Emerging Common European Standard Concerning the Protection of Linguistic Diversity/Linguistic Minorities

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Introduction

While this conference is set up from the social science perspective, policy decisions need to be made within the parameters of the legal framework and hence this paper provides the outlines of the emerging European legal framework. Arguably, the conference’s focus on linguistic diversity invites one to consider not only human rights standards but also the minority specific standards concerning language use. While there is no generally agreed upon definition of the concept ‘minority’, it can be argued that the concept can also be used in a multinational country without clear majority population. This brings ‘minority protection’ very close to the accommodation of population diversity, including linguistic diversity.1


no time to go in to the discussion of the concept minority – happy to answer questions in the discussion time –
In this respect; it seems appropriate to consider the typical questions arising in relation to the accommodation of linguistic diversity, or what are the issues of specific concern to minorities regarding languages and language use. As Europe is one of the poles of comparison (in addition to Canada) of this conference, it seems appropriate to consider the legal standards developed at European level concerning the management of linguistic diversity.

Consequently, an overview of issues of specific concern to minorities regarding language use and basic principles is followed by a discussion of the relevant standards which are mostly developed in the framework of the Council of Europe, while some references are made to the developments in the OSCE and the EU. The focus on the legally binding instruments of the Council of Europe further explains a more in depth analysis of these instruments as well as the related supervisory practice. This analysis will arguably reveal a emerging common European standard in favor of protection of linguistic diversity/linguistic minorities.

Specific Concerns of Minorities regarding Language use and Basic Principles

The point of departure regarding ‘languages’ is that the linguistic value of languages and their relative political strength and importance are different matters. Whereas all languages are linguistically equivalent, the speakers of the different languages are not equal in terms of political power relations. These relations are manifested in national policies regarding the official languages of a country. On the one hand, the need to have one specific *lingua franca* for purposes of administrative efficiency plays in any event an important role. On the other hand, language is generally considered an important factor to evaluate the chances of survival of minorities and their separate identity because of the symbolic investment in a language by the group speaking and wanting to maintain it.

As was reconfirmed by the struggles surrounding the Macedonian peace agreement, the recognition of a minority language as official language can have important symbolic repercussions for the integration of the minority concerned and the larger project of nation-building. However, it should be emphasised that the status of official language is neither the only possible way of granting minority languages some kind of official recognition, nor a *panacea* for all the demands of linguistic minorities, since ‘official language status does not signal that the use of such language in a state is provided by law,

4. Cf. H. Hannum, *Autonomy, Sovereignty and Self Determination*, Philadelphia, University of Pennsylvania Press, 1996, 459: ‘even where a minority language is not sufficiently important to the country as a whole to merit special constitutional recognition, statutory or administrative provisions for the use of minority languages in certain circumstances may be essential to the smooth functioning of government’.
... the exact scope of a right to use an official language can always be subjected to various limitations and considerations'.

5. This statement applies inter alia to states where many of the languages spoken are given official status due to political considerations; South Africa is a case in point.

6. Typical demands of linguistic minorities concern the institutional foundations of cultural reproduction, and more specifically the use of minority languages in the (public) media, the public education system and communications with public authorities and courts. The issue of names in the minority language and the language of street names and other topographical indications often constitute sensitive topics for both minorities and states, as the latter tend to be rather reluctant to make concessions in this regard.

It can be argued that the pressure emanating from a linguistically dominant group is considerable and that this would oblige states to take positive measures to protect the other linguistic groups so as to abide by the requirements of substantive equality. This analysis can be extended beyond the area of pure linguistics in that language promotion is also related to the realisation of socio-economic equality and to equitable political influence for the groups concerned. Another substantive equality argument highlights that language is undeniably a necessary component of almost every service provided by public authorities. Consequently, members of linguistic minorities are systematically put in an unequal and disadvantaged position regarding the enjoyment of public services when these are exclusively provided in the dominant language. In this respect; the

7. Compare this enumeration with the issues dealt with in the Oslo Recommendations Regarding the Linguistic Rights of National Minorities, made by a group of internationally recognised experts commissioned by the Foundation on Inter-Ethnic Relations, which works for the High Commissioner on National Minorities of the OSCE (X, The Oslo Recommendations Regarding the Linguistic Rights of National Minorities & Explanatory Note, The Hague, Foundation on Inter-Ethnic Relations, 1998), namely: names (including topographic indications), religion, community life and NGOs, media, economic life, administrative authorities and public services, independent national institutions, the judicial authorities and deprivation of liberty.
demands of linguistic minorities should indeed be evaluated against the principle of substantive equality as that arguably requires a differential approach to linguistic regulation, attuned to the specific circumstances.

Considering the preceding argument that certain minority language rights are required by the principle of substantive equality on the one hand and the concern of states regarding ‘exaggerated’ demands on public funds on the other hand, a possible solution to the dilemma could be found in the application of a sliding-scale approach.\(^{13}\) Such an approach implies that the specific circumstances are taken into account and would not only be helpful regarding language use in communications with public authorities, but also regarding language use in public media, education, topographical indications, names etc.

As is also reflected in the OSCE sponsored Oslo Recommendations regarding the Linguistic Rights of National Minorities\(^{14}\), the proportionality principle is generally accepted as being crucial in the matter\(^{15}\) and can also be related to the dichotomy of considerations that are relevant for the determination of language rights and more specifically the balance\(^{16}\) that should be pursued in this regard. It would be commendable if states would guarantee certain language rights for linguistic minorities as a token of tolerance and respect for their separate identity. There is, however, also a need for mutual co-operation between citizens, irrespective of their belonging to linguistic minorities.\(^{17}\) This co-operation depends in turn on open communication channels based on knowledge of a common language. In general, the determination of language rights for (members of) minorities can be compared to the search of a just equilibrium between national unity on the one hand and the accommodation of linguistic diversity on the other.\(^{18}\) Although the goal to have a *lingua franca* is in se legitimate, that process should nevertheless not wipe out linguistic differences.\(^{19}\)

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13. F. De Varennes, 169 and 173. See also P. Blair, 11: ‘normally there is a compromise between rigid application of the equality principle and considerations of practicality. What is sought is not parity with the majority language but such facilities for the use of the minority language as are reasonable possible in the circumstances’. Fishman relies in this respect on the principle of an ethnolinguistic democracy, which also turns around proportionality considerations: J. A. Fishman, ‘On the Limits of Ethnolinguistic Democracy’ in T. Skutnabb-Kangas & R. Phillipson (eds.), *Linguistic Human Rights: Overcoming Linguistic Discrimination*, Berlin, Mouton de Gruyter, 1995, 50.

14. For more information on the Oslo Recommendations, see infra…


18. F. De Varennes, 86. See also idem, at p 91 where De Varennes points out that ‘tied in with the issue of relative number of individuals is geographic concentration, especially when one deals with progressively lower percentages of individuals’, which seems to imply that it would not be unreasonable to use a minority language in public services even when it is the language spoken by only very small linguistic groups as long as they are strongly concentrated in a certain area.

19. F. De Varennes, 87. See also The Oslo Recommendations, 14, which clarify that the Recommendations propose an approach ‘which encourages a balance between the right of persons belonging to national minorities to maintain and develop their own identity, culture and language and the necessity of ensuring that they are able to integrate into the wider society as full and equal members’.
The following factors, none of which should be given absolute precedence, are potentially important for decisions concerning the regulation of language use in communication with public authorities in accordance with the sliding scale approach: demographic importance in combination with territorial concentration of the linguistic groups, the limited human and financial resources of the state, the level and type of government services or advantages (as this determines the degree of the disadvantage concomitant to a certain language preference by the state for those speaking a different mother tongue), the desirability of a common national language for the state, related social, cultural and religious considerations, the desire to correct oppressing state practices in the past and finally, the overarching demand that there should be a proportional relation between the goals of a certain language policy and the means used to achieve them. Arguably, several of these factors are equally relevant to the determination of the other language issues of importance to linguistic minorities. However, it is advisable to be cautious regarding the factor of financial capacity of states, ‘since “affordability” will often be a matter of interpretation, that is, of political will and priorities’. The supervisory practice in terms of the FCNM and the Language Charter further reveals that some of these factors receive more attention then others and that increasingly low numbers of speakers alone do not absolve a state from taking protective measures all together (see infra).

It is also appropriate to remark at this point that territorial decentralisation, forms of territorial devolution of competencies, and especially forms of territorial autonomy, can amount to an important form of minority protection, also for linguistic minorities. These techniques would be especially relevant for minorities that are territorially concentrated because members of such minorities could form a majority at that level or, at least, have more influence on government decisions taken at that level. This “autonomy” aspect is actually one of the two dimensions of participatory rights for members of minorities, which are quickly gaining ground in several international organizations. However, it is the other dimension concerning representation in all kinds of government bodies, participation in decision making process and more general consultation mechanisms, which will be focused upon here.

