The Legal Foundations of Linguistic Rights: Application to the Field of Education (2005)

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Protecting linguistic diversity has various dimensions: its philosophical basis, the political principles which underlie it, the strategies chosen to implement it, suitable educational methods, etc. One dimension is the legal basis for knowledge and use of several languages - and particularly lesser used languages. This paper is concerned with the possible legal foundations of language rights. It will look at positive law (i.e. norms which are recognised and applicable in practice), and focus on the legal protection of language rights in education.

There are three possible ways of protecting linguistic diversity in law – by connecting linguistic rights with human rights, by using minority rights to promote them, or by giving languages themselves legal protection. The distinction between the three may well be slightly artificial, but it does help to clarify the picture. We shall consider each of them in turn, and assess its contribution to linguistic rights.

1. Human rights

Human rights systems are designed to protect the human person, as an individual or social being. Essentially, therefore, they are concerned with individual rights, even though such rights are sometimes exercised collectively (e.g. freedom of association or the right to cultural life within a group). Moreover, since the human person is seen in general, abstract terms, human rights are universal.

Since human rights protect the human person in all his/her dimensions, they must cover linguistic attributes too - and allow speakers of particular languages to express and realise themselves fully in those languages, on the same conditions as speakers of majority languages, by exercising classic individual rights: freedom of expression, freedom of education, respect for private life, freedom of philosophical belief, equality, etc.

All of these human rights can be given a linguistic dimension. Many authors could be quoted in support of this view - Fernand de Varennes, Robert Phillipson and Tove Skubnabb-Kangas among them.

Prohibitions on discrimination are particularly relevant to languages, and many human rights instruments (especially Article 27 of the International Covenant on Civil and Political Rights and Article 14 of the European Convention on Human Rights) ban discrimination on grounds of language. Moreover, freedom of expression and information has been taken to apply, not just to the "content" of information (the ideas expressed), but also to the "vehicle" (the language used) - as the United Nations Commission on Human Rights acknowledged in 1993 in the Ballantyne case[1], concerning a Quebec law which prohibited the use of languages other than French in commercial advertising.

In practice, however, human rights do not provide a very effective basis for language rights. There are several reasons for this. The first is that human rights primarily serve to ensure that the state does not stop individuals from doing certain things. However, this "passive" conception is not very useful when use of minority languages is the issue. It is often thought that linguistic rights are adequately guaranteed if the use or teaching of certain languages is not forbidden. For example, countries which show little favour for linguistic rights often claim that their law takes adequate account of minority

[1] Human Rights Committee, *Ballantyne, Davidson and McIntyre v. Canada*, Communications Nos. 359/1989 and 385/1989, 31 March 1993, CCPR/C/47/D/359/1989 and 385/1989/Rev.1.

languages, since it does not forbid their use. Obviously, this conception of human rights leaves minority languages with no effective protection.

Increasingly, however, the freedoms guaranteed by human rights have been interpreted "actively", i.e. as implying an effective right - a real, non-discriminatory possibility of speaking a language. These are positive obligations sometimes incumbent on states, which must take positive action to give the concerned rights real content when people are prevented from using a language in practice. This involves taking specific measures to restore genuine equality in the use of language. Sometimes, "affirmative action" (English) or "discrimination positive" (French) is even thought necessary to counter *de facto* discrimination. Generally, however, in countries which take no positive action to promote linguistic diversity, courts do not regard this omission as a human rights violation.

The use of human rights to protect linguistic diversity is limited for another reason too. Human rights are reasonably effective in guaranteeing the free use of languages in private, but not so effective when the issue is language rights in relation to public authorities. The right to use a particular language in dealings with the authorities (except by defendants in criminal cases), the right to be taught that language in state schools, etc. are not human rights in the traditional sense – and this leaves states free to determine the status of languages and give use of the official language(s) preference over others.

This is why the European Court of Human Rights has so far failed to generate case-law which serves to protect minority languages. This is clear from its judgment of 23 July 1968 in the case concerning language use in Belgian schools.[2] In that case, it ruled (as its current president, Luzius Wildhaber, has noted) that neither the right to education nor the right to respect for private and family life – even in conjunction with the principles of equality and non-discrimination – implied that parents had a right to choose the language in which their children were taught in state schools. This case-law is already old, and some of us hope to see the Court move in a more positive direction. Indeed, in a more recent case - Cyprus v. Turkey of 2001 – it seemed to acknowledge that failure to provide secondary schooling in Greek, for the isolated Greek-Cypriot communities in the northern part of the island, violated the substance of the right of education enshrined in Article 2 of Protocol No. 1. At present, an application by Breton parents against the French legal ban on immersion teaching in regional languages is pending before the Court. However, its chances of succeeding seem slim.

