

Language Rights as a General Principle of Community Law

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A. Introduction: The Status of Languages in the EU

The territory of the European Union is made up of a rich and wide-ranging universe of languages. The European Union contains a wealth of languages. In its current form there are more than 60 autochthonous languages in the 27 Member States, with widely differing situations and legal statuses.¹ The principal characteristic of the European linguistic diversity is the great heterogeneity of situations and internal legal statuses that the European languages display. Most of the languages of EU are spoken by very few people and few languages are enormously widespread. There are many languages in the EU, which, in spite of having an appreciable number of speakers, do not have official recognition. And there are languages that are co-official or have some sort of official recognition in some areas, but struggle to survive. Multilingualism is one of the defining characteristics of the EU, and it is worth examining how EU law deals with it.

EU law considers linguistic diversity in Europe from various viewpoints. One is the internal language framework of the EU itself, which is based on the political principle of equality of languages, with certain super-imposed categories created by various sources. The official status of languages is not expressly regulated in the treaties through which the EU was founded or in the draft Treaty Establishing a Constitution for Europe. Nor is it established which languages are actually official. However, from the regulations in the treaties a distinction can be drawn between "Treaty languages," "official and working languages" and "languages recognized by the Constitution."

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¹ See EUROMOSAIC STUDIES I, II AND III (2004), at http://europa.eu.int/comm/education/policies/lang/languages/euromosaic/index_es.

I. Treaty Languages

Article 314 of the EC Treaty declares that the wording of the Treaty is equally valid in all 23 languages cited in it.² These 23 languages are known as the “Treaty languages.” The main scope of the article is to identify the language versions that should be used to interpret the Treaty, but its full scope goes further. In the context of bringing the EU closer to its citizens, the Treaty of Amsterdam explicitly recognizes the right of citizens to use the “Treaty languages” in addressing certain European institutions. Article 21.3 (formerly Article 8 D) is worded as follows:

Every citizen of the Union may write to any of the institutions or bodies referred to in this Article (referring to the European Parliament and the European Ombudsman) or in Article 7 [that is to say, the Council, the Commission, the Court of Justice, the Court of Auditors, as well as the Economic and Social Committee and the Committee of the Regions] in one of the languages mentioned in Article 314 and have an answer in the same language.³

The linguistic aspects of the right of petition are thus configured. This perspective is expressly recognized in Article 41.4 of the Charter of Fundamental Rights of the European Union, concerning the right to good administration. Alongside the importance of the recognition of language rights from a formal regulatory perspective (this being the highest-ranking regulation that recognizes them),⁴ we must consider the material importance of these rights, since primary law implicitly recognizes the principle of equality in the use of the 23 “Treaty languages” by citizens.

² See Treaty Establishing a Constitution for Europe, art. IV-448.1, Dec. 16, 2004, 2004 O.J. (C310) 1 [hereinafter Draft EU Constitution]. The people of France and the Netherlands rejected the text of the Constitution on 29 May 2005 and 1 June 2005 respectively. In the light of these results, a period of reflection, explanation and discussion is currently under way in all countries.

³ See Draft EU Constitution, arts. I-10, II-101 and III-128.

⁴ See B. de Witte, *Language Law of the European Union: Protecting or Eroding Linguistic Diversity*, in CULTURE AND EUROPEAN UNION LAW 220 (Craufurd ed., 2004).

II. Official & Working Languages

“Official language” status operates on a different plane than the political category of “Treaty languages.” In matters concerning the use of official languages it is by a unanimous decision of the Council that the language framework of the EU may be established and modified (Art. 290 of the EC Treaty). This empowerment of the Council indicates first and foremost the political importance of the legal framework of languages in European affairs. Under Regulation no 1 of the Council, dated 15 April 1958, the number of official and working languages has gradually increased as new Member States have joined the Community. There are currently 23 official and working languages in the EU,⁵ and, in fact, they are the same ones considered “Treaty languages.” Initially there were four official and working languages (German, French, Dutch and Italian). With the accession of Denmark, the Republic of Ireland and the United Kingdom the number increased to six (with Danish and English being added but not Irish Gaelic). Greek was added when Greece joined, and the number rose to nine with the addition of Spanish and Portuguese on the accession of Spain and Portugal. When Finland, Sweden and Austria joined the number of official and working languages rose to 11, and then in May 2004 nine more were added (Czech, Slovak, Slovene, Estonian, Latvian, Lithuanian, Maltese,⁶ Hungarian and Polish). Irish Gaelic (which was already a “Treaty language”) was declared an official and working language in 2005, with effects deferred until 1st October 2007.⁷ Finally, after the accession of Bulgaria and Rumania (1 January 2007) two official languages more were added.⁸ As we said, there are 23 official languages in the European Union.

⁵ Council Regulation No 1 of 15 April 1958, art. 1, 1958 O.J. (17) 401-402 (EEC/Euratom) (Determining the language to be used by the European Economic Community and the European Atomic Energy Community).

⁶ See Council Regulation No 930/2004, On Temporary Derogation Measures Relating to the Drafting in Maltese of the Acts of the Institutions of the European Union, 2004 O.J. (L 169) 1-2 (EC).

⁷ See Council Regulation No 920/2005, Amending Regulation No 1 of 15 April 1958 and Introducing Temporary Derogation Measures, 2005 O.J. (L 156) 3-4 (EC).

⁸ See Council Regulation No 1791/2006, Adapting Certain Regulations and Decisions in the Fields of Free Movement of Goods, Freedom of Movement of Persons, Company Law, Competition Policy, Agriculture (including veterinary and phytosanitary legislation), Transport Policy, Taxation, Statistics, Energy, Environment, Cooperation in the Fields of Justice and Home Affairs, Customs Union, External Relations, Common Foreign and Security Policy and Institutions, By Reason of the Accession of Bulgaria and Romania, 2006 O.J. (L 363) 1-80 (EC).

