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Courriel : themis@droit.umontreal.ca

Droit linguistique comparé*

The Legal Regime of Languages in European Union Law

Dr. Iñigo Urrutia Libarona
Department of Constitutional and Administrative Law
University of the Basque Country

The territorial area of the European Union constitutes a rich and varied linguistic universe that does not limit itself to "State languages". The existence of the multilingual question is one of the defining characteristics of Europe, and its model of political structuring, in constant evolution, should also be like that. Nevertheless, as a consequence of the juridical regime of the official and institutional use of languages, there is a first level of grading between them, according to which Community languages (or Union languages) are different from the other European languages. The building of the economic and political Europe based on the "State language" concept has had effects on the situation of all European languages, thereby affecting European linguistic diversity itself.

The concern regarding the harmful effects induced by the globalising trends based on the economical and political dimension of languages has not been met with effective correcting measures by the European institutions. Thus, within strict limits, the opening to cultural and educational spheres of the Community action has been accompanied by reasserting the Member States' power on matters related to minority languages. We are speaking of a politically "sensitive" question that explains to what extent a political construction made up by States has been deprived of effec-

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tive powers on languages and linguistic communities[1]. The verification of the fragility of the regulatory bases on which to establish a linguistic policy to foster minority languages[2] is related to it.

With the beginning of the twenty-first century, we witness a new phase in the evolutionary process of European construction that must be filled with contents in regard to European minority languages. The Treaty establishing a Constitution for Europe[3] contains several references related to European linguistic diversity, thus opening new perspectives still not explored to date. The recognition of the rich cultural and linguistic diversity may not be limited to a simple support of "State languages", leaving aside the others. It cannot just be a commitment to favour European multilingualism by means of a State unilingualism conception. The commitment in defence of the so-called European regional or minority languages must become real and effective. This is going to be the focus of this paper. To do that, we will start with a shallow analysis of the institutional regimes of the languages contained in the European Constitution; later on, we will focus on the status of the non-official languages of the European Union, and, finally, we will deal with the juridical scope of the linguistic diversity recognition referred to in Article II-82 of the European Constitution (corresponding to the Charter of Fundamental Rights of the European Union, included as Part II of the Constitution[4]), as well as with the prospects of materialisation of this provision.

I. Legal Bases of the Linguistic Regime

The linguistic regime of the European Union is shaped by a whole series of norms and institutional practices mainly oriented towards regulating the internal functioning

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1 See: Bruno DE WITTE, "Minorités nationales: reconnaissance et protection", (1991) 57 *Pouvoirs* 119, where it is stated: "*ceci dit, pour l´instant ce n´est pas l´Europe communautaire, ni aucune institution européenne qui peut prendre la responsabilité principale dans la protection des minorités. C´est encore essentiellement au niveau de l´État que se joue cette question*" ("once we have said this, up to now, neither the Community Europe nor any European institution has been able to take the main responsibility in the protection of minorities. This question is still essentially dealt with on a State level"). See also: Normand LABRIE, *La construction linguistique de la Communauté européenne*, Paris, Honoré Champion, 1993 at 253, in which in regard to regional languages the conclusion "*que les actions communautaires se situent à la périphérie de l´aménagement linguistique, toute prise de décision politique étant évitée*" ("Community actions are placed on the periphery of linguistic planning, avoiding any political decision-making") is reached.

2 See: Niamh NIC SHUIBHNE, *EC Law and Minority Language Policy: Culture, Citizenship and Fundamental Rights*, London, Kluwer Law International, 2002 at 293.

3 The text employed for the writing of this article corresponds to the definitive wording of the Treaty establishing a Constitution for Europe, adopted by the Conference of the Representatives of the Governments of the Member States, in Brussels, on 29 October 2004 (CIG 87/2/04 REV 2).

4 The Charter of Fundamental Rights of the European Union, of 7 December 2000, was proclaimed under the French Presidency at the Nice Summit of December 2000.

of the institutional apparatus. Linguistic regulations are centred around the concept of "officiality", thus conferring linguistic rights, and on the concept of "working language"; later on we will comment on the scope of this concept. Nevertheless, the European linguistic regime is not restricted to the institutional status of languages. The officiality of languages within the European sphere produces excluding consequences as regards the other European languages, the status of which has not been recognised, regardless of their status in their domestic spheres.

Treaties law has not been especially explicit in regard to the status of languages. As a result, this provokes a moving of the provision sphere as regards linguistic matters in favour of Derived Law. The European Constitution takes this very same approach when dealing with the institutional regime of languages; it hardly presents any novelties in comparison with what up to now has been established in the consolidated version of the Treaty Establishing the European Community (ECT or EC Treaty). In relation to the institutional regime of languages, the three basic references are the following.

A. Article IV-448(1) of the European Constitution

Article IV-448(1) of the European Constitution draft (which corresponds to Article 314 ECT in its consolidated version) declares the authenticity of the text of the Treaty worded in twenty-one languages, foreseeing its deposit in the archives of the Government of the Italian Republic, which will transmit a certified copy to each of the governments of the other signatory States[5]. This provision, the origin of which is found in the European Economic Community Treaty (EEC Treaty) and in the European Atomic Energy Community Treaty (EAEC Treaty), has progressively been modified as new States have joined the Communities, including the languages of the States that joined the Union in May 2004. Article IV-448(1) must adjust itself according to the corresponding Acts of Accession.

We are speaking about a provision that is neither specifically oriented towards declaring the officiality of languages nor to regulating the institutional linguistic regime, but rather to determine which versions are authentic. Its primary scope aims at the interpretation of the regulatory text in which it is contained. However, its operativeness is extended due to two circumstances: on the one hand, because other provisions with a substantive content refer to the languages it mentions when determining the linguistic regime (especially associated with the right to petition, on which we will comment later on) and, on the other hand, due to the parallelism found in "the Treaty language" criterion and in the cri-

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5 The languages mentioned in this provision are: German, Danish, Spanish, Finnish, French, Greek, English, Irish, Italian, Dutch, Portuguese, Swedish, Czech, Estonian, Latvian, Lithuanian, Hungarian, Maltese, Polish, Slovakian and Slovenian, a whole group of 21 languages.

terion to determine "the official languages"[6].

In this last regard, we should make some comments. First of all, we should speak about a parallelism in the criteria but not about identical criteria, for not all languages that have been considered "Treaty languages" were declared official languages and working languages. Let us recall the case of Irish (Irish Gaelic) that was already included in Article 314 of the EC Treaty (corresponding to Art. IV-448(1) of the Constitution) but that was not declared an official and working language at first, something which could vary in the near future[7]. We are referring to an intermediary status between officiality and non-officiality in which, obviously, official uses are recognised in regard to these languages. To sum up, this provision does not operate on the official and institutional use regime[8]. The institutional status of languages will depend on the regulations, for Article 314 ECT (which becomes Art. IV-448(1)) cannot be considered a materialisation of a Community Law principle that asserts equality in the use of the "Treaty" languages[9]. The official and institutional use may be the subject of modulations, and this provision will not oppose it. The inclusion of a language as a "Treaty language" or a "language of the Constitution" implies that the version of the latter in these languages will be authentic; nevertheless, it will only be possible to carry out the eventual allegation before the Community institutions of the version of the Treaty in a specific language as long as the regulations on the official use of languages make it possible to do so. It may be said that the officiality of languages is not regulated through the European Constitution.

B. Article IV-448(2) of the European Constitution

In the final phase of the discussion and drafting process of the

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6 See in this regard: Antoni MILIAN i MASSANA, *Público y privado en la normalización lingüística. Cuatro estudios de derechos lingüísticos*, Barcelona, Atelier/Generalitat de Catalunya, 2001 at 164-169.

7 Coinciding with the Irish Presidency of the EU, during the first semester of 2004 and with the legislative elections in Ireland, the question in regard to conferring the working language status on Irish gained special relevance in the discourse of Irish political parties (see: [http://www.eurolang.net/]). Later, in the month after the last month of the Irish Presidency, the Minister for Community, Rural and Gaeltacht Affairs announced the beginning of talks with the Irish Government with the European Commission and other Member States with a view to obtain the recognition as a "working" and official language in the EU for Irish. It seems that the delay in the petition so that it did not coincide with the Irish Presidency period was due to political prudence.

8 As Normand Labrie observes, we must differentiate between the superfunctional level of linguistic policy and its functional level. The linguistic policy measures of the superfunctional level may transfer the capacity of accurately formulating linguistic policy as well as the capacity to implement it to the functional level authorities: N. LABRIE, *op. cit.*, note 1 at 69.

