

Foreword

Spain has an outstanding record in the protection and promotion of its regional or minority languages, since some of them have official status. We should also note that the autonomous communities, notably the Basque Region, have done extremely well in the implementation of the European Charter for Regional or Minority Languages.

The Basque Region was therefore the natural choice for the venue of the conference organised in April 2009 by the Council of Europe with the University of the Basque Country and the support of Spanish authorities – both the Ministry of Public Administration and the Basque authorities – in order to exchange information about good practices in the implementation of the Charter and to look at the future prospects of the Charter in the light of experience during the first 11 years of its existence.

Europe is an area where numerous language groups have traditionally been in direct contact with each other. They enrich each other all the time. Nevertheless, we must not close our eyes to the fact that any contact between languages represents a challenge. Wherever language groups live together, they find themselves in an asymmetrical relation. Nowhere in Europe do we find a situation where two – or more – language groups have the same number of speakers, use languages at the same level and practise them in the same legal, cultural or economic conditions. In some countries, the tensions that arise may be negligible, but in others they are open and serious, and can even lead to conflict.

At the Council of Europe, our response has been to develop specific policy initiatives and conventions to contribute to stability and linguistic diversity. The European Charter for Regional or Minority Languages has been designed to manage the multiplicity of asymmetrical language situations in Europe. It is the only binding legal instrument worldwide devoted to the protection and promotion of regional or minority languages.

During the first 11 years after the Charter came into force, it helped to promote the use of regional or minority languages in public life without prejudice to the official state language. Nor did it restrict the integration of ethnic groups into society: the Charter does not discourage speakers of regional or minority languages from learning the state language.

Diversity and stability underpin the philosophy of the Charter. Its preamble stresses “the value of interculturalism and multilingualism” and considers that “the protection and encouragement of regional or minority languages should not be to the detriment of the official languages and the need to learn them”. Furthermore, the preamble leaves no doubt that the protection and promotion of regional or minority languages should take place “within the framework of national sovereignty and territorial integrity”.

I believe this is an important message. Although the Charter is concerned with strengthening regional or minority languages, it does not treat majority-language speakers and minority-language speakers as groups in conflict or competition with each other. On the contrary, the Charter treats minority languages as elements of the cultural heritage of the population as a whole and of the state as a whole. It seeks to develop a society in which institutions encourage local or regional bilingualism, rather than the eradication of minority languages from the public sphere.

In other words, the Charter reassures the speakers of regional or minority languages that the state recognises their languages and cultures and does not insist on their assimilation. At the same time, the Charter expects speakers of regional or minority languages to learn the official language and thereby integrate and take an active part in the social, economic and political life of the state. This approach means that the majority becomes sufficiently confident of its own identity to be able to take a positive attitude to the cultural identities of regional or minority-language speakers.

The belief at the basis of the Charter – that the recognition of linguistic diversity ultimately reduces tensions arising from majority–minority relations – is internationally recognised. The Council of Europe and the OSCE promote the Charter as a contribution to the maintenance of peace and stability everywhere in Europe in the context of their enhanced co-operation in the field of national minorities.

At the same time, we must be aware that many European languages face a steady decline in the number of people speaking them. If it is not reversed, this trend will inevitably lead to the extinction of languages in regions where they have been traditionally used for centuries, and where they represent an integral part of regional and national identity.

The fact is that regional or minority languages are an expression of our cultural wealth and diversity. They are a source of cultural richness – not a threat. It follows that a Europe-wide application of the Charter is in the interest of the member states concerned, and also necessary for the promotion

of our shared European values, intercultural dialogue, tolerance and understanding.

That is why I want to reiterate the call to those member states that have not yet done so to ratify the Charter as a matter of priority.

*Right Hon. Terry Davis
Secretary General of the Council of Europe, 2004-2009*

**I.
Before the European Charter
for Regional or Minority Languages**

1. The European Convention on Human Rights and minority languages

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The aim of this chapter is to present the case law established by the European Court of Human Rights (hereafter “the Court”) on the subject of minority languages and the question of whether “linguistic rights” can or cannot be considered one of the human rights safeguarded by the European Convention on Human Rights (hereafter “the Convention”).

We therefore need to begin by briefly considering three basic points: the background to and gradual establishment of the said rights; the sociology of regional or minority languages; and how modern states deal with multilingualism. These parameters will help us to understand the approach taken by the Court in the cases presented here, and the case law resulting from the corresponding judgments, and will also enable us to reach some conclusions.