The joint official status of these 23 languages is based on the principle of formal equality of languages. This principle reflects the political equality of Member States, and applies exclusively to “State languages.” Multilingualism is based on the principle of equality, and serves as a defense against international pressure from certain languages, especially English. The principle of equality of languages has been applied invariably since 1958, in spite of the fact that the increase in the number of official languages as more states have joined has affected the internal workings of institutions (the obvious increase in technical complexity is accompanied by an increase in the financial burden of funding translation and interpreting services in more and more language combinations). Citizens of Member States are subject to Community law, which for the most part is directly applicable, so that the same law applies to all the citizens of the EU. The principle of legal certainty, the public nature of regulations and the prohibition of arbitrary actions require citizens to be able to understand the law that must be applied.⁹

It must be stressed that the principle of equality of languages on which European multilingualism is founded is relative rather than absolute. In practice just a few languages are used preferentially for internal purposes within institutions (mainly English, followed by French and German).¹⁰ From a legal perspective, jurisprudence based on the *Kik* affair confirms that there is no constitutional principle of equality of languages that is binding on EU legislators in regulating the framework for internal use of languages at EU agencies, to the extent that the right of use of languages recognized in Article 21 of the EC Treaty is only applied at the institutions cited in the wording of the article, and not in the rest.¹¹

The concept of “state language,” referring to a language that is official throughout the territory of a state, has been used to make additions to the list of official and working languages of the EU,¹² and this has led to exclusions. It is a political

⁹ However, as a consequence of the process of enlargement and of the linguistic configuration of some new Member States, an effect not planned to date will now occur: a percentage of the citizens of some States do not know the new official language introduced by them (this would be the case of the Baltic countries). See I. Urrutia, *Exigencias lingüísticas para el acceso a cargos de representación política : comentario a la Sentencia del Tribunal Europeo de Derechos Humanos de 9 de abril de 2002 (Asunto Podkolzina c. Letonia)*, REVISTA VASCA DE ADMINISTRACION PUBLICA no. 68 (2004); I. Lasagabaster, *Derecho a elecciones libres*, in CONVENIO EUROPEO DE LOS DERECHOS HUMANOS - COMENTARIO SISTEMATICO 651 (I. Lasagabaster ed., 2004). The principle of legal security itself demand an adaptation to the new circumstances.

¹⁰ See N. NIC SHUIBHNE, EC LAW AND MINORITY LANGUAGE POLICY 12-18 (2004).

¹¹ See Case T-120/99, *Kik v. Office for Harmonisation in the Internal Market*, 2001 E.C.R. II-2235; Case C-361/01, *Estate of Cristina Kik v. Office for Harmonisation in the Internal Market*, 2003 E.C.R. I-8283 (§ 93). See R.L. CREECH, LAW AND LANGUAGE IN THE EUROPEAN UNION 32 (2005).

¹² See A. Milian i Massana, *Le principe d'égalité des langues au sein des institutions de l'Union européenne et dans le droit communautaire, mythe ou réalité*, REVISTA DE LLENGUA I DRET no. 38, 62 (2002).

criterion rather than a legal one, and it means that not all the official languages of Member States are official languages of the European Union. Catalan and Basque are two such cases in point (in spite of their having more speakers than some of the official languages of the EU). A lack of flexibility in the development of the Community's language framework has resulted in the radical exclusion from all types of official use of non-state languages regardless of their internal status. This has effects that extend beyond the EU itself, especially for those languages that enjoy official status in their respective territories but not in the Union. Basque and Catalan, for instance, are official languages in their own territories but cannot be used in the EU institutions based there (e.g. the European Agency for Safety and Health at Work, which is based in Bilbao, and the European Commission Delegation in Barcelona). The Charter of Fundamental Rights recognizes the democratic right of citizens to deal with administration in their own language, and the fundamental character of that right makes it hard to justify the restrictive way in which it is applied. This is an anachronistic situation that needs to be corrected by going further into the principles of democracy, human rights and linguistic pluralism.

III. Languages Recognized by the Constitution (Internal Official Status)

In a reorientation of the framework of language use at the institutions of the EU, the draft European Constitution was worded to include a second category in the political hierarchy of European languages. This category was established in the final stages of discussion of the draft Constitution, when a second paragraph was added to Article IV-448¹³ envisaging the possibility of the Treaty being translated into languages with internal official status. The political intent behind this recognition is to introduce a second level of recognition of languages in Europe to cover those that are (joint) official languages in Member States, excluding them from the right of petition.¹⁴ This makes them a *tertium genus*, standing between the

¹³ Draft Treaty Establishing a Constitution for Europe Art. IV-448.2, "This Treaty may also be translated into any other languages as determined by Member States among those which, in accordance with their constitutional order, enjoy official status in all or part of their territory. A certified copy of such translations shall be provided by the Member States concerned to be deposited in the archives of the Council."

¹⁴ The issue of granting constitutional status to the languages that are official in the Member States was brought up in the final phase of the negotiations, primarily by the new Spanish delegation established after the Spanish general elections of May 2004, which has assumed certain demands of Catalan political parties. The initial intention would be to recognize the right to petition in its double aspect of active and passive use (as regards the reply). This position collides with the reluctance of some Member States, primarily of the French Republic, thus leading to such final wording. Therefore, it would be a "compromise formula," closer to the interests favouring the maintenance of the current *status quo* than to the more progressive positions.

languages whose rights are recognized by the European Constitution and those that have no recognized status at all in the context of European institutions.

