

Content and Enforcement of the Right to Education in Higher Education – Does Being European Make a Difference?

MELINDA SZAPPANYOS

Visiting Professor, Kyungpook National University, Office of International Affairs, Global Teachers' University

Nine words represent the basic difference in the content of the right to education in higher education between the Member States of the Council of Europe and non-European States on international level. First, the content of the right to education in higher education should be drawn out, with the help of international documents mentioning the right to education. After clarifying the content, this paper intends to collect together, briefly analyse and compare the opportunities of enforcement of the right to education on national and international level, giving priority to the latter. To be able to give a fairly detailed picture and more relevant information a comparison seems to be beneficial. Therefore, definitions and opportunities of enforcement will be collected and compared in European higher education systems and in the Republic of Korea.

Keywords: right to education, higher education, European Court of Human Rights, Republic of Korea, enforcement

1. Introduction

„No person shall be denied the right to education.”¹ These nine words represent the difference between non-European States and the Member States of the Council of Europe² in terms of the right to education in higher education (HE). But does this short sentence make a real difference?

Although it is usual to start a paper on human rights with a definition of the right in question, in the case of this paper it should immediately be noted that international documents mentioning the right to education generally do not clarify the content of this right with respect to HE. The reality of human rights law does not pay particular attention to HE either: world reports and documents born under various reporting systems focus on the problems of the right to education time to time, and recommendations are

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¹ 1952, Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms as amended by Protocol No. 11, Paris, Art. 2, Phrase 1, (Protocol).

² Since these nine words come from the Protocol, evidently, this paper considers the Member States of the Council of Europe as European countries. The special regime of the European Union is not subject of the present paper.

elaborated, but these reports almost never deal with HE.³ Still, the existence and the necessity of the respect for and enforcement of the right to education in HE is beyond doubt.

The reality of the respect for a human right is almost impossible to measure, not only objective indicators are missing, but the reality is so complex, that generalisation with huge distortion is inevitable. However, there is an indicator which is still unable to describe the whole status of a human right, but can give an overall picture on its respect: the opportunities of enforcement. Thus, after clarifying the content of the right to education, this paper also intends to collect together, briefly analyse and compare the opportunities of enforcement of the right to education in HE on national and international level, giving priority to the latter.

To be able to give a fairly detailed picture and more relevant information, a comparison seems to be beneficial. Therefore, definitions and opportunities of enforcement will be collected and compared in European HE systems and in the Republic of Korea (ROK). The selection of the ROK for this comparison requires explanation. Since the research question of this paper supposes that being European means a difference in terms of the right to education in HE systems, it is evident to compare European reality to a non-European reality. There are several States where the education system is not functioning properly and its problems are evident from global reports, thus seem to be a good choice. However, considering the existing regional and universal human rights protection systems, the ROK is still a better option, since in Asia, human rights, including the right to education are not protected on regional level at all. Thus the protection level supposedly making a difference in the reality of the right to education is missing. While other parts of the world, despite of trying hard, appear to be unsuccessful in establishing regional protection systems, the ROK is not even Member State of the only Asian international organization recently started to focus on human rights, the Association of South-East Asian Nations (ASEAN).⁴ On the other hand, though the efficiency of education systems (based on the abilities of students) is measured up to secondary education level and not on university level, recently, the ROK has the best results,⁵ what makes it an ideal starting point for the present research, and a sample for other States.⁶ Finally, the basis of the theory and practice of HE in the ROK is completely different from Europe in many aspects, including the different cultural background (Confucianism), which influences Korean HE system in many ways.⁷

³ E.g. during the first 4 years cycle of the Universal Periodic Review Mechanism of the Human Rights Council, in connection with the right to education, no document mentioned HE explicitly. But it also must be noted that several documents mentioned education in general. See Melinda Szappanyos, *Víz és jog, A vízhez való jog érvényesíthetősége az ENSZ keretében*, Veszprémi Humán Tudományokért Alapítvány, Veszprém, 2013, pp. 84-85.

⁴ Yuval Ginbar, *Human Rights in ASEAN – Setting Sail or Treading Water?* Human Rights Law Review, Vol. 10, No. 3, 2010, pp. 505-511.

⁵ Organisation for Economic Co-operation and Development, *PISA 2012 Results: Creative Problem Solving: Students' Skills in Tackling Real-Life Problems*, Vol. V, PISA, OECD Publishing, p. 13. <http://www.oecd.org/pisa/keyfindings/PISA-2012-results-volume-V.pdf> (7 July 2014).

⁶ BBC News, *Is South Korean education 'best in world'?* 2 December 2013, <http://www.bbc.com/news/world-asia-25193551> (7 July 2014).

⁷ Jeong-Kyu Lee, *Impact Of Confucian Concepts Of Feelings On Organizational Culture In Korean Higher Education*, Radical Pedagogy, Vol. 3, Issue 3, December 2001, pp. 1-23.