9 See the Sentence of the Court of Justice of 9 September 2003 (C-361/01 P Case, *Kik* v. *OHIM*), point 82.

Constitutional Treaty a second paragraph was added to Article IV-448, according to which:

> *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.*

Furthermore, a Declaration annexed to the Final Act of the Intergovernmental Conference followed Article IV-448(2) specifying that this second paragraph contributes to fulfilling the objective of respecting the Union's rich cultural and linguistic diversity as set forth in the fourth subparagraph of Article I-3(3) of the Constitutional Treaty, and that the Union will continue to pay special attention to the several languages spoken in the Union, including, in particular, those which enjoy official status in all or part of the territory of a Member State, in accordance with the Member State's constitutional order. Moreover, the Conference recommends that those Member States wishing to avail themselves of the possibility recognised communicate it to the Council, within six months from the date of the signature of that Treaty[10]. By establishing such a period of time, it seems that there is a certain will to conclude the process, or at least not to overrun it too long.

The first paragraph of Article IV-448 declares the Treaty's authenticity in the linguistic versions cited in the same paragraph, while the second refers to the possibility to provide translations of the Treaty into any other languages, subject to the Member State's internal constitutional order. This would be the case of Basque (an official language in the Autonomous Community of the Basque Country and a partially official one in the Autonomous Community of Navarre), Catalan (official in the Autonomous Community of Catalonia, in the Valencian Autonomous Community and in the Autonomous Community of the Balearic Islands) or Galician (official in Galicia). These are official languages, therefore languages which share their status with another language of a Member State which is already official in the EU.

Unlike the first paragraph, the second one does not specify that the Treaty's version in the languages mentioned shall be authentic, but rather that the Treaty may be translated into these. The Treaty may obviously be translated not only into the official languages of the Member States but into any European and non-European languages, with the sole nuance that the translation of the Constitution into official languages will be deposited in the Commission's archives[11]. It can be seen, thus, as a recognition at the European level of the

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10 See: Addendum 2 to Document CIG 87/04 REV 2, Declarations annexed to the Final Act of the Intergovernmental Conference and Final Act (CIG 87/04 ADD 2 REV 2): Declaration no. 29, regarding Article IV-448(2).

11 Note that it is not the same archive in which the authentic linguistic versions of the Constitutional Treaty are found.

officiality of the translation, but this does not mean that such versions may be considered as authentic ones.

To sum up, it is certainly a limited recognition with barely no practical effects, with the only relevance to be found in the will to introduce a second level of constitutional recognition for those languages which are official languages in the Member States, although they are not included in the right to petition[12]. A *tertium genus* to be placed between the languages benefited by the linguistic rights granted by the Constitution and those which are not given any status whatsoever in the European institutional sphere. The juridical operativeness of this intermediate degree will rely on how the norms are developed, that is on whether they will be included in a future reform of the institutional linguistic regime.

C. Articles I-10, II-101 and III-128 of the European Constitution

The second basic pillar grounding the institutional regime of the languages in the European Constitution draft is composed of a series of principles which, from different perspectives, are all oriented towards recognising the rights of citizens to use the "languages of the Constitution" in their relations with European institutions. We are referring to articles I-10, II-101 and III-128.

Article I-10 refers to the citizenship of the Union, recognising, among others, the right "to petition the European Parliament, to apply to the European Ombudsman, and to address the Institutions and advisory bodies of the Union in any of the Constitution's languages and to obtain a reply in the same language" (I-10(2)(d)). In turn, Article II-101, contained in the Charter of Fundamental Rights that refers to the right to a good administration[13], provides in its paragraph 4 that "every person may write to the institutions of the Union in one of the languages of the Constitution and must have an answer in the same language". Finally, Article III-128 deals largely with this subject but from a different perspective, for it provides that

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12 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 general elections of May 2004, which has assumed certain demands mainly tabled by Catalan political parties. The initial intention would be to recognise the right to petition in its double aspect of active and passive use (as regards the reply) in the languages declared as official by the States. Such 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, nearer to the interests in favour of maintaining the current *status quo* in the constitutional sphere than to the positions in favour that the Constitution should guarantee full official effects to the languages declared as official in the Member States' internal order. The final decision on the status of the latter depends on whether the EU regulation regarding the official use of languages will be eventually reformed.

13 With regard to this right, see the comments of Lorenzo MARTÍN-RETORTILLO BAQUER, "Dos notas sobre la Carta", in Eduardo GARCÍA DE ENTERRÍA & Ricardo ALONSO GARCÍA (eds.), *La encrucijada constitucional de la Unión Europea*, Madrid, Civitas, 2002 at 195-197.

the languages in which every citizen of the Union has the right to address the institutions or bodies under Article I-10(2)(d), and to have an answer, are those listed in Article IV-448(1). The institutions and bodies referred to in Article I-10(2)(d) are those listed in Articles I-19(1), second subparagraph [the European Parliament, the European Council, the Council of Ministers, the European Commission and the Court of Justice], I-30 [regarding the European Central Bank], I-31 [regarding the Court of Auditors] and I-32 [regarding the Committee of the Regions and the Economic and Social Committee] and also the European Ombudsman.

The recognition of the citizens' right to deal with the institutions of the European Union in the languages of the Treaties was already taken into consideration in the third paragraph of Article 21 of the EC Treaty (former Art. 8 D)[14]. This article was introduced by means of the Treaty of Amsterdam, giving substantial content to the linguistic regime of the Union. Nevertheless, we must highlight that the references that are included in the Constitution in this regard imply some novelties in respect to the former. The characteristics of the recognition of the use of languages are the following.

1. Firstly, it implies the juridical configuration of a true linguistic right. The object of the right recognised is the use of languages, and not only the written use of languages – as explicitly taken into account in Article 21 of the EC Treaty[15]. We are referring to a development of the right to use one language. The formal use of the language is declared suitable and it has juridical consequences[16]. Articles I-10, II-101 and III-128 of the Constitution present all twofold-effect relations, without extending themselves too much on the active side of the right of use. In this way, the right to receive an answer in the language chosen is guaranteed. Consequently, the citizen is placed in the centre of

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14 Article 21 (former Art. 8 D) of the Treaty Establishing the European Community would be written as follows:

Every citizen of the Union may write to any of the institutions or bodies referred to in this Article [we are 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.

15 Neither Article I-10 nor Articles II-101 or III-128 of the Constitution limit the exercise of the recognised right to the "written" use of languages, as it was expressly foreseen in Article 21 ECT when providing that "Every citizen of the Union may write ...".

16 Here, the most characteristic right related to the officiality of languages such as the use of the languages declared official in the citizens' dealings with public authorities is somehow recognised. Nevertheless, this is done by detaching the rights of use from the official language status. That is to say, the right of use is linked to the official language status (about which we will refer to later on), but, in a separated way, the right of use related to the languages of the Constitution is recognised. Therefore, citizens will be able to use the languages of the Constitution that are non-official languages of the Union. Regarding the officiality concept, see: Alessandro PIZZORUSSO, "Lingua i Diritto", in his work, *Minoranze e Maggioranze*, Torino, Enaudi, 1993 at 192.

the European linguistic system, being recognised a subjective public right of language option, with the only nuance that he/she must be a citizen of the Union. Nevertheless, in this last regard we must say that, in their relations with the institutions of the European Union, the individuals who are not citizens of the Union enjoy the most absolute right to use the "languages of the Constitution". The same right as the one recognised to the citizens of the Union, and not because the fundamental right to a "good administration" (II-101)[17], is thus endangered but because these languages are languages with a formal use that has juridical consequences.

2. The right to use (or to linguistic option) is reserved to the languages "of the Constitution". This gives us the opportunity to highlight three aspects:

– Firstly, the provision neither express the characterisation of official language of the Union to bind rights of use to it nor what would seem to us much more important, the characterisation of working languages to these effects. It is spoken there of "one of the languages of the Constitution" and not of the official languages and working languages of the Union[18]. Linguistic rights are recognised in relation to the "languages of the Constitution", and this does neither affect those linguistic rights which can be associated to the Union's official languages nor their number. It could happen, and in fact it happens, that not all "languages of the Constitution" were official languages (such as is the case of Irish) or that there were more official languages than "languages of the Constitution". Therefore, as regards the languages referred to in Article IV-448(2) of the Constitution, nothing should avoid that they were given official language status by modifying the regulation governing the use of the Union's official and working languages. If that were the case, the right to the use of languages recognised by the Constitution in regard to the languages referred to in Article IV-448(1) would be applicable to the languages listed in Article IV-448(2).