The legal scope of this intermediate category was worked out in the Council Conclusion of 13 June 2005 on the official use of additional languages within the Council and possibly other institutions and bodies of the European Union.¹⁵ These conclusions affect languages other than the official & working languages of the EU that are recognized by the constitution of a Member State in all or part of its territory or the use of which as a national language is authorized by law.¹⁶ As such it would cover Basque, Catalan and Galician (official languages), Letzeburgesh in Luxembourg, Croatian in Austria and Hungary, Faroese in Denmark, Sami in Finland, and Turkish as a joint official language in Cyprus, and perhaps Frisian and Welsh. But it is not certain whether it would cover Scots Gaelic, Cornish, Breton, Occitan and Corsican, to cite just a few examples.

The possibility of using these languages depends on an administrative agreement being signed between the requesting Member State and the Council (or the corresponding European institution), and all the resulting direct and indirect expenses charged to the account of the requesting Member State. These agreements establish the conditions for use on the basis of the general framework laid down by the Council. In the case of Basque, Catalan and Galician there have been several agreements with the Council,¹⁷ the Committee of the Regions and the Commission. On 26 April 2006 the Bureau of the European Parliament rejected the possibility of these languages being used. This rejection is based on political reasons, since any technical or financial burden would be borne not by the Parliament but by Spain. It shows how limited some members of parliament believe the European commitment to linguistic diversity to be.

In any event, the possibilities available for the use of these languages are limited and have little practical effect, which means that their use becomes merely testimonial. Only three uses are allowed:

¹⁵ Council Conclusion of 13 June 2005 On the Official Use of Additional Languages Within the Council and Possibly Other Institutions and Bodies of the European Union, 2005 O.J. (C 148) 1-2 (EC).

¹⁶ There is a difference between the Spanish and the English (and French) versions of the text. The latter refers to the languages "whose status is recognised by the Constitution of a Member State on all or part of its territory *or* the use of which as a national language is authorised by law." The former refers the two conditions together (the constitutional recognition and the legal authorisation of use).

¹⁷ See Administrative Arrangement Between the Kingdom of Spain and the Council of the European Union, 2006 O.J. (C 040) 2-3.

1. Making public the acts adopted in a co-decision by the European Parliament and the Council: The government of the Member State has to send a certified translation of acts adopted in a co-decision. The Council will add that translation to its archives and provide a copy of it on request. The Council will ensure that these translations are published on its internet site. In both cases, attention will be drawn to the fact that the translations in question do not have the status of law.

2. Speeches to a meeting of the Council and possibly other Union Institutions or bodies: The government of the Member State will have to ask for permission to use the language in speeches by one of the members of the Institution or body in question at a meeting (passive interpreting). In the case of the Council, this request will in principle be granted, provided it is made reasonably in advance of the meeting and the necessary staff and equipment are available.

3. Written communications to Union Institutions and bodies: Member States will be able to adopt a legal act providing that, if one of their citizens wishes to send a communication to a Union Institution or body in one of the languages referred to in paragraph 1, he or she shall send the communication to a body designated by that Member State. That body will send the Institution or body in question the text of the communication, with a translation into the language of the Member State referred to in Council Regulation No 1/1958. The same procedure will apply *mutatis mutandis* to the reply from the Institution or body in question.

Where the Union Institutions or bodies have a fixed period of time in which to reply, that period will commence from the date on which the Institution or body in question receives the translation into one of the languages referred to in Council Regulation No 1/1958 from the Member State. The period will cease on the date on which the Union Institution or body sends its reply to the competent body of the Member State in the latter language.

B. Recognition of Linguistic Diversity

The approach to regional and minority languages in the EU has changed over time as the Union itself has changed. They are now dealt with as part of the EU's commitment to human rights, which includes the rights of linguistic minorities.

Article 6 of the 1992 Treaty on European Union states that respect for human rights is a basic principle of the Union. At the same time the door to cultural integration in Europe has been opened with a declaration of the value of European linguistic diversity, and the pluralism of Member States is implicitly recognized.¹⁸ Art. 151 (formerly Art. 128) of the EC Treaty states that "*The Community shall contribute to the flowering of the cultures of the Member States, while respecting their national and regional diversity and at the same time bringing the common cultural heritage to the fore.*" In particular, paragraph 4 states that "*The Community shall take cultural aspects into account in its action under other provisions of the Treaty, in particular in order to respect and to promote the diversity of its cultures.*"¹⁹ This article speaks of respect and encouragement through the fostering of a commitment to the promotion of culture and language.

Article 149.1 (formerly Art. 126)²⁰ also mentions the matter, from the viewpoint of education. The authority of the EU in education is limited, and is envisaged as complementary and subsidiary to the actions of Member States. In any event, respect for linguistic diversity appears to be a limit on potential education actions by the Union. Guaranteeing linguistic diversity is seen as a way of limiting the trend towards uniformity that Community-wide education policies might cause. Paragraph 2 of this article establishes that a strength of the EU is "developing the European dimension in education, particularly through the teaching and dissemination of the languages of the Member States."²¹

On the other hand Article 13 of the EC Treaty contains a clause in favour of positive anti-discrimination action so that the Community "within the limits of the powers conferred may take appropriate action to combat discrimination based on sex, racial

¹⁸ See G. Von Toggenburg, *The EU's Endeavours for its Minorities*, in MINORITY RIGHTS IN EUROPE 216 (S. Trifunovska & F. de Verennes eds., 2001).

¹⁹ See Draft EU Constitution, art. III-280. Regarding the scope of this provision, see I. Bernier, *La préservation de la diversité linguistique à l'heure de la mondialisation*, 42 LES CAHIERS DE DROIT no. 4, 945 (2001).

²⁰ See Draft EU Constitution, art. III-282.