2. Basics of the Right to Education in HE – Sources and Content

Even though the promotion of the right to education and numerous problems of its protection are mainstream issues in world politics and human rights law, the content of this human right has not been subject of profound research.⁸ The elements of the content of the right to education in HE are even more obscure and hardly identifiable. Only a few points seem obvious, based on the Universal Declaration of Human Rights (UDHR),⁹ the authentic interpretation of human rights:¹⁰

- It is not compulsory;
- It is not free; (because only primary education must be compulsory and free)
- It is equally accessible to all on the basis of individual capacity;
- Its main purpose is the development of personality; and promotion of understanding and tolerance. Education of any level thus has two main purposes, the development of one's personality and learning to function in a free society and be able to interact according to the basic principles of respect and tolerance.

The collection of international legal sources regarding the right to education does not seem challenging. International human rights treaties should be collected as a first step. Almost all human rights treaties born under the Organization of the United Nations (UN) and regional international organizations protect one or more aspects of the right to education. There are universal human rights treaties protecting it as a general human right entitling every human being (International Covenant on Economic, Social and Cultural Rights¹¹); there are ones declaring it as a basic human right of a specific group of humans (e.g. Convention on the Rights of the Child¹²) and treaties ensuring one aspect of this human right, e.g. the parents' freedom to choose religious and moral education of their children (International Covenant on Civil and Political Rights¹³). But an important thing should be taken into consideration, even though an international treaty declares the right to education, not every element of the regulation does necessarily apply to HE. For example the CRC contains the definition of the child, subject of the rights protected by the CRC, according to which "a child means every human being below the age of eighteen years unless under the law applicable to the child, majority is attained earlier".¹⁴ Since the acceptance into HE requires elementary and secondary education as a prerequisite, we can confidently say that people enrolled in HE are not „children". Therefore, the articles of the CRC not mentioning explicitly HE usually can be used only as indirect references. Similarly, considering the close relationship between human rights treaties adopted under the aegis of the UN, when a treaty, for example the ICCPR, mentions the parents' role in

⁸ Angela Fischer, *The content of the Right to Education – Theoretical Foundations*, Working Paper, Economic, Social and Cultural Rights Series, Center for Human Rights and Global Justice, No. 4, 2004, pp. 5-6.

⁹ GA Res. 217 A (III) 10 December 1948, *Universal Declaration of Human Rights*, Art. 26, Para 1, (UDHR).

¹⁰ Office of the High Commissioner for Human Rights, *Fact Sheet No.2 (Rev.1), The International Bill of Human Rights*, p. 4, <http://www.ohchr.org/Documents/Publications/FactSheet2Rev.1en.pdf> (7 July 2014).

¹¹ 1966, International Covenant on Economic, Social and Cultural Rights, GA Res. A/RES/2200(XXI), 993 UNTS 4, Art. 13, (ICESCR).

¹² 1989, Convention on the Rights of the Child, GA Res. A/RES/44/25, 1577 UNTS 3, Art. 28, (CRC).

¹³ 1966, International Covenant on Civil and Political Rights, GA Res. A/RES/2200(XXI), 999 UNTS 172, Art. 18, Para. 4.

¹⁴ CRC, Art. 1.

the choice of the form of education of their *children*,¹⁵ it is not considered as an element of the right to education in *HE*.

It is to be noted, that treaties protecting the human rights of one specific group of people (women, persons with disabilities, migrant workers) mention only one aspect of the right to education (in general, speaking of all levels of education): equal opportunities. In the following chart universal human rights treaties (and the UDHR), as sources of the right to education in HE, are collected together.¹⁶

Compulsory ¹⁷	UDHR Art. 26, Para 1.		ICESCR Art 13, para 2, point a)				
Free	UDHR Art. 26, Para 1.		ICESCR Art 13, para 2, point c) (progressive introduction of free education)				
Purpose	UDHR Art. 26, Para 2.		ICESCR Art. 13, para 1			CRPD Art. 24, Para 1.	
Equally accessible based on merits	UDHR Art. 26, Para 1.	ICESCR Art 13, para 2, point c)	CRC Art 28, para 1, point (c)	CMW ¹⁸ Art 43, Para 1., point a) + Art 45, para 1, point a)	CRPD ¹⁹ Art. 24, Para 2., point a)	ICERD ²⁰ Art. 5, Point e) v)	CEDAW ²¹ Art 10.

If we compare the universal level sources to the European human rights treaties, it is remarkable that the latter give a lot less details on the content of this human right. Though the international treaty protecting economic, social and cultural rights within the Council of Europe mentions the right to education, but limits it to vocational training.²²

¹⁵ ICCPR, Art. 18, Para 4.

¹⁶ Given the fact, that it is not a universal human rights treaty, but an important source of the right to education in HE, one treaty was left out from the chart, but mentioned here. 1960, Convention against Discrimination in Education, UNESCO, Art. 4, point a).