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17 To go deeper into the universal nature of fundamental rights, see: Emmanuelle BRIBOSIA, "La protection des droits fondamentaux", in Paul MAGNETTE (ed.), *La Constitution de l'Europe*, Brussels, Institut d'études européennes, 2000 at 123, in which the author refers to the need for detaching from citizenship those rights, such as the right to address the Ombudsman or the right of petition which, by way of the fundamental rights, every person should benefit from.

18 The extension of linguistic rights that takes place mainly in regard to the Irish language stands out in A. MILIAN i MASSANA, *op. cit.*, note 6 at 196; see also the study by the same author: Antoni 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?", (2002) 38 *Revista de Llengua i Dret* 58, and Antoni MILIAN i MASSANA, *La igualtat de les llengües a les institucions de la Unió Europea, mite o realitat?*, Bellaterra, Servei de Publicacions de la Universitat Autònoma de Barcelona, 2003 at 39 and 40.

– The second aspect to be highlighted is the fact that it does not limit itself to the subjective sphere of the language option, neither by means of a subjective criterion (as could happen with the need to use the language of the State of which a person is citizen) nor of a geographical one (as would be the case regarding the requirement of using the language of the State in which we are operating). It happens in such a way that a citizen of the Union shall be able to address the institutions referred to in any language of the Constitution, independently of whether the language chosen is official or not in his/her State, in his/her region or in the linguistic area in which he/she lives or from which he/she operates;
– Thirdly, the institutional sphere to which the right of language option contained in Article I-10 applies is established in a specific and excluding way in Article III-128. It will only be possible to use it in the institutions mentioned in it, without making it applicable to those Community agencies and institutions not mentioned there. Nevertheless, Article III-128 only refers to the use of the right of language option established in Article I-10 and it does not mention Article II-101 (included in the Charter of Fundamental Rights) that also recognises the right to address the institutions of the Union *(in genere)* in one of the languages of the Constitution. Therefore, the question –not made clear in the constitutional text– arises about whether the right of language option (included in the fundamental right to a good administration) is conceived as an institutionally limited form or not.

3. The juridical and material guarantee that the provisions comprise is only the right to address and to receive an answer[19]. That is to say, a right of use is configured but it does not seem to encumber the internal juridical regime of the institutions. Later on we will refer to the recent jurisprudence of the Court of Justice that deals with this matter, but it would be suitable to highlight that both levels would not be univocally corresponded in the wording of the Constitution but rather separately. To sum up, the material linguistic regime contained in the Constitution (already in force since the Treaty of Amsterdam, in the regulations of Primary Law –Art. 23 ECT) deals with this subject in regard to linguistic rights of use, ignoring the reference to internal linguistic use.

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19 In relation to the orientation of the linguistic rights recognised, it is important to warn that the latter must be connected with the prevision included in Article 255 ECT (from Amsterdam onwards) regarding the citizens' rights of access. All the same, Article II-101 of the Charter of Fundamental Rights of the Union, paragraph 4 of which also refers to these same linguistic rights, is found under the heading "the right to good administration".

D. Article III-433 of the European Constitution

The third and last basic reference regarding the status of the languages included in the European Constitution is found in Article III-433, which provides that "[t]he Council shall adopt unanimously a European regulation laying down the rules governing the languages of the Union's Institutions, without prejudice to the Statute of the Court of Justice of the European Union"[20]. This provision is very similar to the one already in force in the EC Treaty, Article 290 (former Art. 217), according to which "[t]he Council shall adopt unanimously a European regulation laying down the rules governing the languages of the Union's Institutions, without prejudice to the Statute of the Court of Justice of the European Union". The differences are found in the fact that the constitutional text specifies that the rules must be implemented by means of a Regulation. To sum up, the internal linguistic regime of Community institutions is not defined in the regulations of Primary Law. These regulations only normatively empower the Council. In fact, it is a regulatory reference characterised by its large scope, with an obvious competence dimension. The exclusive attribution of this function to the Council indicates, more than anything else, the political importance that is bound to the linguistic regime[21]. It neither requires the participation of the Commission nor of the European Parliament when defining the basic lines of the linguistic regime that these institutions must also apply, linguistically delimiting their self-organising power. The linguistic regime must neither be established by majority nor by qualified majority, as is the general rule of Article I-23(3), but by means of a unanimous agreement among its members; this is the system foreseen for very important political decisions[22].

E. Derived Law

From these bases, the linguistic regime is established in regulations

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20 Protocol no. 3 on the Statute of the Court of Justice of the EU establishes in its Article 64 that the rules governing the language arrangements applicable at the Court of Justice of the European Union shall be laid down by a European regulation of the Council acting unanimously. This regulation shall be adopted either at the request of the Court of Justice and after consultation of the Commission and the European Parliament, or on a proposal from the Commission and after consultation of the Court of Justice and of the European Parliament. See also the Protocol by which the EURATOM Treaty is modified (included in the Treaty by which the Constitution of Europe is established); its Article 6 provides that "Article 190 is replaced with the following text: 'the linguistic regime of the institutions will be unanimously decided on by the Council of Ministers, without prejudice to the provisions foreseen in the Statute of the Court of Justice'".

21 See the reflection of Iñaki AGIRREAZKUENAGA, *Diversidad y convivencia lingüística. Dimensión europea, nacional y claves jurídicas para la normalización del euskera*, San Sebastián, Diputación Foral de Gipuzkoa, 2003 at 28.

22 The issues concerning the establishment of qualified majorities (and the right to veto) were logically the most debated issues during the final stage of negotiations and the obstacles which appeared were solved in the Intergovernmental Conference of June 2004. See Article I-25 of the European Constitution.

of Derived Law. Regulation no. 1 of 15 April 1958, of the Council, in which the linguistic regime of the European Economic Community[23] is established, is the only regulation of a general scope that rules these matters. The only modifications undergone have taken place as a consequence of the admission of new Member States to the Community, which has implied a progressive increase in the number of languages[24], which was invariable in its beginnings. Article 1 establishes that the official languages and working languages of the Union's institutions are German, English, Danish, Spanish, Finnish, French, Greek, Italian, Dutch, Portuguese and Swedish. After the enlargement of the Union with 12 new Member States in May 2004, the inclusion of 11 new official and working languages has taken place.

This provision distinguishes between official languages and working languages but without linking any particular juridical regime to both categories. Rather, the Regulation only defines the effects of the (multi)officiality regime and makes it by means of two criteria.

– On the one hand, by recognising juridical effects to the use of a single official language, so that the documents sent by a Member State or by a person to the institutions of the Union may be drafted in one official language, requiring the answer to be drafted in this same language (Art. 2); all the same, the documents sent by institutions to a Member State or a person subject to the jurisdiction of a Member State will be drafted in the language of such State (Art. 3)[25].

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23 See also: Regulation no. 1 of 15 April 1958 of the Council in which the linguistic regime of the European Community of Atomic Energy is established.

24 In the beginning, the official and working languages of the Communities were four (German, French, Dutch and Italian); with the adhesion of Denmark, Ireland and the United Kingdom, they came to be six (including Danish and English, but not Irish); with the adhesion of Greece they came to be seven (including Greek); with the adhesion of Spain and Portugal they came to be nine (Castilian and Portuguese were added), and with the adhesion of Finland, Sweden and Austria they came to be eleven official and working languages. In May 2004, nine more were added (Czech, Slovakian, Slovenian, Estonian, Latvian, Lithuanian, Maltese, Hungarian and Polish), and two more in 2007 (Hungarian and Bulgarian), thus completing the number foreseen of official and working languages, except if modifications were introduced.

25 This provision demands being reinterpreted from the Treaty of Amsterdam which, as we have already mentioned, introduced a new paragraph to Article 8 D of the EC Treaty (after being modified, Art. 21) according to which a right of language option would be recognised for the citizens, a right that must be corresponded by the institutions that the former mentioned. The European Constitution keeps the same regime through articles I-10, II-101 and III-128, to the scope of which we have already referred. Thus, the language used by the institutions of the European Union to answer will have to be the language "of the Constitution" that the citizen has chosen, and that can be another language than the language of the State of which this individual is a citizen.

– On the other hand and in regard to those acts of general application or that do not have a specific addressee, the norm of the joint use of all the official languages is established; thus, the regulations and other documents of general application shall be drafted in all official languages (Art. 4) and the Official Journal shall be published in all official languages (Art. 5)[26].

