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Human Rights

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Abstract. The aim of this paper is to look into the topic of human rights, consequently showing that the fight for recognising cultural identity develops through the system of human rights. Strictly speaking, the latter is achieved through civil and political rights, individual rights, or first-generation rights. The collective practices of the individual's cultural self-identification develop particularly through the civil rights, namely, the right of self-determination. The collective practices also influence and determine the political system. Therefore, in this paper I focus on the democratic form of the political system of the segmented or the plural multicultural societies and countries. The implication of this paper is that the consociational democracy (or *consensual,* according to some authors), as a democratic and political system in multi-cultural societies and cultural difference in politics, are tightly intertwined with the source of their rights, i.e. the system of human rights.

Keywords: human rights, civil and political rights, pluralistic multicultural societies, consociational democracy

Introduction

Human rights are among the key concepts of today. On the one hand, ardourously, through the trauma of the two world wars and countless pogroms, they have earned their place in the fundamentals of modern democracy – constituting the concept of parliamentary liberal democracy. On the other hand, via globalisation, they have instituted themselves as one of the universal (or nearly universal) principles underlying modern international relations. Consequently, Francis Fukoyama would declare the "end of history", referring to the fact that liberalism, human rights and democracy are growing into global concepts, with no alternative to them. Regardless of whether we find him overoptimistic, especially in light of civil war expansion, ethnic cleansing, genocide (around 153 armed conflicts following the Second World War) [1,2] or in light of dictators, racism, and discrimination still present in international relations – there is, nonetheless, truth to the thesis that human rights are becoming a movement, gaining global dimensions and turning into a global policy factor.

Hence, the contemporary idea of human rights as formulated in the context of the post-World War II period, following the flagrant human rights violation, represents a *flagship notion*, i.e., a rudder for the so called human rights movement. This idea acquires its formal shape with the Universal Declaration of Human Rights (UDHR), adopted in the United Nations in 1948 as the first comprehensive document which lays the foundation of the international human rights law and the articulation of rights for the purpose of protecting them; here also included are the numerous

conventions, declarations, protocols and agreements, that is, treaties ensuing from the Declaration. [3,4]

The idea of the rights of man gains its institutionalisation and effectiveness in the framework of international human rights law. From the perspective of international human rights law, "rights of man" are legal demands, that is, competences which, in line with the accepted moral principles, venerate individuals in the constitutional legal systems of their countries. [5] By adopting "international human rights law", countries undertake the obligation to create a legal system which binds them to recognise, respect, protect and guarantee the specific rights of their citizens on the given territory, thus regularly proclaiming, and announcing as a value meaningful to us, their acceptance of and adherence to the international human rights norms. However, according to traditional international law [6], regulation of human rights is left to the sovereignty of individual countries, as their internal affair.

The new set of internationally acknowledged rights do not replace the undertaken obligations contained in international conventions and agreements (such as the one to "not repudiate justice" to country's citizens and others), but, instead, remain into force. International provisions and additional mechanisms protect and guarantee the individual rights of man, albeit a much older concept derived from Euro-American ideas of individual autonomy (*liberty* and *equality*), supported by the conception of popular (*civil*) sovereignty and social contract.

Civil and Political Rights

Intrinsic to the corpus of human rights, the civil and political rights, being the oldest and fundamental rights of man, classified in the first-generation ("blue") human rights, differ from other moral issues for the protection and promotion of special concern for *autonomy* and *liberty*. Ensuing from human autonomy and liberty, they safeguard the safety and immunity of the individual, through civil status, from the state, and allow the citizen to participate in governance. Since the individual with a civil status holds irrefutable rights, he/she represents the centrepiece of the community's political system. Civil status reflects individual political identity. Therefore, traits of a community are best discerned from the position of its citizens.

Civil rights are defined as a category of rights essential to the establishment of autonomy (activities and initiative) for the citizens in the political system, whereby they are being treated equally with other citizens of the same system. These rights are closely associated with the political rights, which are participation rights that entail a guarantee to perform political activity in one's country and participate in governance.