¹⁷ Generally, treaties oblige States to make primary and/or secondary education compulsory and/or free, but do not declare the same obligation in case of HE. Therefore, in the chart those articles are mentioned, which declare free and/or compulsory basic education, and does not list HE with the same features.

¹⁸ 1990, International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families, GA Res. A/RES/45/158, 220 UNTS 3, (CMW).

¹⁹ 2006, Convention on the Rights of Persons with Disabilities, GA Res. A/RES/61/106, 2515 UNTS 69, (CRPD).

²⁰ 1965, International Convention on the Elimination of All Forms of Racial Discrimination, GA Res. A/RES/2106(XX), 660 UNTS 212, (ICERD).

²¹ 1979, Convention on the Elimination of Discrimination Against Women, GA Res. A/RES/34/180, 1249 UNTS 14, (CEDAW).

²² 1961, European Social Charter, CETS No. 35, Art. 10; 1966, European Social Charter (revised), CETS No. 163, Art. 10. Though the recent trend requires greater mobility between vocational training and HE, these two are still

The detection of all international instruments without legal binding force, promoting the right to education is a lot more demanding task, if not impossible. Several bodies and organs actively discuss the protection of this human right, including the UN human rights bodies and also institutions in charge of the protection on regional level. Not only governmental, but also non-governmental organizations deal with the promotion of the right to education, producing valuable international instruments, including briefing papers, fact sheets and reports.

National constitutions generally ensure the right to education to everyone under the State's jurisdiction. Besides the constitution, other legal sources regulate the realization of the right to education. Though the regulations are very different country by country, they usually use international instruments as starting points. Using the same categories, elaborated above for the collection of universal human right treaties, European national constitutions²³ can be compared to each other and to the constitution of the ROK. The majority of the Member States of the Council of Europe declared the right to education in its constitution (30 out of 47) and also made basic education compulsory (27 out of 47). 34 States made basic education (sometimes secondary education is included into basic education) free, among these, four States guaranteed HE for free (Greece, Moldova, Romania, Ukraine) explicitly or by not limiting the scope of free education to the basic levels and/or stating that public education is free of charge. Only two States (Andorra and Spain) mentioned the purpose of education (including HE), which reflects on international documents. Ten countries declared that education is equally accessible for everyone, based on merits. Some constitutions dealt with other aspects of HE too, most frequently they guaranteed academic freedom and the autonomy of HE, and stated that private educational institutions can be established according to law.²⁴ The Constitution of the Republic of Korea²⁵ guarantees the compulsory and free basic education and the "autonomy of institutions of higher learning".²⁶ Based on the comparison it can be confidently stated that the basic regulation of the right to education is similar in European countries and the ROK.

3. Enforcement of the Right to Education in HE

3.1. National Level – Is there a Difference?²⁷

Usually HE institutions have certain autonomy in regulating their operation, but this autonomy can be practiced only within a legal framework. The basis of this framework is the national constitution declaring the right to education and a body of national legislation, regulating HE in details. This

separated from each other. Lukas Graf, *The Hybridization of Vocational Training and Higher Education in Austria, Germany, and Switzerland*, Budrich UniPress Ltd., Opladen, Berlin & Toronto, 2013, pp. 14-16. This paper focuses exceptionally on HE.

²³ The English translation of most of the constitutions of the Council of Europe Member States is available at <http://www.legislationline.org/documents/section/constitutions>. When the English translation was not available, the French version was used.

²⁴ Interesting that Greece in its constitution declared that HE education can be conducted only in public, State-run institutions.

²⁵ Constitution of the Republic of Korea, 17 July 1948, http://korea.assembly.go.kr/res/low_01_read.jsp?boardid=1000000035 (10 August 2014) Art. 31.

²⁶ Ibid, Art. 31, Para 4.

²⁷ The author would like to thank to Zsófia Sinka for her contribution to the research and translation related to the Korean legislation on HE.

legislation, besides declaring the principle of equality, usually regulates the rights and obligations of students and other stakeholders in HE, students' right to remedy within the institution, and the opportunity to turn to the judicial system with a complaint against the institution's final decision, under certain conditions.²⁸ Interestingly, though the Higher Education Act of the ROK²⁹ and its Enforcement Decree³⁰ contain a few elements mentioned above, including the rights and obligations of different stakeholders (e.g. duties of faculties³¹ and students' right to self-governing activities³²), principle of equality,³³ and the discipline on students,³⁴ but do not mention students' right to remedy at all. The Enforcement Decree lists what should be regulated by the institution itself, but does not mention it either.³⁵ This means that when a complaint procedure is established in an institution, it does not have a basic regulation in legislation; and institutions can lawfully decide not to regulate it at all. In European States, against the final decision of the institution, students can seek legal action in court. As in any of these States judicial power is vested in courts also in the ROK,³⁶ thus it must be the case in the latter as well, but it is not regulated in the legislation concerning HE.