Europe as one of the poles of comparison: overview of relevant legal standards

When considering language (related) rights as a means to promote linguistic diversity; one could think of individual human rights, more specifically the European Convention on Human Rights (hereinafter: ECHR). However, despite a few potentially positive

20. F. De Varennes, 87, 89, 93, 95, 99, 121. See also P. Blair, 11.
development in the jurisprudence of the European Court on Human Rights pertaining to mother tongue education, it can still be argued that individual human rights accommodate only to a very limited extent language rights adapted to the special situation of minorities. Consequently, it is interesting to investigate to what extent the current minority rights standards contribute to a protection of language rights and the related accommodation of linguistic diversity.

In Europe, three organizations are active one way or the other in this domain; more specifically the Council of Europe, the Organisation on Security and Co-operation in Europe (hereinafter: OSCE) and the European Union (hereinafter: EU). As the Council of Europe is the only one so far that has developed legally binding instruments in this domain it will receive most attention.

Council of Europe

At the level of the Council of Europe, two legal instruments can be identified of specific relevance to the management of linguistic diversity or the accommodation of linguistic minorities, which are supposed to guide the policy choices of the member states in this regard, more specifically the Framework Convention for the Protection of National Minorities (hereinafter: FCNM) and the European Charter on Regional or Minority Languages (hereinafter: Language Charter).

Several provisions of the FCNM concern language issues, more specifically language and public authorities, language and courts, language and education, and language in the media. While the FCNM does not include a definition of the concept ‘national minority’, this concept would arguably include linguistic minorities and definitely addresses the accommodation of linguistic diversity. The Language Charter has a clear focus on languages and language use, and actually avoids the language of individual rights or group rights (notwithstanding the occasional slippage in the Charter and its Explanatory Report to the language of rights) and is thus more directly related to the accommodation of linguistic diversity and to questions of linguistic policy. It is nevertheless widely accepted that this charter is of particular relevance for linguistic minorities and hence the accommodation of linguistic diversity. While the ratification record of these instruments is far from perfect in that not all European states have ratified it, they are widely ratified and hence seem to form a first indication of an emerging common European standard concerning linguistic diversity.

22. See the arguments developed in ‘ ‘ to be published by Intersentia in 2005 in a book edited by Bruno de Witte.
23. Most attention tends to go to the relation between ethnic and national minorities. I have elsewhere (Devising an Adequate System of Minority Protection…) argued that these two concepts are interchangeable. Since ethnic encompasses linguistic, national would do as well. See also the discussion of the practice of the AC regarding the scope ratione personae of the FCNM.
24. Per 10 March 2005 17 states had ratified the Language Charter (13 more states have signed but not yet ratified it) and 36 states had ratified the FCNM (6 more states having signed it).
OSCE

Before analyzing these two conventions in more depth, a succinct discussion of activities of the OSCE and EU are in order. In the 1990s the OSCE fulfilled a trendsetting role in the field of minority protection, the importance of which is modulated by the fact that OSCE commitments are not legally binding, but constitute mere political commitments. Since the establishment of the OSCE High Commissioner on National Minorities (hereinafter: HCNM) in 1992, most OSCE developments pertaining to minorities are connected to the office of the HCNM. Reference should certainly be made to several Recommendations commissioned by the OSCE HCNM.

While the HCNM does not have standard setting as part of his mandate, he has already several times requested a group of international experts to draw up recommendations on topics which his experiences have revealed to be highly problematic. The HCNM found himself indeed confronted with several recurrent themes in his work as mediator between government authorities and minorities, several of which concern (or at least include) languages and language use. The most relevant sets of Recommendations that have resulted so far are: the 1998 Oslo recommendations regarding the linguistic rights of National Minorities, the 1996 Hague Recommendations regarding the Education Rights of National Minorities (recommendations 11-18 of in total 19 recommendations concern language in education), and the 2003 Guidelines on the use of minority languages in the Broadcast media (recommendations 5, 9, 10, 12 and especially 14 to 17 of 17 recommendations) concern minority languages and media.

Importantly, these experts formulated their recommendations on the basis of the existing standards in terms of general human rights and minority rights. These recommendations seem to further the synergy concerning standard setting and interpretation as they all tend to put forward progressive interpretations of these standards similar to those identified in the monitoring mechanisms of FCNM and the Language Charter, which means that they are rather demanding as regards state obligations towards minorities. So far four sets of recommendations have been published. In this respect it has been pointed out that they might not impose legal obligations on states but definitely reflect a valuable statement of minimum standards of good practice. The HCNM in any event tends to encourage states as well as minorities to use these Recommendations.

In view of the lack of specific legal standing of these recommendations there is no supervisory mechanism provided for them. As I argued more fully elsewhere25 these recommendations are relied upon both explicitly and implicitly in various supervisory mechanisms (not only of minority specific instruments but also non minority specific instruments). Hence, it still seems appropriate to briefly evaluate these Recommendations, as they arguably form part of the emerging common European standard.

The *Oslo Recommendations* ‘attempt to clarify... the content of minority language rights generally applicable in the situations in which the HCNM is involved’ and presume compliance with all other human rights obligations.\(^{26}\) As is clarified in the Explanatory Note, these recommendations go beyond the list of explicit minority rights standards and also draw progressive inferences from equality considerations and individual human rights, like the freedom of expression. In this way the recommendations tend to transcend *de lege lata* standards and to venture in the realm of *de lege ferenda* considerations. It is in any event clear that the Oslo Recommendations are meant to deal with all the language rights of relevance to minorities.

Indeed, the recommendations are divided in sections which correspond to the language related issues which arise in practice.\(^{27}\) The themes pertaining to language use that elaborated upon by the recommendations are the following: names, religion, community life and NGOs, the media, economic life, administrative authorities and public services, independent national institutions, the judicial authorities and finally, deprivation of liberty.\(^{28}\)

As the Oslo Recommendations post date the The Hague Recommendations regarding Education Rights of National Minorities, the former do not address questions related to language in education.

The *Hague Recommendations* also derive from international human rights instruments and attempt to develop the rather general and often vague elements of international law into more precise and detailed provisions for states to guide their educational policies. Recommendations 11 to 18 are focused on the intersection between language and education, which demonstrates the importance of linguistic policies in relation to education. The Hague Recommendations acknowledge the importance both of the need for members of minorities to learn their mother tongue so as to maintain their identity better, and the need for minorities to integrate in the wider society, which necessitates the proper knowledge of the state language. For the several levels of education the concomitant (alternative) state obligation to facilitate mother tongue education for persons belonging to minorities are indicated.\(^{29}\)

Furthermore, the question of language use in media is elaborated further upon in the Guidelines on the Use of Minority Languages in the Broadcast Media. In devising these Recommendations the independent experts based themselves on the general principles of freedom of expression, cultural and linguistic diversity, protection of identity as well as equality and non discrimination.\(^{30}\) It should be acknowledged that there are

\(^{26}\) The Oslo Recommendations, *op. cit.*, 3-4.
indeed less explicit standards on this specific topic which also explains the qualification ‘guidelines’ instead of the usual ‘recommendations’. In line with considerations of substantive equality, the Guidelines highlight the need for the development of progressive, positive state obligations to address the use of minority languages in the broadcast media. An independently regulated, non discriminatory legislative environment appears appropriate, as well as certain public funding initiatives to enable minorities to effectively develop broadcast media operations.

In so far as the conference themes also focuses on the degree of participation of groups in the policies on languages, it seems important to highlight the growing attention for participatory rights for members of minorities. The right of members of national minorities to participate in the development of policies of relevance to their identity is (inter alia) enshrined in article 15 FCNM. The HCNM also commissioned Recommendations on this topic, which resulted in the Lund Recommendations on the Effective Participation of Minorities in Public Life. As will be developed somewhat further below, the supervisory practice in terms of the FCNM and the Language Charter has clearly revealed the central importance of some kind of involvement of members of minorities (at least through consultation) concerning the issues covered by the Convention.

**European Union**

When reviewing the standards regarding language developed by European organizations, the European Union cannot be left out, especially in view of the ever expanding European integration process, which clearly transgressed the purely economic field. The Union has developed various activities surrounding lesser used languages. While these used to consist mainly of funding activities, the EU institutions seem increasingly open to mainstreaming of linguistic diversity concerns, as was underlined in the Commission’s Action Plan of July 2003.

31. The Minority Rights Group International underscores that just like the sets of Recommendations, the Guidelines are an authoritative comment and practical elaboration on the issue, constituting a ‘valuable statement of minimum standards and good practice’ (press release MRG, 4 November 2003).

