Regional or Minority Languages (1992) stated in respect of the continent:

„Considering that the protection of the historical regional or minority languages of Europe, some of which are in danger of eventual extinction, contributes to the maintenance and development of Europe's cultural wealth and traditions;"

From a legal-dogmatic point of view, minority language rights, like minority rights in general, are of a mixed nature. Some rights have the characteristics of civil and political rights, - since they are sub-rights of these, - so that the state's action is mainly negative, although positive state action is required, for example, in certain cases of minority language

expression or in relation to minority language use in court. The specific nature of economic, social and cultural rights is reflected in the minority language rights associated with the establishment and maintenance of state institutions, such as the right to education, not only in the positive nature of the state obligation, but also in the gradual nature of its implementation, depending on the available material resources. The latter leads to the possibility that the unjustified deprivation of material resources may also constitute a violation of minority institutional language rights. In addition, the majority state has a duty of protection and legal certainty.

Kloss (1969, 133) mentions two groups of approaches to minority rights. The first group is that of "tolerance rights", where the expected state behavior is to refrain from unjustified state interference. The second group consists of the rights which presuppose active state enforcement in the various arenas of public life, notably the courts, public administration, education and the media. These are "promotion rights." The approach that groups minority language rights in the same way as the former is an approach that groups them directly according to the different nature of the state obligations that derive directly from them.

As far as the first group is concerned, it is mainly the right to the free and non-discriminatory use of the minority language in private life. These rights are implicitly protected by the right to privacy and freedom of expression. Freedom of expression also includes freedom of choice of language in areas other than public life, as the UN Human Rights Committee held in *Ballantyne, Davidson and McIntyre v. Canada*. (Ballantyne, 1989) Language laws that protect the official majority language at the expense of minority language use, such as most recently the Ukrainian, language law also impose restrictions in private life. Thus, the importance of "tolerance rights" comes from the protection from the tyranny of the majority which sometimes takes a regulatory position.

"Promotion rights" may be recognized by legislation or judicial practice as part of general human rights or as an autonomous minority right. The point is to legislate on the content of the positive obligations that the state can be expected to implement□for example, when to start a

minority language class. More specifically, whether the general rules or, as a specific exception, more favorable norms apply, i.e. in the example, fewer pupils are sufficient to start a minority class. A more radical way of promoting a minority language is to give it official status. (Kymlicka, Patten, 2003, 8-9) Of course, this does not necessarily mean real equality, since the public and institutional use of the majority official language is necessarily more intensive.

Other Arguments: Diverse Communities and Equal Rights

The political philosophical justification for minority language rights can be traced back to the acceptance of survival as a community with a distinct identity as a value in itself and the interpretation of equality. As a justification for minority rights and thus minority language rights, these two elements are already reflected in the position of the Permanent Court of Justice in the case of the Albanian minority schools, which saw the essence of protection in equality, alongside the preservation of the characteristics, traditions and features of the protected group. (Minority Schools in Albania. 1935)

Today the Framework Convention for the Protection of National Minorities expressly protects – among other minority rights – the language rights of minorities, and the European Charter for Regional or Minority Languages as a part of the European cultural heritage not only protects but also promotes minority languages. Thus, it may seem justified to talk about a breakthrough, as far as the above justification is concerned not just in terms of the protection of minority rights in international law, but also with regard to the fact that majority-minority multilingualism has won a battle in Europe. In fact the breakthrough is symbolic and rhetorical, since pre-modern societies in Europe have been generally multilingual in everyday life, and there is a strong belief that maintaining monolingualism requires huge normative work for the modern nation-state, at the cost of large sacrifices. (Oeter, 2010, 141) And in many countries around the world, it is still a goal to be achieved. This heritage of modernism is more persistent than the optimistic expectations of like-minded people[1] at the time of the entry into force

of the Framework Convention and the Charter, although there are undeniable positive achievements associated with their implementation. Linguistic homogenization has become the fate of modernity and is still with us today. Moreover, the problems of asylum seekers and immigrant communities seem to overwhelm[2] the issue of the protection of national minorities who have historically lived together.

As far as legal equality is concerned in a given state, the right of speakers of the dominant language to use their mother tongue is embodied in the status of the majority language as an official language, which means that their linguistic rights are not expressed explicitly, but are implicit linguistic rights. (Andrássy, 1998, 35-48,167- 182)

Implicit linguistic rights justify the linguistic rights of linguistic minorities through the mediating principle of equality of human and civil rights. That is, equal human dignity is the political philosophical, human and constitutional basis of minority language rights. Based on the implicit linguistic rights of majority language speakers, the recognition of minority language rights is the real realization of legal equality.