Ombudsmen usually have competence to examine human rights abuses, even though their „actions are geared primarily towards the accountability of ‘the system’ rather than towards upholding the rights of the single individual. Monitoring the administrative actions of the executive or public sector does, however, bring forward issues which bear on human rights protection.”³⁷ The characteristics of this position make the ombudsmen capable of handling complaints concerning the right to education in HE effectively, therefore, their number grew quickly in the last few decades.³⁸ An ombudsman in HE is “a person or persons independent of the educational institution who investigate(s) complaints against the institution and make(s) a decision on the individual case which may or may not be binding on the institution, together with recommendations on what constitutes good practice in such situations.”³⁹ The special features of university ombudsmen are different from country to country (e.g. term of office, nomination process, supervision), but what is common: even if they cannot solve the abuse of the right to

²⁸ See for example the Act CXXXIX of 2005 on Higher Education of Hungary, http://www.nefmi.gov.hu/letolt/nemzet/naric/act_cxxxix_2005.pdf (16 August 2014), Secs. 46-51, Secs. 73-75.

²⁹ Higher Education Act, Republic of Korea, 2009, Ref. 7309. Available in English at http://www.moleg.go.kr/english/korLawEng;jsessionid=Gcb1Me48oc1JemBfpguy0LybVYGITgJow6q8HUXiiv2WyKqmSpPKSbax3VD4h0S0.moleg_a2_servlet_engine2?pstSeq=52242&brdSeq=33&pageIndex=57 (16 August 2014) (Higher Education Act).

³⁰ Enforcement Decree of the Higher Education Act, Republic of Korea, 2009, Ref. 6617. Available in English at http://www.moleg.go.kr/english/korLawEng;jsessionid=Gcb1Me48oc1JemBfpguy0LybVYGITgJow6q8HUXiiv2WyKqmSpPKSbax3VD4h0S0.moleg_a2_servlet_engine2?pstSeq=52242&brdSeq=33&pageIndex=57 (16 August 2014) (Enforcement Decree).

³¹ Higher Education Act, Art. 15.

³² Ibid, Art. 12.

³³ Enforcement Decree, Art. 31, Para (1).

³⁴ Higher Education Act, Art. 13.

³⁵ Enforcement Decree, Art. 4.

³⁶ Constitution of the Republic of Korea, Art. 101, Para. 1.

³⁷ Anand Satyanand, *The Ombudsman Concept and Human Rights Protection*, Victoria University Wellington Law Review, Vol. 29, 1999, p. 22.

³⁸ Kenneth L. Stewart, *What a University Ombudsman Does A Sociological Study of Everyday Conduct*, The Journal of Higher Education, Vol. 49, No. 1, 1978, p. 1.

³⁹ Nicholas Saunders, *(Yet) another ombudsman: Student complaints, and appeals revisited*, Perspectives: Policy and Practice in Higher Education, Vol. 6, No. 2, 2002, p. 56.

education, they can act as an independent mediator and avoid unnecessary judicial procedures.⁴⁰ In the ROK the ombudsman position was integrated into the Anti-Corruption and Civil Rights Commission (ACRC) in 2008.⁴¹ Besides working out and execute anti-corruption strategies, this commission investigates complaints of civil and political rights abuses.⁴² HE public institutions fall under the competence of the ACRC.⁴³ According to its latest annual report, the ACRC made 21 corrective recommendations in the area of Administration, Culture & Education, based on complaint procedure.⁴⁴ Unfortunately, the report does not give more details on the complaints submitted in education. But based on the legislation it seems to be evident, that in case of a violation of the right to education in HE, a complaint can be submitted to the ACRC (or to the local ombudsman⁴⁵) under conditions established by the legislation.⁴⁶

3.2. Universal Level – Is there a Difference?

Except for the CMW, the ROK is a Contracting Party to all enumerated universal human rights treaties, similarly to the majority of the Member States of the Council of Europe. Consequently, State obligations in the protection of the right to education in HE are the same. These treaties do not only enumerate human rights to be protected, but establish procedural obligations as well. Not only have the treaties themselves established procedural obligations, but also the optional protocols attached to them. The collection of all participation in treaties of European countries is not the purpose of this paper, considering that these States participate in human rights protection through very various ways. To achieve the goals of this research, it is enough to state that European countries have various procedural obligations depending on the participation in different universal treaties. But because the 47 Member States of the Council of Europe as a group are compared to the ROK, it seems necessary to collect the possible procedural obligations and mark (in the chart with different background colour) those which were accepted by the latter.⁴⁷

⁴⁰ Franz Marhold: *Mass Higher Education and Students' Issues: Ombudsmen as a Remedy?*, in Kristl Holtrop & Josef Leidenfrost (Eds.), *Student – Institutional Relationships in Times of New University Management: Academic Ombudsmen in European Higher Education*, European Network for Ombudsmen in Higher Education, Occasional Paper No. 1, p. 46.

⁴¹ ACRC Korea, Annual Report, 2012, p. 5.

