15 The European Charter for Regional or Minority Languages

Specific Features and Problems of Application

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Abstract
As was the case after the Great War, World War II was followed by the setting up of international legal regimes to protect national (national, ethnic, linguistic, and religious) minorities in Europe. The emerging ideas of universalism and European unity were to prevent the aftermath of World War I, a conflict which erupted as a result of Western focusing the system of European minority protection on Central and Eastern Europe. The European Charter for Regional or Minority Languages protects minority languages, without granting minority rights. It provides an *á la Carte* system of obligations, with a supervisory system hinged on government reports. The Charter was intended to be a 'high politics' treaty. Nevertheless, with the protection of the minority linguistic heritage and the indirect provision of minority linguistic rights, it meant a first step towards bringing an end to the 19th century processes linguistic homogenization of the budding nation-states. As such, its implementation is highly political. The minority languages protected by the Charter are strongly varied in nature. If we add this factor to the *á la Carte* system of obligations, the sheer complexity of the system prevents evaluations of the Committee of Experts from being as consistent as they should be. An important contribution of the soft supervisory mechanism is that it at least puts some problematic issues on the agenda, however, experience has shown that the transposition of treaty obligations into national law is always a simpler task than creating the substantive conditions for the actual use of minority languages.

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15.1 Minority Protection in Europe: Geopolitics and Zeitgeist

Following the end of both World War I and the Cold War, international legal regimes were established to protect national (national, ethnic, linguistic, and religious) minorities in Europe. The historical circumstances of the times were different, of course, yet in both cases, geopolitical and *Zeitgeist* related reasons were the triggers for the emergence of international legal regimes. Perhaps the most important difference was that while World War I was followed by a large-scale territorial reorganization between states, after the Cold War, it was 'only' federations that broke down in Central and Eastern Europe, strictly within the confines of *uti possidetis*. Nevertheless, it is worth clarifying some similarities and differences between the legal regimes of these two periods.

Following World War I, the peace treaties gave rise to states comprising several different minorities, the boundaries of which had been arbitrarily redrawn in light of power considerations. Minorities were guaranteed protection under aegis of the League of Nations to achieve the desired stability. At the same time, however, the other goal was to pave for a possible, albeit not so painful assimilation of those groups.[1] In this vein, treaties were concluded between the Great Powers and the newly established or territorially enlarged Central and Eastern European states which guaranteed minority rights and limited the sovereignty of the latter states. In contrast with the peace treaties signed with the states losing World War I, such restrictions had to be justified. The justification was laid down in the Clemenceau doctrine. In a letter to the Prime Minister of Poland, French Prime Minister Clemenceau explained that, according to European public law, there was nothing new about the fact that when a new state is born or where an existing state has grown in territory, the major powers require binding international commitments in the form of an international treaty on certain principles of governance.[2]

As a result of World War I, a new era dawned in the history of international law, which in many respects constituted a break with the state-centered positivism that preceded the Great War. Four traits characterized this modernist concept: the criticism of the sovereign state as the only source of power; openness to the legitimacy of national sentiment; belief in a wide range legal procedural techniques and decision-making procedures for dealing with international conflicts; and piecing together entities hitherto unthinkable in the traditional international approach: states, nations, peoples and individuals. In the international law career of the people, the nation, the minority, the *Zeitgeist* as well as the emergence of

1 Patrick Thornyberry, *International Law and the Rights of Minorities*, Clarendon Press, Oxford, 1991, p. 49.
2 Péter Kovács, 'The Protection of Minorities Under the Auspices of the League of Nations', *in* Dinah Shelton (ed.), *The Oxford Handbook of International Human Rights Law*, Oxford University Press, 2013, p. 327.

the concept of 'people' in the social sciences or in the arts, may have played a role. An example would be the ethnography research or the music of Béla Bartók.[3]