32. The first traces of participatory rights for minorities can be found in the 1990 Copenhagen Declaration of the OSCE (paragraph 35) and the 1992 Declaration on the Rights of Peoples belonging to National or Ethnic, Religious and Linguistic Minorities (article 2).

For more in depth discussion, see K. Hend, “An investigation into the desirable, and possible role of the Language Charter in expanding on article 22 of the EU’s Charter of Fundamental Rights”, www.ciemn.org/mercator, under mercator publications, 24 p.

Notwithstanding the fact that language policy remains a typical state competence, the member states discretion in this respect is circumscribed by constraints imposed by the common market frame, as was clarified in the *Groener* and *Mutsch* judgements of the ECJ. The ECJ has furthermore clarified in *Bickel/Franz* and *Angonese* that while the substantive implementation of minority language policy resides primarily with the Member States, the EC has a role to play. This role is rather a negative one, and consists more specifically in imposing limits on national minority policy, in the sense that the latter need to comply with the community benchmarks of non-discrimination and proportionality.

Nevertheless, one can also point to a small competence basis for the EU to take more positive measures aimed at the promotion of linguistic diversity, also within Member States. Article 151, paragraph 4 TEC ("The Community shall take cultural aspects into account in its action under other provisions of this Treaty, in particular in order to respect and to promote the diversity of its cultures") could result in a more culturally (and hence also linguistically) sensitive community policy. Paragraph 4 can indeed be interpreted as a ‘diversity’ mainstreaming clause. In this respect; several recent EC documents underline that ‘respect for linguistic and cultural diversity is one of the cornerstones of the EU’. Unlike article 13 TEC, the EU Charter on Fundamental Rights’ non-discrimination clause explicitly include language as a prohibited ground of discrimination. The Charter’s inclusion in the Constitution seems to augur well for its legally binding status, but it should be underscored that the Charter provisions are not meant to widen the competence of the Union. Nevertheless, the linguistic non discrimination aspect could arguably be taken on board in the mainstreaming of diversity hinted at above.

Following the (proclamation of) the European Year of Languages in 2001 (in cooperation with the Council of Europe), the Commission’s activities culminated in July 2003 in an Action Plan, which is purported to adopt a new approach regarding not only language learning but also the promotion of linguistic diversity with special attention for minority languages. Typically for the EU’s approach to linguistic diversity, the focus of

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39. See [eurropa.eu.int/comm/education/policies/lang/year/index_en.html].
41. Action Plan, at p. 4-5.
the action plan is on the promotion of language learning, in view of its link to the promotion of free movement of persons and services and hence the common market rationale. In other words, the promotion of linguistic diversity, and of minority languages more specifically, seems predominantly a spin off, a more marginal point.\textsuperscript{42} Still, it is hard to deny that slowly but surely some progress is achieved.

When having a closer look at the third approach of the Action Plan entitled ‘Building a Language Friendly Environment’\textsuperscript{43}, it becomes apparent that the Commission adopts an outspoken mainstreaming function. Not only is envisaged that existing programs, like Da Vinci and Socrates, can play a more active role in promoting linguistic diversity (mainly through teaching), but it is also stipulated that ‘in the longer term, all relevant community programmes and the structural funds should include more support for linguistic diversity, \textit{inter alia} for regional and minority languages, if specific action is appropriate’\textsuperscript{44}. Obviously, the more concrete meaning of ‘relevant’ and ‘if specific action is appropriate’ will determine how far-reaching this mainstreaming approach will be. It could (!) imply that for the implementation of (certain) EU programs, the member states are required to contribute to the promotion of regional and minority languages (without of course impeding the fundamental freedoms). In this respect it can also be mentioned that the Commission in its Action Plan explicitly encourages national and regional bodies to give special attention to measures to assist those language communities, whose numbers of native speakers is in decline from generation to generation, in line with the principles of the European Charter of Regional and Minority Languages (see infra)!\textsuperscript{45}

Focus on FCNM and Language Charter: text and supervisory practice

Framework Convention for the Protection of National Minorities (FCNM)

The Framework Convention is undoubtedly very important for minority protection purposes since it is the first international treaty with a multilateral, general protection regime for minorities.\textsuperscript{46} Furthermore, the FCNM clearly demonstrates in what way individual human rights and minority rights interrelate to achieve an adequate system of minority protection and accommodation of (linguistic) population diversity. Indeed, several articles of the Framework Convention take up individual human rights of the ECHR

\textsuperscript{42} Action Plan, at pp. 12-14.
\textsuperscript{43} Action Plan, at p. 13.
\textsuperscript{44} Action Plan, at p. 12.
\textsuperscript{46} Framework Convention, articles 7, 8, 9 and 12, § 3.
which are of special relevance for minorities,\(^\text{47}\) while adding at times extra requirements because they are essential for the purpose of safeguarding the specific fundamental right for minorities.\(^\text{48}\)

The Convention also enshrines several minority rights, but is confined to vague program-type statements, each time suitably circumscribed with several escape clauses, thus seemingly granting states a wide margin of appreciation.\(^\text{49}\) Consequently, it is imperative to scrutinise the actual content of its provisions concerning language rights as well as the concomitant supervisory practice in order to gauge its potential contribution to and enhancement of linguistic diversity. As will be further elaborated upon below, the Advisory Committee, reveals through its monitoring activities that the margin of appreciation for states is not unlimited.

In any event, programmatic, rather open provisions, seemingly only providing certain broad guidelines, are not *per se* negative, since they allow the specific circumstances to be fully taken into account.\(^\text{50}\) Nonetheless, the margin of discretion for states should not be too wide in order for the minority protection offered to be meaningful.\(^\text{51}\)

Since the Convention deliberately omits a definition of the concept ‘national minority’, the determination of its scope *ratione personae* seems left to the discretion of the contracting parties.\(^\text{52}\) Various states have issued declarations on ratification explaining what groups they considered to be ‘national minorities’ for purposes of the FCNM. Belgium is the only state that deposited a declaration already on signature (which is actually still not followed by ratification). Its content is very much on point in view of the focus of this article on language rights. The Belgian declaration also reveals the big stumbling block for ratification so far, namely the fear that the FCNM would entail the destruction of the delicate balance concerning language regulations in the country. Its declaration states that ‘the Framework Convention applies without prejudice to the constitutional provisions guarantees or principles, and without prejudice to the legislative rules which currently govern the use of languages’. It should be noted that Switzerland has a similar declaration in addition to its definitional statement.

\(^{47}\) For example Framework Convention, article 9, §§ 2, 3 and 4.


\(^{50}\) Benoit-Rohmer, 49. See also infra.

\(^{51}\) Paragraph 4 of the Explanatory Report to the Framework Convention explains that no consensus could be reached on the interpretation of the term national minorities. See infra for the practice of the Advisory Committee.

\(^{52}\) Framework Convention, article 4, §§ 1 and 2.
Analysis of the text of relevant substantive articles

Conceptually, it is important that the Framework Convention recognises the need for equality in fact, in addition to equality in law, as well as the concomitant positive obligation of states to ensure this equality both in fact and in law.\footnote{Explanatory Report to the Framework Convention for the Protection of National Minorities, [www.coe.int], paragraph 39.} The Explanatory Report to this Convention also indicates that the goal of equality in fact, may require State parties to adopt special measures, that take into account the specific conditions of the persons concerned.\footnote{J. Packer, ‘On the Content of Minority Rights’, loc. cit., 164.} While this explicit goal of substantive equality augurs well for minority protection purposes;\footnote{Explanatory Report to the Framework Convention, paragraph 42.} a closer look at the provision reveals its weak, open-ended formulation, in that the escape clause ‘where necessary’ is added. Similarly, article 5 seems to enshrine the right to identity for minorities and the positive obligation on contracting states to promote the conditions necessary to preserve the minority identity, including their language.\footnote{See also G. Alfredsson, ‘A Frame an Incomplete Painting: Comparison of the Framework Convention for the Protection of National Minorities with International Standards and Monitoring Procedures’, I.J.G.M.R. 2000, 292-293; G. Pentassuglia, ‘Monitoring Minority Rights in Europe’, 419.} However, when one assesses the more concrete provisions related to identity features of minorities, the actual scope of these positive obligations is mitigated by the various types of escape clauses, which grant a considerable margin of appreciation to states.\footnote{G. Alfredsson, ‘A Frame an Incomplete Painting’, 303.}

As the review of the supervisory system will confirm, however, this margin of appreciation does not give the states carte blanche.\footnote{F. Steketee, ‘The Framework Convention: A Piece of Art or a Toll for Action?’, 5.} In this respect, it can be argued that ‘the onus is also on governments to demonstrate with facts and figures the applicability of any such escape – clauses’.\footnote{G. Pentassuglia, ‘Monitoring Minority Rights in Europe’, 1999, 417, 420.} Nevertheless, only the on-going practice of the supervisory mechanism and the contracting states will show over time whether and to what extent contracting states actually improve their systems of minority protection.\footnote{Explanatory Report, § 61.}