⁴² Asian Ombudsman Association, *Factsheet, Anti-Corruption & Civil Rights Commission, Republic of Korea*, 8 April 2010, p. 1, <http://asianombudsman.com/ORC/factsheets/KoreaOmbudsmanFactsheet.pdf> (16 August 2014).

⁴³ Act on Anti-Corruption and the Foundation of the Anti-Corruption & Civil Rights, Republic of Korea, 2011, Ref. 1592. Art. 2, Para. (1), point b).

⁴⁴ ACRC Korea, Annual Report, 2013, p. 33.

⁴⁵ Act on Anti-Corruption and the Foundation of the Anti-Corruption & Civil Rights, Chapter III.

⁴⁶ *Ibid*, Art. 39.

⁴⁷ The chart contains the procedural obligations related to the international treaties collected together as sources. The obligations of the ROK are emphasised with different background.

Reporting obligation	ICESCR ⁴⁸	CRC Art. 44, Para. 1.	CRPD Art. 35, Paras. 1-2.	ICERD Art. 9, Para. 1.	CEDAW Art. 18, Para. 1.
Opportunity for individual complaints	ICERD Art. 4. + declaration is needed	Optional Protocol to CEDAW ⁴⁹ Art. 2.	Optional Protocol to the ICESCR ⁵⁰ Art. 7.	Optional Protocol to the CRC on a communications procedure ⁵¹	Optional Protocol to the CRPD ⁵² Art. 1, Para. 1.
Opportunity for Inter-State Complaints	Optional Protocol to the ICESCR Art. 10				
Inquiry Procedure	Optional Protocol to the ICESCR Art. 11.				

Though it seems that the ROK did not accept many procedural obligations besides the reporting systems included in the treaties themselves, this fact cannot be considered as a significant difference if we treat the Member States of the Council of Europe as a group. Evidently, there are Member States of the Council of Europe, which did undertake a lot more obligations, but for example the Republic of Moldova has the same procedural obligations. Moreover, the expert bodies examining the reports and individual complaints are independent and work based on guidelines, to secure the consistent interpretation and enforcement of human rights. Consequently, there is a difference between *some* European States and the ROK on universal level.

3.3. Regional Level – Is there a Difference?

There is definitely a difference, as we have seen above, since there is an international treaty declaring that “*No person shall be denied the right to education.*” and this treaty applies to all Member States of the Council of Europe. Even though this sentence is very short, we cannot forget that behind it, there is the European mechanism for the protection of human rights, especially the European Court of Human Rights (ECtHR or Court).

The fact that the Court interpreted the Convention for the Protection of Human Rights and Fundamental Freedoms⁵³ (ECHR) and its protocols not using the principle of interpretation of the 1969 Vienna

⁴⁸ In case of the ICESCR the reporting obligation is not in the treaty itself, but established by a resolution of the Economic and Social Council of the UN. ECOSOC, resolution 1988/4, 24 May 1988, point 6.

⁴⁹ 1999, Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women, GA Res. A/RES/54/4, 2131 UNTS 83.

⁵⁰ 2008, Optional Protocol to the International Covenant on Economic, Social and Cultural Rights, GA Res. A/RES/63/117.

⁵¹ 2011, Optional Protocol to the Convention on the Rights of the Child on a communications procedure, GA Res. A/RES/66/138.

⁵² 2006, Optional Protocol to the Convention on the Rights of Persons with Disabilities, GA Res. A/RES/61/106.

Convention,⁵⁴ but an evolutive interpretation instead, is well-known,⁵⁵ thus requires no evidence. In the case of the right to education though, as the ECtHR noted itself, the Court had a difficult task in determining the content and the scope of application of this right, because the article declaring the right is rather brief, unlike some other precise provisions of the ECHR.⁵⁶

To get an overall picture on the position of the Court on the content of the right to education in HE, the case-law should be analysed. Because the case-law related to the right to education is quite vague, and the focus of this paper is HE, the scope of the research had to be limited. The Protocol mentions two aspects of the right to education: besides declaring the right with a brief sentence, it also established the right of parents to decide on the religious and philosophical content of their children's education. Since the database of the ECtHR case-law lists these two rules of the article separately,⁵⁷ the research did not examine cases, indexed under the second sentence of the article in question. To further limit the scope of the research, those judgements were taken into consideration, which dealt with HE. With these restrictions only four cases of the ECtHR can be used to analyse the right to education in HE.

Among the cases concerning HE, two were submitted to the Court stating exceptionally the violation of the right to education,⁵⁸ the others stated the breach of several articles of the ECHR and the Protocol. Interestingly, out of the four applications, three were submitted against Turkey.⁵⁹ According to the Court, the right to education was violated in half of the cases. All judgements were issued after the entry into force of the Protocol No. 11,⁶⁰ therefore the European Commission on Human Rights could not contribute to the reasoning. In contribution to these four, there is another judgement to be taken into consideration as one of the most important early judgements of the Court in terms of the right to education, the "*Belgian linguistics case*".⁶¹ Through these judgements the ECtHR elaborated the right to education by interpreting the article in question in a creative way.