As far as post-Cold War geopolitical considerations were concerned, the severe escalation of the tension between the majority population and minorities in certain Central and Eastern European states, in the immediate neighborhood of Western Europe, threatened the international order. The consolidated operation of a state can easily be affected by humanitarian threats, gross violations of fundamental rights on a large scale, or ethnic conflicts in neighboring or nearby states, leading to mass influxes of refugees and tensions between governments. All this was vividly illustrated by the Yugoslav crisis. These threats raised the question of how and to what extent international institutions should participate in the resolution of inter-ethnic conflicts, and what the winners of the Cold War were to do with Eastern Europe.[4] Not unlike the post-World War I period, stability in Central and Eastern Europe was once again at stake. The difference is that in our days besides the stability of borders, the prospect of cross-border humanitarian threats was equally important in the eyes of the 'peace-makers'. The idea that countries of Central and Eastern Europe are in permanent conflict with each other was decisive in shaping the Western political approach to the region. The prospect of NATO and EU accession eased tensions between Eastern and Central European states. It is not an overstatement to say that it was the Central and Eastern European ethnic conflicts that led to the development of contemporary European instruments for minority protection. As Will Kymlicka underlined, a

> "rapid consensus developed amongst all the major European organizations that the best approach to influencing the treatment of national minorities in post-communist countries was to establish minimum norms and standards, along with international mechanisms to monitor a country's compliance with them."[5]

Thus, the Framework Convention for the Protection of National Minorities and the European Charter for Regional or Minority Languages were adopted in the Council of Europe. The idea that it was the Central and Eastern European ethnic conflicts that led to the adoption of the above mentioned international treaties is well illustrated by the fact

3 *See* Nathaniel Berman, 'Modernism, Nationalism, and the Rhetoric of Reconstruction', *Yale Journal of Law and Humanities*, Vol. 4, Issue 2, 1992, pp. 351-380.

4 Rainer Hoffmann, who used to be the chairman of the Advisory Committee of the Framework Convention looked back and concluded that everybody in the Committee and the Secretariat was convinced that what happened in the Yugoslav war cannot repeat itself. *See 20 Years of Dealing with Diversity. Is the Framework Convention at a Cross-Road?* European Center for Minority Issues, Flensburg, 2018, p. 22.

5 Will Kymlicka, *Multicultural Odysseys*: *Navigating the New International Politics of Diversity*, Oxford University Press, Oxford, 2007, p. 197.

that the 20th anniversary of the entry into force of those treaties did not prove to be an occasion for revising their provisions or at least concluding some additional protocols. The moment of upheaval had passed, and the protection of autochthonous minorities is now overshadowed by attempts to solve other humanitarian issues, such as the challenges of coping with the influx of immigrants and refugees arriving from outside of Europe.

Although the end of the Cold War did not see the wake of a new period of international law, it nevertheless boosted human rights protection and aspirations for European unity. The ideas of human rights universalism and European unity precluded the repeating of events following World War I when Western powers narrowed the system of the European minority protection to Central and Eastern Europe within the League of Nations.[6] The decisive factor, however, was that the protection of minority rights was recognized as an integral part of the international law regime for the protection of human rights. This link was established by Article 1 of the Framework Convention for the Protection of National Minorities. According to this Article, minority rights are covered by the international protection of human rights, consequently they are not the exclusive competence of sovereign states, and this conveys the message that, affording minority rights cannot be made conditional upon a declaration of loyalty to the state.

15.2 The Charter in a Nutshell

The Charter protects languages that are traditionally present in specific areas, yet it also stipulates that languages that do not have a clear territorial base should also be protected.[7] The objects of protection are the languages of minorities, excluding their local variations. Since the Charter is based on the concept of protecting the European cultural heritage, the languages of immigrant communities are not covered by the protection guaranteed under the Charter. If a regional or minority language is an official language, it will only be protected in case the State Party voluntarily undertakes to do so.[8]

The Charter offers both lower and higher levels of protection. The objectives and principles set out in Part II must be applied to all regional or minority languages. Goals

6 Julie Ringelheim, 'Minority Rights in a Time of Multiculturalism – The Evolving Scope of the Framework Convention on the Protection on National Minorities', *Human Rights Law Review*, Vol. 10, Issue 1, 2010, p. 107.