Detailed according to the international instruments for protection, the current list of civil and political rights is as follows: right to life; right to be free from torture and cruel, inhuman and degrading treatment or punishment; right to humane treatment of prisoners; freedom from debtors' prison; freedom of movement and residence; right to a fair trial; right to an effective judicial remedy; right to an effective remedy before a court; right to judicial protection; right to execution of judgement; right to protection from retroactive criminal law; right to recognition as a person before the law; right to privacy; freedom of thought, conscience and religion; freedom of thought and expression; prohibition of propaganda for war and inciting national, racial or religious hatred; right to peaceful assembly; freedom of assembly; right to marry and found a family; rights of the child; political rights; right to equality before the law; freedom of aliens from arbitrary expulsion; right to

gender equality; prohibition of discrimination; rights of minorities; right of peoples to self-determination (collective right). [3]

The civil and political rights are not confronting, but complementary to each other, thereby assisting in the enhancement of personal responsibility – they spur individual initiative and sense of responsibility for one's life. Their constitutional status also empowers them to enhance the credibility of the system.

Here, however, a separate group [7] of civil and political rights shall be delineated, the exercise of which forms the first circle of cultural self-identification of the individual citizen. In this instance reference is made about the citizen belonging to a cultural group other than the country's majority culture. This primarily pertains to: freedom of thought, conscience and religion; right to peaceful assembly and association; freedom of thought and expression; right to participation in governance and equal access to public service; right to liberty and security; right to be free from torture and cruel, inhuman and degrading treatment or punishment; freedom from arbitrary interference with privacy, family, home or correspondence; right to a nationality.

Then follow the classical rights, which, although relevant, are not pivotal in defining the right to cultural identity, namely: right to recognition as a person before the law; right to life; freedom from arbitrary arrest, detention or exile; right to a fair and public trial before independent and impartial tribunal; right to be presumed innocent; etc.

This first circle of rights, which makes up the backbone of the civil and political rights, is further complemented by rights from additional international instruments of economic, social and cultural provenance. They constitute the second concentric circle around the first, and often contain positive obligations, so that the state canassist the exercise of the first circle of civil and political rights and provide social accommodation to diversity. Such rights are: right to employment; right to just and favourable conditions of work; right to safe and healthy working conditions; right to organise; right to protection of working women; right to equal opportunities and equal treatment in matters of employment without discrimination based on sex; right to the family to social, legal and economic protection; right to protection and assistance of migrant workers and their families; right to health; right to social and medical assistance.[95]

The third concentric circle consists of the quasi-collective and collective (group) rights of minorities and indigenous peoples, also including rights of migrant workers.Such rights, as established for the collectivities of minorities, indigenous peoples and migrants, build upon the previoustwo circles of rights and frame the complexity of the so called social and cultural rights or rights of the differentiated citizenship. [8]

In view of the abovementioned, this separate group of civil and political rights presents the basis for cultural self-identification of the citizen, i.e. the individual.

Cultural (Group) Identity

The cultural identity is not just a mere reflection of given features of culture, but an interpretation towards individual self-identification – personification (*Who am I?*,*What am I?*, *Where do I come from?*,*Where do I belong?*), and endeavour for gaining status (power) in the wider society; primarily a struggle for recognition of resources, position and development.[9,10,11]The struggle around

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[95]The European Social Charter as a Council of Europe product and an ECHR "complementing" instrument.

values, and the perception of exclusion, power and resources, is fuelled from the impression that such interests are incompatible with those of other groups, i.e., there is limitation of resources in the given social moment, and so the interests of all groups cannot be satisfied entirely and at once. In fact, the struggle for recognising group's cultural identity is carried out through the human rights system, especially via the civil and political rights. Exercising human rights in a society implies taking over political power or entering its streams so it can be harnessed towards fruition of the concept of human rights. [12] Today we recognise two lines of struggle: the one demands regard for cultural identity, whichis consistent with the comprehension of the concept of dignity, whereas the other is discernible in the acceptance of economic demands for resources, aimed at protecting integrity of traditions and lifestyle acquired by members of the given groups. [9,10,13,14]