\textit{Article 9} clearly builds on the freedom of expression provision in article 10 ECHR, with the bonus that the useful reference is made to the use of the minority language. While the first paragraph also stipulates that states shall ensure a non discriminatory access to media for persons belonging to national minorities, paragraphs 3 and 4 contain more detailed provisions in this respect. Since paragraph 3 is concerned with the establishment of private minority media, paragraph four’s reference to a general positive obli-
gation on public authorities to take the necessary measures to facilitate access to media for members of national minorities arguably concerns the public media. In regard to paragraph 3 it is furthermore striking that the FCNM adopts a differential approach for printed media on the one hand and broadcast media on the other. While authorities can suffice with a negative, non interference approach for the former, they are supposed to take positive measures in relation to the latter. The Explanatory Report arguably justifies this differential treatment by emphasizing that broadcast media in any event requires regulations as it concerns scarce resources, which is not the case for the printed media.61

Article 10 guarantees the right to use the minority language but its second paragraph, concerning the right to use this language in communication with the public authorities is very heavily qualified.62 Not only is the right contingent on finding a high geographical concentration of members of the linguistic minority but it is also weakened by discretionary phrases like ‘where such a request corresponds to a real need’ and ‘as far as possible’. Whereas, the Explanatory Report indicates that the ‘real need’ is to be assessed by the states on the basis of objective criteria, it does not further specify what this means, what this would entail for the states. The Report does indicate that ‘as far as possible’ implies that ‘in particular the financial resources of the Party concerned’ can be taken into account.63 However, it seems obvious that is rather easy for states to argue that certain pro minority language measures would go beyond their financial resources. The actual impact of this provision is thus rather questionable.64

Article 11 deals with the issue of the use of minority languages for the names and last names of members of minorities and also for local names, street names and other topographical indications. Although the fact that these issues are being addressed in the Convention is unquestionably positive, the numerous escape clauses and qualifications carry, once again, the risk to undermine this potential.

Article 11, paragraph 1 on the right to use surname and first names in the minority languages contains the reference to the national legal system ‘according to modalities provided for in their legal system’. In this case the Explanatory Report adds the important requirement that ‘the legal system of the Parties will, in this respect, meet international principles concerning the protection of minorities’,65 thus countering possible attempts to evade the state obligations under this provision.

Paragraph 2 on the right to display in the minority language signs, inscriptions and other information of a private nature is framed in a strong, unequivocal manner. The fact that this provision is limited to the display of information of a private nature, and

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64. Explanatory Report to the Framework Convention, § 68.
65. Explanatory Report to the Framework Convention, § 70.
consequently less sensitive for states, could explain its strikingly strong wording. The provision on the display of traditional local names, street names and other topographical indications intended for the public contrasts nicely in this respect. States commit only to ‘endeavour in the framework of their legal system’ to provide this and then only ‘when there is sufficient demand’.

This is obviously a very weak provision, especially as there is no requirement as to how that sufficient demand will be established. The additional conditions that this display is only to be endeavoured in areas traditionally inhabited by substantial numbers of persons belonging to minorities and taking into account their specific conditions, seem at first sight in line with the proportionality requirement and the need to take measures adapted to the specific circumstances. However, the lack of further indications as to how these qualifications are to be understood (e.g. what is substantial?) offers ample opportunity for the states to evade any responsibility. This time the Explanatory Report does not provide a clarification of the text which would tend to strengthen the commitments on the part of the contracting states. It merely states that ‘this article aims to promote the possibility of having local names, street names and other topographical indications intended for the public also in the minority language’, without pointing to an obligation of any kind for the states. Furthermore, the Report underlines that ‘this provision does not imply any official recognition of local names in the minority languages’.

Article 14 regarding the right to learn the minority language and being taught or receiving instruction in a minority language, is equally cautiously formulated. Moreover, the states appear not to have an obligation to take positive measures regarding the right to learn the minority language. Particularly the right to instruction in a minority language is very tentatively phrased in that states are not obliged but merely encouraged to provide this service. Together with the requirement of territorial concentration, article 14, par 2 also contains vague conditions like there being ‘sufficient demand’ from persons belonging to minorities, without specifying what this entails. Furthermore, the obligation only exists ‘as far as possible’ and ‘within the framework of their education system’. The Explanatory Report once again does not add stringency to the state obligations concerned but rather acknowledges that this provision is worded very flexibly, leaving parties a wide measure of discretion.

Article 15 stipulates that contracting states ‘shall create the conditions necessary for the effective participation of persons belonging to national minorities in cultural, social and economic life and in public affairs, in particular those affecting them’. While this provision does not really specify a right to participation, its terse language does indicate that the participation it envisages is not confined to the political sphere, but extends

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66. *Inter alia* F. Benoît-Rohmer, 48-49.
67. Explanatory Report to the Framework Convention, §§ 75-76.
to broad areas of public and social life. This would also seem to require that appropriate minority participation takes place concerning decisions on educational curricula and language policies more generally. Article 15 in any event leaves considerable discretion to the states to decide the particular modalities of participation. Also the Explanatory Report merely enumerates a non exhaustive list of possible means to promote the participation of persons belonging to national minorities. The list furthermore seems to focus mainly on securing that minorities ‘have a say’, which does not necessarily imply ‘having influence’.

Procedural Issues: the Monitoring Mechanism and Review of the Annual Activity Reports of the AC

In order to properly evaluate the contribution of the Framework Convention to minority protection and the accommodation of population diversity, it is essential to assess its monitoring mechanism and the way in which the rather vague terms of the Convention are interpreted.

The Framework Convention itself determines the broad lines of the monitoring mechanism in articles 24 to 26. These provisions merely establish that the Committee of Ministers of the Council of Europe is ultimately responsible for the monitoring exercise, which is limited to a periodical review of state reports, excluding any judicial or quasi-judicial complaint procedure. The periodic state reports have to contain full information on the legislative and other measures adopted by state parties in order to give effect to the Convention. The fact that it is a political body who has the final say concerning the review of these state reports appears to limit the effectiveness of the procedure.

The provisions further stipulate that an Advisory Committee, consisting of experts in the field of minority protection, will assist the Committee of Ministers in this activity. As the determination of the further details pertaining to this reporting mechanism are left to the Committee of Ministers, this body established in its 1997 Resolution (97) 10 inter alia the rules pertaining to the composition of the Advisory Committee. Importantly, these Rules specify that members of the Advisory Committee ‘shall serve in their individual capacity, shall be independent and impartial...’. This requirement significantly contributes to the legitimacy of the Advisory Committee and its monitoring work, with the potential to strengthen the credibility of the supervision.

69. Explanatory Report, paragraph 80.
71. Resolution (97) 10, rule 6.
73. Resolution (97) 10, rule 23.
After consideration of the periodic state reports, the Advisory Committee transmits its opinions to the Committee of Ministers.\(^{74}\) Subsequently, the Committee of Ministers adopts conclusions concerning the adequacy of the measures taken by the state party concerned to give effect to Framework Convention. In addition, the Committee of Ministers has the possibility to formulate recommendations in respect of the state party concerned and even set a time limit for the submission of information on the implementation of these recommendations.\(^{75}\) However, no real sanctions can be imposed on contracting states for non-compliance with their obligations under the Convention.\(^{76}\)

Several issues pertaining to the actual practice of the monitoring mechanism deserve special attention in order to gauge its contribution to the effective protection of linguistic diversity. Firstly, the degree to which the Committee of Ministers relies on and follows the opinion of the Advisory Committee will be important, as the latter consist of independent experts, supposedly not restricted by political sensitivities. Related to this is the question how the Advisory Committee interprets the Convention, the more concrete scope of the state obligations and how it gives shape to its own responsibilities in this respect. Finally, the way in which the Committee of Ministers will make use of its possibility to adopt recommendations and monitor their follow-up, will also have a considerable impact on the efficiency and impact of the overall supervisory mechanism of the FCNM.

The AC’s Activity Reports, and especially the Fourth Activity Report (covering the period between 1 June 2002 and 31 May 2004) contain various positive assessments of the co-operation with the Committee of Ministers, which is essential for the overall impact of the monitoring procedure. The fact that the Resolutions of the Committee of Ministers (continue to) take up the main message of the corresponding Opinions of the AC is obviously to be welcomed as that consolidates the legitimacy of the monitoring mechanism.\(^{77}\)

Furthermore, the Committee of Ministers has taken various procedural decisions that help the AC to operate more effectively. The most important ones are the decision authorizing the AC to commence its monitoring without state report in case of persistent delays in submission, the decision confirming the suggested revised outline for the state reports of the second cycle and the mandate enabling the AC to increase its contacts with civil society by organizing meetings with NGOs and other independent sources also outside country visits.\(^{78}\) By contributing to the reduction of delays in the monitoring pro-

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\(^{74}\) Resolution (97) 10, rule 24.