In a number of states, there is a contrary view, expressed or unspoken, that equality is not created by guaranteeing minority language rights[3], but by equal access to the national, i.e. official language. This thesis was originally formulated in the connotation of the ability of members of the lower classes to perform official functions in France in the context of the Great Revolution in Abbe Gregoire's famous *Rapport sur la nécessité et les moyens d'anéantir les patois et d'universaliser l'usage de la langue française* (Gregoire, 1794, Hobsbawm, 1997, 262).

In the light of the above, participation in public power becomes a function of linguistic assimilation. Important arenas for state language policy are education, the judiciary and public administration "because it is through the regulation of language access to these that the state can influence access to power, i.e. maintain the hegemonic position of certain language groups - the linguistic majority." (Nagy, 2018, 47) Modernization and social advancement (Joutard, 2007, 193) will only be possible in the majority language and will necessarily be linked to assimilation. In addition to this, minority languages will also become invisible in many respects, as they are only used in private life. As a social scientist pointed out□

"Minorities are deprived of the possibility to communicate. Their language is being taken away. One of the basic tenets of all homogenization hysteria is that the minority should not be able to speak, should be silenced. Let it be silenced with regard to language and let it be silenced with regard to the right to determine the way it is expressed." (Csepeli, 2014, 322)

Arguing for minority language rights on the basis of legal equality is not a demand for real linguistic equality. This is impossible in this context, since the state can hardly be neutral in a linguistic - cultural sense, since linguistic sovereignty is an attribute of state sovereignty. In addition, statehood and sovereignty give rise to new languages, such as Bosnian and Montenegrin, which have recently been born. It could be said that the number of languages multiplies when the number of states increases, but the reverse is not true. Hobsbawm, 1997, 82)

The Dilemmas of International Law

The linguistic rights of minorities are implicit or otherwise heteronomous, and ideally also autonomous. They follow from the very essence of universal human rights for all, their enjoyment free from discrimination, and are therefore human sub-rights, i.e. heteronomous linguistic rights. Autonomous, on the other hand, are the specifically formulated minority rights of persons belonging exclusively to a linguistic minority.

However, the protection does not automatically extend to public life. Thus, in Cadoret v. France, the UN Human Rights Committee held that the fact that the complainant could not use the language of his choice in French courts did not raise the question of freedom of expression. (Cadoret, 1988) However, the UN Human Rights Committee has held that an express prohibition on the use of minority languages in public when the conditions for such use are met in practice constitutes discrimination under Article 26 of the International Covenant on Civil and Political Rights, as stated in Diergaardt v. Namibia. (Diergaardt, 1997)

"... The Committee notes that the authors have shown that the State party has instructed civil servants not to reply to the authors' written or oral communications with the authorities in the Afrikaans language, even when they are perfectly capable of doing so. These instructions barring the use of Afrikaans do not relate merely to the issuing of

public documents but even to telephone conversations. In the absence of any response from the State party the Committee must give due weight to the allegation of the authors that the circular in question is intentionally targeted against the possibility to use Afrikaans when dealing with public authorities. Consequently, the Committee finds that the authors, as Afrikaans speakers, are victims of a violation of article 26 of the Covenant."

It can be concluded from this that, in order to establish discrimination in the use of a language in the public domain, it is not sufficient for minorities not to be guaranteed the use of their mother tongue but it must expressly forbidden.

If the language aspect of a human right is implicit, the wording is too narrow. For example, as a part of the right to a fair trial defendants have the right to understand the proceedings, so they have the right to an interpreter. But if they understand the language of the procedure, even if their mother tongue is different, they have no right to interpretation. To be entitled to a fair trial in such a case, a separate minority language right is needed, because the courts may be reluctant to recognize the minority language aspect in practice. As an illustration I only refer to the case of Cyprus v. Turkey (Cyprus, 2001) Turkey occupied the northern part of Cyprus in 1974, where the Turkish Republic of Northern Cyprus was later established. This generally not recognized state has allowed Greek-language primary schools to operate but banned Greek-language high schools. Those Greek students living there who wanted to pursue their studies at high school level had to choose between education either in Turkish or in English. The case concerned whether Turkey – which, according to the European Court of Human Rights exercised effective control over the territory – violated the Greek students' right to education under Article 2 of the First Protocol to the European Convention on Human Rights. The Court ruled in principle – on the basis of the Belgian language case – that Article 2 of the Additional Protocol does not define the language in which the right to education is to be respected. Consequently, the right to education in the mother tongue is not part of the right to learn. (But the quasi-first instance procedure conducted by the European Commission on Human Rights led to the conclusion that the Greeks of Northern Cyprus are entitled to