However, through own affirmation and entry into the agenda of civil consensus, individuals bring about irreversible changes and seek *"new theory"* of liberal justice. Such justice ought to be ground for a more inclusive society comprising several communities and resting on the value of individual rights and legal procedures that guarantee the rights of minorities (cultural groups). Will Kymlicka[8]terms this model *"liberal pluralism"* or search for new basis for social justice – lawfulness, concept of multicultural society. According to Kymlicka'a theoretic argumentation, the "justice principle" dictates that both the majority and minority enjoy equal cultural rights and be able to exercise them effectively. Subsequently, this model is placed in eristic juxtaposition to Iris M. Young's [15] models dubbed "differentiated citizenship" and "overlapping consensus" or multiple loyalties and multiple identities. As innovative principle, the "differentiated citizenship" is based on diminishing injustice among the ethnic cultural groups in a society and supporting justice within. John Grey promotes an even more radical version of state "division" on different jurisdictions, jurisprudence, i.e., legal systems for different cultures in a state.[96]

Of all the bases for cultural accommodation in a multicultural society, the most problematic is the premise underlying the concept of "liberal pluralism" – a premise that constitutes the so called societal identities, societal cultures [16], interwoven cultures or essential communities. The creation of societal cultures is closely related to the modernisation process, whereas such cultures show identical tendency to cluster within a given territory and rest on a common language. For a culture to endure and thrive in the modern world, it has to be societal due to the pressure existing in every culture to create one common culture.

Group Rights, Group Cultural Practices and Democracy

Group or "[c]ollective rights refer to the rights accorded to and exercised by collectivities, where these rights are distinct from, and perhaps conflicting with, the rights accorded to the individuals who compose the collectivity."[16]

"The idea that groups are prior to individuals, even if true, cannot by itself explain [the] asymmetry between groups," and therefore the debate is shifted from the subject "over the primacy of the individual or the community" to the real debateover whether it is necessary, for the sake of fair treatment of different cultures and their members, to accord different rights (differentiated citizenship) in order to attain effective equality and fairness in expressing individual cultural identity in a society. [16]

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[96]The basic conceptual framework for the transformation towards multicultural democracy is devised byJohn Gray in his work "Two Faces of Liberalism".

The answer to this quandary is: yes; different rights – additional, special – or so called group-differentiated rights can be accorded in order to attain the goal, and that is compatible with the liberal theory on the rights of man.

Demands different national and ethnic groups put forth to the majority hinge on the type and nature of the issues faced in their society.

First and foremost, all ethnic and national minority groups ask that their representatives are treated as equal members of the community, and the society in general. It is a call for equality and non-discrimination, especially concerning political participation, but also for the utter regard for human rights, as thefirst condition to positive legal recognition of minority rights, which has a contentual and procedural dimension. The second condition to conferring rights to ethnocultural groups is recognition of the individual right to group affiliation. [3,17] The third condition,or ambience, is the necessary special protection and emphasis on the freedom of assembly, which, given the context, entails associations based on ethnic, linguistic and other cultural diversity. This generates an emancipation process for the group rights, or the rights of individuals – by association with others to constitute a minority [3,4], which, at the same time, signifies a process to maximise liberty and the freedom of assembly. Such demands pertain to complete exercising of the right to cultural identity, which transforms into a right to cultural diversity. Thus, beside the demand for equal treatment, based on citizen's individual rights, groups make demands about their collective identity, that is, demands for the recognition of their group (collective) rights. Nurturing one's identity also implies communicating with members of one's own nation living abroad, hence the demands to eliminate administrative hurdles that hamper such communication.