1.1. The background and gradual establishment of linguistic rights

First, when considering the origins of the protection of minorities, and thus of regional or minority languages, one needs to bear in mind that the main purpose of the system for the protection of minorities and their rights, set up under the auspices of the League of Nations, was that of ensuring international stability – in other words, to ensure that ill-treatment of minorities was not used as a justification or pretext for intervening in neighbouring states. This incipient system included a number of provisions for the protection of languages – that is, “linguistic rights” such as the right to set up private schools or the right for the children of such minorities to receive primary education in their mother tongue in state schools.

Second, this system was very limited in scope: it applied only to minorities living in countries defeated in the First World War, not to minorities in the victorious countries which introduced the system. It established dual standards in the way national minorities were treated.

The end of the Second World War brought about global improvements in the form of new references to linguistic issues, initially of a general and indirect nature, but later more specific, in various legal texts concerning the

protection of fundamental rights. For example, the preamble and Article 2 of the 1948 Universal Declaration of Human Rights referred to:

faith in fundamental human rights, in the dignity and worth of the human person and in the equal rights of men and women ... without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion;

and Article 26 on the right of everyone to education stipulated that:

Education shall be directed to the full development of the human personality and to the strengthening of respect for human rights and fundamental freedoms. It shall promote understanding, tolerance and friendship among all nations, racial or religious groups, and shall further the activities of the United Nations for the maintenance of peace. 3. Parents have a prior right to choose the kind of education that shall be given to their children.¹

Article 27 of the International Covenant on Civil and Political Rights (1966) provided that:

In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language.²

The International Covenant on Economic, Social and Cultural Rights (1966), after stipulating in its preamble that:

the ideal of free human beings enjoying freedom from fear and want can only be achieved if conditions are created whereby everyone may enjoy his economic, social and cultural rights, as well as his civil and political rights,

went further, in its Article 13, enshrining:

the right of everyone to education. They [the Parties] agree that education shall be directed to the full development of the human personality and the sense of its dignity, and shall strengthen the respect for human rights and fundamental freedoms. They further agree that education shall enable all persons to participate effectively in a free society, promote understanding, tolerance and friendship among all nations and all racial, ethnic or religious groups, and further the activities of the United Nations for the maintenance of peace ... The States Parties to the present Covenant undertake to have respect for the liberty of parents and, when applicable, legal guardians to choose for their children schools, other than those established by the public authorities, which conform to such minimum educational standards as may be laid down or

1. See text at www.un.org/en/documents/udhr/.

2. See text at www2.ohchr.org/english/law/ccpr.htm.

approved by the State and to ensure the religious and moral education of their children in conformity with their own convictions.³

Even before that, Article 5 of the UNESCO Convention against Discrimination in Education, in a still more incisive form, stipulated that:

1. The States Parties to this Convention agree that:

(a) Education shall be directed to the full development of the human personality and to the strengthening of respect for human rights and fundamental freedoms; it shall promote understanding, tolerance and friendship among all nations, racial or religious groups, and shall further the activities of the United Nations for the maintenance of peace;

(b) It is essential to respect the liberty of parents and, where applicable, of legal guardians, firstly to choose for their children institutions other than those maintained by the public authorities but conforming to such minimum educational standards as may be laid down or approved by the competent authorities and, secondly, to ensure in a manner consistent with the procedures followed in the State for the application of its legislation, the religious and moral education of the children in conformity with their own convictions; and no person or group of persons should be compelled to receive religious instruction inconsistent with his or their conviction;

(c) It is essential to recognize the right of members of national minorities to carry on their own educational activities, including the maintenance of schools and, depending on the educational policy of each State, the use or the teaching of their own language, provided however (i) that this right is not exercised in a manner which prevents the members of these minorities from understanding the culture and language of the community as a whole and from participating in its activities, or which prejudices national sovereignty; (ii) that the standard of education is not lower than the general standard laid down or approved by the competent authorities; and (iii) that attendance at such schools is optional.