7 *See* Jean-Marie Woehrling, *The European Charter for Regional or Minority Languages. A Critical Commentary*, Council of Europe Publishing, Strasbourg, 2005; Alba Nogueira López *et al.* (eds.), *Shaping Language Rights, Commentary on the European Charter for Regional or Minority Languages in Light of the Committee of Experts' Evaluation*, Council of Europe Publishing, Strasbourg, 2012.

8 However, an official language in a minority position should automatically have at least the lower level of protection, since, despite being recognized as official, its position is basically determined by its minority position.

and principles include the recognition of minority language use as a manifestation of cultural wealth, respect for the geographical boundaries of the minority language, and ensuring that new administrative units do not impede the use of a minority language. They further include the teaching and learning of minority languages at all levels, as well as the promotion and encouragement of minority language use in public and private life, in oral and written form.

Part III covers the following areas: education, court procedures, public administration, media, and culture, economic and social life, and cross-border relationships. Part III provides for a higher level of protection, according to which State Party may designate certain minority languages for this purpose. The Charter allows State Parties to choose from various commitments of different degrees of protection for selected languages in each area of language use. A minimum of 35 paragraphs must be selected, with at least 3 paragraphs from the field of education and culture, and at least one from the other fields. It is not mandatory to undertake any obligations regarding cross-border relationships. The scope of ratification can be extended.

The government reports compiled on the implementation of the Charter are examined by a Committee of Experts, which draws up a report and draft recommendations. Based on the report and the draft recommendations of the Committee of Experts, the Committee of Ministers of the Council of Europe draws up recommendations. Unlikely the Advisory Committee of the Framework Convention, the Committee of Experts consisting of independent experts can clearly state – even on delicate issues – their opinion on the compliance of State Parties in their evaluation report. An example is that the Advisory Committee

> "finds it important that the authorities favor a flexible approach to the application of the 20% threshold, taking into account the specific local situation, notably the actual needs and demands of persons belonging to national minorities."[9]

In the same case, the Committee of Experts expressly invited Slovakia to revise the 20% population threshold for the use of minority languages in court procedures and public administration.[10] In summary, the Charter protects minority languages and not minority rights, provides an *á la Carte* system of obligations and its supervision is based on government reports.

9 Third Opinion on the Slovak Republic, ACFC/OP/III(2010)004, p. 8.

10 Application of the Charter in the Slovak Republic (2nd monitoring cycle), ECRML, 2009, p. 8.

15.3 Changes in International Law, Language Conservation and Politics

International law preceding 1914 was referred to as 'titanic law'.[11] According to this metaphor, this law was created by powerful entities, towering over the individuals, regulating relationships between them. These titans lived in their own caves, not caring much about the world, slaughtering those who violated the boundaries of their territory. International law was limited to regulating contacts between states, such as diplomatic and consular relations, or war and warfare.

Due to the tremendous changes to its structure which took place in the 20th century, today international law is not simply the regulator of the interstate arena. In recent decades, international law has gone far beyond mitigating interstate confrontation and delimiting competencies of sovereign entities by addressing issues stemming from the complex interdependency of states, the protection of common values, including cultural values. Rules coordinating domestic laws, are incorporated into the internal legal systems of the states.[12] More and more issues earlier covered exclusively by internal law have become areas of international law. The rights, interests and well-being of individuals and communities have become a priority; the protection of cultural heritage being an obvious example. The protection of cultural heritage emerged as a special area of international law.

The protection of cultural heritage at the universal level began in the framework of the UNESCO with the establishment of international rules for the preservation of tangible cultural and natural heritage. Finally, the regime included also intangible values, covering *e.g.* language.[13] In the context of the Council of Europe, Article 2 of the European Cultural Convention required State Parties to encourage and support their own citizens to learn other European languages. The Preamble to the European Charter for Regional or Minority Languages stated:

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

11 The term was introduced by Giambattista Vico. *See* Antonio Cassese, *Terrorism, Politics and Law. The Achille Lauro Affair*, Polity Press, Cambridge, 1989, p. 145.

