

Introduction

Minority Language Policy: Theory and Practice

Stefan Oeter

I. Ten Years of Experience with the Language Charter

In 1998, not only the Council of Europe's Framework Convention for the Protection of National Minorities, but also the European Charter for Regional or Minority Languages (Language Charter) entered into force. Thus, we are celebrating in 2008 the tenth anniversary of this peculiar treaty instrument – and we can look back on ten years of experience with the attempt to protect minority languages through mechanisms of international treaty law.¹ Protection of languages traditionally has been a prerogative of national minority legislation and language laws. With the Language Charter, treaty law has started to develop a kind of minimum standard for national language legislation.² Such minimum standard is not all-encompassing – only about half of the member states of the Council of Europe are bound by the Language Charter, and only 14 out of the 27 member states of the EU have ratified the Charter. So the question arises: is it worth looking to the Language Charter if so many states are not willing to accept its rules as a common standard for language policy in Europe?

Phrasing the question in such a manner is risking to distort the issue. The drafting of the Language Charter has not been a futile attempt – just to the contrary, it has been a very successful enterprise. Even if an important number of European states is signalling that they are not willing to abide by the Charter's standards, they are not denying that the Charter has codified a series of useful and sensible rules on how to design a suitable language policy concerning minority languages in a Europe characterized historically by linguistic diversity but in future threatened by a strong cultural homogenization. The 'menu approach' of the Charter may look strange at first sight – the experiences with it demonstrate that in particular the flexibility of the 'menu approach', with its possibilities to tailor a specifically adapted set of undertakings, helps to do justice to the diversity of socio-linguistic situations in the various

¹ See also Sia Spiliopoulou Akermark et al. (eds.), *International Obligations and National Debates: Minorities around the Baltic Sea* (The Aland Islands Peace Institute, Mariehamn, 2006).

² See Patrick Thornberry and Maria Amor Martin Estébanez, *Minority Rights in Europe. A Review of the Work and Standards of the Council of Europe* (Council of Europe Press, Strasbourg, 2004), 137-168.

states of Europe.³ And such diversity of situations is not only striking if one looks into the language policy of different European states, but occurs also within individual states - one might think of the discrepancies between the situations of Danish and Frisian in Germany, between Welsh and Scottish Gaelic in the United Kingdom, between Catalan and Asturian in Spain, between German and Albanian in Italy. Minority language policy evidently is path-dependent, and often can only be explained with a view to the history of certain languages and linguistic communities, but also to the history of official language legislation. You can not set abstract standards and then expect states to change drastically its language policy – language policy is a regime which usually has grown in a long historical process, intimately linked with the project of nation ‘state-building’,⁴ and thus is open only to gradual changes under normal circumstances.

Practice under the Charter also is forced to manoeuvre between the two poles of a sweeping rights rhetoric used by NGO’s on the one hand and Council of Europe member state’s attempt on the other hand to phrase the Charter as a purely ‘objective’ instrument that formulates certain prerequisites for national language policy. Text and drafting history of the Charter tell an obvious lesson – European states wanted the Charter not to become a human rights instrument, but an instrument with norms of an ‘objective character’ protecting cultural and linguistic diversity in Europe.⁵ However, as often happens with law drafted in a particular perspective - you can never predict the ironies of legal evolution. The Charter has managed to transform language policy in a number of states – and in that process it has empowered minority language communities to insist on their rights and to press for an improved legislation and better institutional arrangements.⁶ Evidently there is no hint of granting individual or collective rights in the wording of the Charter – but in practice the Charter has created legal standards that work like individual and collective rights and that empower minority language speakers to insist upon education in minority languages, on using the language before judicial courts and the administration, on claiming a right to receive radio and television programmes in minority languages, and on insisting to be treated in the minority language in hospitals and

³ See Stefan Oeter, ‘The European Charter for Regional or Minority Languages’, in: Gaetano Pentassuglia (ed.), *Mechanisms for the Implementation of Minority Rights* (Council of Europe Publishing, Strasbourg, 2004), 131, at 132-135.

⁴ See only Eric J. Hobsbawm, *Nations and Nationalism since 1780. Programme, Myth, Reality* (Cambridge University Press, Cambridge, 1990).

⁵ See the Explanatory Report to the European Charter for Regional or Minority Languages, ETS 148.