It should be noted that "linguistic beliefs" (the belief that one should speak a particular language and transmit it to one's children via their schooling) are not protected in the same way as religious beliefs - although human rights should, in principle, treat all convictions equally. (It is true that Article 2 of Protocol No. 1 to the European Convention on Human Rights does protect the right of parents to provide education in conformity with their religious and philosophical convictions, but this has never been interpreted as including their right to provide education consistent with their linguistic convictions).

The only language right which may be regarded as solidly recognised by human rights systems in the sphere of education is the right of parents to bring children up in their own language - but in private schools, with no right to state funding (unless refusal of funding is directly discriminatory), and on condition that these schools respect the state's general rules on education (which may insist that children must also learn the national language).

It must also be emphasised that, although various non-binding international texts, such as declarations or recommendations, and some experts who have written on the subject, affirm that language rights based on human rights do exist, these opinions are not binding either on states or on the authorities which ensure that they respect their international obligations. Ultimately, human rights disappoint as a means of promoting linguistic diversity.

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[2] *Belgian Linguistic Cases,* Appl. 1474/62; 1677/62; 1691/62; 1769/63; 1994/63; 2126/64.

2. Minority rights

Languages are primarily a collective phenomenon. Minority languages express minority groups. These groups can be legally protected as such - be given the right to their own schools, media, etc. They can also be given some autonomy in decision-making or in organising public services in a way which takes account of their language or culture.

The rights given to minorities, particularly in the matter of language, can take several forms:

- national law may protect certain groups, e.g. Hungary's laws on linguistic minorities living in the country;
- countries can conclude bilateral conventions to protect minorities; this has been done, for example, for the Danish-speaking minority in Germany and the German- speaking minority in Denmark;
- minority rights can also be protected by multilateral conventions; one such is the Council of Europe's Framework Convention for the Protection of National Minorities, which guarantees them respect for their special language features and also the right to establish and run their own private schools (Article 13).

This approach to protecting language rights can be very effective, as the favourable status of German in the South Tyrol / Alto Adige shows. But the use of minority rights to protect language rights also has its limitations. For one thing, minority rights (unlike human rights) embody a very broad range of solutions, since these are generally tailored to the concrete needs of a real group, and those needs vary greatly. In other words, minority rights are essentially specific, whereas human rights are universal. At the same time, minority rights can be seen as local applications of the universal principle of equality, insofar as they seek to establish real – not just formal – equality between majorities and minorities. This was the position adopted by the Permanent Court of International Justice in its Advisory Opinion on minority schools in Albania (6 April 1935), in which it declared that genuine equality might require different treatment for the majority and the minority, and would be violated "if a minority were deprived of its own institutions, and compelled to renounce that which constitutes the very essence of its being as a minority" (particularly use of a language).[3]

One major limitation on the use of minority rights to protect languages is the lack of an agreed definition of the term "minority". In fact, with very few exceptions, the only minorities traditionally protected are "national" minorities, i.e. "historical" minorities, resident for a considerable time on the territory of a state where they form a separate, numerically smaller and weaker group. These groups must also be conscious of their special identity and wish to preserve it, i.e. claim minority status. The transition from rights for national minorities to more general rights for linguistic communities, as proposed in the Universal Declaration of Linguistic Rights (Barcelona, 1996) has not been made in positive law. Recent immigrant communities are not generally recognised as national minorities. Moreover, to be accorded rights, historical linguistic minorities must usually attain a certain numerical strength on a given national territory. Another problem is the fact that some countries are still fundamentally hostile to the whole idea of minorities on their territory, and refuse to recognise their existence or grant them official status. A case in point is France, whose legal tradition is strongly opposed to recognising minorities and giving them specific rights. Indeed, the Constitutional Council has ruled that such recognition would be incompatible with the principles of equality of citizens and unity of the French people.

Furthermore, although it can be said that a general unwritten principle of international law now obliges states to respect the identity of minorities resident on their territory - *inter alia* in linguistic terms - the rights deduced from this principle are still relatively vague and not very demanding. Essentially they comprise the right of minorities to exist, coupled with a few positive obligations applying to states in

[3] Hudson, M.O., (1975), 'The Fourteenth Year of the Permanent Court of International Justice,' *The American Journal of International Law*, Vol. 30, No. 1 (Jan., 1936), pp. 1-26.

the education field. For example, Article 13 of the Framework Convention for the Protection of National Minorities says that states are not obliged to fund private schools for minorities. Moreover, fairly perfunctory approaches to teaching of the minority language are sometimes regarded as adequate (teaching that language as a second language, instead of using it as the vehicular language).