2. The States Parties to this Convention undertake to take all necessary measures to ensure the application of the principles enunciated in paragraph 1 of this article.⁴

Likewise, UN General Assembly Resolution 47/135 of 18 December 1992 adopted the Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities, whose Article 4 provides that:

1. States shall take measures where required to ensure that persons belonging to minorities may exercise fully and effectively all their human rights and

3. See text at www2.ohchr.org/english/law/cescr.htm.

4. See text of the UNESCO Convention against Discrimination in Education, of 14 December 1960, at http://portal.unesco.org/en/ev.php-URL_ID=12949&URL_DO=DO_TOPIC&URL_SECTION=201.html.

fundamental freedoms without any discrimination and in full equality before the law.

2. States shall take measures to create favourable conditions to enable persons belonging to minorities to express their characteristics and to develop their culture, language, religion, traditions and customs, except where specific practices are in violation of national law and contrary to international standards.

3. States should take appropriate measures so that, wherever possible, persons belonging to minorities may have adequate opportunities to learn their mother tongue or to have instruction in their mother tongue.

4. States should, where appropriate, take measures in the field of education, in order to encourage knowledge of the history, traditions, language and culture of the minorities existing within their territory. Persons belonging to minorities should have adequate opportunities to gain knowledge of the society as a whole.

5. States should consider appropriate measures so that persons belonging to minorities may participate fully in the economic progress and development in their country.⁵

Article 30 of the Convention on the Rights of the Child (1989) also stipulates that:

In those States in which ethnic, religious or linguistic minorities or persons of indigenous origin exist, a child belonging to such a minority or who is indigenous shall not be denied the right, in community with other members of his or her group, to enjoy his or her own culture, to profess and practise his or her own religion, or to use his or her own language.⁶

Following the Second World War, similar developments along these lines took place in the European context, most prominently the European Convention for the Protection of Human Rights and Fundamental Freedoms of 4 November 1950 (“the Convention”). This treaty, although it included references to issues related to linguistic rights, dealt with the matter mainly through a general clause prohibiting discrimination, under Article 14:

The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.⁷

5. See text at www.un.org/Docs/asp/ws.asp?m=A/RES/47/135.

6. See text of the Convention at www2.ohchr.org/english/law/crc.htm.

7. The text of the Convention can be found at: www.echr.coe.int/NR/rdonlyres/D5CC24A7-DC13-4318-B457-5C9014916D7A/0/EnglishAnglais.pdf.

This was subsequently set out in specific, albeit no more detailed, terms in Article 1 of Additional Protocol No. 12 to the Convention, which stipulates that:

1. The enjoyment of any right set forth by law shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.

2. No one shall be discriminated against by any public authority on any ground such as those mentioned in paragraph 1.⁸

However, the ground repeatedly relied on in applications to the Court, as we will see, is the right to education or instruction set out in Article 2 of the Additional Protocol to the Convention. This ground is always invoked in conjunction with the general prohibition on discrimination.⁹ Under the terms of the aforementioned Article 2:

No person shall be denied the right to education. In the exercise of any functions which it assumes in relation to education and to teaching, the State shall respect the right of parents to ensure such education and teaching in conformity with their own religious and philosophical convictions.¹⁰

More significant progress on language rights was made in 1992 when the Council of Europe adopted the European Charter for Regional or Minority Languages, whose preamble states:

Considering that the right to use a regional or minority language in private and public life is an inalienable right ... Stressing the value of interculturalism and multilingualism and considering that the protection and encouragement of regional or minority languages should not be to the detriment of the official languages and the need to learn them.¹¹

But this is not the place to compare the content of the Charter or the progress made.

8. See the authorised version of the text in English at www.echr.coe.int/NR/rdonlyres/D5CC24A7-DC13-4318-B457-5C9014916D7A/0/EnglishAnglais.pdf.

9. How could this be otherwise? The prohibition on discrimination was not initially an individual right per se under the Convention; therefore individuals can only rely on it in relation to violation of one of the rights protected by the Convention.

10. See the text of the Additional Protocol at www.echr.coe.int/NR/rdonlyres/D5CC24A7-DC13-4318-B457-5C9014916D7A/0/EnglishAnglais.pdf.

11. See text at <http://conventions.coe.int/Treaty/EN/Treaties/Html/148.htm>.

Similarly, Article 14 of the 1994 Framework Convention for the Protection of Minorities stipulates that:

1. The Parties undertake to recognise that every person belonging to a national minority has the right to learn his or her minority language.
2. In areas inhabited by persons belonging to national minorities traditionally or in substantial numbers, if there is sufficient demand, the Parties shall endeavour to ensure, as far as possible and within the framework of their education systems, that persons belonging to those minorities have adequate opportunities for being taught the minority language or for receiving instruction in this language.
3. Paragraph 2 of this article shall be implemented without prejudice to the learning of the official language or the teaching in this language.¹²

Reference can also be made in the European context to The Hague Recommendations of 1996 on the education rights of national minorities,¹³ in which an attempt is made to clarify the content of minority education rights, or to the 1998 Oslo Recommendations¹⁴ on the linguistic rights of national minorities.