As we may see, we are speaking about provisions that regulate the regime of the official use of languages and that act on the recognition of the officiality status. The articles referred to focus on the officiality sphere but do not regulate the sphere of procedural language. It is true that Article 1 regards the officiality concept and the working language one without establishing an apparent distinction in the treatment, but it is also true that subsequent articles keep silent on procedural language, focusing on the regime of communications, notifications and publications. As regards procedural language, Article 7 only says that "the languages to be used *in the proceedings* of the Court of Justice shall be laid down in its rules of procedure"[27], emphasising the high degree of linguistic autonomy of this institution. And in Article 6 it is established with general character that "the institutions of the Community may stipulate in their rules of procedure which languages are to be used in specific cases".

To sum up, the officiality regime is defined in Regulation no. 1 of the Council and it operates on the citizens' linguistic rights and on the relations between Community institutions and the States. But this regulation does not close the institutions' internal regime of use, for their regulations refer us back to the self-organisational sphere that will have to evolve within the systematic framework that the former represents.

And this is because neither in practice does the simultaneous use of all languages in all the procedures apply nor do the regulations request it. The aspects regarding the institutional use of the official languages have been determined in the corresponding rules of organisation and functioning of each institution. The detailed analysis of linguistic regulations that is applied in the Council, in the Court of Justice, in the Commission, in the European Parliament and in other institutions such as the European Central Bank or in the Community agencies would exceed by far the

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26 Since the coming into effect of the Treaty of Nice, the *Official Journal of the European Communities* has taken the name of *Official Journal of the European Union*, according to Article 2, point 38, of this Treaty.

27 Italics added. See, however, Protocol no. 3 of the Constitution, on the Statute of the Court of Justice of the EU, in which Article 64(2) establishes that until a set of rules governing the language arrangements applicable at the Court of Justice have been adopted, the provisions of the Rules of Procedure currently in force shall apply, and it adds that "by way of derogation from Articles III-355 and III-356 of the Constitution, those provisions may only be amended or repealed with the unanimous consent of the Council".

aim of the present contribution[28]. It should be enough to just indicate that the juridical regime of the internal use of languages is not homogeneous; there appears clearly a dividing line between the working languages and the official ones. This division of levels reflects itself in the regulations, and in regard to its legality the Court of Justice has made a special pronouncement.

F. Jurisprudence

The analysis of the jurisprudence of the Court of Justice regarding the level of the official and institutional use leads us to underline three aspects in a very synthetic way.

– Firstly, a recent jurisprudential line seems to prove that the equality principle of languages is a relative principle[29]. Regarding the provisions on the use of the languages included in the Treaty, the Court says that "those references cannot be regarded as evidencing a general principle of Community law that confers a right on every citizen to have a version of anything that might affect his interests drawn up in his language in all circumstances"[30].
– Secondly, the Court has increasingly and strictly interpreted the regulatory provisions on procedural language by especially referring itself to the authentication of texts in the Commission[31] and to the sending of projects within the terms set [32]. The language is conceived as a formal but substantial requirement. We must point out that this derives from the regulatory configuration regarding procedural language.
– Thirdly, we highlight the existence of a well established line on the basis of which, when interpreting a Community Law text, we should similarly take into consideration all the existing linguistic versions as long as they are equally authentic[33]. In regard to the cases in which there is only one authentic linguistic version (let us say the Decisions), the literal interpretation will have to be based, obviously, on the language of the

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28 See among others: Amadeu LOPES SABINO, "Les langues dans l'Union européenne. Enjeux, pratiques et perspectives", (1999) 35 *Revue trim.dr. eur.* 159; A. FORREST, "The Politics of Language in the European Union", (1998) 6 *European Rev.* 299; I. AGIRREAZ-KUENAGA, *op. cit.*, note 21 at 22-38; in regard to the linguistic policies of the organisations, see: A. MILIAN i MASSANA, *loc. cit.*, note 18, 67-71; N. LABRIE, *op. cit.*, note 1 at 90-133.

29 See the Judgment of the Court of First Instance of 12 July 2001 (T-120/99, *Kik/OAMI* Case, Rec. p. II-2235), ratified by the Judgment of the Court of Justice of 9 September 2003, *supra* note 9, point 93.

30 Judgment of the CJEC of 9 September 2003, *supra* note 9, point 82.

31 Judgment of the CJEC of 15 June 1994 (C-137/92 Case, *Commission des Communautés européennes* c. *Basf Ag Commission and others*).

32 Judgment of the CJEC of 10 February 1998 (C-263/95, Case of Germany).

33 See, among others, Judgment of the CJEC of 3 March 1977 (C-80/76, *Kerri Milk* Case); Judgment of the CJEC of 6 October 1982 (C-283/81, *Cilfit* Case); and Judgment of the CJEC of 13 April 2000 (C-420/98 Case, *W.N.* c. *Staatssecretaris van Financiën*).

act, without prejudice to its possible translation into other languages for the purpose of its eventual publication.

G. General Characters

From these premises, we may extract the following general characters of the Community language regime.

1. Legal Nature

The linguistic regime of the European Union institutions is essentially of a juridical nature. The official status of languages depends on their regulatory recognition. The official regime of languages is based on the "languages of the Constitution" (or Treaty languages) concept, but the officiality status of languages is not regulated in Primary Law. The latter limits itself to declare rights of use of the "languages of the Constitution" in regard to some institutions, not all of them, and to refer the regulation of the officiality linguistic regime in favour of the Council, which will be able to establish and modify it unanimously. The concept of State language or official language in the whole of the State territory has been the criterion used to include languages among the official and working languages of the Union[34], which has produced excluding effects. Now, from a future-oriented perspective no element in the Constitution seems to be contrary to a widening of such criterion in order to extend it to those languages referred to in Article IV-448(2) EC, that is those languages which are official in their respective Member States. Such extension could be made through a reform of the Council's Regulation no. 1 currently in force, by recognising not only one language per State, but all those languages which are official in their Member State; this way, the constitutional rules establishing a linguistic *tertium genus* in regard to the languages with an internal officiality status would be filled with material content. The system allows the existence of intermediate linguistic statuses, so that, as a consequence, it becomes evident that the languages which have been declared as official languages of the Union's institutions do not fully coincide with the "languages of the Constitution", and vice versa.

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[34] In relation to the cases of shared co-officiality over the whole State territory, it becomes difficult to identify a criterion. See: A. MILIAN i MASSANA, *op. cit.*, note 6 at 166, where the author says "when a Member State recognises more than one official language in its whole territory, or for the central institutions and bodies of the State, and one of these languages is already an official and working language of the Community because it is official in another Member State, the other languages do not acquire this status". This criterion would be valid in the Irish case. See also the opinion of I. AGIRREAZKUENAGA, *op. cit.*, note 21 at 27, where the author highlights the case of Malta, in the territory of which English shares officiality with Maltese; in this case Maltese was declared official and working language in May 2004, even if English was already official. However, I understand that, in these cases, the will of the State involved expressed during the negotiating process becomes more important (Art. 8 of Regulation no. 1 of the Council of 15 April 1958).

2. Institutional Nature

The European linguistic regime is shaped in relation to the institutional network[35]. However, the guarantee of the Community liberties, the functioning of the Common Market and the development of the European Union based on a limited number of languages produce negative (uniforming) effects on all those languages that do not share this status.

3. Shared Status

The shared status configuration of languages produces a system of full multilingualism[36] directed towards guaranteeing a principle of juridical security[37]. However, as a consequence of the process of enlargement and of the linguistic configuration of some candidate 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 Slovakia and the Baltic countries). The principle of juridical security itself seems to demand an adjustment to the new circumstances.

We should also highlight that the language equality principle is not an absolute principle but a relative one insofar as it is not requested for all the institutional activity to be written in all languages. On the other hand, we must keep in mind that the shared status is based on the formal equality of officiality; some differences may be observed in regard to its regime of use that results from the regulations and consolidated institutional practices.

4. Ousting Character

The juridical characterisation of the European linguistic regime is structured on the basis of a linguistic regulation adopted by the Council of Ministers. To date, the regime of language official use has been restricted to State languages, on account of a conception of State monolingualism, producing a first hierarchical level among European languages[38]. No official status whatsoever has been granted to the languages which are official in part of

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35 Full multilingualism is defined and applied in regard to the European institutional framework, but the regulations do not limit its exercise because of personal circumstances or geographical considerations. The relational linguistic rights of the citizens with Community institutions have been widely shaped, although their effects only apply to the languages of the Constitution or to the Union's official languages.

36 See: Josep M. SANMARTÍ ROSET, *Las políticas lingüísticas y las lenguas minoritarias en el proceso de construcción europea*, Oñate, Instituto Vasco de Administración Pública, 1984 at 398.