⁵³ 1950, Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights) as amended by Protocols No. 11 and No. 14, CETS No. 5.

⁵⁴ 1969, Vienna Convention on the Law of Treaties, 1155 UNTS 344, Art. 31.

⁵⁵ Kanstantsin Dzehtsiarou, *European Consensus and the Evolutive Interpretation of the European Convention on Human Rights*, German Law Journal, Vol. 12, No. 10, pp. 1730-1745. Alastair Mowbray, *The Creativity of the European Court of Human Rights*, Human Rights Law Review, Vol. 5, No. 1, 2005, pp. 59-60.

⁵⁶ Case „*Relating to Certain Aspects of the Laws on the Use of Languages in Education in Belgium*” v. Belgium (Application no 1474/62; 1677/62; 1691/62; 1769/63; 1994/63; 2126/64), ECtHR (1968). Part I, B, 3, point 28. („Belgian linguistics case”).

⁵⁷ Categories used by the HUDOC database within the right to education (in general) group: right to education; respect for parents' philosophical convictions and respect for parents' religious convictions.

⁵⁸ Mürsel Eren v. Turkey (Application no. 60856/00) ECtHR (2006); Tarantino and Others v. Italy (Applications nos. 25851/09, 29284/09 and 64090/09) ECtHR (2013).

⁵⁹ Leyla Sahin v. Turkey (Application no. 44774/98) ECtHR (2005); Mürsel Eren v. Turkey and Irfan Temel and Others v. Turkey (Application no. 36458/02) ECtHR (2009).

⁶⁰ Protocol No. 11 to the Convention for the Protection of Human Rights and Fundamental Freedoms, restructuring the control machinery established thereby, ETS No. 5, Strasbourg, 11 May 1994.

⁶¹ Though the “Belgian linguistics case” does not deal with HE, still the basic content of the right to education was elaborated by the Court in this judgement. This case is also considered as a cornerstone in terms of language rights and minority rights. Roberta Medda-Windischer, *The European Court of Human Rights and minority rights*, Journal of European Integration, Vol. 25, No. 3, 2003, p. 11.; Kristin Henrard, *The interrelationship between individual human rights, minority rights and the right to self-determination and its importance for the adequate protection of linguistic minorities*, Global Review of Ethnopolitics, Vol. 1, No. 1 2001, p. 51.

3.3.1. Scope of Application of the Right

In the first relevant judgement concerning the right to education, the Court had to explicitly express that Art. 2 of the Protocol does indeed contain a human right with a content determinable and consequently, establish obligations for the Contracting Parties.⁶² The Court also noted that the Protocol „guarantees [...] a right of access to educational institutions existing at a given time”.⁶³ Thus even though the judgement in question was basically related to secondary education, the ECtHR did not exclude HE from the scope of application of the right to education. Despite of this clear position, the practice of the Commission was not completely consistent and did not entirely follow the Court’s judgement.⁶⁴ In the case of *Leyla Sahin v. Turkey* the ECtHR confirmed again that the right to education is a human right to be protected in HE as well.⁶⁵

3.3.2. Content of the Right & State Obligations

The content of the right to education was determined in the “*Belgian linguistics case*”, but summarized with respect to HE by the *Leyla Sahin v. Turkey* judgement. Based on these judgements the right to education contains the following elements:

- “[R]ight of access to educational institutions existing at a given time”,⁶⁶
- Right to “have the possibility of drawing profit from the education received, that is to say, the right to obtain [...] official recognition of the studies [...] completed.”⁶⁷
- Equal “treatment of all citizens in the exercise of their right to education”.⁶⁸

The ECtHR firmly states from the beginnings of the related case-law that Contracting Parties are not obliged to establish and/or to subsidize educational institutions. The obligations of States start to exist when the institution is established.⁶⁹ The main obligation of the Contracting Parties with respect to the right to education is to regulate education system making sure that “such regulation must never injure the substance of the right to education nor conflict with other rights enshrined in the Convention.”⁷⁰

3.3.3. Limitation of the Right to Education

Though Contracting Parties to the ECHR are obliged to respect and ensure the right to education, they also have the responsibility to regulate, which regulation necessarily involves some restrictions on the

⁶² „Belgian linguistics case”, Part I, B, point 3.

⁶³ Ibid, Part I, B, point 4.

⁶⁴ *Leyla Sahin v. Turkey*, Part II, B, point 139.

⁶⁵ Ibid, Part II, B, points 141-142.

⁶⁶ „Belgian linguistics case”, Part I, B, point 4; *Leyla Sahin v. Turkey*, Part II, C, point 152.

⁶⁷ Ibid.

⁶⁸ *Leyla Sahin v. Turkey*, Part II, C, point 152.

⁶⁹ „Belgian linguistics case”, Part I, B, point 3.