There is also a wide range of non-governmental initiatives, which have emerged from the activities of international governmental organisations, the most relevant of which is the June 1996 Universal Declaration on Linguistic Rights.¹⁵

1.2. The sociolinguistic situation of regional or minority languages

In keeping with the composition and situation of modern states, the typology of minority languages is particularly complex. Nonetheless we can try to establish an initial classification.

The main category comprises languages that are minority languages in one state, but official and majority languages in another, usually neighbouring, state. It must be said that these languages are not under any immediate threat – there is no risk that they will cease to exist as spoken languages – but, if they are not officially recognised in the state where they are a minority, their use, importance and prestige there will decline. In many cases, restrictions on the use of these languages can cause international tension, depending on

12. See the text of the Convention at <http://conventions.coe.int/Treaty/EN/Treaties/Html/157.htm>.

13. See the text at www.osce.org/documents/hcnm/1996/10/2700_en.pdf.

14. See the text at www.osce.org/documents/hcnm/1998/02/2699_en.pdf.

15. See the text of the Declaration at www.unesco.org/cpp/uk/declarations/linguistic.pdf.

the states concerned. Two examples are the use of German in Italy, which seems unlikely to create tension, and the use of Russian in former Soviet republics, which is more likely to cause tension.

Second, there are indigenous minority languages that are spoken in two or more states but are not a national language in any state, as in the case of Basque, which is spoken in Spain and France, or Sámi, which is spoken in several north European countries.

Third, there are minority languages that are spoken in only one country, for example Scots Gaelic or Welsh in the United Kingdom. It is difficult to imagine in these two cases that this could give rise to tensions that might jeopardise peace or stability in the countries concerned, but the number of speakers of these languages has greatly decreased¹⁶ and this poses a threat to Europe's wealth of languages.

1.3. How modern states deal with multilingualism

There is an obvious and substantial linguistic diversity, and a wide socio-linguistic and demographic diversity of regional or minority languages, in Europe. However, the way of dealing with this linguistic diversity has focused on the over-riding interests of the modern nation–state, including (as we all know) the defence of monolingualism, in some cases as a means of unifying different cultural communities but also as a way of promoting a single national identity, which is strengthened by the establishment of a single national language.

At a time when the emphasis was on strengthening the nation–state, linguistic diversity was sometimes perceived as a problem or even a threat. This negative perception was the result of the role played by language in defining and constructing national identities; also, minority languages are seen as a barrier to communication to the detriment of the consolidation of a single national identity. Linguistic diversity within the modern nation–state is therefore seen as an element that undermines the establishment and stability of a single, unified political community, one that sows the seeds of division and instability. It may even be considered to pose a threat to the political unity of the state.¹⁷

16. Compared to 100 or 150 years ago, these languages have declined but there has been a rather successful revival of the Welsh language in the past 30 years, one of the best examples of language revitalisation in Europe.

17. See M. König, "Cultural diversity and language policies" at: www.unesco.org/issj/rics161/koenig-spa.html; E. Ruiz Vieytez, "Lenguas oficiales y lenguas minoritarias: cuestiones sobre su estatuto jurídico a través del derecho comparado", *II Simposi Internacional Mercator: Europa 2004: Un nou marc per a*

This approach has sometimes resulted in language policies that are exclusive and uphold the idea of a single national language, an idea which is clearly detrimental to regional or minority languages. The strategic objective underlying the intervention of the national state in such cases is a single national language that is common to all the state's inhabitants and, insofar as is possible, the disappearance of minority languages. At a slight risk of generalisation, it can be said that, following the strengthening of the modern nation-state, national governments in Europe have responded to the situation of linguistic minorities established in their territory either with inadequate policies entailing negative effects for linguistic diversity or even with hostile linguistic policies designed to undermine or eliminate minority languages.

In view of this situation – and especially with the spread of globalisation, accompanied by massive flows of migrants resulting from the state succession that has occurred on the European continent since the 1980s – those communities which are increasingly concerned by the problem have turned to the international organisations responsible for upholding human rights to protect what are now known as “linguistic rights”. We will therefore now take a look at the applications that have been lodged with the European Court of Human Rights.