\(^{75}\) Alfredsson, loc. cit. (supra note 21), pp. 295-297.

\(^{76}\) AC, Fourth Activity Report (supra note 34), § 15.

\(^{77}\) AC, Fourth Activity Report (supra note 34), § 17.

procedure and the accumulation of ‘independent’ information by the AC, these decisions clearly enhance the quality, strength and smoothness of the monitoring process, which is bound to have positive repercussions for the resulting level of minority protection.

Notwithstanding the above-mentioned positive developments which tend to enhance minority protection and also the protection of the related linguistic diversity, it remains to be seen how state practice will develop in response to the Conclusions and Recommendations of the Committee of Ministers. The second cycle of monitoring which started in September 2004 is expected to bring more clarity in this respect.

More Substantive Issues of the Supervisory Practice: Review of the Country Specific Opinions of the AC

As the ensuing analysis of the opinions will confirm, the FCNM system knows several constraints, notwithstanding the de facto predominance of the AC in the monitoring procedure. Monitoring can in any event not lead to binding decisions for the state parties, which have furthermore a certain margin of appreciation, so the AC cannot impose specific techniques or measures. However, once states have made a certain choice, the AC is rather critical as to its actual functioning and its effects. In this respect, it identifies possible improvements, each time underlining the importance of involving the minorities concerned (consultations etc). Similarly, while the AC is not oblivious to possible financial constraints of states, it continues to strive for the best possible level of minority protection. In this respect the AC’s practice constitutes a continuously developing body of ‘best practices’ in relation to the accommodation of (inter alia) linguistic diversity.

It should first of all be underlined that the Advisory Committee explicitly reserves for itself the right to critically screen the position taken by the contracting states regarding the determination of the scope *ratione personae* of the Framework Convention. The AC tends to promote an inclusive approach and underlines in any event that no unjustified distinctions should be made, and increasingly questions the use of the citizenship criterion in this respect. The latter is of course also important for linguistic minorities,

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79. The success of certain techniques obviously also depend on the specific (demographic) situation in the state. The AC has for example welcomed the adapted constituency boundaries and reserved seats in Ukraine (Opinion on Ukraine, 1 March 2002, at www.humanrights.coe.int/minorities, §§ 69-70), while approving the choice of a lower threshold and consultative committee for Danes in Germany to offset the lack of direct parliamentary representation (Opinion on Germany, 1 March 2002, www.humanrights.coe.int/minorities, § 63). See also Alfredsson, loc. cit. (supra note 21), p. 301; Pentassuglia, ‘Monitoring Minority Rights in Europe …’, (supra note 24), p. 422.


82. AC, Advisory Opinion on Finland, 22 September 2000, [www.humanrights.coe.int/minorities], § 17; AC, Opinion on Switzerland, 2003, § 21.
more particularly in the newly independent states of Eastern Europe and for the so-called ‘new’ or immigrant minorities.

Finally, in its opinions on Finland and Switzerland, the Advisory Committee appears to accept that minorities should also be identified at the regional level and not only at state level, depending on the respective competencies of these sub-state levels of government.\(^{83}\) This is of special relevance in Canada, and more specifically the English speaking minority in the province Quebec. The practice of the FCNM clearly departs in this respect from the Human Rights Committee’s view in Ballantyne et al v Canada and follows the approach of the Venice Commission in its 2003 report on the identification of minorities in Belgium.\(^{84}\)

### Full, Real Equality and Special Measures for Minorities

When studying the country specific opinions of the Advisory Committee, it cannot be denied that a recurring feature of the opinions of the AC is the emphasis on full, real equality, which would require the adoption and implementation of special measures for persons belonging to national minorities.\(^{85}\) It should be noted that most of the assessments of the AC are arguably imbued with substantive equality considerations. In addition to the overarching theme of substantive equality, other issues that are of similar importance and feature regularly in the AC’s opinions, are the demands for clear, sufficiently detailed legislative frameworks concerning the issues addressed by the Convention, and a concern for bringing actual practice in line with the legal rules.\(^{86}\) The AC underscores indeed the importance of having legislative frameworks with sufficiently detailed and clear rules so as to avoid too much discretion for authorities.\(^{87}\) Obviously, while the AC necessarily concedes a certain margin of appreciation to states by not being overly directive, it guards simultaneously that this margin is not too extensive. This has been particularly obvious in relation to several of the language rights provisions of the FCNM.

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84. *Inter alia* AC, Opinion on Switzerland, 20 February 2003, ACFC/INF/OP/I(2003)007, § 87; Opinion on Azerbaijan, 22 May 2003, ACFC/INF/OP/I(2004)001, § 28. In its opinion on Austria, 16 May 2002, at www.humanrights.coe.int/minorities, the Committee underlined that even for very small groups a considerable amount of determined measures on the part of the competent authorities are required to help them to preserve their identity (§ 82). The last opinions reveal a trend to demand further, more far reaching positive state action and state support, also of a financial nature. See *inter alia* AC, Opinion on Norway, 2002, § 77; AC, Opinion on Armenia, 16 May 2002, ACFC/INF/OP/I (2003) 001, § 93.
Concerning specific provisions of the Framework Convention, the Advisory Committee shows itself to be rather demanding, clearly going beyond a minimalist reading of the FCNM’s open-ended formulations. When reviewing the opinions of the AC, several recurrent issues emerge, more specifically concerning language rights, education rights, rights pertaining to media and participatory rights. The focus here will be on the former, while the linguistic issues of education rights and rights pertaining to media will also be touched upon. In view of the importance of participatory rights for the realization of these language related rights, they are also included in the assessment.

**Language Rights**

As regards language rights, regulations pertaining to language use vis-à-vis public authorities are carefully reviewed as the Advisory Committee does not shy away from voicing criticism regarding numerical thresholds used.\(^{88}\) It even promotes the possibility of giving minority languages an official status at sub-state level in case of strong territorial concentrations.\(^{89}\) It is furthermore commendable that that AC emphasizes that the actual implementation of the rules requires accompanying measures in recruiting staff and providing language training.\(^{90}\) The latter are indeed essential to improve the actual implementation and realization of the language rights concerned.

Underlining the increasing prominence of positive state obligations, the Committee goes as far as urging states to proactively check the needs (on the part of minorities) concerning (inter alia) language use vis-à-vis public authorities.\(^{91}\)

**Mother Tongue Education**

The importance of mother tongue education for members of national minorities is extensively acknowledged and promoted, with special attention for bilingual teaching in this respect.\(^{92}\) While the AC notes with satisfaction the achievements in this regard of Albania for the Greek and Macedonian population, it criticizes the lack of education in Roma and Vlach and calls on the authorities to examine and cater for the needs of the latter communities as well.\(^{93}\) A similar critical attitude can be noticed in the opinion on Norway concerning minorities other than the Kven and Sami. Interestingly, the AC clarifies here

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88. AC, Opinion on Croatia, 6 April 2001, [www.humanrights.coe.int/minorities]., § 44.. In this regard the AC welcomes the implementation of the Ohrid Agreement in Macedonia (as reflected in article 7 of the Constitution) which has resulted in the recognition of various minority languages as official languages in some municipalities where the language is spoken by at least 20 percent of the inhabitants: AC, Opinion on the former Yugoslav Republic of Macedonia, 27 May 2004, ACFC/INF/OP/I(2005)001, §§ 67-68.

