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# THE EUROPEAN CHARTER FOR REGIONAL OR MINORITY LANGUAGES: SOME OF ITS CHARACTERISTICS AND THE FUTURE OF THE SUPERVISORY MECHANISM

## Foreword

Time goes by fast… I first met Krzysztof Drzewicki at an ICRC school in Warsaw during exciting times in 1980. We learnt from him not only about international humanitarian law but Polish politics. One day the two Hungarian participants, the only ones from the Eastern block, left the lectures and went to the cinema. We saw Wajda's excellent movie, Man of Iron. It was the ultimate lesson from our whole stay in Poland. I mentioned to Krzysztof that what we had done. He looked into my eyes and shook my hand without a word. Later we met in Turku and Oslo. I remember we had discussions on how human rights had become international, and on trade-union rights, on an island near Turku. Professor Drzewicki's brilliant works have always been starting points for me when I collect literature on international humanitarian law, human rights and minority rights law. It was a great pleasure to listen to his lecture in Budapest not long ago.

## Introduction: time to evaluate or Vingt Ans Après

Language, as an envelope, defends vulnerable human existence, as do the walls woven by norms and customs surrounding civilized humanity.[1] Moreover, there is only one home: language.[2]

[1] N. Elias, *A civilizáció folyamata. (Über den Prozess der Zivilisation)* Budapest, Gondolat 1987, p 78.

[2] S. Márai, *Európa elrablása. (Europe's Abduction)*, Budapest 2008, (originally in 1946) p. 99.

In 2018 we celebrate two important dates concerning the European Charter for Regional or Minority Languages. The Charter came into force on 1 March 1998, following the Framework Convention for the Protection of National Minorities a month previously. Both international treaties are the instruments of Council of Europe and this shows the leading role that has been taken by the old continent, and the Council of Europe, in the field of the protection of minority languages and the rights of minorities. 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, 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 maintaining monolingualism requires huge normative work for the modern nation-state, at the cost of large sacrifices.[3] This heritage of modernism is more persistent than the optimistic expectations of like-minded people have thought in the time of the entry into force of the Framework Convention and the Charter, although there are undeniable positive achievements associated with its implementation.

Anyway, in the past twenty years enough experience has been gathered for us to be able to evaluate how the mechanism works. Here I concentrate only on two issues: on certain inherent characteristics of the Charter which make its implementation and the supervision of this implementation more difficult; and on enhancing the development of the Charter's supervisory mechanism. But first I address the question why the Charter is important.

## The challenge: why do we need the Charter?

Looking back to the early 1990s it is possible to identify four general reasons why the Framework Convention and Charter were concluded. The 1990s posed a challenge to the European states. Serious ethnic conflicts in former Yugoslavia and the former Soviet Union made it clear to the European states that there was a need for regional rules to protect minorities. European states recognized that within a foreseeable future there would be no UN Convention on Minority

[3] S. Oeter, *Mehrsprachigkeit als Last oder Bereicherung?* [in:] *Minderheiten als Mehrwert*, Hrsg. M.Th. Vogt, J. Sokol, D. Bingen, J. Neyer, A. Löhr, Frankfurt am Main 2010 (Schriften des Collegium Pontes), p. 141.

Rights. There was a failure to adopt an Additional Protocol on Minority Rights related to the European Convention on Human Rights. There was an agreement on Chapter IV of the OSCE Document on the Humanitarian Dimension Conference in Copenhagen (1990) containing a catalogue of minority rights. Admittedly, it was not internationally legally binding. However, despite the failure of the draft Additional Protocol, there were grounds for hope.

If we are trying to find specific reasons, we may refer to two other causes that led to the Charter. One of them is its previous form: the Charter had existed as a resolution of the predecessor to the current Congress of Local and Regional Authorities, the Standing Conference of Local and Regional Authorities of Europe.[4] The other is the preservationist ideology[5] which mainly manifested in the fields of environment and cultural traditions. The Charter in its Preamble says: "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". In 2003 the growing interest in cultural preservation led to the UNESCO's Convention for the Safeguarding of the Intangible Cultural Heritage and its Article 2 (2) clearly covers minority languages.