1.4. Cases brought before the European Court of Human Rights

It is a well-known fact that the Court's jurisdiction extends only to applications concerning violation of the rights and freedoms covered by the Convention, in accordance with Article 32 thereof. This international treaty neither recognises expressly linguistic rights nor does it expressly protect them as fundamental rights. Nevertheless, given that Article 14 of the Convention prohibits discrimination, *inter alia* on grounds of language, and that Article 2 of the Additional Protocol to the Convention establishes the right of parents to ensure education and teaching for their children in conformity with their own religious and philosophical convictions, European citizens have also applied to the Court to protect their linguistic rights. Consequently applications were submitted at a very early stage, even before the ban on discrimination was fully established following the adoption of Additional Protocol No. 12.¹⁸

totes les llengües?, 27-28 Feb 2004; and G. Calaforra, “Lengua y poder en las situaciones de minorización lingüística”, at: www.uv.es/~calaforr/CursColonia.pdf.

18. See R. Dunbar, in E. Vieyetz and R. Dunbar (eds), *Human rights and diversity: new challenges for plural societies*, Bilbao, 2007. With particular reference to the Court's case law, see G. Gilbert, “The burgeoning minority rights jurisprudence of the European Court of Human Rights”, *Human Rights Quarterly*, 24 (2002), 736ff.

In addition, Article 6.3a (and e) of the Convention sets out provisions on criminal proceedings, establishing the right of the accused to be informed of the charges against him in a language which he can understand and his right to the free assistance of an interpreter if he cannot understand the language used in court.

In light of these provisions, it is possible to identify two types of cases: 1. those which can be considered as concerned with linguistic rights relating to the right to a fair trial; and 2. those which can be considered as connected with linguistic rights relating to the right to education.

1.4.1. Linguistic rights relating to the right to a fair trial

These are rights which will duly also become linguistic rights relating to public affairs, insofar as the courts form part of the public authorities.

The first case in this respect was that of *Isop v. Austria*,¹⁹ in which a person of Slovenian nationality claimed the right to use Slovenian in criminal proceedings, despite the fact that he also spoke German. The European Commission of Human Rights²⁰ decided that Article 6 of the Convention did not include the right to be heard in court in one's own mother tongue.

In a later case, *Bidault v. France*,²¹ concerning statements by French witnesses whose mother tongue was Breton and who claimed the right to use that language despite the fact that they also spoke French, the European Commission held that the cited Article 6.3 did not recognise witnesses' right to choose the language they wished to use in court.

In the 1990s, in the *Lagerblom v. Sweden* case,²² the Court had to rule on a case in which the applicant, who resided in Sweden and spoke Swedish, but whose mother tongue was Finnish, claimed that it had been impossible for him to choose a defence counsel who spoke Finnish, with whom he could communicate in his mother tongue and whom he could fully understand, despite the fact that he belonged to the Finnish minority living in Sweden. On the contrary, he had been assigned a defence counsel with whom he could only communicate through an interpreter. The applicant claimed that he had the right to be assigned a Finnish-speaking lawyer in accordance

19. See Case No. 808/60 of 1962.

20. The Commission was created by the European Convention of Human Rights with multiple functions in the procedure of examining complaints – most significantly, the competence to decide admissibility. After Protocol No. 11 came into force, it was abolished and its functions and those of the former Court given to the new Court.

21. See Case No. 11261/84 of 1986.

22. See Case No. 26891/95 of 14 January 2003.

with Article 6 of the Convention. The Court held that the right safeguarded by Article 6 of the Convention was not absolute and therefore did not give the accused the right to be assigned a lawyer of his own choosing, notwithstanding the importance of a relationship of confidence between lawyer and client. Consequently the Court held that Article 6 of the Convention did not, in itself, safeguard the right to choose a lawyer who necessarily spoke the minority language of the accused, provided that the interpretation was adequate to enable the accused to participate effectively in his trial.

1.4.2. Linguistic rights relating to the right to education

This set of applications to the Court concerns requests for protection of an assumed right to be educated in one's own minority language as a human right safeguarded by the Convention, which, as we saw when considering the recognition of such rights in the Convention and some of its additional protocols, continues to pose problems.