37 The citizens of the Member States must be subject to Community Law, which, for the most part, can be directly applied. We are referring to the same Law for all the citizens of the Union. The principle of juridical security, the publicity of the regulations and the interdiction of arbitrariness demand that the means that may help all the citizens to understand a Law that they must comply with are provided. See: H. BAUER-BERNET, "La production de textes juridiques en diverses langues officielles par les institutions des Communautés Européennes", (1989) 13 *Llengua i Dret* 20.

38 See: A. MILIAN i MASSANA, *loc. cit.*, note 18, 62.

a State and which, in turn, are not official in the whole territory of another Member State. As a consequence of an excessively rigid development of the Community's linguistic regime, those European languages which are not State languages have been radically excluded as regards any aspect of their official use. This is an anachronic situation and it should be corrected by going deeper into the principles of officiality, democracy and linguistic pluralism.

II. The Status of the Non-official Languages of the Union

We should start underlining an indisputable fact such as the existence of a multilingual reality within the territorial sphere of the European Union. The existence of this multilingual situation is one of the defining characteristics of Europe and it should also be a characteristic of its model of political structuring, in constant evolution. We are speaking about a rich and varied linguistic universe that, obviously, does not limit itself to "State languages". European linguistic diversity nourishes itself mainly from the so-called "regional or minority languages" that coexist with State languages. In turn, their characteristic is the great heterogeneity of situations and internal juridical statuses that they display[39].

What is the answer of the European Union Law to this reality? The fact that the institutions of the Union have not been empowered in regard to regional and minority languages, together with the poor willingness to provide a development to the provisions of the treaties on cultural and linguistic diversity[40], explain the lack of juridical relevance of the institutional actions in this field. The recognition of the non-official languages of the Union is almost non-existent, limiting itself to the declarative sphere. In this regard, we should underline the resolutions approved by the European Parliament in favour of regional languages and cultures, which are important in the symbolic sphere but have a poor juridical operativeness[41]. Their main potentiality would be found in the identification of lines of action, the germ of the guidelines for linguistic policy that try to foster the regulatory and executive activity of the Commission and the States. Specifically regarding the Basque language, we should highlight the Decision of the Committee on Petitions of the European Parliament of 27 January 1993, in which it was agreed to request that the Council

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39 From the data collected in the "Euromosaic" Report, the existence of 26 regional or minority languages in the Union constituted by 15 Member States can be inferred. These languages are distributed among 49 linguistic groups and are used by more than 20 million people. Almost 50% is found in Spain and 23% in France [http://www.uoc.edu/euromosaic/].

40 Former Articles 149(1) (former Art. 126) and 151(1) (former Art. 128) of the EC Treaty. These provisions also appear in the European Constitution (Art. III-280 and III-282), although the prevision of important procedural modifications must be highlighted, with which we will deal later on.

and the Commission adopt the same measures already requested for the Catalan language in the Resolution of 11 December 1990, at the request of the Parliament of Catalonia and of the Balearic Islands. We are speaking about measures oriented towards favouring the use of these languages in some Community actions, the scope and the effectiveness of which have appeared to be rather poor[42].

The taking into consideration of regional or minority languages when elaborating Community policies, which the Parliament and the Committee of the Regions[43] have insistently requested from the Commission, has not given any result in practice. The truth is that the Commission has not provided the requested regulatory basis (or juridical basis) for the promotion of European regional and minority languages, thus hindering the implementation of the already foreseen budgetary lines directed towards the fostering of regional languages, dialects and cultures[44]. Nevertheless, the Commission has not had any difficulties in carrying out projects related to the fostering of European linguistic diversity (MLIS), providing them with an excluding character, for their only beneficiaries have been the official languages of the Union, plus Irish and Luxembourgish, the official languages of the candidate countries and the languages of the European Economic Space[45]. The specific programme of minority language promotion has

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41 See the Arfé Resolution on a Community Charter of Regional Languages and Cultures and on a Charter of Rights of Ethnic Minorities of 16 October 1981 (OJEC of 9 November 1981); the second Arfé Resolution of 11 February 1983 (OJEC of 14 March 1983); the Kuijpers Resolution on the languages and cultures of regional and ethnic minorities of 30 October 1987 (OJEC of 30 November 1987); the Killilea Resolution on cultural and linguistic minorities of 9 February 1994 (OJEC of 28 February 1994); the Morgan Resolution on regional and lesser-used European languages of December 13, 2001 (OJEC of 25 July 2002); the Resolution of 14 February 2002, on the promotion of linguistic diversity and language learning in the framework of the implementation of the objectives of the European Year of Languages. And the most recent Resolution of 4 September 2003, with recommendations to the Commission on European regional and lesser-used languages –the languages of minorities in the European Union– in the context of enlargement and cultural diversity.

42 The measures listed in the Resolution of 11 December 1990, on languages in the Community and the situation of Catalan are the following: a) the publication in Catalan of the Community's treaties and basic texts; b) the use of Catalan for disseminating public information concerning the European institutions in all the media; c) the inclusion of Catalan in the programmes set up by the Commission for learning European languages; and d) the use of Catalan by the Commission's offices in its written and oral dealings with the public in Catalonia and the Balearic Islands.

43 See, especially, the Opinion of the Committee of the Regions on the "promotion and protection of regional and minority languages" of 13 June 2001 (2001/C 357/09), published in the OJEC of December 14, 2001, especially recommendations 2.3, 2.4 and 2.5.

44 On the notion of juridical basis, see: K. BRADLEY, "The European Court and the Legal Basis of Community Legislation", (1988) 13 *Eur. L.Rev. in toto*.

45 A clear example of this line of action is the SOCRATES Programme oriented towards the learning of foreign languages, which has only been open to the official languages of the Union plus Irish and Luxembourgish. See the critical reflections of M. STRUBELL, "Europako

been blocked since 1999. Recently, the Commission has approved a Plan of Action to promote language learning and linguistic diversity (2004-2006), which by means of an integrated approach also includes the promotion of the learning of regional and minority languages, within the context of building a language-friendly environment[46]. This programme implies some steps forward that should be highlighted but it also shows some limitations insofar as it is not so much a matter of supporting specific programmes and specific actions for these languages but rather to integrate them progressively into the general programmes related to the teaching of languages. It is not a complete and sectorially structured programme regarding the fostering of minority languages; it is only limited to the educational sphere in which the latter have found some suitable room[47]. All the same, the question arises regarding the need for legislative measures to accompany an

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hizkuntza politikaren oinarri orokorrak", (2002) 45 *Bat Soziolinguistika Aldizkaria* 38, in which this author asserts that the juridical basis of this programme is not specified in Article 157 of the EC Treaty but that this is not a hindrance for its implementation. The author highlights that the juridical basis that protects the programmes of linguistic diversity promotion would be of full application, without the need for specific basic acts for the non-official languages of the Union. See also: I. AGIRREAZKUENAGA, *op. cit.*, note 21 at 78.

46 See: "Communication from the Commission to the Council, the European Parliament, the Economic and Social Committee and the Committee of the Regions: Promoting language learning and linguistic diversity: an Action Plan 2004-2006" of 24 July 2003 (COM –2003– 449 final). In order to place this action plan in its context, we mainly have to take into account the Resolution of the European Parliament of December 13, 2001 (*supra* note 41), in which measures to promote the learning of languages and linguistic diversity (point 4), as well as the approval of the Council (of Education) of 14 February 2002, in which Member States were invited to adopt specific measures to foster linguistic diversity and the learning of languages, requesting the Commission to elaborate proposals in these areas. The Commission opened a period of public consultation based on the document entitled "Promoting language learning and linguistic diversity" (SEC –2002– 1234) that concluded on 10 April 2003. Later on, the Action Plan 2004-2006 was finally approved in July 2003.

47 The First Section of the Action Plan (entitled "Life-long language learning") establishes the general aim of learning two foreign languages in addition to the mother tongue. Point 6 refers to the "range of languages", where we may read: "Taken as a whole, the range on offer should include the smaller European languages as well as all the larger ones, regional, minority and migrant languages as well as those with 'national' status, and the languages of our major trading partners throughout the world". The reading of this document leads us to take into consideration the possibility of opening the programmes to the teaching of regional languages, although their learning as foreign languages does not seem to have been introduced as an aim. The actions of the Socrates Programme oriented towards the learning of foreign languages are still limited to the official languages of the Union (plus Irish and Luxembourgish). The point in which the document pays more attention to regional languages is on "building a language-friendly environment", where it is specified that "Under the new approach to the funding of projects relating to regional and minority languages, support will be made available *from mainstream programmes rather than specific programmes for these languages*" (italics added). And *"Member States* are encouraged to give special attention to measures to assist language communities whose number of native speakers is in decline from generation to generation, in line with the principles of the *European Charter for Regional and Minority languages*".

action plan on minority languages, as the European Parliament has recently pointed out[48].