⁶ See Sia Spiliopoulou Akermark, ‘Conclusions’, in: Sia Spiliopoulou Akermark et al. (eds.), *International Obligations and National Debates: Minorities around the Baltic Sea* (The Aland Islands Peace Institute, Mariehamn, 2006), 589, at 593-595.

homes for the elderly, to name only some of the most important guarantees of the Charter.

The lesson to be drawn from this experience is ambivalent: states are keen on avoiding a rhetoric of linguistic rights, want to phrase language legislation in purely objective terms – but it is difficult to avoid that suitable legal standards developed in the field of minority language policy are understood as linguistic rights and are instrumentalized by minority language communities as a tool of empowerment vis-à-vis the state. To a certain degree states themselves bear the responsibility for such a dynamic. Experience has shown that there exists a temptation for politicians to grant minority language communities some symbolic, more or less programmatic promises of recognition and protection, without wanting to grant operational measures of protection and promotion of the language afterwards. One step of symbolical recognition may be the ratification of a treaty like the Language Charter – but it may also be the inclusion of a minority language protection clause in the constitution or the enactment of a programmatic piece of language legislation.⁷ Such programmatic norms are far from being unimportant – but they do not suffice to establish an operational system of protecting and promoting a language. Nevertheless, majority politicians often think that with granting such symbolic promises of protection, they have done what is expected from them – and that nothing more is needed. In such a case, it is not astonishing that minority language communities and their organizations start to exploit the legal potential of the existing programmatic norms. If the operational pieces of legislation are missing, one must try to deduce operational rules from the abstract principles laid down in international treaties, constitutional clauses and programmatic framework statutes.

In such a perspective, the astonishing relevance of such programmatic documents like the Language Charter points to a deficiency in national legal orders. States have made some general promises in the constitutions and their treaty undertakings, but they have not shown the corresponding willingness to transform these promises into the small coins of operational legislation of a more technical character. Another problem must be borne in mind as well. Ordinary legislation is to a certain degree contingent, dependent on the volatilities of the political process. If political majorities change, they might be tempted to take away statutory rights and privileges that had been granted by former majorities. In terms of majority policy

⁷ See Alan Patten and Will Kymlicka, 'Introduction: Language Rights and Political theory. Context, Issues and Approaches', in: Will Kymlicka and Alan Patten (eds.), *Language Rights and Political Theory* (Oxford University Press, Oxford, 2003), at 41.

such a move might make sense; for minority communities it might be fatal, however, since they are often very weak in a socio-linguistic perspective anyway. Constitutional guarantees and normative baselines enshrined in international treaties might fulfil here an essential role in policing the fundamental boundaries that should not be overstepped by contingent majorities.

II. **Minority Language Policy and its Legal Aspects as a Focus for JEMIE**

Dealing with such questions of minority language policy and its legal repercussions accordingly is a desideratum that has been taken up by JEMIE with this special issue. The topics that the articles are dealing with are admittedly diverse. Nevertheless, there is a common thread running through the various contributions. The articles try to cope with the richness of experience that minority language policy on the national level, but also at the international level has produced during the last decades. If you go back some twenty or thirty years, there were only a handful of examples for a sensible kind of language policy intended to protect and promote minority languages. This has completely changed during the last decades. Countries like Spain or the United Kingdom have made decided efforts to develop an elaborate and refined minority language policy – with the result that we have now such a plethora of exemplary cases and potential lessons that might be drawn from such cases that it has become difficult to keep an oversight. The contributions of this focus issue start from the richness of practical experience with minority language policy and attempt to draw some more general lessons from it.

The contribution of Xabier Arzoz on the nature of language rights⁸ is going directly to the heart of any legal debate on minority language policy, namely the eternal question whether it really makes sense to phrase legal standards for minority language policy in terms of human rights. The traditional legal debate that evolved during the 1990's on issues of minority protection (and minority language protection) showed a clear tendency to use the paradigm of human rights. As Xabier Arzoz writes in his introduction, human rights are an integral part of the legal revolution that has taken place since 1945, and human rights have become a significant element of modern political culture. When an individual or a group has a claim, Xabier Arzoz writes, “it tends to be formulated in a rights discourse and, more often than not, in a human rights discourse.” Accordingly, it seems logical at first sight to use such paradigm as the primary code for formulating legal standards of minority language policy. But it is far from evident that such

⁸ See Xabier Arzoz, ‘The Nature of Language Rights’, published in this volume..

a coding in human rights terms really makes sense. It might also be that a human rights language distorts the issues that we have to deal with when we are trying to develop sensible legal answers to the challenges of minority language policy. The thought-provoking and seminal article of Xabier Arzoz deals very critically with the issue – and comes to an answer that might sound astonishing to many lawyers, an answer which nevertheless is convincing if one follows the arguments of Xabier Arzoz.