²¹ EC Treaty, art. 149.2 (formerly art. 126).

or ethnic origin, religion or belief, disability, age or sexual orientation.”²² Specific instruments need to be adopted for the empowerment contained in this article to become operational. It should be highlighted that the article does not mention language among the grounds for discrimination that may result in the adopting of a policy of promotion. This void was filled by the Charter of Fundamental Rights of the European Union, Article 21 of which includes language among the forms of discrimination that it prohibits, in these words: “any discrimination based on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation shall be prohibited,”²³ and the following Article states “the Union shall respect cultural, religious and linguistic diversity.”²⁴

Only limited authority in cultural and linguistic matters has been transferred to the EU. However there is sufficient legal basis in the Treaty to cover a language policy that aims to defend linguistic diversity.²⁵ Such a policy should pay particular attention to regional and minority languages, as they are the ones most in need of protection. Recognition of the wealth of European cultural and linguistic diversity cannot be limited merely to supporting state languages and neglecting all the rest. Multilingualism in Europe cannot be encouraged from the standpoint of “one State, one language”: a real, effective commitment to regional and minority languages is needed.

To date the EU has not followed any clearly defined language policy guidelines when it has had to deal with regional or minority languages.²⁶ When it has had to regulate financial aspects that in some way affect regional languages, developing linguistic diversity has not been one of its reference points. Indeed, its approach seems rather to have centred on overcoming any language barriers that stand in the way of the exercise of essentially economic rights.²⁷ In all, we cannot say that the

²² EC Treaty, art. 13.1 (formerly Art. 6 A).

²³ EU Charter of Fundamental Rights, art. 21, 2000 O.J. (C 364) 1.

²⁴ EU Charter of Fundamental Rights, art. 22, 2000 O.J. (C 364) 1; Draft EU Constitution, art. II-82.

²⁵ See de Witte, *supra* note 4, at 234

²⁶ See SHUIBHNE, *supra* note 10, at 293; N. LABRIE, LA CONSTRUCTION LINGUISTIQUE DE LA COMMUNAUTÉ EUROPÉENNE 24 (1993); B. de Witte, *The Impact of European Community Rules on Linguistic Policies of the Members States*, in LANGUAGE POLICY FOR THE EUROPEAN COMMUNITY 164 (F. Coulmas ed., 1991).

²⁷ About the linguistic effects provoked as a consequence of non-linguistic regulations, see B. de Witte, *Surviving in Babel? Language Rights and European Integration*, in THE PROTECTION OF MINORITIES AND HUMAN RIGHTS 287 (Y. Dinstein & M. Tabory eds., 1992). See also LABRIE, *supra* note 26, at 160.

EU has established any real language policy aimed at encouraging linguistic diversity and pluralism in Europe as it exercises its authority in relevant matters. The fact that we can observe some language-based delimitation of Community freedoms (circulation, establishment, etc.) is due to the jurisprudence of the Court of Justice rather than to any effort to identify a legal basis for EU intervention.

Determining the scope of Article 22 of the Charter of Fundamental Rights is not a simple matter. An analysis of the process by which the Charter was drawn up reveals that proposals aimed at achieving the recognition of the subjective language rights of citizens, language-related assurances concerning the actions of the Community and the collective rights of members of linguistic minorities put forward by the European Bureau for Lesser Used Languages and the Committee of the Regions were rejected.²⁸ The final wording merely includes the statement “The Union shall respect cultural, religious and linguistic diversity” being included in Chapter III, entitled “Equality.”²⁹

Linguistic diversity is recognized in general terms. No subjective right of use of languages is configured, and there is no recognition of a scope of freedom of development in the identity of linguistic minorities. Nor is there a clearly defined public duty. This cannot be seen as an extension of the competencies of the Union, which remain delimited by the treaties, as envisaged in Article 52.2 of the Charter. Respect for linguistic diversity is considered more as a principle for action than as a substantive right. The Union and its Member States are obliged to observe such principles and promote their application in their respective areas of authority. The guarantee of linguistic diversity cannot be directly claimed in court: legislation, regulations or administrative measures are needed to establish its scope.³⁰

²⁸ Doc. CHARTE 4237/00, CONTRIB 110, of 18 April 2000, “Projet de Charte des droits fondamentaux de l’Union Européenne”; Doc. CHARTE 4352/00, CONTRIB 216, of 8 June 2000, “Projet de Charte des droits fondamentaux de l’Union Européenne”; Doc. CHARTE 4420/00, CONTRIB 276, of 19 July 2000, “Projet de Charte des droits fondamentaux de l’Union Européenne”.

²⁹ The Charter of Fundamental Rights of the EU has seven Chapters (Chapter one: Dignity; Chapter two: Freedoms; Chapter three: Equality; Chapter four: Solidarity; Chapter five: Citizens’ Rights; Chapter six: Justice; and Chapter seven: General Provisions).

³⁰ The document that contains the linguistic policy of the European Union is the “Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions. See *A New Framework Strategy for Multilingualism*, COM (2005) 596 final (Nov. 22, 2005) (not published).

C. Arguments on Language Rights as General Principles of Community Law

The EU has taken care to integrate human rights into its legal order from its beginnings, and this concern has been accentuated as its powers have increased. The Community law is characterized by the principles of primacy and direct applicability. It also includes the principle of respect for human rights and a requirement that Member States respect the principles of democracy.

From its earliest days, the Court of Justice has sought to encourage respect for human rights through the mechanism of general principles of law. In the absence of Community regulations expressly recognizing human rights, the Court of Justice resorted to general principles of law as “common constitutional principles of Member States” (see the *Internationale Handelsgesellschaft*³¹ case). Specifying these principles is a problem in legal terms. The larger the European Union becomes the more difficult it will be to seek the common denominator: those principles recognized in one State may not be recognized in others, or may be recognized in different ways.