Still, even the utter fulfilment of these demands fails to resolve the issues of the ethnic and minority groups. Since these group members differ from others, the consistent application of the formal and legal equality is insufficient. All efforts, therefore, focus on providing members of different ethnic groups who suffered discrimination the needed support and assistance (differential treatment) to exercising certain rights, in order to attain genuine and actual equality. Or at least come close to it. Hence the demand to recognise collective rights ofminorities; equal, but distinct from those accorded to the majority.If one accepts the concept of social justice, according to which equality precludes equal starting position for the different ethnocultural groups, the collective rights, in principle, are not conflicting with the liberal idea of equality. [18]

The multinational state providing to all its citizens general, equal individual rights, regardless of their group affiliation, may seem "neutral" in regard to different national groups. But, in given cases, it can substantively favour the majority (as it often does), for example: when delineating internal borders; in the use of languages in education, court and government service; when proclaiming public holidays; on the division of competences between central and local authorities; etc. In that sense, the model of civil citizenship, whereas citizens undertake equal rights and obligations before the state, is outdated and unfit to modernise, since it emerged from much more homogenous political communities. [8,19] In line with the abovestated, such a model cannot keep pace with the rise of ethnocultural diversity.

Namely, instead of democracy, the rule of the majority in deeply divided societies spawns dictatorship of the majority and segregation of citizens. Jacob Levy [20] maintains that the complexity of politics in pluralistic multicultural societies is reflected in the separate relations of the different segments towards the wider society, its macroinstitutions and the underlyingvalues, thusimpeding wider consensus.What such societies require is a democratic regime ensuing from a consensus, and not from opposition, one of inclusion, not exclusion, one that strives to maximise the size of the ruling majority instead of satisfying with tight majority, which implies consensual democracy.

Exclusion in plural societies presents a significant cause of identity conflicts among relevant identity groups in the process of making political decisions (institutions and decision-making processes), which reinforces Lijphart's thesis about lacking flexibility of majoritarian democracy in heterogeneous pluralistic societies with large and complex cultural groups [21], whereas the policy of "recognising differences" on the basis of group's positions is a policy of consideration for social and political inequalities of people in the society, and reducing differences. The very policy of "recognising differences" is an instrument for social and political inclusion.

Although multiculturalism is readily associated with cultural differences, whereas it represents a model where culture and cultural identity become a means to achieving political legitimacy and gaining influence, the problem of accepting differences in multicultural societies remains a powerful source of conflicts; hence the need for solutions to replace the model of dominance with the model of partnership, that is, with new liberal justice and a consociational democratic system that rests on it.

This model may be neither perfect nor the most adequate to the new and old EU member states alike, but it is a new model, nonetheless, and so it is too early to arrive at a conclusion whether its concept is better and where it leads to.

Concluding Notes

This paper highlights the separation of the basic civil and political rights from the corpus of human rights and freedoms, constituting the ground for the "right to cultural identity". The latter has not yet been proclaimed a separate right, with no perspective, whatsoever, of emerging as such. However, efforts here were made to demonstrate that some of the classical civil and political rights, along with the rights of minorities, indigenous peoplesand just a few social and economic rights, are regrouped to form the basis of the so called "right to cultural identity".

This earlier regrouping conceived the notion of collective cultural identity (Bhiku Parekh) or societal groups, also known as the group-differentiated rights (Will Kymlicka), so that later on the cultural group identity would change into policy of accommodation (adjustment, adaptation) for the mentioned cultural groups in the context of democratic political system.