12 As David Kennedy observed: "Specialists in every field – family law, antitrust, intellectual property, civil procedure, criminal law, banking and commercial law – have all come to see their subject in international or comparative structure." David Kennedy, 'The Mistery of Global Governance', *in* Jeffrey L. Dunoff & Joel P. Trachtman (eds.), *Ruling the World? Constitutionalism, International Law and Global Governance*, Cambridge University Press, Cambridge, 2009, p. 39.

13 *See* the 1972 Convention Concerning the Protection of the World Cultural and Natural Heritage.

This statement is a clear manifestation of the conservationist ideology dominating of the protection of both the environment and cultural heritage in international law.[14] The declared purpose of the Charter is to remove minority language protection from the highly politicized world of minority rights, thereby making it more acceptable to certain European states. However, this benevolent effort is doomed to fail. Language issues are highly political even if they are disguised as cultural heritage protection. States and state languages emerge hand in hand, suffice to consider the evolution of the Bosnian and Montenegrin languages. Some fear that the recognition of the Silesian language would lead to autonomy claims in Poland. There is nothing more political than the perceived threat to the integrity of the state and the fear of the other.

It is reasonable to say that the Charter definitely forms a part of the 'Law of Minorities'.[15] Its main aim – the protection of minority linguistic heritage and indirectly, affording minority language rights – classifies it as belonging to minority law. It introduces the political concept of multilingual citizenship, an understanding of citizenship that takes linguistic equality seriously.[16] The Charter can also be interpreted as a text describing the ideal type of state minority language policy, while at the same time, it is also a tool for assessing minority language policies.[17] All of the above leads us to the further conclusion that perhaps even beyond the original intentions of founding fathers, the Charter is in effect regulator of the complex area of 'diversity management'.[18] According to a more modest assessment, the Charter is "a plea for tolerance."[19] This is undoubtedly true, especially when we consider that the concept of tolerance is complementary to the concept of human rights, of which minority rights, including language rights, are an integral part. At the same time, the Charter foresees much stronger obligations for States Parties than to merely tolerate minority language use: they are to protect and promote minority languages. At a higher level of abstraction, this means that the 19th century nation-state model of linguistic homogenization should finally be overcome through a series of positive steps.

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14 Robert Dunbar speaks about ecological attitude. Robert Dunbar, 'Minority Language Rights in International Law', *International and Comparative Law Quarterly*, Vol. 50, January 2001, p. 94.

15 Péter Kovács laments in the title of his book, rights of minorities or law of minorities? Péter Kovács, *International Law and Minority Protection: Rights of Minorities or Law of Minorities?* Akadémiai, Budapest, 2000.

16 R. Gwynned Parry, 'History, Human Rights and Multilingual Citizenship: Conceptualising the European Charter for Regional or Minority Languages', *Northern Ireland Legal Quarterly*, Vol. 61, Issue 4, 2010, p. 329.

17 *See* Francois Grin, *Language Policy Evaluation and the European Charter for Regional or Minority Languages*, Houndmiles, Basingstoke, Palgrave Macmillan, 2003.

18 Stefan Oeter, 'Conventions on Protection of National Minorities', *in* Stefanie Schmahl & Martin Breuer (eds.), *The Council of Europe. Its Law and Policies*, Oxford University Press, Oxford, 2017, p. 545.

19 *See* Camiel Hamans, 'The Charter: A Plea for Tolerance', *Scripta Neophilologica Posnaniensia*, Tomus XVIII, 2018, pp. 165-189.

In any case, the Charter was not intended to be a 'high politics' treaty, a treaty directly touching upon the delicate questions of sovereignty, such as security, military cooperation, state succession, membership in the EU, or even minority rights. This is not only evidenced by the cultural heritage context, but also by the fact that the Charter has less political weight than the Framework Convention in the Council of Europe. It is clear from the chronically understaffed nature of the Secretariat of the Charter, or from the fact that the Charter still does not have provision to elaborate Thematic Commentaries. Moreover, in contrast with the Framework Convention, the European Commission did not expect candidate countries to ratify the Charter as a precondition to membership in the EU. This was presumably down to the Baltic States: the European Commission respected their special sensitivity *vis-à-vis* the Russian language. However, in the case of Serbia, the implementation of the Charter is also under review in the accession negotiations.