His starting point is difficult to deny. The human rights revolution has produced an inflation of rights claims in political discourse as well as in legal doctrine. “The range of interests subject to rights claims has grown considerably.” Part and parcel of such growth is the attempt of a number of leading specialists on minority language issues to advocate a human rights approach to ‘language rights’, with the ensuing concept of ‘linguistic human rights’.⁹ The charm of such a formula is that it seems to promise to every inhabitant of the planet an extended language rights scheme that seems to be prone to universalization. Such inflation of rights language has not only been driven by activists and sympathetic legal scholars, but also by international organizations that contributed “to creating a false image of an extended level of protection of language rights”.¹⁰ The human rights approach depends, however, on a number of assumptions about law and human rights which legal science, as Xabier Arzoz argues, might find questionable. At first the rights discourse neglect to a large degree the dimension of necessary limits of such rights – and the more sweeping the claims of the rights discourse are, the more dramatic the question of limits becomes. Secondly, the rights discourse misrepresents the actual status and significance of the claimed ‘language rights’ - they are not ‘hard’, operational human rights entitlements but ideals and aspirations, and are “not as entitlements already recognized by international binding rules and whose effective implementation can be demanded of states”. The author cogently argues that the equation between language rights and human rights leads to a distorted image of the relationship between law and politics. While human rights – at least traditional civil and political human rights – do limit state behaviour, set limits for the permissible intrusions of state organs into the liberties of societal actors, language rights are an issue primarily devolved to the political process.¹¹ International treaties, constitutional law, but also statutory law may fix baselines, fundamental boundary lines, and may set certain guidelines for the political process. Language rights, however, cannot in itself

⁹ Ibid., at I.

¹⁰ Ibid.

¹¹ Ibid.

determine the details of what should be done in education or the media field. They are, in the terminology used by Xabier Arzoz, in most cases ‘positive rights’ that call upon the state to grant certain kinds of services (like education, communication with the administration and the courts, mass media programmes) through the medium of minority languages.¹² One of the basic insights of modern ‘language rights’ debate is the fact that the traditional ‘status negativus’ rights, like a general ban on discrimination and other classical individual rights, are not sufficient for the protection of linguistic minorities, and that the unique position of such minorities within society justifies providing them additional legal safeguards.¹³ The mentioned additional safeguards, however, have different degrees of ‘enforceability’, ranging from self-executing to merely programmatic norms. This implies that the state is under a duty to develop further activities in order to make its citizens benefit from the rights granted – a set of activities that necessarily involves a broad range of public authorities that should further develop the guidelines set in the more or less programmatic ‘language rights’ provisions.¹⁴ To bridge the gap created by a lack of implementing activities with a simple recourse to deductions from the programmatic provisions will be difficult in such cases, if possible at all in practical terms.

In the core part of his contribution, Xabier Arzoz argues convincingly that language rights are only in certain limited dimensions an integral part of human rights law.¹⁵ The basic regime of linguistic tolerance, that is, the safeguards against discrimination and against various forms of forced assimilation, are comprised by traditional human rights law. The more ambitious set of ‘positive rights’, requiring the state to serve its minority citizens in their own languages, are alien to human rights, at least in its classical version. Xabier Arzoz tries to explain this “poor status of language rights in international law”.¹⁶ Contrary to traditional ‘negative rights’ that have a clear function in moderating ethnic conflict and in pacifying society, ‘positive’ language rights are potentially divisive. They depend on the particular circumstances of a given language in a given society. Establishing universal rules of fairness in the interaction of people from different linguistic communities would soon prove to be doubtful enterprise – such rules are context-dependent and must be tailored to the specific circumstances. Their challenge is not a universal question, but a culture-specific one. “Given that the conditions of states, languages

¹² Ibid., at 2.