Answering the question whether those reasons are still relevant I am afraid the answer is yes. The ethnic conflicts in Europe are not bloody today, but they definitely exist. There is no UN Convention, and no Additional Protocol to the ECHR either. Moreover, the consensus standing behind the Council of Europe treaties seem to be shrinking, clear signs of this are the halt of the ratification process of the Charter and the significant delay of the reports of the state parties, both in the case of the Framework Convention and the Charter. It is also important that the question of asylum seekers and immigrant communities overwhelm the legal protection of national minorities who have historically lived together, and that serious attempts to gain independence (Scotland, Catalonia) in the past few years has also increased the backward tendency in some European states.

Furthermore, the international protection of linguistic rights is still not satisfactory. The protection of the linguistic rights of minorities as a part of binding international law – as demonstrated by the foregoing examples – is mostly indirect, relying on the prohibition of language-based discrimination, and if the protection is direct, it has a rather weak normative power. It is not clear from the *wording* of Article 27 of the International Covenant on Civil and Political Rights that the right of minorities to use their own language also covers public life in addition to private life. Under Article 14, paragraph 2, of the Council of Europe

[4] Resolution 192 (1988) on the regional or minority languages.

[5] Robert Dunbar refers directly to an ecological attitude, given that international ecological diversity is also a highly protected value. See R. Dunbar, *Minority Language Rights in International Law*, "International and Comparative Law Quarterly" January 2001, vol. 50, p. 94.

Framework Convention for the Protection of National Minorities, the majority state can easily find an excuse for not properly guaranteeing the right to learn in a minority language.

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 has 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 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*[6]. 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 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 confirmed it.[7]

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.

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[6] *Cyprus v. Turkey*, ECHR appl. 25781/1994, judgment 10 May, 2001.

[7] M. Paz, *The Failed Promise of Language Rights: A Critique of the International Language Rights Regime*, „Harvard International Law Review" 2013, vol. 54, no. 1, pp. 199–200.

## The response: the Charter. Some of its characteristics

The implementation of the Charter, and supervision of its implementation, are obstructed by some characteristics of the treaty. This is not a retrograde criticism of the founding fathers of the Charter. It seems to be obvious that certain compromises were definitely needed to conclude the treaty especially to avoid the obstruction of its implementation, but this noble effort failed in practice.

As we have seen, the Charter does not protect minority language rights, but minority or regional languages as part of the European cultural heritage. So, it may be seen as a kind of indirect response to the challenge. The subject of protection is therefore not the language minorities or their rights, but rather the minority or regional languages of European culture that are at risk. The Charter does not include the terms "national minorities", "*volksgruppen*" or "*groupes ethniques*"; it does not even mention linguistic communities. The Charter addresses, inter alia, the "users" of minority or regional languages. However, since a language cannot exist without the people using it, the Charter stillrecognizes the rights of those who speak it.[8]

Therefore, given the sensitivity of some European states, the Charter is deliberately seeking to pursue a goal which seems to be neutral on the surface. The basic concept of the Charter is the protection of regional or minority languages forming a part of the European cultural heritage. Its aim is benevolent and noble: to remove the protection of minority language from the highly politicized debate over individual or collective minority rights, and to make the whole business more attractive to certain European states. The latter means that the Charter keeps the protection of minority languages and cultures separate from the concept of minority rights, which is always associated with the "horrible" concept of political power-sharing in the eyes of the political elite of certain European states. .

This aim of the Charter, namely to maintain a separation between public political sensitivities and the protection of minority languages and cultures, thus guaranteeing their high level of protection, can only be partially successful, at best. Language is a political affair – language policy is also essential for the traditional areas and concepts of political theory[9] – and remains the same when dressed up in the airy robe of cultural heritage protection. Politicians easily see through the airy robe. It is not difficult to prove the truth of this statement, so here I will only refer to some evidence.

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[8] D. O'Riagáin, *The political importance of the Europen Charter for Regional or Minority Languages* [in:] *Implementation of the Europen Charter for Regional or Minority Languages*, „Regional or Minority Languages" 1999, no. 2, Council of Europe Publishing, p.16.