Jurisprudence therefore took an important step in this matter: the Court of Justice declared in the *Nold* case that in matters of human rights general principles may be configured on the basis of international instruments on human rights in which “Member States have co-operated or to which they have acceded.”³²

This jurisprudence was taken up by positive law when these principles established by the Court of Justice were included, by the Treaty of Amsterdam, in Articles 6.1 and 6.2 of the EU Treaty (former Art. F.1), which read as follows:

1. The Union is founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law, principles which are common to the Member States.
2. The Union shall respect fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms signed in Rome on 4 November 1950 and as they result from the constitutional traditions common to the

³¹ Case 11/70, *Internationale Handelsgesellschaft v. Einfuhr und Vorratstelle für Getreide und Futtermittel*, 1970 E.C.R. I-1125.

³² Case 4/73, *Nold v. Commission*, 1974 E.C.R. 491, at 508, para 14.

Member States, as general principles of Community law.

At this point we must ask whether language rights are included in these general principles of law, and to what extent they affect the legal framework of each Member State. The idea defended here is that minority rights do form part of the general principles of law. This assertion is based on the following arguments:

a) The instruments of the Council of Europe that recognize the language rights of minorities have been broadly ratified by Member States. The Framework Convention for the Protection of National Minorities has been ratified by all Member States except France, Belgium, Greece and Luxembourg (these last three countries have signed it but have not ratified it).³³ It is well known that some Member States, such as France, Belgium and Greece, have proved reluctant to recognize the existence of linguistic minorities and to ratify international instruments. The paradigm of this reluctance is probably the case of France, where the *Conseil Constitutionnel* declared that the European Charter for Regional and Minority Languages (ECRML) was incompatible with the constitutional principles of the indivisibility of the Republic, equality under the law and uniqueness of the French people.³⁴ In spite of this, there are signs of emerging common European law on linguistic minorities and minority languages along the lines laid down by the Framework Convention and the ECRML.³⁵ It is the job of the Court of Justice to establish general principles of Community law by comparing the legal frameworks of Member States without requiring that all legal orders should be exactly the same.³⁶ Any other interpretation would be tantamount

³³ The European Charter of Regional or Minority Languages has been signed by all the member States except Belgium, Estonia, Greece, Ireland, Latvia, Lithuania and Portugal; besides, the Czech Republic, France, Italy, Malta and Poland haven't ratified it.

³⁴ See *Conseil Constitutionnel*, Décision n° 99-412 DC, 15 juin 1999 (Charte Européenne des langues régionales ou minoritaires) Recueil p 71 JO 18.6.1999, p. 8974.

³⁵ See de Witte, *supra* note 4, at 217.

³⁶ See von Toggenburg, *supra* note 17, at 227.

to limiting the jurisdictional functions recognized by Art. 220 of the EC Treaty. The Court of Justice has not yet to rule openly on this matter.³⁷

b) As will be seen later, candidate states are required to respect human rights, including those concerned with protecting minorities and linguistic rights. The linking of candidate states to the Council of Europe and the ratification of agreements on civil and political rights are two constant references in accession processes.

c) References identical to those indicated in the foregoing subsection can be found in international politics.

d) The Preamble of the ECRML itself states the legal meaning of its precepts when it says: “[...] *the right to use a regional or minority language in private and public life is a inalienable right conforming to the principles embodied in the United Nations International Covenant on Civil and Political Rights, and according to spirit of the Council of Europe Convention for Protection of Human Rights and Fundamental Freedoms.*”³⁸ The Explanatory Report on the ECRML (which is clearly the most specific instrument that deals with this matter) states that it is drawn up to complement the European Convention on Human Rights through positive action in regard to the protection of minority languages.³⁹

e) Finally, the contents of the Draft Treaty Establishing a Constitution for Europe expressly indicate that the protection of minorities is a founding principle of the Union, and as such a common principle of all Member States. Article I-2 TCE states, [t]he Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and *respect for human rights, including the rights of persons belonging to*

³⁷ See SHUIBHNE, *supra* note 10, at 233.

³⁸ Preamble of the European Charter for Regional and Minority Languages (emphasis added).

³⁹ See COE’s Explanatory Report on the European Charter for Regional or Minority Languages, at <http://conventions.coe.int/Treaty/en/Reports/Html/148.htm>

minorities."⁴⁰ These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail.

This express mention of minority rights means that respect for linguistic rights is unequivocally a principle of Community law, and one defined as common to Member States. As such any jeopardizing of this European value, and any breach by a Member State, could result in the application of the mechanisms for prevention and sanctions envisaged in Article I-59 of the Constitution. Moreover, Article I-1.2 of the Draft Constitution states that "[t]he Union shall be open to all European States which respect its values and are committed to promoting them together."⁴¹

D. Language Rights are Considered as General Principles of Law when Community Law is Applied by European Institutions or by the Internal Authorities of Member States

Human rights, as protected in the legal framework of Community law, apply to the bodies of the EU. Recognition of human rights in the scope of the Union does not extend the competencies of its institutions; those rights will only apply in those material areas where the EU has authority. This raises the question can those rights have any influence in the internal frameworks of Member States?

The answer is a resounding yes. The general principles of Community law are applicable when States apply Community law. They do not therefore affect only Community institutions. The Court of Justice has developed significant, clear jurisprudence on this matter.

In the *Bostock*⁴² case the Court states that the requirements arising from the protection of fundamental rights in the body of Community law are also binding on Member States when they apply Community regulations, from which it results that the latter are obliged insofar as is possible to apply those regulations in such a way as not to undermine those requirements." Following the terms of the *ERT* ruling,⁴³ the Court of Justice cannot rule in regard to the European Convention for the

⁴⁰ Draft EU Constitution, art. I-2.

⁴¹ Draft EU Constitution, art. I-1.2.