¹³ Ibid.

¹⁴ Ibid.

¹⁵ Ibid., at 3.

¹⁶ Ibid., at 3.2.

and their speakers are so extremely different, it is difficult to elaborate international principles of linguistic promotion based on consensus.”¹⁷ Coping with the inevitable indeterminacy of language rights for various reasons cannot – as it is the case with traditional human rights – be a mere matter of interpretation, left to courts or other treaty organs. Granting language rights to individuals implies assuming duties on the part of the government, which has to provide the necessary personnel and material resources to facilitate minority language services in administration, education, justice, the mass media and so on. The conceivable options of how such an implementation might take place are many. That is – so argues Xabier Arzoz – “why politics are essential in accommodating linguistic diversity, defining language rights and managing linguistic conflicts. The content of language rights is a product of the political process within each society.”¹⁸ Acknowledging a state’s leeway for formulating its language policy does not admit of the possibility that a state may opt for cultural or linguistic homogenization. But, apart from certain basic guarantees, extended areas of language policy and law are not covered by international human rights - an observation which is particularly true with regard to core issues of language maintenance and promotion.

This does not say that international law cannot deliver further contributions to develop these fields of language law. In order to do this, however, framers of international instruments must avoid human rights language. The author demonstrates this with the example of the Council of Europe’s Language Charter.¹⁹ In his perspective – and I share this perspective – the framers of the Language Charter decided to remedy the minority language-related shortcomings of traditional human rights instruments without appealing to a rights-based approach. States preferred enhancing the protection of minority languages through objective measures – a set of measures that breaks the field of protection of minority languages into manifold options in order to construct a comprehensive framework that should match as closely as possible the needs of protection and interest of each particular language. The Language Charter’s contribution to this objective is not inconsiderate, as Xabier Arzoz observes. The Charter considerably advances the standards of protection in areas where universal instruments are very deficient. The Language Charter “goes beyond other instruments in interlacing the public space with a complex of language requirements”.²⁰ If evaluated from a human rights perspective, however, one’s assessment will tend to be unfavourable, the author proposes – and the

¹⁷ Ibid.

¹⁸ Ibid.

¹⁹ Ibid., at 4.

Language Charter will consequently be reported as having egregious deficiencies. The Charter does not guarantee enforceable rights, neither individual nor collective, but it encourages states to take positive measures to protect and promote minority languages. States are allowed to differentiate in developing such positive measures, and they have a wide – and discretionary – choice which measures they think are adequate in light of the specific circumstances. The major point made by Xabier Arzoz is accordingly that the Language Charter does not aspire defining the rights of linguistic minorities as such, but rather limits itself to providing the rudiments for developing context-based standards of protection of minority languages. The context-based varying standards established by the Language Charter “should be adjusted by the states to the needs of each particular language, taking account of the needs and wishes expressed by the group which speak it”.²¹

A comprehensive analysis of the set of constitutional guarantees for minority languages in the legal orders of a series of European countries corroborates the lesson of the context-based nature of the varying standards used in the different constitutional orders. There clearly is a “wave of constitutionalization of language rights” in recent years, but the concrete content of such ‘constitutionalized’ linguistic guarantees varies a lot, according to the specific context.²² Can these constitutional guarantees be understood as fundamental rights? Xabier Arzoz remains sceptical with regard to this point. There clearly is a linguistic dimension of linguistic rights, but the most essential issues – at least if perceived from the perspective of language maintenance and promotion – are beyond the outreach of a fundamental rights approach. He demonstrates this with the example of linguistic regimes for education. There is a ‘right to education’. But education must be provided in speech and writing through a certain language – and the general ‘right to education’ does not include the right to be educated in one’s chosen language. It is more or less the choice of the national legislator to determine the languages of education – and the concrete regime of how various languages are used in the educational field when a legal system opts for the presence of more than one language.²³

The conclusion is clear: “Language rights are not universal but a socio-political construct of certain societies.” There is – as Xabier Arzoz argues – no universal understanding of language rights. They are not essentially given and do not exist prior to positive enactment. “Language

²⁰ Ibid.

²¹ Ibid.