The culture group, namely, emerges as a resonator of political articulation and mobilisation, and so it represents a new political stakeholder, that is, a new political factor, in a democracy some authors call consociational democracy, or in more general terms – democracy in multicultural societies. Mutual cohabitation between collective cultural identity and its political articulation, and classical individual rights and their political accommodation, creates a new political situation that requires intervention into the system of liberal justice and majoritarian democracy hitherto known and elaborated. In some authors' conviction, it requires establishment of new liberal justice and a system of consociational democracy based upon it. This system will develop new and effective *balance* between the individual rights – individual citizenship and underlying political institutions, and the collective cultural rights – differentiated citizenship and underlying participative political institutions. Such a project is neither simple nor easy to realise, and since multicultural societies have no major options to choose from, finding the new balance becomes an"urgent" focus point.

Although this is a fermenting debate "zigzagging" and going "back and forth", I share the opinion with a group of authors who maintain that collective cultural rights are an essential element in the re-democratisation of the political landscape and the establishment of new practices in democracy,

which are imposing, advancing and lasting. In fact, it is one of the basic components of democratic changes taking place in the 21st century.

References

1. Mason D. T., Fett, P. J.: How Civil Wars End: A Rational Choice Approach. Journal of Conflict Resolution, Vol. 40(4). JSTOR (1996) 546–568
2. Stephen, S.: Peacemaking in Civil War. In: Schneckener U., Wolff, S. (eds.): Managing and Settling Ethnic Conflicts. Palgrave Macmillan, New York (1991)
3. .Фрчкоски, Д. Љ.:Меѓународноправозаправатаначовекот. Магор, Скопје (2006)
4. Фрчкоски, Д. Љ.,Георгиевски С.,Петрушевска Т.: Меѓународнојавноправо. Магор, Скопје (2012)
5. .Shelton, D.: International Law and Relative Normativity. In: Evans M. D. (ed.): International Law, 1stedn. Oxford University Press (2003).
6. .Милер, Д.:Блеквеловаенциклопедијанаполитичкатамисла. МИ–АН, Скопје (2002)
7. .Donders, Y. M.: Towards a Right to Cultural Identity?.Intersentia, Antwerpen – Oxford – New York (2002)
8. .Кимлика, В.:Мултикултурнограѓанство.ИДСЦО, Скопје (2004).
9. .Taylor, C.: The Politics of Recognition. In: Gutman A. (ed.): Multiculturalism. Princeton University Press, New Jersey (1994).
10. .Тејлор, Ч.:, Огледизаполитикатанапризнавање. Во: Гатман Е. (уред.): Мултикултурализам.Евро-Балканпресс,Скопје (2004) 25-57, 102
11. Parekh,B.: Rethinking Multiculturalism: Cultural Diversity and Political Theory. Harvard University Press, Cambridge MA (2000).
12. Douzinas, C.: Human Rights and Empire: The Political Philosophy of Cosmopolitanism. Routledge – Cavendish, New York (2007).
13. .Margalit, A.: The Decent Society.Harvard University Press, CambridgeMA(1996)
14. .Скаловски, Д.:Вопрволицееднина. Аз-Буки,Скопје (2010)
15. .Young, I. M.: Polity and Group Difference: A Critique of the Ideal of Universal Citizenship. Ethics, Vol. 99(2). JSTOR (1989) 250-274
16. .Kymlicka, W.: Multicultural Citizenship: A Liberal Theory of Minority Rights. Oxford University Press, Oxford (1995)
17. .Rights of Minorities in Upper Silesia (Germ. v. Pol.), 1928 P.C.I.J. (ser. A) No. 15 (Apr. 26)
18. .Mesic M.: Prijeporiokokolektivnih (kulturnih) prava. ZbornikPravnogfakulteta, Vol. 57 (3), Zagreb (2007)
19. .Kymlicka, W.: Introduction: An Emerging Consensus?. Ethical Theory and Moral Practice (1998) 1:143
20. .Levy, J. T.: Classifying Cultural Rights.In: Kymlicka, W., Shapiro, I (eds.): Ethnicity and Group Rights, NOMOS XXXIX, New York University Press, New York-London (1997) 22-66

21. .Lijphart, A.: Patterns of Democracy. Yale University Press, New Haven and London (1999)