This evolution expresses the precariousness of the regulatory framework of the European Union and shows clearly the limited scope that the commitment of linguistic promotion has in the political and decision-making sphere[49]. In the Community context, linguistic pluralism has limited itself to the promotion of State languages, the latter benefiting from the fostering action and being the only targets of the linguistic regulation on the official use. The sensitiveness regarding multilingualism does not go much further than the valuation of State unilingualism, being used as a defence when faced with the drive of some specific languages, mainly English[50]. Regional or minority languages are placed within a framework that formally proclaims linguistic diversity but that, in the material aspect, only acts as a way of reasserting the integral multilingualism principle, with its subsequent excluding effects[51]. Neither the contribution of minority languages nor of the linguistic communities that are different from those of the State languages in the development of the European Union have been approached[52].

As a consequence of the building of Europe, languages acquire an economic and political dimension that has negative repercussions on those languages that are excluded from Community action[53]. The European Union has not taken into consideration the unbalancing effects that the process of European construction is having on regional or minority languages. The latter remain in a marginal position[54]. Their communicative function decreases as they are excluded from spheres

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48 Precisely, this is the reason for adopting the Resolution of the European Parliament of 4 September 2003 (*supra* note 41), with recommendations on European regional and lesser-used languages (already mentioned); in the presentation of its reasons, it is possible to read that the action plan will have little effect if it is not underpinned with legislative measures.

49 See: Florian COULMAS, "European Integration and the Idea of the National Language", in Florian COULMAS (ed.), *A Language Policy for the European Community: Prospects and Quandries*, Berlin, Mouton de Gruyter, 1991 at 14; see also: Roberto TONIATTI, "Los derechos del pluralismo cultural en la nueva Europa", (2000) 58 (II) *Revista Vasca de Administración Pública* 43.

50 See: Tove SKUTNABB-KANGAS & Robert PHILLIPSON, "Linguistic Human Rights, Past and Present", in Tove SKUTNABB-KANGAS & Robert PHILLIPSON (eds.), *Linguistic Human Rights. Overcoming Linguistic Discrimination*, Berlin/N.Y., Mouton de Gruyter, 1995 at 92.

51 See the reflection of J.A. FISHERMAN, "On the Limits of the Ethnolinguistic Democracy", in T. SKUTNABB-KANGAS & R. PHILLIPSON (eds.), *op. cit.* , note 50 at 61.

52 See the reflection of A. ARGEMÍ i ROCA, "Europako hizkuntza-komunitate txikiak eta hizkuntza horietan garatutako hezkuntza eta unibertsitatea: ikuspegi orokorra eta etorkizuneko garapena", in EIRE, *Euskal unibertsitatea 2021*, San Sebastián, EIRE-UEU, 2002 at 476-480.

53 See: N. NIC SHUIBHNE, *op. cit.*, note 2 at 200.

54 Stephen BARBOUR & Cathie CARMICHEL, *Language and Nationalism in Europe*, Oxford, Oxford University Press, 2001 at 59.

of use, placing them in a much more precarious situation[55]. But what is especially noticeable is that the lack of juridical recognition has negative effects on the internal status of languages, and the Community action does not counteract them[56]. In fact, the status of the official languages of the Union is excluding and objectively restrictive for regional languages, but it is especially so for the regional languages declared as official in their respective territories (such is the case, at least partially, of the Basque language), for it implies restrictions of some linguistic rights that have been recognised in the internal sphere.

From the perspective of the Spanish Internal Law, the co-officiality status implies symmetry and equality of languages, which expresses itself in a subjective public right of option of the official language for the citizens[57]. The latter will be able to relate to the public authorities in the official language they choose, be it the State language or the co-official regional one. Given the fact that they are at the service of the citizen's linguistic option, public authorities cannot impose the use of one of the official languages. Thus, the freedom of language derived from the co-official status of Basque language is excluded from the dealings with Community institutions. The recognition of the right to use the co-official language in the citizens' dealings with their institutions is excluded given the fact that they are institutions of the European Union[58].

But, in addition, a decline of the equality regime of the official languages on an internal level also takes place, insofar as the administrative (or judicial) procedures that are fully carried forward in the regional official language that require some kind of communication, report or participation of some European institution will have to do it in a language different from the official language in which the procedure is being carried forward. The fact of simply taking into consideration Community Law implies for the juridical operator the obligation of acting by means of a specific linguistic code, excluding his/her right to act through one of the official languages and imposing on him/herself the use of an official language that he/she has not chosen. The interpretation of Community regulations will have to be carried out on the basis of a linguistic version that is different

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55 See the reflection of N. NIC SHUIBHNE, *op. cit.*, note 2 at 292.

56 See the reflection of Bruno DE WITTE, "The Impact of European Community Rules on Linguistic Policies of the Member States", in F. COULMAS (ed.), *op. cit.*, note 49 at 163-177.

57 See: I. AGIRREAZKUENAGA, *op. cit.*, note 21 at 85.

58 We should take into account that the Community linguistic regime is not conceived from a territorial perspective but, as it has been said, from an institutional one. The use of the languages has effects, not due to the linguistic characterisation of the territory where the institutions are found (that is the rule that regulates the Spanish co-officiality linguistic system, something that limits the use of co-official languages in the relations with the central administration of the State), but on an institutional basis.

from the optional language, not only because this version is the only authentic one but, basically, because it is the only one that exists. Community Law also implies restrictions in regard to the linguistic rights recognised in other spheres, such as that of the consumers' linguistic guarantees. The right to receive information in the official regional language is affected by the Community regulations, to which we will refer later on[59]. From the perspective of the process of linguistic normalisation of the co-official regional languages, their exclusion from any kind of official use in the European institutions makes their own normalised development more difficult, even in the internal sphere[60]. The uniforming pressure of the Union demands the adoption of measures to counteract it, so that the institutional position of Community languages ceases to be a hindrance for the consolidation of the equality of co-official languages in the internal sphere. It corresponds to the European institutions to adopt the necessary measures to guarantee that neither the institutional status of languages nor the regulations and actions of the European Union imply limits or restrictions on the exercise of the linguistic rights recognised by internal legislation.

Within the context of the reorientation of the linguistic use regime of the European Union's institutions through an eventual modification of the Council's Regulation no. 1, and on the basis of the specific reference contained in Article IV-448(2) EC regarding official languages, **it is possible to propose** *the recognition of a status in the European sphere that is proportional to the one enjoyed by the languages in their respective Member State.* This reflection connects with the widespread opinion that it is necessary to modify the official and institutional regime of language use[61]; its materialisation could be channelled through a double line of action that would be the following: the reduction in the number of working languages and the guarantee of official spheres of use in regard to the languages declared official in the Member States.

– The reduction in the number of working languages does not seem to be an impeding hindrance, not even a restrictive one, in order to guarantee the citizens' democratic right of communicating with the public authorities in their language[62]. Reasons of efficiency and mere practical operativeness seem to go in this reductionist direction, the appli-

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59 In this regard, see: A. MILIAN i MASSANA, *op. cit.*, note 6 at 198.

60 See the reflection of A. MILIAN i MASSANA, *loc. cit.*, note 18, 84.

61 See, among others: A. FORREST, *loc. cit.*, note 28, 318; Marie Pascale HEUSSE, "Le multilinguisme ou le défi caché de l'Union Européenne", (1999) 426 *Revue du Marché Commun et de l'Union Européenne* 206; Miguel SIGUAN, *La Europa de las lenguas*, Madrid, Alianza, 1996 at 188.

62 See the reflection of A. LOPES SABINO, *loc. cit.*, note 28, 168, where it says "*si, pour ce qui est des langues officielles, une intégration de base démocratique doit respecter l´exigence du contact du pouvoir avec le citoyen dans la langue de celui-ci, le traitement des langues de travail peut être simplifié sans causer de tort à ce principe*"("if, as regards the official languages,

cation of which will show different contours depending on the different dimension and task of each institution. At any rate, it is clear that the reduction in the number of working languages could also be applied to the Parliament[63].

– Related to what we just said and on a different level to that of the working languages, it will be possible to guarantee some communicative effects to the use of official regional languages, along the lines proposed in the Galle Resolution of 6 May 1994, of the European Parliament, in regard to the right to use one's own language[64]; in this resolution it was urged to recognise the citizens' right to address requests in their own language, "provided that it is an official language in their territory".