Finally, international means of putting pressure on states which fail to respect the existence or rights of linguistic minorities are still limited to mere recommendations, like the OSCE's "Hague Recommendation Regarding the Education Rights of National Minorities". Usually, too, they apply only when the physical existence of minorities is threatened. In other words, they are still of limited use in protecting the linguistic rights of minorities.

3. Direct protection of lesser used languages

Since the machinery used to protect human rights and minority rights has proved relatively ineffective, another approach has gradually emerged. It does not seek to protect individuals (human rights) or groups (minority rights), but languages themselves as a collective cultural asset. This is the approach adopted in the European Charter for Regional or Minority Languages, which aims at direct protection of languages and linguistic diversity as cultural heritage.

In this approach, safeguarding a minority language (e.g. Breton or Romanch) is a matter, not just for those who speak it, but for everyone, since it is a common asset. Moreover, regional/minority languages are an essential part of Europe's culture, i.e. its linguistic diversity – which is why the Council of Europe is acting to protect them.

Consequently, the European Charter for Regional or Minority Languages does not create rights for individuals or minorities, but obligations for states and public authorities, requiring them to protect those languages.

Treating languages as assets which belong to everyone, this approach accords with the current trend towards the recognition of new types of cultural right. The Charter's technique - using cultural rights to protect languages – is special in making no contrast between national and minority languages. Its approach is pluri-lingual, and its aim is cultural pluralism: it does not pit regional/minority languages *against* national languages, but wants them to coexist in a rational, positive manner. The two are seen as reinforcing each another, not competing. The Charter calls for tolerance towards regional/minority languages, and understanding between speakers of those and majority languages.

Moreover, to make direct protection effective, the Charter does not stop at prohibiting negative treatment of regional/minority languages. It is not enough if the state does not penalise them - public authorities must show positive commitment, and pursue an active policy of supporting and promoting them.

At the same time, the Charter does accept distinctions between languages, based on their legal status and social function. All languages may be equal in dignity and value, but they are not equal in coverage, demographic impact, social and political role, and other objective factors which must be allowed for in managing them. This is why, from the Charter's point of view, distinctions of policy and status, determined by the actual situation of each language, are legitimate as a way of ensuring that each gets the kind of legal protection it needs.

To implement this approach, the Charter is divided into two main sections (Parts II and III):

- principles common to all states and all languages: states must implement these principles fully, but are free to decide how to do that;

- practical and specific commitments, giving states a double choice: from a list in the Charter, they select a limited number of measures which they promise to take, and on the other hand define the languages to which they will apply them.

The main principles laid down in Part II include:

- recognition of regional/minority languages as an expression of cultural wealth, and genuine legal status for them;
- resolute action to promote regional/minority languages. i.e. a genuinely active policy in order to support them;
- the provision of appropriate forms and means for the teaching of regional/minority languages at all appropriate stages, i.e. a guarantee that these languages can be genuinely learned and transmitted;
- the promotion of tolerance towards regional/minority languages.

States ratifying the Charter commit to take the action needed to give these principles real substance for the regional and minority languages used on their territory. To help them do this, Part III of the Charter suggests various practical measures, listing 70 detailed and very specific commitments. States must accept 35 of these commitments for every language to which this part applies. The commitments themselves apply to the various aspects of language policy, and particularly education (Article 8).

This article 8 envisages various approaches: make available the complete or a substantial part of education in these languages or provide for the teaching of these languages as an integral part of the curriculum: states are invited to choose the approaches best suited to each language on the basis of its specific situation.

The following commitments are also included:

- study of these languages at university level,
- permanent training in these languages for adults in the frame of continuing education,
- teaching of the history and culture of which these languages are the expression,
- appropriate training for teachers responsible for teaching in, or of, these languages,
- assessment of the effectiveness of teaching of these languages.

The Charter also sets up machinery to monitor its application by ratifying states, which are required to submit regular reports on their implementation of their commitments. A committee of independent experts also makes an assessment, and both its findings and the reports are examined by the Council of Europe's Committee of Ministers.

The Charter's system for the protection of cultural rights usefully complements individual or collective language rights. But is effective only in states which ratify the text – which not all the Council of Europe's member states have done. Specifically, France, Greece and Turkey have yet to ratify. The French Constitutional Council, for example, has declared it incompatible with the French Constitution. The system also depends on states' acting in good faith, and taking active measures to promote the use of regional and minority languages. These conditions are not universally fulfilled, and some states remain hostile to the Charter or do not implement it effectively.

Nonetheless, protecting languages as a cultural right is a very useful adjunct to the recognition of language rights based on human or minority rights.

To conclude, linguistic rights – although mentioned ever more frequently in the international literature – are still more aspired to than realised. The content and legal scope of educational measures to promote linguistic diversity and harmonious relations between language communities, as proclaimed in the Universal Declaration of Language Rights, remain uncertain.