89. AC, Opinion on Romania, 6 April 2001, [www.humanrights.coe.int/minorities], § 50.


91. See inter alia AC, Opinion on Switzerland, 2003, § 69.


that ‘the guarantees of Article 14 are not conditioned upon lack of knowledge of the state language, the authorities should examine to what extent there is demand amongst the national minorities … to receive instruction in or of their language, and depending on the results improve the current legal and practical situation if necessary’.94

The Committee seems to consider the needs and wishes expressed by the minorities as quasi determinant of the state obligation, but the closing ‘if necessary’ re-acknowledges the inevitable state discretion in this regard… Nevertheless, its opinion on the UK arguably demonstrates that the AC thinks it appropriate or even desirable for the contracting states to promote mother tongue education and the teaching of minority languages, even if it is not a rallying point for the minorities themselves.95 Furthermore and in order to fully realize the right to mother tongue education the AC highlights the need for supporting measures like minority language textbooks and suitably qualified teachers.96

In regard to the former Yugoslav Republic of Macedonia, which is still struggling with the underlying causes and the effects of the violent inter ethnic conflict in 2001, the AC underlines the importance of the integrating capacity of schools. The AC points out that special attention should be given to encourage individuals’ knowledge of the languages spoken in their region. While the importance of mother tongue education is not diminished,97 the focus here shifts to multi-lingual education and the enhancement of individual multilingualism amongst the students because this would facilitate contacts between pupils of various communities.98

**Names and toponymic information**

The Committee has shown its concern about possible problems regarding transcription of names, which the states are in principle allowed to do in terms of article 11 FCNM. However, the authorities must take appropriate measures within the public administration to ensure that the names of persons belonging to national minorities are transcribed phonetically into the official language so as to avoid phonetic distortions.99 Also here the AC scrutinizes the actual implementation and realization of national legal standards in themselves in line with the FCNM.100

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94. AC, Opinion on UK, 30 November 2001, [www.humanrights.coe.int/minorities], § 91.
96. The Committee notes with concern the deficient implementation of the constitutional guarantee of mother tongue education (as enshrined in the Constitution article 48), especially for the Turkish, Vlach, Roma and Serb minorities. The authorities are urged to ensure that solutions are found that meet the needs of the communities concerned and also points to the importance of ensuring that enough teachers are adequately trained: AC, Opinion on Macedonia, 2004, § 88-92.
99. Ibid, § 73.
100. AC, Opinion on Moldova, 2002, § 51.
The Media and Minorities

As regards the media the Advisory Committee scrutinizes several dimensions, including the coverage of minority languages in the public media, sufficient programs on minorities and their cultures, languages etc, and their presence in private media. Also in this regard the Committee interprets the demands flowing from the FCNM quite extensively, and even encourages the states to support minorities in their requests for broadcasting licenses when they do not use an opportunity out of their own motion. Similarly, Switzerland is encouraged to examine possibilities for securing sufficient funding for the ailing only Romanche daily newspaper, notwithstanding the fact that substantial public subsidies are already granted to the Romanche press agency.

In its assessment whether the different minority languages get each a fair share of the broadcasting time, the AC takes into account whether the timeslots are advantageous or not, which arguably has substantive equality undertones. The AC also advises the authorities to ensure that a proper balance is reached when providing assistance regarding subsidies for private media to the extent that also the needs that exist among numerically smaller minorities are taken into account. The special attention of the AC for the actual practice and realization of minority rights is highlighted by its demand that the authorities ‘monitor carefully that the …. obligation of public service broadcasting companies to increase their efforts in this sphere is implemented and to take appropriate measures if this obligation is not honored’.

The Right to Effective Participation of Persons belonging to National Minorities

Article 15’s right to effective participation of persons belonging to national minorities, closely related to the internal dimension of the right to self-determination, covers a broad variety of issues, including questions of (territorial or personal) autonomy and local self government, consultation mechanisms of various kinds and several other forms of representation of minorities in the public sphere.

The AC seems to consider the participation of minorities in decision-making processes as a precondition for a sound minority protection, as is exemplified by the experiences in Romania. Several of its opinions reflect a clear disapproval of a de facto under-representation or even absence of members of national minorities in Parliament or a

101. AC, Opinion on Switzerland, 2003, § 49.
103. AC, Opinion on Macedonia, 2004, § 64.
104. See also AC, Opinion on Macedonia, 2004, § 62.
Government body.\textsuperscript{109} The AC's attention does not only concern the composition of government bodies but also the legislative procedures followed. In this regard it welcomed the existence of a range of constitutional provisions in the Former Yugoslav Republic of Macedonia that help to reflect the interests of persons belonging to minorities for the adoption of laws which affect minorities, concerning inter alia use of languages, and education.\textsuperscript{110}

In addition to more direct forms of participation,\textsuperscript{111} the AC underlines throughout its work (also concerning other articles of the FCNM) the need to consult the minority groups concerns in order to ensure an effective dialogue. While consultation does not equal the possibility to determine the ultimate decision, the AC underscores that it should not be a hollow exercise.\textsuperscript{112} While the Committee tends to welcome the establishment of National Councils of National Minorities, it immediately emphasizes that authorities should actually involve the representatives of the councils consistently and sufficiently.\textsuperscript{113}

The AC's opinions reveal that it attaches great importance to a proper institutional framework ensuring regular (and effective) consultations, pressing states to consolidate contacts with minorities through the establishment of an official body of some kind.

A more direct link between participatory and linguistic rights can be identified in the concern expressed by the AC (in line with the decisions of both the ECHR\textsuperscript{114} and the HRC\textsuperscript{115}) pertaining to the implementation of language requirements\textsuperscript{116} for candidates of (local) elections.\textsuperscript{117} Furthermore, the AC's preference for mirror representation of minorities in a wide range of public sector services, will tend to facilitate the actual provision of public services in the related minority languages.

It should also be underlined that forms of territorial autonomy can be important means of self-government for linguistic groups that are territorially concentrated, of

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\item \textsuperscript{109} AC, Opinion on Macedonia, 2004, § 94.
\item \textsuperscript{110} It should be underlined however that even regulations concerning actual representation in assemblies, executives, public service etc do not guarantee actual influence on the decision taken. Still, the voice of the respective minorities is being heard. (see also Verstichel, p. 26)
\item \textsuperscript{111} In case the national legislation does not institute an obligation to consult, the AC still recommends that the minorities be consulted in a more consistent manner, while the authorities should give reasons when they in the end do not follow the advise (AC, Opinion on Romania, 2001, § 66). See also AC, Opinion on Azerbaijan, 2003, § 74.
\item \textsuperscript{112} AC, Opinion on Serbia and Montenegro, 2003, §§ 106-107.
\item \textsuperscript{113} Eur. Ct. H. R., Podkolzina v Lettonie, 9 April 2002, [echr.coe.int], §§ 33-38.
\item \textsuperscript{114} HRC, Ignatane v Latvia, Application 884/1999, 25 July 2001.
\item \textsuperscript{115} The AC underlines in its 2003 opinion on Azerbaijan more generally that language proficiency requirements should not be overly extensive as that would cause undue problems related to the implementation of article 15 (§ 79).
\item \textsuperscript{116} AC, Opinion on Estonia, 2001, § 55.
\end{itemize}
course depending on their actual content and attributed competencies. In this regard, the AC explicitly promotes the development of local self-government and genuine decentralization strategies as these are considered to be often an important factor in creating the necessary conditions for effective participation of persons belonging to national minorities.

**Interim Conclusion**

Overall, the degree to which the FCNM enhances the protection and promotion of linguistic diversity cannot be determined in a clear-cut way. The text of the convention contains several language clauses but the state obligations are formulated in a very open ended, vague manner. The supervisory system is somehow constrained by this feature in that states cannot be obliged to actually adopt specific measures, the system cannot result in binding decisions which obviously limits (further) the enforcement possibilities. Nevertheless, when states have opted for a certain approach, the AC will critically scrutinize the actual implementation thereof and will also make increasingly specific suggestions as to how states could improve their standards and practices. Arguably, these suggestions are impregnated with substantive equality considerations, implicitly if not explicitly. In this respect, the AC tends to critically review the groups covered by the Convention in a state, urging states to include immigrant or ‘new’ minorities, which also has repercussions for the languages spoken by these groups. Furthermore, the AC is critical towards numerical thresholds states have adopted before minority languages can be used in education or in communication with administrative authorities. In this respect the implicit adoption of a sliding scale approach can arguably be detected etc. The Committee even promotes the possibility that minority languages are made an official language in areas where the minority concerned is territorially concentrated. It should furthermore be highlighted that the need to consult with or even involve the minorities concerned in the decision (and policy) making process is a recurrent theme in the supervisory practice of the FCNM. Overall, the supervisory system of the FCNM reflects a trend to work towards the enhancement of the protection of linguistic diversity, both quantitatively and qualitatively.

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119 For an in depth discussion of the European Charter for Regional or Minority Languages, see Philip Blair, The Protection of Regional or Minority Languages in Europe, Fribourg, Institut du Fédéralisme, 1994, 99p; Patrick Thornberry & Maria Amor Estebanez, Minority Rights in Europe, Council of Europe, 2002, 137-168...
The European Charter for Regional or Minority Languages

Introduction

Regarding the European Charter for Regional or Minority Languages (herinafter: Language Charter), it appears appropriate to start with a more general evaluation concerning typical features of the Charter, prior to reviewing the supervisory practice. It is first and foremost remarkable that the Charter does not grant any rights to speakers of certain minority languages or to certain linguistic groups but is focused on the languages themselves and thus on a recognition, protection and promotion of linguistic diversity, as dimension of cultural diversity.

Nevertheless, it is obvious and is underscored by the Explanatory Report that ‘the obligation of the parties with regard to the status of these languages and the domestic legislation which will have to be introduced … will have an obvious effect on the situation of the communities concerned and their individual members’.