⁷⁰ Ibid, Part I, B, point 5.

right to education.⁷¹ The Court elaborated the conditions of a lawful limitation of the right to education based on the structure of other articles in the ECHR. A restriction is compatible with the ECHR, if it is foreseeable for the people entitled by the right, pursues a legitimate aim, and the principle of proportionality has been respected.⁷² In addition, “[s]uch restrictions must not conflict with other rights enshrined in the Convention and its Protocols either”.⁷³

In case of the right to education the Court’s task in deciding the legitimacy of an aim is more difficult, than in case of some other rights protected by the ECHR, because Art. 2 of the Protocol does not list the legitimate aims of a possible limitation. According to the ECtHR, States enjoy a certain margin of appreciation in the regulation of educational institutions, but “the final decision as to the observance of the Convention’s requirements rests with the Court.”⁷⁴ In the four cases concerning the right to education in HE the ECtHR accepted the “aims of protecting the rights and freedoms of others and maintaining public order”,⁷⁵ and “of achieving high levels of professionalism, [...] which is a general interest” as legitimate.⁷⁶ In these two cases the Court did not find violation of the right to education. In the case of *Irfan Temel and Others v. Turkey*, the Court found the lack of a legitimate aim, but did not consider the question in details, because the key issue was the principle of proportionality.⁷⁷ Because the restriction was way too exaggerated, the Court found the violation of the right to education. In the fourth case the Court found a violation of the right to education in the lack of foreseeability, therefore did not even examine the existence of a legitimate aim.⁷⁸

4. Summary: Content and Enforcement of the Right to Education in HE – Europe v. ROK

The definition of the right to education in HE is not different in European countries and in the ROK. But the content of the right is determined in more details in the previous, giving a more solid body for interpretation, which makes enforcement easier, regardless of its level. If we take all sources into consideration, the following statements may be made regarding (based on universal treaties and national constitution) the right to education in HE in the ROK:

- It is not compulsory;
- It is not free. Even though the participation in HE is not for free, the State is obliged to try to introduce free education progressively on this level too.

⁷¹ *Leyla Sahin v. Turkey*, Part II, C, point 154.

⁷² *Ibid.*

⁷³ *Ibid.*, Part II, C, point 155.

⁷⁴ *Ibid.*, Part II, C, point 154.

⁷⁵ *Ibid.*, Part II, C, point 158.

⁷⁶ *Tarantino and Others v. Italy*, Part I, B, point 48.

⁷⁷ *Irfan Temel and Others v. Turkey*, Part II, B, point 42.

⁷⁸ *Mürsel Eren v. Turkey*.

- It is equally accessible to all on the basis of individual capacity “without distinction as to race, colour, or national or ethnic origin”.⁷⁹ Equal opportunity should also be provided for people with disabilities and for women.⁸⁰
- Its main purpose is the development of personality and promotion of understanding, human rights and tolerance.
- “Independence, professionalism and political impartiality of education and the autonomy of institutions of higher learning shall be guaranteed.”⁸¹

Owing to the case-law of the ECtHR, Member States of the Council of Europe have more reference points about the content of the same human right. From the judgements it is clear that the right to education applies to HE and entitles everyone without distinction to access HE institutions (based on individual capacity and consideration of the needs of the society) and to draw profit from HE on equal basis. The Court also gave guidance for the limitation of the right stating that it is acceptable if it is foreseeable, pursues a legitimate aim and proportionate. In summary, even the difference in sources are nine words, in reality, the guidance for the protection of this human right is a lot more punctual for European States.

The differences in the universal level enforcement are not evident, because it varies State by State. In this case the reason of the difference in the efficiency of protection is not the Membership in the Council of Europe, thus not “being European”, but the States’ individual decision to take part in international treaties. National level enforcement is not different in structure. The right to education is protected by HE institutions at first place; complementary to this, the ombudsman, governmental offices and the judicial system have a role in the enforcement. The right to education in HE in the ROK is protected to similar extent at universal and national level as in European countries. But in the case of the ROK the regional level of protection is completely missing.

5. Lessons for the ROK

Yes, definitely there is a difference. But simply answering a research question by the analysis of the European case-law and the comparison between European countries and a less known Asian country cannot be meaningful, if the country in disadvantage is unable to draw useful conclusions. In the followings, based on the European experiences, a number of recommendations are drawn out for the ROK to contribute to the more effective protection of the right to education in HE.

5.1. More Effective National & Regional Protection

There are opportunities to enforce the right to education in HE, as we have seen above. But in Korean HE institutions complaint mechanisms are almost never used.⁸² It has a cultural reason, namely that Confucianism still deeply influences the structure and characteristics of HE. “Teachers generally control

⁷⁹ ICERD, Art. 5.

⁸⁰ The ROK is not Contracting Party to the CMW, therefore the protection of migrant workers falls under the prohibition of discrimination.

⁸¹ Constitution of the Republic of Korea, Art. 31, Para (4).