[9] W. Kymlicka, A. Patten, *Language Rights and Political Theory*, „Annual Review of Applied Linguistics" 2003, vol. 23, p. 3.

Those states which did not ratify the Charter were not friends of the rights of national minorities. Thus, even though France signed and made a declaration of commitment, it did not ratify the Charter, as the French Constitutional Council hindered the process, confirming that the Charter was seen as incompatible with the idea of a united and indivisible Republic.[10] Every sign indicates we can not expect a Greek or Turkish ratification. Certain former socialist states of Central and Eastern Europe took a rather long time to consider the ratification.

In the nineties in newly independent states like Croatia, Bosnia, Montenegro or Slovakia, the new state language became the symbol of independent statehood, a language which was not the same as, but not very much different to, the former common language. There was a strong political wish for linguistics to prove those different characteristics of the new state language and to separate them, as much as was possible, from the common language of the recently disappeared federations. Words and phrases were invented or reinvented to strengthen the highest political phenomenon, the independent state.

A further example is the sometimes-mysterious object of the protection. The Charter protects regional and minority languages, but this protection does not extend to local variants, to different dialects. In many cases, answering the question whether we are dealing with a dialect or a separate language is not a simple matter. As stated in the official *Explanatory Report* to the Charter, the answer depends not only on linguistic considerations, but also on psychological-sociological factors and political affairs.[11] The Charter leaves it to the authorities of States Parties to decide what they consider an independent minority language, in accordance with their domestic democratic processes. The decision to classify it as a separate language or a dialect is political and non-linguistic, given that linguists mockingly say the difference between a language and a dialect lies in the fact that a language is supported by parliament, the army, the government, in other words, by sovereignty.

Consequently, the majority state fulfills its obligations under the Charter if it only teaches the literary language but not the local version – the true mother tongue. However, this can alienate users of the local version, and their true language can get lost. On the other hand, it is also true that the Committee of Experts in certain cases expressly calls for the protection of dialects, as for example, in the case of the various dialects of the Sámi language.[12]

Finally, I would like to draw the attention to the fact that in some cases, but more and more frequently, there are bitter political debates over the draft recommendations elaborated by the supervisory organs of the Framework Convention

[10] Look at, for example, The Constitutional Council of France, Decision 99-412 DC OF 15 June 1999, European Charter for Regional or Minority Languages.

[11] Explanatory Report, para 32.

[12] In the case of Norway, for exmaple.

and the Charter in the Council of Ministers. The long debates on the political level lead to further delays in the monitoring processes.

The *a la Carte* system of the protection is the other main characteristic feature of the Charter. The *a la Carte* system is not a deficiency; it is a tool to adapt the obligations to the specificities of the minority languages which have very different background situations and to protect them this way, but it should be done in good faith.

The trouble with the *á la Carte* system is twofold. First, the Council of Europe never found the courage to return the ratification document for further consideration, pointing out that for one or another minority language, due to the objective position of the language, other selection would be needed. Although the Council of Europe cannot force a Member State to change its ratification, a warning before the conclusion of the process could have had a beneficial effect on policy makers. On the other hand, the Committee of Experts has repeatedly criticized the selection of certain States Parties, because they did not take into account the different positions of each minority language in their ratification documents, but the findings of the Committee of Experts are not legally binding, and in addition, they are *post festa* observations in terms of the ratification. (A State Party may, of course, change its ratification document at any time, but this has only been the case in a few cases.[13])

Second, if you take into consideration that in the State Parties there many different minority languages having very different features, such as geographical concentration, the number of speakers, educational and cultural infrastructure, the level of recognition and protection and the *a la Carte* system, it is understandable why it is difficult for the Expert Committee of the Charter to be consistent in their supervisory work. It can happen that roughly the same situation is evaluated differently in different cases. The position of the minority languages is different, but the instrument of ratification may be the same and sometimes it is difficult to recall the reasons which have led to this or that different conclusion. Anyway, an article by article General Commentary would be of great help, as was the case in the work of the Advisory Committee of the Framework Convention.