²² Ibid., at 5.1.

rights are local, historically-rooted claims, not fixed universals.” There exist a few linguistic human rights as such, in principle of negative character. But the main bulk of ‘language rights’, its recognition and status, is a political matter. Accordingly, language rights are primarily constructed at the national level.²⁴

This sounds a bit resignatory, but it is realistic in my perspective. My own experience of nearly ten years inside the treaty mechanism of the Language Charter has told me more or less the same lessons as the ones brought forward by the contribution of Xabier Arzoz. International mechanisms may deliver a suitable mechanism for stabilizing expectations: if a state makes certain promises concerning minority language protection, the treaty bodies can remind the state organs of such promises (transformed into international legal obligations) and can contribute to a certain degree to a legal empowerment of minority language communities in claiming the operationalization of such promises. International law cannot, however, define in concreto the operational details of an adequate language legislation. This must be done at the national level, and the international level plays only a supplementary level in this regard.

The contribution of Valeria Cardi on “Regional or Minority Language Use before Judicial Authorities: Provisions and Facts” has a much more limited focus. Contrary to the contribution of Xabier Arzoz with its orientation towards theoretical questions, the essay of Valeria Cardi has a definite empirical focus. It is looking at the practical implementation of international standards, with a particular focus on the practical impact that such international standards might make. In essence, however, the underlying question is very similar to the question driving Xabier Arzoz: Ms. Cardi is looking into the question whether (and to what degree) international standards really have an impact upon the practice of minority language policy – and upon the linguistic patterns of minority language speakers.

For that purpose, Valeria Cardi has singled out a limited undertaking under the Language Charter covering a specific social domain of language use, namely the use of minority languages before (and in proceedings of) judicial courts. This domain of language use is characterized by a very low presence of minority languages – even in societies where minority languages as such have a strong protection and promotion. The Language Charter has dedicated

²³ Ibid., at 5.2.

²⁴ Ibid., at 6.

an entire paragraph to the issue of minority language use in the judicial field²⁵, and the variations in the different options give the possibility of investigating the relevance of the various choices for practical language use in the judicial sector. The member states of the Charter have ratified rather different options – but does this really make a significant difference in social practices? Valeria Cardi uses the monitoring reports of the Committee of Experts for the Language Charter as a source of information on the practical implementation of the provisions – and this is a justifiable methodology, since the Committee of Experts invests a lot of efforts and resources in gaining a reliable picture of the practical implementation of the Charter.

The assumptions underlying Valeria Cardi's study resemble very much the result of the contribution of Xabier Arzoz. Ms. Cardi also starts from the premise that language rights have a (limited) human rights core, in the sense of traditional 'negative' rights protecting societal liberties against excessive intrusions by state organs, whereas the main bulk of language rights consists of 'positive' rights going beyond the realm of traditional human rights law, 'positive' rights that oblige the state to provide certain key public services through the medium of minority languages.²⁶ She demonstrates the differences between the two categories in a part where she distinguishes the realm of the traditional fair trial rights (which have a linguistic dimension) from genuine language rights in the judicial field.²⁷ Whereas traditional fair trial rights guarantee only a proceeding with an effective participation of the accused, which includes a right to use one's mother tongue when the accused does not sufficiently understand the official language, the genuine language rights as codified in Art.9 of the Language Charter grant an unconditional right to use the minority language before judicial courts.²⁸ This does not automatically affect functional transparency of the minority language, i.e. the perception of minority language speakers that the use of the minority language in the given social domain (of the judiciary) is the most appropriate way of communicating with the judicial authorities.²⁹ Formal rights granted by language legislation (and treaty obligations) do not necessarily change the underlying socio-linguistic patterns, as the article argues.

²⁵ See Jean-Marie Woehrling, *The European Charter for Regional or Minority Languages. A Critical Commentary* (Council of Europe Publishing, Strasbourg, 2005), at 165-178.

²⁶ Valeria Cardi, 'Regional or Minority Language Use before Judicial Authorities : Provisions and Facts', published in this volume.

²⁷ *Ibid.*, at 2.2.

²⁸ *Ibid.*

²⁹ *Ibid.*, at 2.3.