⁴² Case C-2/92, *Bostock*, 1994 E.C.R. I-955.

⁴³ Case C-260/89, *ERT*, 1991 E.C.R. I-2925.

Protection of Human Rights, a regulation that is external to Community law. By contrast, from the moment that the said regulation enters into the field of application of Community law the Court of Justice, should it know of a matter raised with pre-judicial nature, must provide all the elements of interpretation required for the national jurisdictional body to appreciate the compliance of that regulation with the fundamental rights whose observance the Court of Justice ensures. The *Kremzow* ruling of 29 May 1997 requires that the link between national law and Community law be a "sufficient link."⁴⁴

The areas where Community law may act may be significant from the viewpoint of language policies and rights, e.g. when the fields of education, culture and cross-border co-operation, among others, are involved. The level of protection of linguistic rights recognized in international regulations needs to be assured by the Community authorities and by Member States when they apply EU legislation. This results in an incipient common European standard for the protection of minority languages.⁴⁵ As indicated in Article 7.1.c of the ECRML, this standard is governed by the need for "resolute action to promote regional or minority languages in order to safeguard them."⁴⁶ The specific scope of the linguistic rights involved may pose legal difficulties, as the regulation introduces valuation criteria that condition the assurances provided. The ratifying of the ECRML by the Union would help to establish the precise scope of linguistic rights and would result in greater awareness on the part of State authorities and greater involvement by Community institutions in the defense of those rights.

E. Are Language Rights Applicable as General Principles of Law in Member States when They are not Applying the Community law?

The answer to this question seems to be a clear no. The fundamental rights recognized by the EU apply only to Community regulations and internal regulations enacted in compliance with Community regulations. However, recent practice at the European Parliament suggests that this interpretation needs to be qualified. The European Parliament has addressed a Member State and called for respect for a fundamental right, more specifically the right of ownership, for which

⁴⁴ Case C-299/95, *Kremzow*, 1997 E.C.R. I-2629.

⁴⁵ See F. de Varennes, *The linguistic rights of minorities in Europe*, in *MINORITY RIGHTS IN EUROPE*, *supra* note 18, at 19.

⁴⁶ European Charter for Regional or Minority Languages, art. 7.1.c.

urban development regulations need to be modified.⁴⁷ The EU has no authority in matters of urban development. Nor can this be seen as the application of a Community regulation or an internal regulation enacted in implementation of one. In explanation of its intervention, the Parliament has declared that citizens can expect lawfully to enjoy the rights enshrined in the Charter of Fundamental Rights of the European Union. Moreover, human rights and the rule of law are common principles of Member States. The resolution by the European Parliament aimed at assuring the enjoyment of human rights warns that there might even be recourse to the procedure laid down in Article 7 of the TEU. All this is concerned with rights of ownership, but is it far-fetched to believe that the same could be said about linguistic rights? Recently, on May 2006, the European Parliament Lesser-Used Language and National Minority Intergroup approved a declaration demanding that "France ratify the European Charter for Regional or Minority Languages, and the Framework Convention for the Protection of National Minorities."⁴⁸ It called for the EU to intervene to help the languages on French territory that are now facing endangerment because of State policies that have led to serious decline; it also challenges the Member States and the European Union over the urgency of the measures to be taken and on their duty to intervene in order to protect the languages spoken on the French territory. As analyzed in the following section, it is not possible to require candidate states to respect linguistic rights when those rights are not respected within existing Member States.

F. Language Rights as General Principles of Law and Candidate States

Since the early 1990's clauses on the guaranteeing of human rights have consistently been included in agreements between the EU and third-party states. Although the activities of the Union in regard to minority languages have been limited, this has been a significant point in its dealings with third-party countries. This is more of a paradox than a Community language policy, a paradox that enables the European Union to be analyzed in the mirror of its requirements of candidate states.

The declaration of the European Council at Laeken (15-December-2001) on the future of the EU stated that European institutions needed to be brought closer to

⁴⁷ European Parliament: Report on the alleged abuse of the Valencian Land Law known as the LRAU and its effects on European citizens (Committee on Petitions; Rapporteur Janelly Fourtou) Final A6-0382/2005.

⁴⁸ Declaration of the European Parliament lesser-used language and national minority Intergroup at Strasbourg (24-May-2006), see in http://www.eblul.org/index.php?option=com_content&task=view&id=93&Itemid=37&lang=en

citizens. This was seen as the “democratic challenge” facing Europe.⁴⁹ The same document defines Europe

as the continent of humane values, the Magna Carta, the Bill of Rights, the French Revolution and the fall of the Berlin Wall; the continent of liberty, solidarity and above all diversity, meaning respect for others' languages, cultures and traditions. The European Union's one boundary is democracy and human rights. The Union is open only to countries which uphold basic values such as free elections, respect for minorities and respect for the rule of law.⁵⁰

It goes on to say that “the European Union derives its legitimacy from the democratic values it projects.”⁵¹

The EU's concern for human rights took on a new dimension with the disappearance of the Central and Eastern European block. As a result of EU enlargement to include states from Central and Eastern Europe certain political criteria were adopted by the Council to determine the conditions for accession. The states of the former “Eastern block” were required to make progress in politics and democracy, in their institutions and in their economies. The protection and guaranteeing of human rights became a political criterion for candidate states. The European Council in Copenhagen (21-22 June 1993) set criteria for accession that included guarantees of “[...] democracy, the rule of law, human rights and respect for and protection of minorities....”⁵² At the European Council in Luxembourg in December 1997 it was determined that the process of integration of new members would henceforth be carried out through “partnerships.”⁵³ This process began with preliminary rulings on applications for admission that contained a first approach to the situation of minorities in the states in question. Then, in 1998 and 1999, the Commission drew up Regular Reports on progress in candidate states with

⁴⁹ European Council meeting in Laeken, 14-15 December 2001, Presidency Conclusions: Annex I: Laeken Declaration on the future of the European Union (SN 300/1/01 REV 1), paragraph I.