The political nature of the Charter is well illustrated by the fact that there are fierce political debates in the Committee of Ministers over the draft recommendations forwarded by the Committee of Experts as the essence of their supervisory work. It is problematic for the Council of Europe Committee of Ministers to allow all member states to participate in the debate on the draft recommendations. In some cases, this may open up a new front in the political conflict between two member states, such as Ukraine and Russia, the former being a party to the treaty, the latter not.

The Charter strives towards balancing majority and minority interest, state resources and institutional needs in the context of minority language protection, in the *á a Carte* system geared towards the widest possible ratification. The latter, namely, that the Charter leaves the initiative completely to states has been the subject of criticism.[20] The Charter indeed follows the example of the European Social Charter giving State Parties the right to choose obligations from Part III of the Charter, so that commitments may be adapted to the different situations of minority languages. Unfortunately however, the text of the Charter did not state that State Parties should select commitments according to the objective situation of minority languages, but at least the Explanatory Report does so.[21] (The objectives and principles set out in Part II should be applied to all regional or minority languages.) The Explanatory Report also states that the exclusion of a minority language from the scope of Article III. Part II of the Charter may not be applied in a manner contrary to the spirit, objectives and principles of the Charter.[22]

By choosing minimum standards under Part III State Parties simply consolidated the level of protection that has already existed.[23] According to another opinion in most cases,

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20 Tove H. Malloy, *National Minority Rights in Europe*, Oxford University Press, Oxford, 2005, p. 219.

21 Explanatory Report, para. 43.

22 Id. para. 42.

23 Gaetano Pentassuglia, *Minorities in International Law*, Council of Europe Publishing, Strasbourg, 2002, p. 130.

the existing level of protection only served as a starting point for the drafting of the ratification document, mainly due to the involvement of minority language organizations. The inclusion of such normative ambitions in the ratification processes may have given the impression that far-reaching reform processes were taking place in the ambit of minority language policies. At the same time, the ratification also drew attention to certain neglected minority languages, such as the Kven language in Norway or Limburg in the Netherlands.[24]

One criticism voiced in respect of the Charter, was that its standard-setting role hampered the emergence of genuine minority language rights.[25] This position, however, does not take into consideration that the objective standards set by the Charter[26] may lead to enforceable rights. Moreover, if we consider that only Article 3 of the Framework Convention for the Protection of National Minorities contains a subjective right – the right to identity – then, given the cultural heritage scope of the Charter, this criticism seems unfair.

15.4 Features and Problems of Supervising Implementation

The supervisory mechanism over the implementation of the Charter is based solely on government reporting. This is down to the fact that minority language rights were integrated into cultural heritage protection, since individual complaints would an expression of subjective language rights. A more efficient form of supervision would include individual complaints as well. As of yet, however, the Charter does not contain rights, only state obligations. Meanwhile, if we look closely for example at the text of the UN Rights of the Child Convention, it also basically only refers to state obligations, and it has an optional complaint procedure. Even the UN International Covenant on Economic, Social and Cultural Rights has been supplemented by such a protocol.[27]

If we consider international law not only as a set of norms but also as law in practice, great importance must be attached to the activities of bodies set up to monitor implementation, even if they are not judicial in nature and are not empowered to provide mandatory interpretation.

The Committee of Experts consisting of independent experts' reviews government reports, in addition, it receives shadow reports which help in the evaluation process. This can be easily justified in light of the fact that the minority languages protected by the

24 Sterfan Oeter, 'Council of Europe – The European Charter for Regional or Minority Languages', *in* Daniel Thürer (ed.), *International Protection of Minorities – Challenges in Practice and Doctrine*, Schulthess, Zurich, 2014, pp. 63-64.

25 Malloy 2005, p. 218.

26 Pentassuglia 2002, pp. 130-131.

27 Gábor Kardos, 'The European Charter for Regional or Minority Languages: Some of its Characteristics and the Future of the Supervisory Mechanism', *Gdanskie Studia Prawnicze*, Issue 2, 2019, p. 270.