The first case concerned "certain aspects of the laws on the use of languages in education in Belgium"²³ in a number of applications by French-speaking Belgian parents who wished their children to have the possibility of being taught in French in primary and secondary state schools, despite the fact that they lived in a Flemish-speaking area and that under Belgian law they were obliged to receive their education in Flemish, following the establishment in Belgian legislation of the principle of the territoriality of languages. The application was lodged from the perspective of the right to education.

The Court held that the negative wording of Article 2 of the Additional Protocol to the Convention did not imply an obligation for states parties to establish or subsidise any form of education chosen by parents, thereby allowing the state a wide margin of appreciation with regard to the resources to be assigned to the education system and its organisation. It also held that interpreting the terms "religious" and "philosophical" as including parents' linguistic preferences distorted the ordinary meaning of these terms and read into the Convention something which was not there.

With regard to the alleged violation of Article 14 of the Convention, the Court held that it was impossible to base the application solely on the ground of discrimination against the said pupils, because it was not an autonomous right. Moreover, the establishment of instruction solely in Flemish in certain areas where the population was predominantly Flemish and of French in Walloon areas was not incompatible with Article 14 of the Convention,

23. Known as the "Belgian Linguistic case" of 23 July 1968.

which did not prohibit different treatment in situations which are different de facto.

In 2005 the Court applied the same reasoning in the case of *Skender v. "the former Yugoslav Republic of Macedonia"* concerning the abolition of teaching in Turkish,²⁴ which meant that the applicant had to move to another area. As in the Belgian linguistic case, the Court held that this complied with criteria of territoriality and that Article 2 of the Additional Protocol to the Convention, in conjunction with Article 14 of the Convention itself, did not confer an absolute right on parents to choose any form of education they wished in any specific minority language.

Although the Court's decision in the Belgian linguistic case did not recognise a right to education in the minority language, by including education in a minority language within the scope of Article 2 of the Additional Protocol, it nevertheless sowed the seeds for indirect protection of such a right in the future, even if this did not apply to the Skender case.

The *Cyprus v. Turkey* case²⁵ stemmed from the closing of the only secondary school providing secondary education in Greek in the northern part of Cyprus, resulting in a fundamental discontinuity in those children's education given that, though primary education was provided in Greek, secondary education was provided only in Turkish. In the Court's view this was a denial of the basic right to education because, although the possibility of continuing to the next level of education formally existed, it was impossible in practice for these pupils, who did not have sufficient knowledge of the Turkish language. The Court was to a certain degree influenced by the tension existing on the border between the Turkish controlled area of Cyprus and the rest of the island and the dangers that students could face if they had to cross the border every day.

In its judgments the Court has recognised that states have considerable freedom in deciding their own linguistic policies, as can be seen in *Podkolzina v. Latvia*,²⁶ in which the Russian-speaking applicant had been a candidate for election to the Latvian parliament. To show that she had sufficient command of the Latvian language, the applicant had been obliged under Latvian legislation to sit a test, in which she had been successful. However, she had been obliged to sit a further ad hoc test in particularly strained and difficult conditions, after which she had been eliminated from the list of candidates.

24. See Case No. 62059/00.

25. See Case No. 25781/94 of 10 May 2001.

26. See Case No. 46726/99 of 9 April 2002.

The Court did not question the state's right to ensure that the candidate had adequate command of a particular language, because it considered the requirement to prove adequate proficiency in the official language legitimate and proportional, given that the choice of working language in a national parliament is determined by specific political and historical considerations in each country. However, the way the test had been conducted in this case was held to be a violation of the Convention. This case also has a clear connection with participation in public affairs by speakers of regional or minority languages, and possible discrimination against such participation.

In the *Slivenko v. Latvia* case,²⁷ the Court had to rule on the deportation of the wife and daughter of a retired Russian army officer, who had lived all of their lives in Latvia. As a result of the new Latvian nationality law adopted after Latvia became independent from the former Soviet Union, they had lost their nationality and been obliged to leave the country; anyone who violates this law may be extradited from Latvia for five years. This line of reasoning differed from that applied in cases of soldiers still on active service who also belonged to the Russian-speaking minority. The Court found the application, which invoked discrimination on the basis of the applicant's ethnic language or origin, inadmissible given that language was not the decisive element in this case. The Court reached the same conclusion in the *Sisojeva and others v. Latvia* case, which was based on similar grounds and adopted the same reasoning.²⁸ (See pp. 69-71 for basis of such cases.)