The Charter does not protect the official languages which are in a minority position. If a regional or minority language is an official language, it will only be protected under the Charter if the State Party makes a voluntary commitment to that effect, referring to it as a lesser used official language.[14] However, an official language in a minority position should automatically receive protection, since,

[13] Slovakia, Hungary and Germany, Austria (in certain Landern) extended the Part III protection to Roma languages.

[14] The lesser used official language is the Irish formula. During the preparation of the text, the Irish delegation wanted to ensure that they could protect Irish which was an official language in Ireland. The irony is that Ireland has yet to ratify the Charter.

despite being recognized as an official language, its position is essentially determined by its minority status. According to the Committee of Experts, if a lesser used official language gets Part III protection, it includes Part II protection as well. This seems to limit the right of States Parties to protect a less widely used official language under the Charter. However, while this may not be in line with the text of Charter, it is line with the spirit of it. It would be strange if an official language, even if a lesser used one, does not get Part II protection under the Charter.[15] Cooperation with the Charter presupposes an internal high-level legal minority language protection and cultural support, which is not cheap at all, or, as a Russian politician stated, "very expensive".[16]

The costly nature of maintaining minority linguistic infrastructure is problem even in times of economic prosperity. The problem actually is the dependence on the state budget, especially with the fashionable allocation mechanisms of our time. Primarily, this is a tendering system that is increasingly not merely covers the financing of individual projects, but also maintenance costs. This problem is aggravated by two further problems today. One of them is that the minority linguistic communities are demographically shrinking, which makes the majority state think about cutting costs. This is related to the still existing negative effects of the financial crisis in certain State Parties.

## On enhancing the development of the Charter's supervisory mechanism

The Charter has been ratified by 25 European states. This number is significantly lower than the number of those states which ratified the Framework Convention. There are different reasons why this is the case. Unfortunately, the Charter is still seen as less important than the Framework Convention. Furthermore, in the case of the Charter, the West did not put any significant political pressure on the former Eastern Bloc countries to ratify it. Serbia only pays attention to it due to the EU accession process. More ratification is needed to further strengthen the Charter and to provide wider interest in enhancing the supervisory mechanism.

For members of minority language communities to use their mother tongue, three things are needed: capacity, opportunity, and desire to do so. Practical prerequisites are are crucially important for the desire, because bilingual speakers

[15] J.-M. Woehrling, *The European Charter for Regional or Minority Languages. A critical commentary,* Strasbourg 2007, pp. 79–80.

[16] P. Thornberry, *The charter and the role and responsibility of the state* [in:] *From Theory to Practice: The European Charter for Regional or Minority Languages*, „Regional or Minority Languages" 2002, no. 3, Council of Europe Publishing, p. 21.

use their mother tongue only if they think it will help them to achieve something.[17]

The Committee of Experts carries out examinations of the conditions for effective minority language use in the State Parties. The deeply-held belief of the Committee of Experts is that a State Party should make not only legal rules for the implementation but should also provide infrastructural conditions for the actual implementation.[18] So it is true that the Committee of Experts, by overcoming legal formalism, devotes sufficient attention to sociolinguistic relations.[19]

The supervision process based on government reports not only guarantees the possibility of continuous dialogue between the States Parties, the Committee of Experts and the minority language advocacy organizations, but it also provides an objective reflection on the minority policy of the scrutinized state and puts forward international expectations of pro-active behavior. International rules can never take over the role of internal constitutional guarantees, but the expectations based on the interpretation of them may well align the states' minority policies.

There are three main problems with the practical functioning of the existing reporting system: the delays in governments submitting their reports, political pressure to soften the draft recommendations in the Council of Ministers, and the fact that the adopted recommendations are not implemented.

As far as delays are concerned, government agencies refer to reasons such as they have too many international reporting duties at the same time, the small number of people working in the staffs, the cumbersome nature of the internal legislative process or a change of government, and more and more frequently they are simply asking for benevolent understanding. It is true that the three-year periodicity might be too demanding. The main concern is the risk of a delay in the reporting periods, and as a consequence the assessment responds to a situation that does not exist any more. The Committee of Experts seeks to urge governments with informal and political pressure, which is not really effective. If there is no governmental report, it would be necessary to base the assessment and the draft recommendations of the Committee on the NGO materials alone, since this would give an incentive to the governments to comply with the deadlines. However, this has not been made possible for the Committee, simply because the Council of Europe is not strong enough, and the States Parties are

[17] F. Grin, *Language Policy Evaluation and the European Charter for Regional or Minority Languages*, New York 2003, pp. 43–44.