Charter are very varied as regards the number of their speakers, the geographical concentration of users, their language consciousness, the development of their educational and cultural infrastructure, their degree of recognition and protection. Even the level of activity of minority NGOs in bringing certain issues to the Committee of Experts' attention can vary greatly from state to state.

Commitments under Part III cannot be properly evaluated without a sound knowledge of the sociolinguistic position of the minority language[28] and of the legal system of the state in question. In addition, public authorities, misunderstanding the substance of certain obligations, opt for an unsuitable commitment,[29] or, alternatively, choose randomly to avoid criticism.[30] A consequence of this complexity is that the evaluations of the Committee of Experts are not always as consistent as they should be. Moreover, recent changes to the format of the reports of the Committee of Experts do not necessarily pave the way towards improvement.[31]

The report-based supervisory system has three key players: public authorities, the Committee of Experts and the minority language community. Article 16(2) of the Charter explicitly authorizes the Committee of Experts to use information provided by civil society groups when evaluating government reports, giving the state the opportunity to respond. The Working Group of the Expert Committee always visits the state party in question and always meets with representatives of minority language organizations first. Moreover, after the adoption of the report, it may be the case that the member responsible for the Committee of Experts' evaluation report is involved in the deliberations of government bodies and minority organizations, discussing what follows from the recommendations made by the Committee of Ministers of the Council of Europe. Optimally, there is an ongoing 'trialogue' between the stakeholders to ensure better compliance with the Charter.

Perhaps the most important part of the Committee of Experts' evaluation work is that where the language of the commitment allows, it insists on putting it into actual practice and is not satisfied with the mere fact that only the law in books is in line with the Charter. This approach leads the Committee of Experts to pay close attention to monitoring the

28 Robert Dunbar points out that the Committee of Experts gives considerable attention to sociolinguistic questions. Robert 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 No. 5.)*, Council of Europe Publishing, Strasbourg, 2008, p. 60.

29 As it happened in conjunction with Article 11, mixing up public and private media.

30 Oeter 2014, p. 72.

31 Evaluation charts have recently been introduced in the reports of the Committee of Experts. The charts feature arrows indicating the direction of change in compliance, upward or downward. Although short explanations are provided, delicate investigation is needed to clarify whether there have been real changes on the ground, or whether the same facts were simply reevaluated.

infrastructural prerequisites of minority language use. In fact, this is a persistent element of the 'case law' of the Committee of Experts.

The self-image of the State Parties differs in respect of the international legal obligations undertaken. As an observer underlines, some states are more sensitive to criticism and are proud of what they are trying to achieve, such as Norway. Others are less sensitive, but more hypocritical. Most of the states are located between the two extremes. The ambitious reforms announced as a result of some recommendations are often accompanied by passionate resistance to other issues.[32] Experience has shown that transforming internal law is always a simpler task than creating the substantive-technical conditions for the actual use of minority languages.[33] Repeating certain recommendations on the same subject over and over will sometimes yield important results. The situation may be different where the recommendation is affected by a sharply disputed domestic issue, yet even where this is the case, the opposition may exploit the recommendation to criticize the government.

A serious problem of the supervisory regime is that the Committee of Experts has a very limited scope of action between two rounds of reporting. The most they can do is write a letter asking for information and/or draw attention to the state's obligation under the Charter.

As is generally the case with international treaties maintaining a review procedure ending with recommendations, it can be said that on the one hand, the soft mechanism at least puts some problematic issues on the agenda but on the other, it weakens the international liability resulting from non-enforcement. The essence of state responsibility under international law is accountability.[34] For this, however, it is necessary to establish the international infringement in an authentic way, including the legal consequences of state liability. Where this is missing state liability is watered down. What remains is a soft responsibility to take the recommendations seriously.

32 Oeter 2017, p. 569.

33 That is the main message of the 'case-law' under the Charter.

34 James Crawford & Jeremy Watkins, 'International Responsibility', *in* Samantha Besson & John Tasioulas (eds.), *The Philosophy of International Law*, Oxford University Press, Oxford, 2010, p. 283.