⁵⁰ Laeken Declaration on the future of the European Union (SN 300/1/01 REV 1), paragraph I, p. 20.

⁵¹ Laeken Declaration on the future of the European Union (SN 300/1/01 REV 1), paragraph I, p. 22.

⁵² European Council meeting in Copenhagen, 21-22 June 1993, Presidency Conclusions; paragraph 7 A.iii.

⁵³ European Council meeting in Luxembourg, 12-13 December 1997, Presidency Conclusions, paragraph 14-16.

reference to the Copenhagen criteria. The rights of linguistic minorities were considered, and Slovakia was asked to give priority for 1998 to “the adoption of legislative provisions on minority language use and related implementing measures” following the finding that “[t]here has no progress on the adoption of minority legislation and no significant change in the protection of minorities.”⁵⁴ In July 1999 Slovakia passed a law on linguistic minorities, and the Regular Report for that year stated that the country had applied international standards and the recommendations of the OCSE, the Council of Europe and the Commission, concluding that “[t]his priority has been met.”⁵⁵

The joint report known as the “composite paper” summarizes the steps requested of all the countries that joined in May 2004. It lists the progress made and gives recommendations for the future in regard to the guaranteeing of linguistic rights.⁵⁶ Slovakia was required to adopt legislation protecting its minority languages, and recommendations were made to Latvia, Estonia, the Czech Republic, Hungary, Bulgaria and Rumania concerning their minorities.

The political criterion of protection for minorities is also of particular importance in the forthcoming expansion of 2007. The latest report on Bulgaria and Rumania states that the Commission has detected improvements in the “integration of minorities”, but stresses the need to continue work to integrate the Romany minority.⁵⁷ The same goes for the candidate states in the Balkans.⁵⁸ The Council’s Decision of 20 February 2006 on the principles, priorities and conditions of the Association for the accession of Croatia requires that it “[p]romote respect for and protection of minorities in accordance with the European Convention on Human Rights and the principles laid down in the Council of Europe’s Framework

⁵⁴ Regular Report from the Commission on Slovakia’s Progress Towards Accession (1998).

⁵⁵ Regular Report from the Commission on Slovakia’s Progress Towards Accession (1999).

⁵⁶ Composite Paper: Reports on progress towards accession by each of the candidate countries, where we can read “on minorities, many of the weaknesses identified in the last regular reports have been addressed. The Estonian Parliament adopted amendments to the Citizenship law to allow stateless children to become citizens. The Slovak parliament adopted minority language legislation. Nonetheless, some candidate countries continue to face difficulties in finding the right balance between legitimate strengthening of the state language and the protection of minority language rights. In this context the language law in Estonia and draft legislation in Latvia fall short of meeting international standards...”

⁵⁷ Communication from the Commission. Comprehensive monitoring report on the state of preparedness for EU membership of Bulgaria and Romania COM (2005) 534 (Oct. 25, 2005).

⁵⁸ See Council Regulation 533/2004, On the Establishment of Partnerships in the Framework of Stabilisation and Association Process, 2004 O.J. (L 86) 01 (EC), as amendment by Regulation 269/2006, 2006 O.J. (L 47) 7 (EC).

Convention for the Protection of National Minorities and in line with best practice in EU Member States"; and accelerating the application of constitutional legislation on national minorities is considered to be a priority.⁵⁹ In particular, urgent measures are called for to guarantee the proportional representation of minorities in local and regional administrations, in the administration of the State and in judicial bodies.⁶⁰ The situation vis-à-vis Macedonia is similar: is called on to "[p]romote respect for and protection of minorities in accordance with the European Convention on Human Rights and the principles laid out in the Council of Europe's Framework Convention for the Protection of National Minorities, in line with best practice in EU Member States" and encourage access to education by all ethnic communities.⁶¹

In regard to Serbia and Montenegro the following priority is established:

In Serbia: Strengthen the functioning of minority national councils. Promote good inter-ethnic relations, in particular by taking adequate measures in the field of education. Promote participation of minorities in the judiciary and law enforcement bodies.

In Montenegro: Adopt the law on protection of minority rights.⁶²

For Albania the following requirement is established:

Improve the legal framework on minorities so that it meets the requirements of the Council of Europe Framework Convention for the Protection of National Minorities, and ensure its implementation throughout Albania in particular as regards increasing the use of minority languages in citizens' dealings with the authorities and the display of traditional local names, improving access to media for persons belonging to

⁵⁹ Council Decision of 20 February 2006 On the Principles, Priorities and Conditions Contained in the Accession Partnership with Croatia and Repealing Decision 2004/648/EC, 2006 O.J. (L 055) 30-43 (EC).

⁶⁰ *Id.*

⁶¹ Council Decision of 30 January 2006 On the Principles, Priorities and Conditions Contained in the European Partnership with the Former Yugoslav Republic of Macedonia and Repealing Decision 2004/518/EC, 2006 O.J. (L 035) 57-72 (EC).