[18] The notion of infrastructural offer has been used int he debates of the Expert Committe by Steafn Oeter.

[19] R. Dunbar, *Definitely interpreting the European Charter for Regional or Minority Languages: the legal challenges* [in] *The European Charter for Regional or Minority Languages: Legal Challenges and Opportunities*, „Regional or Minority Languages" 2008, no. 5, Council of Europe Publishing, p. 60.

tolerant towards each other: they are completely aware that "today for me, tomorrow for you".

Although, in an international legal sense, the States Parties all have the right to re-formulate the texts of the draft recommendations prepared by the Committee of Experts, the ultimate meaning of the review of the Expert Committee – the independent professional scrutiny – is severely compromised through frequent modification or deletion of certain recommendations.

It is a problem that the review mechanism between two reporting rounds is inactive. As the recent example of Ukraine shows, a lot of things can happen between two reporting periods which justify remedying the intermediate freeze of the review.

The Charter is not designed to be directly enforced through an internal court procedure, so it is necessary to have internal legislation for implementation. In the issue of ignoring of the recommendations, States Parties try to explain their behavior in diverse ways. Reference is made to the fact that to anticipate the necessary changes will require a longer time, or to the fact that a new government has come to power, which needs time, and besides, there are other priorities. Another approach is to recall how well the legal situation is in line with the requirements, ignoring the fact that in the most cases the legal regulation is fine, or at least acceptable, but the failure to implement comes from the lack of necessary human and material infrastructure. Governments, of course, would like to point out that this issue is a matter for local governments, forgetting that the state is a unified and responsible unity in international law, represented by a government. They also do not forget the consequences of the economic and financial crisis and, in addition to referring to unfavorable demographic trends, emphasize that there are no real needs for certain developments and investments.

Finally, *ceterum censeo,* I would like to mention that the Charter lacks an optional complaint mechanism. There are arguments against such a mechanism. First, the Charter does not contain rights, only state obligations. This is true, but if you look closely at the text of the UN Rights of the Child Convention, it basically only refers to state obligations, and it has an optional complaint procedure. Second, you could say the Charter has an *al a Carte* system, and that this makes the whole thing very complicated, but in the case of the European Social Charter this has not been an obstacle. Moreover, it is possible to argue that the language of the Charter is not really suitable for such a mechanism, but even the UN International Covenant on Economic, Social and Cultural Rights has been supplemented by such a protocol. Feasibility related arguments lead to a preference for a collective complaints system over the individual one, as is the case with the Framework Convention.[20]

[20] K. Drzewicki, *Advisability and feasibility of establishing a complaints mechanism for minority rights*, „Security and Human Rights" 2010, vol. 21, issue 2, pp. 93–107.

## Instead of conclusions

Would not it be time to review the Charter (and the Framework Convention) at a conference, since in the last two decades enough experience has been accumulated for this? Unfortunately, a positive spirit and willingness seem to be lacking. As I have heard in the Council of Europe, negotiating the two treaties would never take place today.

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**THE EUROPEAN CHARTER FOR REGIONAL OR MINORITY LANGUAGES: SOME OF ITS CHARACTERISTICS AND THE FUTURE OF THE SUPERVISORY MECHANISM**

In 2018 we celebrated an important anniversary of the European Charter for Regional or Minority Languages. The Charter entered into force on 1 March 1998. The Author presents the reasons which led to the conclusion of the Charter, and discusses issues which prove its importance today. He comes to the conclusion that the implementation and the supervision over the implementation of the Charter are obstructed by some characteristics of the treaty and tries to clarify those features of the international instrument. The article also contributes to the discussion on the question of how to improve the efficiency of the Charter's implementation mechanism.