Secondly, certain general principles in article 7 (part II) aside, the contracting states can under certain minimum requirements chose their obligations à la carte. Part III of the Charter addresses measures to promote the use of regional or minority languages in the various areas of public life, more specifically education, the administration of justice, administrative authorities and public services, the media, cultural activities and facilities, economic and social life and transfrontier exchanges. For each subject matter the Charter contains several alternative state obligations ranging from maximal to minimal solutions. Each state can even determine for itself to what languages spoken in its territory the Charter will apply, thus taking the state discretion very far.

Consequently, the actual contribution of the Charter to minority protection is modulated and balanced in view of its high flexibility as regards the content of state obligations. However, as will be further explained infra, the supervisory mechanism has established through its practice that this discretion is not unlimited, especially in regard of Part II. Furthermore, the Explanatory Report to the Charter reveals that states may not choose arbitrarily between these options but have to do so ‘according to the situation of each language’. Arguably, this would tend to entail that ‘the larger the number of speakers of a certain language and the more homogenous the regional population, the

120. The Definitions of article 1 clarify that the field of application of the Charter is limited to indigenous languages and thus excludes the languages of immigrants. Blair remarks in this regard that: ‘the decision to exclude such languages is clearly open to objections, especially as in some Western European Countries … they are perceived as the greater problem’ (P. Blair, 57).

121. For a strong criticism as regards this flexible approach of the European Charter in that it leaves so much choice to the states, see F. De Varennes, ‘Ethnic Conflicts and Language in Eastern European and Central Asian States: Can Human Rights Help to Prevent Them?’, I.J.G.R. 1997, 156.


123. P. Blair, 59-60.
stronger the option which should be adopted’. Nevertheless, it is difficult to deny that the level of discretion granted to states is extremely high in the Charter, and surely even higher than the other ‘minority’ instruments.

In any event, the focus of the Charter is more directly geared towards the promotion of linguistic diversity, and hence the theme of this conference. Furthermore, the above mentioned themes or areas of public life the Charter addresses reveal several similarities with the language related themes of the FCNM, more specifically mother tongue education, minority languages and media, minority languages in communication with the public authorities etc.

It should also be underlined that among the general principles of Part II features prominently the equality principle. The Charter clearly focuses on substantive equality as article 7, § 2 underlines that ‘positive measures aimed at bringing about greater equality between the users of regional or minority languages and the rest of the population are not to be considered as discriminatory against the majority’. The Charter does not only allow for these special measures but it also recognizes that non-discrimination in itself does not tend to be sufficient to protect the languages focused upon. In this regard it was correctly pointed out that ‘the main function of the Charter is in fact itself to provide for concrete measures to promote regional or minority languages’. This focus on substantive equality is also clearly reflected in the practice of the supervisory mechanism, implicitly if not explicitly.

On the one hand the text of the Language Charter provides more direct guidelines, albeit through the enumeration of alternative obligations, for the development of state policies concerning linguistic diversity. The sliding scale approach is arguably imbedded both in the FCNM and the Language Charter but in the latter there is also an outright enumeration of possible approaches that states can adopt. On the other hand, the text of the Language Charter narrows the scope of the linguistic reality covered, to the extent that it explicitly excludes ‘immigrant languages’ (and ‘dialects’) and is predominantly focused on languages with a certain, clear territorial basis. Nevertheless, as will be elaborated upon infra, also here the inclusive approach of the independent expert body provides some counter weight, and reveals that the non territorial languages are not completely excluded from the Charter’s scope of application. Another important parallel in both Council of Europe instruments of special relevance for linguistic diversity,

125. Ibid. See also A. Spiliopoulou-Akermark, … 235.
126. See infra.
127. A traditional sentence in this regard is “Recommends that the … authorities take account of all the observations of the Committee of Experts …” (e.g. Recommendation RecChL (2002)1 of the Committee of Ministers on the application of the European Charter for Regional or Minority Languages by Germany; Recommendation RecChL (2003)1 of the Committee of Ministers on the application of the European Charter for Regional or Minority Languages by Sweden).
can be found in the central, critical importance of participation of the speakers of the languages concerned (slippage?), at least through consultation, which is clearly reflected in both the text of the Language Charter and the supervisory practice so far.

**Supervisory system of the Language Charter**

At first sight, the supervisory system of the Charter further exacerbates its weaknesses as it is limited to the supervision of periodic state reports and leaves the final responsibility in this regard to a political body, the Committee of Ministers of the Council of Europe. However, as in the case with the FNCM also here the first supervisory activities are undertaken by independent experts (the Committee of Experts). The Committee of Ministers tends to follow the conclusions and recommendations of this independent expert body,\(^{128}\) which arguably strengthens the de facto independence of the monitoring mechanism. This approach of the Committee of Ministers is especially welcome in view of the fact that the Committee of Experts has opted for demanding interpretations of the corresponding state obligations, thus constraining the actual scope of state discretion. Also here the independent expert body tends to ‘encourage the parties to gradually reach a higher level of commitment in accordance with the Charter’.\(^ {129}\)

First of all, regarding the scope ‘ratione linguae’, the Committee of Experts has taken a broad, inclusive approach\(^ {130}\) to the application of the general principles in Part II of the Language Charter. The latter are applied to all languages which, according to the Committee, fulfil the definition in Article 1, irrespective of the State parties’ position.\(^ {131}\) States are indeed urged to reconsider their positions in this respect and include this or that language (that would fulfil the definition of article 1 according to the Committee of Experts) in the scope of part II.\(^ {132}\) This can be contrasted with the situation in terms of Part III, where the state parties can determine for which specific language spoken in their territories they are willing to accept (a certain level of) obligations.\(^ {133}\)

While the Committee of Experts has, until now, not gone as far as urging states to include additional languages in the scope of Part III of the Charter, it cannot be denied that the Committee is interpreting the demands of Part II in an ever demanding way. For

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\(^{128}\) Estebanez & Thornberry, Minority Rights in Europe, 157.


\(^{131}\) Committee of Experts, Opinion on Slovenia (2004), para 38 in respect of Croatian; Opinion on Denmark (2004), §§ 24-26.


\(^{133}\) Committee of Experts, opinion on Finland (2004) par 29; Opinion on Austria (2005) chapter 3 C.
example in its second report on Hungary it felt that in view of the assimilationist experiences, the authorities should take stronger measures inter alia in the field of education for which they should use the current standards for Part III languages to the Part II languages as well. Similarly, in its opinion on the Netherlands, Finland and Austria the Committee emphasized that also in relation to Part II languages a general national language policy should be devised.\textsuperscript{134}

While there are several parallels to the monitoring practice under the Framework Convention,\textsuperscript{135} at least one parallel might not that easily develop and that is the one regarding the nationality requirement. The Advisory Committee has urged contracting states not to adhere too rigidly to a nationality requirement, hence opening the scope of protection of the Framework Convention to ‘new’ immigrant minorities.\textsuperscript{136} Article 1 of the Language Charter, however, seems to rule out a similar development under the Language Charter as it explicitly excludes the languages of immigrants, while defining a regional or minority language as a language traditionally used in the state territory by a group of its nationals (less numerous then the rest of the population). Nevertheless, it can be argued that ‘any line between traditional and recent must logically be modified over a period of time in the life of the charter’.\textsuperscript{137} Similarly, after numerous decades a language of what used to be migrants could be qualified as a language traditionally used by the nationals of a state (and thus included in the scope of the Charter). Hence, a certain relaxation towards languages of at one point immigrant communities would not be entirely unexpected.\textsuperscript{138}

Similarly, the practice of the Committee of Experts has revealed that it does not totally disregard ‘dialects’ either, while it reviews the status, protection and promotion of non territorial languages with increasing vigour, in line with its ever more demanding reading of Part II obligations.\textsuperscript{139}
It was already pointed out that the Charter is predominantly focused on languages with a certain territorial basis. Indeed, the expression ‘within the territories in which such [regional or minority] languages are used’ (or expressions similar to this) are a constant feature of the obligational framework in terms of the Charter. Still, this crucial concept of territory is defined in the Explanatory Report in relative, open terms, more specifically as ‘the geographical area in which the said [regional or minority] language is the mode of expression of a number of people justifying the adoption of the various protective and promotional measures provided for’ in the Charter. In other words, no strict criteria as to the minimum size of territory or an absolute or relative minimum number of speakers are put forward. A progressive interpretation by the Committee of Experts in line with the sliding scale approach could already lift potential barriers to the inclusion of certain languages.