*D.H. and others v. Czech Republic*²⁹ is the latest case to date on this subject; it was dealt with by the Grand Chamber. The applicants alleged that, because Czech education laws obliged them to sit exams to prove their proficiency in the national language (and not in their minority language), most Roma children of primary and secondary school age were sent to schools for children with special needs. In practice this constituted disguised discrimination, based not so much on language as on ethnic origin insofar as the Czech educational system had two parallel school networks: ordinary schools for most of the Czech population and special schools for retarded children, to which almost all Roma children were sent. The applicants invoked the right not to be subjected to such discriminatory and degrading treatment, given that the difference in treatment was not based on any objective and reasonable justification. They also claimed that it had deprived

27. See Case No. 48321/99 of 9 October 2003.

28. See Case No. 60654/00.

29. See Case No. 57325/00 of 7 February 2006.

them of the right to education, as the school curriculum in such schools was inferior and limited their possibilities of obtaining secondary education.

Although the application was based first and foremost on discrimination and violation of the right to education on grounds of ethnic origin, the entrance examination in the official language was an important element to consider, because it failed to take account of the importance of the minority language; thus, Roma children had poorer results and this was used to justify treating them as retarded children who required a different type of schooling.

In view of this situation, the Court for the first time acknowledged that the education policy in question had resulted in indirect discrimination in relation to the right of minorities to education. Moreover, despite its usual reluctance to impose positive obligations on the basis of Article 2 of the Additional Protocol to the Convention – which is negatively worded – the Court found that, given the circumstances of the case, the application of Article 14 of the Convention in conjunction with Article 2 of the Additional Protocol called for affirmative action by the respondent state, given the particular vulnerability and needs of Roma children. The Court did not consider only the linguistic aspect, but looked rather at the final outcome of this educational policy, despite the fact that the Czech Government claimed that the Court was indulging in undesirable judicial activism and that it was necessary to have a wide margin of discretion when dealing with such a sensitive social issue.

These are recent positive steps to protect minorities and, indirectly, their linguistic rights in relation to education, but one should remain cautious and avoid extrapolating conclusions. Indeed, the Latvian and Czech cases cited above are different from the previous ones in the sense that the applicants were discriminated against on the grounds that they did not master the official language well enough, rather than them being deprived of their right to speak, use or learn their mother tongue. Thus it might be difficult to argue that there has been a clear-cut evolution of the Court's case law on linguistic rights, which appear to be multi-faceted.

1.5. Some conclusions

It is difficult to draw clear conclusions on the protection of linguistic rights as human rights from these specific examples of very indirect protection of linguistic rights under the Convention and its additional protocols, as seen in the Court's case law analysed above.

However, it can be said that certain linguistic rights have been established since the initial emergence of systems for the protection of minorities, reflecting this concern at international and regional level, particularly in Europe.

It can also be said that, in order to understand the conclusions reached by the Court in cases dealing with this type of rights, it is necessary to take account, on the one hand, of the sociological situation of these languages and the way in which states have addressed the issue and, on the other hand, of the weak substantive basis on which the Court based its decisions: the sole possibility of indirect protection through Article 2 of the Additional Protocol to the Convention, taken together with Article 14 of the Convention.

Moreover, the Court's case law on such issues, although limited, has been slowly expanding. It is interesting to note the development which allows the Court, while acknowledging that states have a wide margin of discretion in protecting the right to education, to require from those very states that they take positive action in certain circumstances.

To date this case law has been restricted mainly to issues such as the right to education in the minority language and the right to take part in one's own trial in one's mother tongue. There are still very few judgments in this area, but a tendency is visible in certain cases for the Court to allow more substantive complaints in the field of languages.

Consequently, it would seem possible – and even desirable – to improve the protection of linguistic rights in Europe. This might be achieved in two ways: either by incorporating an additional protocol to the European Convention on Human Rights, on individual cultural rights for people belonging to a national minority (though one should recall the failed attempts of the 1993 Vienna Summit in this respect); or by negotiating other treaties to protect the cultural rights of national minorities, the method used in adopting the Framework Convention for the Protection of National Minorities and the European Charter for Regional or Minority Languages.

The latter convention and the practice of the Committee of Experts seem to offer promising avenues; they demonstrate that the Charter brings with it real added value, for example, in the unconditional right to use the regional or minority language in court or, with regard to education, in Article 7 and all of Article 8 of the Charter.