On the European level we should distinguish different spheres within the concept of official status of languages itself, in order to allow us to harmonise the efficiency of the institutional functioning and, at the same time, the enlargement of its sphere of jurisdiction so that not only the official languages of the new Member States are also official languages of the Union, but also in order to recognise official uses for those languages declared official in their respective territories. The aim would be to guarantee the democratic right of the citizens to use their official language in their dealings with the institutions of the European Union and the right to obtain an answer in this same language[65]. This seems to be the course of action taken by the Spanish Government with a view to an eventual reform of the Council's Regulation on official languages[66]. All the same,

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an integration on a democratic basis must respect the requirement of the contact of the authorities with the citizens in their language, then, the treatment of the working languages may be simplified without damaging this principle").

63 In this sense, the Judgment of the European Court of Human Rights of 9 April 2002 (*Podkolzina* c. *Latvia*), proves that the linguistic restrictions that the States may establish in regard to the exercise of political rights are possible within certain limits. It is possible to act on the linguistic requirements with the aim of guaranteeing a normalised functioning of the institutions. Nevertheless, the room for manoeuvre will only be able to affect the organisation of the institutional system but, in no case, the definition of the bases and the essential elements of political practice in a democratic system. On this judgment, see: Iñigo URRUTIA LIBARONA, "Exigencias lingüísticas para el acceso a cargos de representación política. Comentario a la STEDH de 9 de abril de 2002 (Asunto Podkolzina c. Letonia)", (2004) 68 *Revista Vasca de Administración Pública*; see also: M. LEVINET, "Les inéligibilités aux élections législatives devant la Cour européenne des droits de l'homme. À propos de l'arrêt du 9 avril 2002, *Podkolzina* c/ *Lettonie*", *Revue fr. dr. constit.* 2003.54.427.

64 Resolution A3-0162-94, OJEC of 25 July 1994.

65 In this regard, see: A. MILIAN i MASSANA, *loc. cit.*, note 18, 89.

66 Thanks to the kindness and the efforts made by the Centre of European Documentation of the Faculty of Economics and Business *(Centro de Documentación Europea de la Facultad de CCEE y Empresariales*) of the University of the Basque Country *(UPV-EHU)*, we have had access to the communications, dated on 13 September 2004, with which the current Minister of Foreign Affairs and Cooperation addresses the President of the European Commission

the citizens of the Union should be granted access to Community regulations in their corresponding official language; that is to say, they should be guaranteed the right to obtain regulatory texts in the languages that are official in the Member States, at least those texts that have direct effects.

III. Recognition of Linguistic Diversity

A. Scope

The *Charter of Fundamental Rights of the European Union* was proclaimed on the occasion of the European Council of Nice held in December 2000. The issue regarding its juridical value acquires a new dimension as a result of its inclusion in Part II of the *Treaty establishing a Constitution for Europe*[67]. As we know, Article 22 of the Charter of Fundamental Rights, now

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(Romano Prodi) and the rotational President of the Council of Ministers (Bernard Bot), informing them about the following:

As you know, on Wednesday 14 July the Irish Government announced its decision to open discussions with the rest of the Union's Member States and with the Commission with a view to obtain for the Irish language the official working language status within the Union, in accordance with the Regulation 1/1958.

I'm writing you these lines to inform you about the Spanish Government's will that, in the course of the corresponding reform of the mentioned Regulation, the official language status within the Union be recognised for Catalan, Valencian, Galician and Basque, all of them official languages in Spain and widely used by a big part of the population.

I also let you know that, on the same date of the present letter, I have forwarded this request to the President of the Council of Ministers of the Union. Besides this, the Spanish Government is very interested in knowing the ideas of the Commission on the way in which the commitment acquired by the Union in our recent Intergovernmental Conference (in regard to the cultural diversity of Europe and the special attention the Union will pay to the languages spoken in the Union, including in particular those languages which enjoy official status in all or part of the territory of a Member State in accordance with their constitutional order) will start to be fulfilled.

Yours sincerely (signed, Miguel Angel Moratinos)

Two aspects should be highlighted. On the one hand, taking the transcribed text into account, there seems to be a great difference between the request of the Irish Government and the one of the Spanish Government, insofar as the status of "working language" seems to have been requested for Gaelic, while the "officiality" status seems to have been requested for Spain's non-State languages. On the other hand, following what we have mentioned above, it seems to be confirmed that the path to follow is the reform of the Council's Regulation no. 1 regarding the Union's linguistic regime.

67 In this regard, see: Luis Maria DÍEZ-PICAZO, *Constitucionalismo de la Unión Europea*, Madrid, Civitas, 2002 at 37, in which the author says that the Charter will have to function as a validity criterion both in Derived Community Law and, by virtue of the supremacy principle, in National Law, which would even imply the introduction of a certain dose of diffuse constitutional justice in all the Member States insofar as the national judges are forced to inapply by themselves any national regulation that is incompatible with Community Law. See also: Francisco RUBIO LLORENTE, "Mostrar los derechos sin destruir la Unión (Consideraciones sobre la Carta de Derechos Fundamentales de la Unión Europea)", in E. GARCÍA DE ENTERRÍA & R. ALONSO GARCÍA, *op. cit.*, note 13 at 119ff.; E. BRIBOSIA, *loc. cit.*, note 17, 127 and 128.

Article II-82 of the Constitution, provides that "[t]he Union shall respect cultural, religious and linguistic diversity".

The problem arising from this provision regards its scope; in relation to it, we may ask whether it adds some extra juridical consequences of a material nature to the provisions already contained in the EC Treaty and transferred to the European Constitution.

As we have said, the model of European structuring is a model that is in constant evolution. The opening to the cultural and educational spheres of the Community action within strict limits takes place from the 1992 Treaty of the European Union, and it has been accompanied with a reassertion of the power of the Member States as regards linguistic matters. Several provisions of the EC Treaty regarding linguistic diversity are being transferred, with some modifications, to the European Constitution. Thus, we could mention:

– Article III-282 of the European Constitution, which provides that: "1. The Union shall contribute to the development of quality education by encouraging cooperation between Member States and, if necessary, by *supporting* and *complementing* their action. It shall fully respect the responsibility of the Member States for the content of teaching and the organisation of education systems and *their cultural and linguistic diversity*"[68]. This provision practically reproduces what was provided in Article 149 (former Art. 126) of the EC Treaty[69] and it shows that the educational action sphere of the European Union is conceived in a complementary and subsidiary way, considering the respect for linguistic diversity as a limit to Community action itself[70]. Paragraph 2 of the same article specifies that "Union action shall be aimed at: a) developing the European dimension in edu-

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68 Italics added.

69 We may say that it does not imply important modifications in regard to Article 149 of the consolidated text of the EC Treaty, the first paragraph of which stated: "the Community shall contribute to the development of quality education by encouraging cooperation between Member States and, if necessary, by *supporting and supplementing* their action, while *fully respecting the responsibility* of the Member States for the content of teaching and the organisation of education systems and their *cultural and linguistic diversity*" (italics added).

70 A Community principle that clearly expresses the safeguard of "State identity" is the subsidiarity principle. It is a principle with a multiplicity of interpretations (see: Chantal MILLON-DELSON, *Le principe de subsidiarité*, Paris, PUF, 1993 at 3ff.; Iñaki LASAGABASTER, "Comunitats Autònomes i Unió Europea" (1995) 20 *Autonomies* 68; R. DEHOUSSE "Le principe de subsidiarieté dans le débat constitutionnel européen", in P. MAGNETTE (ed.), *op. cit.*, note 17 at 151-160; Michael SALEWSKI, *Nationale identität und Europäische Einigung*, Göttingen/Zürich, Munster-Schmidt, 1991 at 50), but one of its contents is to respect the spheres of action of the States and of the political bodies of smaller territorial spheres insofar as they are the most suitable structures to do it.

cation, particularly through the teaching and dissemination of the languages of the Member States"[71]. The provision says "the languages of the Member States", which admits several interpretations, from the most restrictive to the widest ones[72]. Reference is made to European laws or framework laws, which "shall establish incentive measures, excluding any harmonisation of the laws and regulations of the Member States" after consultation of the Committee of the Regions and the Economic and Social Committee, and to the Council, which shall adopt recommendations on a proposal from the Commission.

– Article III-280 of the Constitution provides that "[t]he Union 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" (italics added). In particular, its paragraph 4 provides that "[t]he Union shall take cultural aspects into account in its action under other provisions of the Constitution, in particular in order to respect and to promote the diversity of its cultures"[73]. This article speaks about "respect" and "promotion", thus orienting a commitment of cultural promotion within which linguistic promotion would also be included, this latter understood in a wide and non-restrictive sense. That is to say, the promotion of regional or minority languages would also be included in this provision, although it is true that a restrictive interpretation of it would imply excluding effects[74]. We must point out that Article III-280 of the Constitution implies an important novelty in comparison to Article 151 (former Art. 128) of the EC Treaty. It is not a modification of a material kind (for its contents are almost identical), but a procedural one. The Constitution rests the adoption of "incentive measures" through the legislative activity and through "recommendations" adopted by the Council, but the majority regime is modified insofar as the EC Treaty demanded that they were adopted "unanimously" and Article III-280 (last) abolishes

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71 This second paragraph of Article III-282 virtually reproduces paragraph 2 of Art. 149 (former Art. 126) of the EC Treaty.