⁶² *Id.*

minorities and extending minority language education.⁶³

And Bosnia & Herzegovina is called on to “Further improve the legal framework on minorities so that it fully meets the requirements of the Council of Europe Framework Convention on National Minorities, and ensure its implementation throughout Bosnia and Herzegovina.”⁶⁴

Finally we must mention the case of Turkey, for which a specific strategy has been designed.⁶⁵ Turkey’s accession is particularly complex because of the political, economic, cultural, geopolitical and other implications. All these factors mean that unique circumstances come into play, though the Commission has expressly declared that the same criteria should be followed as for other states. It must be considered that Turkey is a country where there have been clear cases of political persecution of minority languages and communities such as the Kurds.⁶⁶ The Council Decision of 23 January 2006 entitled “The Principles, Priorities And Conditions Contained In The Accession Partnership With Turkey” notes progress, but lists numerous aspects which Turkey is required to improve with a view to potential accession.⁶⁷ These are mostly concerned with matters of human rights, political and civil rights, prevention of torture and inhuman treatment, combating impunity, assuring the principle of non discrimination, the rights of women and children, trade union rights, etc. Specifically in regard to the rights of linguistic minorities, there are requirements to guarantee cultural diversity and promote respect for and protection of minorities in accordance with the Framework Agreement; to guarantee the property rights of minorities, the presence of

⁶³ Council Decision of 30 January 2006 On the Principles, Priorities and Conditions Contained in the European Partnership with Albania and Repealing Decision 2004/519/EC, 2006 O.J. (L 035) 1-18 (EC).

⁶⁴ Council Decision of 30 January 2006 On the Principles, Priorities and Conditions Contained in the European Partnership with Bosnia and Herzegovina and Repealing Decision 2004/515/EC, 2006 O.J. (L 035) 19-31 (EC).

⁶⁵ See Council Regulation 390/2001 of 26 February 2001 On assistance to Turkey in the Framework of the Pre-accession Strategy, 2001 O.J. (L 58) 1 (EC). See Council Decision 235/2001, 2001 O.J. (L 85) 13 (EC); Decision 398/2003, 2003 O.J. (L 145) 40 (EC).

⁶⁶ T. Skutnabb-Kangas and S. Buçak, How the Kurds are Deprived of Linguistic Human Rights, *in* LINGUISTIC HUMAN RIGHTS - OVERCOMING LINGUISTIC DISCRIMINATION 366 (T. Skutnabb-Kangas & R. Phillipson eds., 1995) (“Turkey does more, with more brutal means, and more overtly, than any other country in the world to actively kill a language, Kurdish (...) the international community is aware that Turkey follows a policy of genocide, physical and cultural, and linguistic.”).

⁶⁷ Council Decision of 23 January 2006 On the Principles, Priorities and Conditions Contained in the Accession Partnership with Turkey, 2006 O.J. (L 22) 34 (EC) (especially paragraph 3.1 “short-term priorities”).

languages other than Turkish on TV and radio, and the adoption of measures to support the teaching of those languages, etc.⁶⁸

In short, measures to protect minorities by states (including the “Copenhagen principles”) are considered as “structural principles” or “political principles” in the procedures for accession to the EU.⁶⁹ In regard to the states of Central and Eastern Europe and the Balkans, the existence of a legal framework for the protection of national and linguistic minorities is made a political criterion for their admission to the Union. The yardsticks used by the Commission to measure the degree of fulfillment of those principles are the instruments for the defense of human rights available to the Council of Europe, i.e. mainly the European Convention on Human Rights and the Framework Convention for the Protection of National Minorities.

G. Conclusions

I. Linguistic rights have been dealt with under Community law through various viewpoints. The linguistic regime of the European Union is essentially of a legal nature. As a consequence of the legal regime of the languages there is a graduation between them. The building of political and economic Europe based on the “state language” concept affects the European linguistic diversity itself.

II. Nevertheless, the express legal recognition to the European linguistic diversity takes place in a new context, the context of the opening of the European Union to fundamental rights. The respect for the linguistic diversity is shaped as an aim of the Union, identifying a sphere of action. A sphere of action that has to materialize itself with specific measures that guarantee the development of linguistic diversity in the European institution’s action, endowing the non-discrimination principle with positive measures.

III. We must take into account the important role of the fundamental rights in the Community law. Fundamental rights are applicable and fully in force in Community law as general principles, and in accordance with the common

⁶⁸ *Id.* (“Ensure cultural diversity and promote respect for and protection of minorities in accordance with the European Convention on Human Rights and the principles laid down in the Council of Europe’s Framework Convention for the Protection of National Minorities and in line with best practice in Member States.- Guarantee legal protection of minorities, in particular as regards the enjoyment of property rights in line with Protocol No 1 to the European Convention on Human Rights.- Ensure effective access to radio/TV broadcasting in languages other than Turkish. Remove outstanding obstacles, particularly with regard to local and regional private broadcasters.- Adopt appropriate measures to support the teaching of languages other than Turkish.”).

⁶⁹ See von Toggenburg, *supra* note 18, at 225.

constitutional traditions of Member States and the principles that can be deduced from international instruments on human rights in which Member States have cooperated or to which they have signed up. As we have seen, there is enough legal basis to say that linguistic rights form part of the general principles of law, since European states have cooperated in and signed up to conventions aimed at protecting minority languages and indeed minorities themselves.

IV. If linguistic rights are considered as general principles under Community law, they must apply to Community regulations and in the implementation of Community regulations by member States. To take things a step further, it could also be asserted that because they are human rights, linguistic rights oblige the institutions of the Union, as the European Parliament has said, to assume a responsibility for “[...] in cooperation with the Member States, for resolving the problems affecting the EU's citizens”, including those concerned with linguistic rights. In this way, linguistic rights can be taken as being generally applicable in the Member States of the EU, in the application of both Community law and internal law.

V. The specific extent of these rights may be open to argument, but the general principle indicated is not. This is the interpretation that is most consistent with requiring candidate states for accession to the Union to respect minority rights, including linguistic rights. What right would the EU have to require candidate states to respect linguistic rights if those rights are not respected in the bodies of law of its own Member States? That is why it is important for the EU to ratify international conventions on linguistic rights and the protection of minorities. In that way the rights covered by those conventions must be enforceable in the application of Community law and in the application of the internal bodies of law of Member States.