have a wish to secure the education of their children according to their cultural and ethnic traditions.) Finally, the Court concluded that the policy of the North-Cypriot authorities' can be regarded as having the effect of denying the essence of the right to education, as the students had to travel to the Greek part to pursue their studies there. As an analyst of the case correctly pointed out, the Court did not respect the Greek language, its decision was a not recognition of the right to learn in mother tongue, but it was arrived at because of the particular circumstances of the case. The Court took the view that the complaint had to be accepted because the sensitive political context justified it.(Paz, 2013, 199-200) Consequently, in similar cases we should wait for a sensitive political context. The conveyed message is not that it is better to avoid such a context, just the opposite, to exploit it.

The European Court of Human Rights ruled in Catan and others v. Moldova and Russia (Catan, 2012) that Russia had violated Article 2 of the First Additional Protocol to the European Convention on Human Rights, because it was responsible, as the state exercising effective control over Transnistria, for the provision there that state schools could use only the Cyrillic alphabet in education. Here again, the Court avoided finding freedom of choice of language in education, arguing that it found no legitimate justification for interference by the local authorities, and held that the aim was to Russify the Moldovan community. The aim was to unify Transnistria with Russia. Primary and secondary education play a fundamental role in the development of children and their future success, and it is therefore unacceptable to interrupt the process of education and to present parents with a difficult choice in order to achieve the sole aim of entrenching separatist ideology.

Consequently, the nature of the political context is again the basis of justification.

The question of "political context" leads back to the question of the justifiability of language rights. The negative understanding is that minority language rights endanger stability because they undermine the territorial unity and the cultural nature of the state. Linguistic rights can be stylized as an apparent threat to the security of the state because they can be interpreted as challenging the cultural supremacy

of the majority. For example, the public use of place names and other geographical names in minority languages, even if only in the form of name tags, can represent that a community exists, is there, is at home, is authentic in its physical space. So it is not only the majority community that has an authentic existence in the given state context. And basic mother tongue education is threatening because, although it provides only a modest amount of knowledge, it does provide some intellectual recognition of a means of expression, demonstrating that there is a raison d'être for a different culture. Needless to say, the higher the form of education, the more threatening it is to majority cultural dominance. More sophisticated arguments about minority language education and media are not based on the unacceptability of segregation. It is that separate schools and cultural institutions help to create separate competing communities within the state. And official language rights obscure the ethnocultural character of the majority state. Even if at the local level, often only in law but not in practice, the use of minority languages is allowed in the administration, it is not allowed in the central bodies, especially the parliament, which is the embodiment of popular sovereignty.

The positive consideration is that linguistic rights and their protection can be seen as a means of maintaining peace and security, but according to the fears cited above, claiming language rights could threaten state sovereignty. It can therefore be seen that conflicting conclusions can be drawn with regard to minority rights, including language rights, from the point of view of peace and security. They are dangerous if they are not sufficiently respected, but they are also dangerous if they are claimed or guaranteed to an 'excessive' extent. It follows from this, however, at least for the political leadership of certain states, that since it is dangerous either way, it is advisable to keep the guarantee of minority language rights to a minimum. On the one hand, because it is much cheaper, less money is spent on creating and maintaining minority language infrastructure. On the other hand, if there is a lot of pressure, there is room for *manoeuvre*, otherwise, if there is a high level of protection of minority language rights, there is none, because then the linguistic minority will think of secession. In other words, one way or another, linguistic minorities are seen as a security risk.

The positive approach seems to the prevail in international documents, look at for example, the preamble to the 1993 UN General Assembly Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities, It explains that the promotion and protection of the rights of persons belonging to national or ethnic, religious and linguistic minorities contribute to the political and social stability of the States in which they live. Therefore, we can conclude, the failure to protect these rights can lead to political destabilization of the state concerned. Conversely, if the majority state meets the aspirations of minorities and guarantees their rights in a way that recognizes the dignity and equality of all, it will reduce tensions within and between states. Unfortunately, these arguments do not necessarily convince some majority politicians who play the minority card.