The general principles of article 7 are particularly important, not in the least as the Committee of Experts tends to apply these generously (in any event not limited to languages singled out in the declarations made by state parties). Paragraph 5 clarifies that non territorial languages are not all together excluded as Part II is said to apply to non-territorial languages mutatis mutandis and in a flexible manner, which should take into account the needs and wishes and respect the traditions and characteristics of the groups which use the languages. In view of its broad reading of Part II obligations, the Committee has become more demanding and more concrete in what kinds of additional measures should be taken by the states concerned. The assessment by the Committee of Experts of state undertakings (also) concerning non-territorial languages has proven rather critical, emphasizing that more needs to be done.\textsuperscript{140} Especially in view of the flexibility of the concept territory, it can be argued that elements of justice and need are allowed to enter calculations on whether Charter measures should be applied.\textsuperscript{141}

Article 1 Charter also excludes dialects (of the official languages of the state) of the scope of the Charter. While the Explanatory Report broadens this exclusion to dialects of ‘one and the same language’, it acknowledges that the distinction between dialects and separate languages is also dependent on psycho-sociological and political phenomena.\textsuperscript{142} The Report does not indicate any clear criteria in this respect but basically leaves it to the discretion of the authorities within each state ‘in accordance with its own democratic processes’.\textsuperscript{143} The Committee of Experts has nevertheless taken a critical approach to positions of States in this respect, thus underscoring the limits of this discretion.

\begin{footnotesize}
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\item[140.] Thornberry & Estebanez, Minority Rights in Europe, 145. See also the Committee of Experts opinion on Sweden (2003) § 397 C in which it seems to adopt a rather critical assessment of the territorial dimension in that it underlines that certain obligations should be met irrespective of numbers and level of territorial concentrations of the speakers concerned. See also Opinion on Hungary (2004), §§ 56-57.
\item[141.] Explanatory Report, § 32.
\item[142.] Ibid.
\item[143.] Committee of Experts, Opinion on Sweden (2003), §§ 30-32.
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In its views on Finland’s initial report, the Committee criticized the Finnish authorities for not taking adequate measures to protect the two lesser variants of Sami. The fact that Finland only recognized ‘the Sami language’ obviously did not stop the Committee of Experts to look beyond that denomination and distinguish and evaluate the three variants of Sami. It underlined that all so-called ‘variants’ were entitled to protection according to their specific needs, which takes up the sliding scale approach but emphasizes also the Committee’s inclusive approach _ratione lengua_. Although no express reference was made to the term ‘dialect’ during the exchanges between the Committee of Experts and the State, the Committee’s stance provides a beginning of position regarding the dilemma dialect/language.

In its opinion on Sweden it seems to take this for ‘dialects’ favorable decision further as it indicates concerning the dispute whether Scania is a dialect or a language that each idiom should in any event be treated with a minimum of respect.\(^{144}\) Similarly, the Committee noted that even if Kven Finnish would be a dialect in Norway there would still be a need for urgent action to protect it.\(^{145}\)

More generally in line with the practice of the Advisory Committee under the Framework Convention, the Committee of Experts sets out to circumscribe the at first sight broad discretion of contracting states, while respecting the inherently flexible system of the Language Charter. The Committee has for example not shied away from suggesting that states should accept more demanding levels of state obligations in view of the specific needs and situation of each language spoken in their territories.\(^{146}\) In any event, the Committee tends to critically assess the actual realisation of commitments undertaken by the state authorities which regularly leads it to urge the state authorities to step up their actions.\(^{147}\) In this respect the Committee, like the AC, underscores the need to take the necessary supportive measures, like staff training of the judiciary and/or the civil service.\(^{148}\) The Committee also underlines the need for states to adopt pro-active policy and the appropriate positive measures.\(^{149}\) The fact that speakers of a minority or regional language happen to be proficient in the majority language does not take away this obligation.\(^{150}\) Overall, the Committee of Experts, just like the Advisory Committee of the FCNM, continuously strives for enhanced, better implementation by the state authorities.\(^{151}\)

\(^{144}\) Committee of Experts, Opinion on Norway (2003).
\(^{145}\) Committee of Experts, Croatia, 20 September 2001, § 17. In this regard, the Committee of Experts tends to pay special attention to education as it considers education in the mother tongue one of the most essential ways to protect and maintain a certain language. See e.g. in its opinion on the UK (2004), §§ 118 and 207.
\(^{146}\) Committee of Experts, Opinion on UK (2004), inter alia paras 157, 238-239, 305, 366; Opinion on Slovenia (2004), paras 113, 122 and 193.
\(^{147}\) Committee of Experts, Opinion on Austria (2005), chapter 3 C.
\(^{148}\) Committee of Experts, Opinion on Denmark (2004), §§ 21, and 79.
\(^{149}\) Ibid., § 35.
\(^{150}\) Committee of Experts, Opinion on Sweden (2003), §§ 192 and 224.
\(^{151}\) Emphasis added. In this respect the Committee calls for the establishment of a permanent consultation body, see inter alia Committee of Experts, Opinion on Norway (2003), §§ 42 and 85.
Importantly, also the Language Charter has as a recurrent, central theme the participation of speakers of regional or minority languages to the extent that their needs and wishes have to be taken into consideration in the determination of language policies. The General Principles of part II, explicitly state in this regard that:

“In determining their policy with regard to regional or minority languages, the Parties shall take into consideration the needs and wishes expressed by the groups which use such languages. They are encouraged to establish bodies, if necessary, for the purpose of advising the authorities on all matters pertaining to regional or minority languages”.

In other words, it seems that the broad state discretion granted to states when determining their linguistic policies goes hand in hand with an obligation to involve the groups concerned in taking decisions in this field and to actually take their views into account. In its supervisory practice the Committee of Experts gives further body to this obligation by pointing out that states have to give speakers of the languages concerned a possibility of being consulted on all issues pertaining to language policy, even if these speakers have not requested linguistic support. This participation dimension is also elaborated explicitly in art 11, 3 – as that underscores the importance of the representation of the speakers of the regional or minority languages in bodies mandated to guarantee the freedom and pluralism of the media.

It can also be pointed out that this critical approach of the Committee has manifested itself in the follow up rounds of supervision. The Committee explicitly checks the state reports (and its own findings on the basis of ad hoc state visits) against the recommendations of the Council of Ministers of the previous round and generally takes its agenda of urging states to steadily improve their commitments and practices.

152. Committee of Experts, Opinion on Norway (2003) § 60; Opinion on Slovenia, §§ 54, 63 and 95; Opinion on the Netherlands (2004), § 70.
153. Emphasis added. In this respect the Committee calls for the establishment of a permanent consultation body, see inter alia Committee of Experts, Opinion on Norway (2003), §§ 42 and 85.
154. Opinion on Finland, 2001, § D.
155. Committee of Experts, Norway – second monitoring cycle, 3 September 2003, inter alia § 98 and Chapter 4: Findings of the Committee, A and B.
Conclusion

In view of the various similarities in the way in which the two legally binding instruments of the Council of Europe contribute to the accommodation of linguistic diversity, and considering the steadily expanding ratification record of these instruments, there does seem to be an emerging common European standard in this regard.

At first sight both instruments seem to leave the states a wide margin of appreciation, while the supervisory system only seems to exacerbate the problem because of its weakness. The actual practice of the supervisory mechanism has revealed though that the contracting states implementation record is critically reviewed in a way which increasingly circumscribes this state discretion, continuously pushing states to improve and enhance their de lege and de facto protection levels.

Regarding the scope of linguistic diversity covered by these instruments, the FCNM system promotes the inclusion of immigrant groups and hence also their languages. While the explicit text of the Language Charter seems to rule a similar development out, the Committee of Experts’ inclusive approach reveals careful steps in the direction of a certain level of inclusion.

Regarding both a general focus on substantive equality as the scope of state obligations undertaken by states, a sliding scale approach is reflected or at least implicit in the critical assessments by the supervisory mechanisms. While one cannot distill clear standards from the supervisory practice as the suggestions and recommendations are always related to the specific circumstances of each country/group/language, certain trends can be identified. Numerical thresholds imposed by states are critically reviewed and sometimes a reduction of these standards is recommended. The Committees in any event screen carefully the actual implementation of choices made by the states and underscores the importance of supporting measures like the provision of text books in minority languages and teacher training in the use of minority languages. The Committees indeed increasingly makes concrete suggestions as to how standards and or practice can be improved, slowly but certainly reducing the at first sight boundless state discretion. These suggestions cannot take the form of binding decisions but nevertheless set a certain tone and indicate expectations by a body with considerable de facto authority. Finally, it is also striking that both Committees emphasize throughout the importance of the consultation and participation, even actual involvement, of speakers of minority languages in the decision (and policy) making process.

The practice of the Committee of Experts of the Language Charter has furthermore revealed that as it proceeds in the second monitoring cycle, it tends to proceed with the agenda’s set in the first cycles for the respective states, hence further reducing state discretion. Similar developments are expected for the recently started second monitoring cycle for the FCNM, which would only contribute to strengthen the emerging common European standard in favor of the protection and promotion of linguistic diversity.