Valeria Cardi analyses the different levels of protection provided for under the Charter and then looks into the findings of the monitoring reports drawn up by the Committee of Experts under the Language Charter. In a detailed analysis of the relevant findings concerning Art.9 para. 1 (i) and (ii) of the Charter, the author demonstrates that the formal level of protection does not really affect the level of minority language use before courts.³⁰ Irrespective of the formal level of ratification, in most cases minority languages have rarely (if ever) been used before courts. There is only one element influencing the language choice of minority language speakers that has a certain linkage with the formal level of undertaking chosen, and that is the availability of employees of the judiciary sufficiently competent in the relevant minority language.³¹ There exists a certain correlation between the formal level of undertaking chosen and the availability of such staff, since states usually will not opt for the highest undertakings when such staff is lacking. This element is also the only one which can be influenced by the state authorities themselves, by hiring adequate judicial staff and training the personnel. The other factors identified as major obstacles towards using minority languages in court practice are mainly of a psychological and sociological nature – fear of delays in proceedings, fear of being seen as ‘troublemakers’, lack of adequate terminology and of practising lawyers trained in using the minority language in judicial contexts.³² It is difficult, if not impossible for the state to influence these factors, and accordingly the formal legal position granted to a minority language before courts does only marginally influence real language use in such domain.

Experience under the Charter tells that these findings are definitely true – although they give a bit too narrow view on the issue. The Committee of Experts for the Language Charter has identified these structural impediments, but is of the opinion that it is the task of the relevant state to try to overcome the vicious circle that is lurking in behind. There is only a chance to break the vicious circle when the state authorities give clear signals that they are encouraging and supporting the use of minority languages before courts. Court authorities must prepare themselves logistically for such language use, either by hiring/training relevant personnel or by providing for an adequate translation service – and they must demonstrate to the public that they are prepared and that they do not perceive person making use of their rights as ‘troublemakers’. If such measures are taken, there is chance of breaking the vicious circle in a medium term, although the scepticism running through the contribution of Valeria Cardi has its

³⁰ Ibid., at 3.2.

³¹ Ibid., at 3.3.

³² Ibid.

clear justifications.

The third contribution of the focus issue of JEMIE, the contribution of Eduardo J. Ruiz Vieytez on “New Minorities and Linguistic Diversity: Some Reflections from the Spanish and Basque Perspective” looks on issues of minority language policy and the protection of linguistic diversity from a quite different angle. With the huge number of migrants that came to Europe during the last decades, traditional patterns of linguistic diversity are overshadowed, if not overwhelmed by new modes of linguistic diversity. In addition to linguistic diversity linked to autochthonous minorities, migrant communities implant a different, but nevertheless significant pattern of linguistic diversity into plurilingual societies.³³ The new linguistic diversity to a certain degree challenges the language policy answers to traditional linguistic diversity. In some cases, migrants might fill up the ranks of shrinking ‘old minorities’ - if the migrants and their children happen to being socialized in an environment dominated by a minority language. Processes like this happen e.g. in certain Rumansh-speaking villages in the Swiss canton of Grisons, in South Tyrol as well as in some other places. Usually, however, migrants will tend to assimilate to the linguistic patterns of majority society. This is even more evident if the migrants speak the majority-language anyway, like migrants from Latin America in Spain. Socio-linguistic consequences of migration thus are rather diverse.³⁴

The author investigates first the effects of immigration on linguistic diversity in the Basque Country, which serves here as a paradigmatic example. Special focus is directed on the educational system in the Basque country, because in this sector the effects of migration on traditional patterns of minority language policy can be seen earlier than in other public domains.³⁵ But before entering into such a country specific analysis, the author looks into the usual patterns of how language policy in plurilingual societies might react to phenomena of migration. In a follow-up chapter, he demonstrates that language policy reacts in a particular way within bilingual frameworks (like the one predominant in the Basque Country). In order to understand the intricacies and the resulting challenges for language policy, the author describes in some detail the peculiarities of the Basque Country’s educational model, where parents can choose between a predominantly Basque language educational model, a predominantly

³³ See Eduardo J. Ruiz Vieytez, “New Minorities and Linguistic Diversity: Some Reflections from the Spanish and Basque Perspective”, published in this volume.

³⁴ *Ibid.*, at 2.

³⁵ *Ibid.*, at 3.