Returning back to the questions of legal dogmatics, in the absence of a clear decision, it would be necessary to formulate and explicitly guarantee minority language rights in an autonomous manner in spheres, like judicial and administrative procedures or public education. However, this need is only partially met by current international law, even though the linguistic rights of persons belonging to national minorities appear to be protected in international law. If the international legally non-binding sources in the form of recommendations are also taken into account, they already amounted to almost five hundred printed pages in 2003! (Medgyesi, 2003)

In reality the international protection of linguistic rights is still not satisfactory. The protection of the linguistic rights of national minorities in binding international law, is mostly indirect either through the prohibition of discrimination on the basis of language as in, for example, Article 14 of the European Convention on Human Rights or in the private sphere through freedom of expression and right to privacy. In the former case, however, discrimination must be identified, - is there an objective justification for the distinction? - and in the latter case a corresponding legal interpretation is necessary, as we saw in the Ballantyne case.

If the protection is direct, it has a rather weak normative power and the state obligation deriving from it is rather vague and uncertain. It is not even clear from the wording of Article 27 of the International Covenant on Civil

and Political Rights whether the right of minorities to use their mother tongue languages extends or not beyond the private sphere to public life. Article 10(1) of the Council of Europe's Framework Convention for the Protection of National Minorities recognizes (but does not guarantee) the right of minorities to use languages in private as well as in public (but before non-state bodies), orally and in writing. Paragraph 3 simply provides the same guarantees as to the use of the mother tongue of a minority person subject to criminal proceedings that a foreign tourist in such a situation would have. Under Article 14(2), the majority state may find good ground in a number of internationally guaranteed loopholes for not enforcing in practice the right to learn in a minority language. (These problems cannot, unfortunately, be eliminated by the otherwise excellent Thematic Commentary of the Advisory Committee on the monitoring of the implementation (Them Com3).

Conclusions

Language bridges the isolation of the individual in society and plays a crucial role in human existence, development and *dignity*. This is why the protection of mother tongue use as a human right is justified. Language is a means of creating and expressing identity, acting as a marker of cultural difference and group identity, and is therefore one of the most important expressions of *community identity*. Thus, the use of mother tongues must also be protected as a minority right. The languages on which language use is based are part of the *cultural heritage of humanity*. They are therefore the subject of international protection of cultural heritage. The rationale for recognizing language rights is the correct understanding of *equality of rights* and the *preservation of diverse communities*.

The fact that the minority language sub-rights of general human rights may be interpreted too narrowly, and that recognition of these sub-rights may be denied, justifies the conclusion that explicit safeguards are needed in international law, where possible, to ensure that minority language rights, the sub-rights and the corresponding state obligations arising from them are precisely defined.

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Endnotes

1 „Even in the last century, it was not uncommon to punish indigenous or minority children in school if they did not speak the official language□ Aboriginal children in Canada, in Australia, in the United States, in Taiwan and Finland were at times punished, humiliated and even beaten for talking their own language. In Turkey, it was forbidden to teach the Kurdish language, and until relatively recently so was broadcasting Kurdish songs, publishing in Kurdish, or even having a Kurdish name. In Bulgaria in the 1980s, a law made speaking Turkish in public an offence□ there was a joke in Bulgaria that Turkish was the most expensive language in the world because if you used it in the street you could be fined hundreds of leva, the Bulgarian currency. Also in the 1980s, some local authorities in Florida went so far as to attempt to ban the official use of all languages except English – even the Latin used to identify animal species in public zoos – as well as forbidding translation in Spanish or other languages for public health care purposes for pregnant women and in public hospitals, because English was to be the exclusive official language for local authorities." Dimitry Kochenov and Fernand de Varennnes 2014 4)

2 The immigrant communities have left behind their original homes. Their motivations have been mainly, but not exclusively, economic, and they are only newly or relatively newly arrived in the European countries. Many of them do not show any signs of giving up their identity and assimilating into the majority. Their growing numbers and adherence to their culture and traditions raises the question of whether it would be necessary to accept them as permanent factors in the society, and consequently, at least on a longer run to secure for them, beside equality and freedom of religion, other minority rights. To improve the standards for minority rights of immigrants and at the same time at least to maintain or, as it is generally needed, to raise the level of protection of homeland minorities is not an easy path.

3 It is not difficult to find evidence of this statement. Look at the following text□„...the immersive teaching of a regional language is a method which is not limited to teaching that language but consists of using it as the

main language of instruction and as a language of communication within the establishment, by providing that the teaching of a regional language can take the form of immersive teaching, article 4 of the referred law disregards article 2 of the Constitution. ("The language of the Republic shall be French.") It is therefore contrary to the Constitution." That was a recent conclusion of the Constitutional Council of France. (Conseil, 2021)