⁸² Unlike in Europe, no statistics are available and all the procedures, if any, are confidential.

their students through both legitimated authority and moral norms that are somewhat analogous to those between parents and children [...]. Based on these Confucian values, students usually follow their teachers' instructions without any criticism."⁸³ Criticizing a teacher is as unimaginable for a student as it is to a younger faculty member or administrative staff. Consequently, the use of officially available complaint mechanisms is more than rare. However, internationalization can gradually change the attitude of Korean students (incoming and outgoing students).⁸⁴ Moreover, as we have seen above, the basic legislation on HE does not mention the students' right to remedy. To significantly change the attitude of Korean students, human rights education and time is required. The elimination of the difference in legislation needs the positive decision of the bodies participating in national law-making (Korean National Assembly, Ministry of Education, Science and Technology).

It seems to be obvious that even though the difference between European countries and the ROK in the enforcement of the right to education in HE on universal level is not significant on universal level, but there is a difference, with respect to the majority of European States. Giving a suggestion for making the universal protection of the right to education in HE more effective is the simplest. Even if the reality of the protection does not change, or does not change entirely, enforcement would be more efficient with the ratification of more international human right treaties, which establish more procedural obligations for States. The elimination of this difference depends on the Korean government and National Assembly of the Republic of Korea.

5.2. More Effective Regional Protection

Important to note that the prerequisite of a regional protection system is the existence of a regional international organization charged with human rights protection. Though the need for the establishment of an Asian intergovernmental organization, along with a regional protection system, is not a new concept in academic literature,⁸⁵ still no basic steps were taken in reality. Naturally, the establishment of a protection mechanism (including the treaty protecting human rights, the bodies responsible for it, and the rules of the procedure) depends on political consensus. Based on the experiences of the ECtHR a few suggestions can be made.

Text of the article protecting the right to education – declaration. As we have seen, one short sentence made a huge difference in the European protection, but the reason of this difference is mainly the creative thinking of the ECtHR. From the preparatory work of the ECHR it is obvious, that European States refused to accept the obligation of establishing and subsidizing educational institutions.⁸⁶ It is reasonable to think that such a costly obligation would be rejected also by Asian countries. Therefore, declaring the right to education with a more concrete, detailed content (*e.g.* explicitly stating that the right to education

⁸³ Lee 2001, p. 14.

⁸⁴ Seonjin Seo & Mirka Koro-Ljungberg, *A Hermeneutical Study of Older Korean Graduate Students' Experiences in American Higher Education: From Confucianism to Western Educational Values*, *Journal of Studies in International Education*, Vol. 9, No. 2, 2005, pp. 182-183.

⁸⁵ Hao Duy Phan, *A Blueprint For a Southeast Asian Court Of Human Rights*, *Asian-Pacific Law & Policy Journal*, Vol. 10, No. 2, 2008-2009, pp. 384-433; Quazilbash Ali Mohsin, *NGOs Efforts Towards the Creation of a Regional Human Rights Arrangement in the Asia-Pacific Region*, *ILSA Journal of International and Comparative Law*, Vol. 4, 1997-1998, pp. 603-614.

⁸⁶ „Belgian linguistics case”, Part I, B, point 3.

involves the right to access to educational institutions and also entitles everyone to draw profit from education) seems hardly possible. But even if the declaration is laconic, mentioning that the right to education is to be applied in all levels of education, including HE would not create financial or political risk.

Text of the article protecting the right to education – limitation. Though the text on the content of the right to education is sensible from political and financial point of view, the possible limitations can be more concretely regulated. Following the formulation of the ECHR, three elements could be incorporated in the paragraph regulating the limitation.⁸⁷ The conditions of “prescribed by law” (including the requirement of foreseeability) and “necessary in a democratic society” (proportionality) should definitely be part of the text. The enumeration of legitimate aims is more complex. In the analysed cases the ECtHR accepted the protection of the rights and freedoms of others, the maintenance of public order, and achievement of high levels of professionalism in education as legitimate aims. Besides these, there are two more legitimate aims common in ECHR articles, the protection of public safety and of health or morals. All these could be accepted as legitimate aims for limiting the right to education.

The nature of the protection system. Since the author of this paper is convinced that among the regional protection systems the European is the most effective, therefore would propose to establish a court protecting human rights. Naturally, the establishment of a regional protection system of any kind, which takes the various geographical, political and financial environment into consideration, would be beneficial for Asia. Definitely, the lack of regional protection makes the biggest difference between the Member States of the Council of Europe and the ROK. Unfortunately, the elimination of this difference requires more than the positive attitude and decision of the Korean government. The establishment of a regional organization and protection system is unimaginable without international cooperation of Asian countries and the support of the international community.

⁸⁷ This proposal considers Articles 8 to 11 of the ECHR, which were used as examples by the ECtHR itself in the analysed cases. See *Tarantino and Others v. Italy*, Part I, B, point 45.