Castilian one and a mixed, genuinely bilingual educational model.³⁶ According to empirical data, migrant families in general tend to favour the model granting education primarily in Castilian language, thus shifting the numerical weight in favour of castilian-language education. It is obvious that the Basque authorities do not like such tendency and try to create counterweights against this erosion of the Basque-language educational model. If pursued with utmost consequence, this would mean forcing migrant children into dedicated minority language education – a difficult choice if the human rights (and linguistic rights) of the migrant parents shall be respected. Contrary to these high degrees of sensibility towards ‘old’ minority languages, there has been very little effort to recognize and integrate the native languages of ‘new’ minorities into the public space.³⁷

In a further part of the essay, the author tries to sketch the outlines of a multicultural approach to linguistic diversity, including the diversity created by ‘new’ minorities. He argues against any categorical distinction between traditional and ‘new’ minorities. If traditional linguistic groups deserve protective legal status and positive measures from public institutions, it is not less true – such goes the argument – that the new linguistic communities might equally claim protective action.³⁸ The legitimacy of such a claim – so the author argues – can not be questioned by historic or numerical reasons, at least in a long-term perspective. Some of the formulations here are overbroad and sweeping, like the sentence that “all persons, irrespective of their nationality, must be entitled to exercise their human rights in their own language”.³⁹ According to the author, such principle “entails the extension of the same measures to other minorities in the same situation, only to be modulated by objective criteria such as a minimum number of members or territorial concentration of their members.

The consequence of his line of argument is that the Basque Country would have to review the traditional linguistic models of education. Firstly, it is necessary (in the author’s perspective) to reinforce the acquisition of the Basque language for all students not included in the so-called D model. Secondly, it would be necessary to provide as much instruction in immigrant languages as is reasonable and possible. Thirdly, this change would have to be done partially integrating this parallel instruction with students in other educational models, avoiding physical separation in different schools. And finally, distribution of students following different linguistic models

³⁶ Ibid.

³⁷ Ibid., at 3.

³⁸ Ibid., at 4.

should not correspond to social class differences.⁴⁰

III. **Minority Language Policy and the Evolving Discipline of Language Law**

The three different articles demonstrate quite well how far on the way to a new pattern of minority language policy Europe has gone. If we compare the discussion led in these contributions with the state of the art on the legal aspects of minority language protection some two decades ago, the difference is striking. We have accumulated a lot of experience, and our categories and conceptualizations have become much better adapted to the concrete challenges.

Some problems still remain unresolved, however. The first, and probably the most basic one of these questions, is the issue of ‘linguistic human rights’. Does it really make sense to frame minority language policy discourses in the code of human rights discourse? The reflections of Xabier Arzoz warn us against a too simplistic transferral of human rights discourse to the field of minority language policy. There are some dimensions of ‘language rights’ that have clearly a traditional human rights aspect. But the core issues of modern debates on minority language policy, measures of language maintenance and language promotion, are outside the realm of traditional human rights protection. These ‘positive’ rights need dedicated efforts of state authorities, need personnel and other material resources in order to achieve suitable results. But by way of deduction from indeterminate international legal norms you can not determine what should be done. International treaties and constitutional law may set some directive principles, some guidelines; to fix the operational details, however, is responsibility of the political process and its actors. Since additional resources can only be taken from other societal sectors, and the adequate mix of measures needed in order to create a sensible system of protection is very context-specific, this kind of operational policy must be left to the political process.

This lesson is corroborated by the study of Valeria Cardi on minority language use before judicial authorities. Irrespective of the concrete level of legal protection, minority languages tend to be rarely used before judicial courts. This is less due to deficiencies in the legal standards of protection, but reflects deeply-rooted socio-linguistic patterns of minority language communities. It is not that easy to change such patterns, which means that minority

³⁹ Ibid.

⁴⁰ Ibid., at 5.

languages remain incarcerated in a limited space of functional domains, often without much possibilities of modern development.

The influx of migrants further complicates the picture. ‘New’ minorities pose a twofold problem: how should their members be integrated in society – should they learn the majority language or the locally dominant minority language? And what about the native languages of migrant communities? We are standing here in front of the most decisive conundrum of minority language policy. Can we continue with business as usual, can we perhaps even extend the mechanisms and devices developed for ‘old’ minorities to the problems of ‘new’ minorities? Or should we develop a completely new set of answers for this new type of problems? The answer is not known – but the question will haunt us for the next decades.