72 In this regard, see: A. MILIAN i MASSANA, *loc. cit.*, note 18, 87, in note 93, where the author points out that the terms "official languages of the Member States" are not used, which makes it possible to interpret that Community action would not be only restricted to the official languages.

73 Regarding the scope of this provision, see: Ivan BERNIER, "La préservation de la diversité linguistique à l'heure de la mondialisation", (2001) 42 *C. de D.* 945.

74 In this regard, the Resolution of the European Parliament of 4 September 2003 (*supra* note 41), urges the Commission to include an "explicit reference" to the fostering of linguistic diversity, included the regional and minority languages, as an expression of cultural and linguistic diversity (point 21 of epigraph B "proposed actions") into the provisions dealing with the action of the EU in the sphere of culture.

this regime of adoption of agreements. Given the fact that they are actions in defence of cultural and linguistic diversity, the adoption unanimously of a regime of agreements appeared to be too rigid.

What kind of reading must be done? The transfer of powers of a cultural type in favour of the European Union takes place in a limited way, and the reluctance of the Member States to cede power domains in matters regarding their linguistic minorities in favour of a suprastate body become obvious. The protection of linguistic diversity is already foreseen in the EC Treaty and it is reproduced in the Constitution, although it is characterised by its limitations. The States are the true main characters that will define the scope of the linguistic diversity promotion; in practice, it has become obvious that the support for multilingualism has been limited to the fostering of interstate linguistic diversity.

Taking into account what we have just said, when analysing the scope of the provision included in Article II-82 of the Constitution (contained in the Charter of Fundamental Rights), we find ourselves faced with material parameters that are not particularly new[75]. The analysis of the preparatory studies of the Charter shows that three proposals were rejected: the proposals directed towards recognising subjective linguistic rights for the citizens, linguistic guarantees when faced with Community action, and collective rights for the members of linguistic minorities; these were proposals promoted by the European Bureau of Lesser-Used Languages (EBLUL-BELMR) and the Committee of the Regions[76]. The final wording would limit itself to saying that the Union "shall respect cultural, religious and linguistic diversity", being included in Title III, which deals with "equality".

The recognition of linguistic diversity is carried out in generic terms. No subjective right to the use of languages is configured, no sphere of freedom of identity development of the linguistic minority and no accurately delimited public duty are recognised either. Its scope is rather limited and neither the recognition of linguistic rights nor the specific interventions of linguistic diversity by the States may be inferred from it[77]. It cannot be interpreted either as an enlargement of

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75 Alain FENET, "Diversité linguistique et construction européenne", (2001) 37 *Rev. trim. dr. eur.* 267.

76 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". See: Mar CAMPINS ERITJA, "El reconeixement de la diversitat lingüística a la Carta dels Drets Fonamentals de la Unió Europea", (2002) 38 *Revista de Llengua i Dret* 107 and 108. The proposals of the European Bureau of Lesser-Used Languages (EBLUL-BELMR) are also listed in detail in EBLUL, "Hizkuntz aniztasunerako neurriak", (2002) 45 *Bat Soziolinguistika Aldizkaria* 41ff.

77 See the opinion of M. CAMPINS ERITJA, *loc. cit.*, note 76, 110.

the powers of the Union in this regard, as it is expressly foreseen in Article II-111(2) of the Constitution. The latter are still delimited by the Treaties.

The Preamble of the Charter provides that "the Union contributes to the preservation and to the development of these common values [human dignity, freedom, equality and solidarity] while respecting the diversity of the cultures and traditions of the peoples of Europe as well as the national identities of the Member States and the organisation of their public authorities at national, regional and local levels". That is to say, the guarantee of common values implies the essence of the recognition of fundamental rights on the European level, the materialisation of which will have to be carried out unimpaired of cultural diversity. The guarantee of cultural diversity is conceived as a limit to the uniform treatment of the recognised rights. We could interpret it as a measuring device when developing specific Community policies.

The respect for linguistic diversity is shaped more as a "principle" of action than as a substantive right. A principle of action directed towards institutions, bodies and agencies of the Union, respecting the subsidiarity principle, as well as towards the Member States only when it applies the Law of the Union (Art. II-51(1)). The principles force the Union and the States to comply with them according to their respective competencies[78]. As regards the provisions of the Charter that include "principles", Article II-112(5) provides that they "may be implemented by legislative and executive acts taken by institutions, bodies, offices and agencies of the Union, and by acts of Member States when they are implementing Union law, in the exercise of their respective powers. They shall be judicially cognisable only in the interpretation of such acts and in the ruling on their legality". The guarantee of linguistic diversity cannot be directly invoked before the Courts, and legislative, regulatory or administrative measures of implementation that will delimit its own scope will be necessary.

Be that as it may, the recognition of linguistic diversity shows a certain novelty of approach. This express juridical recognition takes place in the context of the opening of the European Union to fundamental rights and of its taking into consideration as the basis of a new organisational model that is closer to the Europe of the citizens and of the peoples. From this perspective, regulation is undertaken, complementing the reference contained in Article I-3(3) of the European Constitution regarding the aims of the Union among which it is included that the Union "shall respect its rich cultural and linguistic diversity, and shall ensure that Europe's cultural heritage is safeguarded and enhanced". The respect for linguistic diversity is shaped as an aim of the Union, identifying a

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78 See: F. RUBIO LLORENTE, *loc. cit.*, note 67, 135.

sphere of action[79]. A sphere of action that has to materialise itself with specific measures that guarantee the development of linguistic diversity in the context of the European institutions' action, endowing the non-discrimination principle with positive contents "based on any ground such as ... language ... or membership of a national minority" guaranteed in Article II-81(1) of the Constitution[80].

We could see some slight recognition of a collective dimension associated with the protection of minority languages. The Charter does not only impinge on the citizens as the owners of a right not to suffer any discrimination because of language; Article II-82 refers to "linguistic diversity" in a collective or socialising sense. Linguistic diversity has a social substratum, the specific characteristics of which are the object of protection. In addition, we must take into consideration that, in the case of regional or minority languages, we start from a very clear position of inequality in the European context due to the juridical, political and economic reasons to which we have already referred. It is not enough to guarantee the possibility of enjoying rights without suffering any discrimination because of being members of a linguistic minority. The adoption of positive assertion measures that are suitable and proportionate to the aim of attaining equality in the exercise of linguistic rights is demanded. This active and sustained intervention must be filled with real contents by means of a regulatory and institutional action of the European Union, and to this we will refer next.

B. Prospects of Materialisation

We will focus the subject by formulating a question: What would happen if the institutions of the Union decided to recognise the official character of only one European language, excluding all the other "State languages"? This is a hypothesis that perhaps is far from today's reality and regarding which, indeed, we should raise obvious objections of a juridical type. In particular, we should question the effectiveness of principles such as juridical security and certainty of Law, the equality principle, the publicity of the regulations, etc. But what would happen if through the respective educational systems of the Member States enough knowledge of these languages declared unique would

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79 As Marc FALLON says in "Les préambules et principes de la Constitution européenne", in P. MAGNETTE (ed.), *op. cit.*, note 17 at 93: "*ces articles comportaient des dispositions à la fois 'générales', 'essentielles' ou 'fondamentales', tour à tour qualifiées de 'principes' ou d''objectifs' qui, dépourvus d´application autonome, servent à la mise en oeuvre de dispositions spécifiques*" ("these articles implied provisions that were at the same time 'general', 'essential' or 'fundamental', sometimes qualified as 'principles' or 'aims' which, deprived of an autonomous practice, serve the implementation of specific provisions").

80 See: S. CASTELLÁ, "La protecció de les minories per la Unió Europea", CIEMEN, *El dret a la diversitat lingüística. Reflexions al voltat de l´article 22 de la Carta dels Drets Fonamentals de la Unió Europea*, Barcelona, Editorial Mediterránea, 2002 at 72. See as well: Carlos FERNÁNDEZ LIESA, *Derechos lingüísticos y derecho internacional*, Madrid, Dykinson, 1999 at 81.

be guaranteed at the end of compulsory education? In this case, it does not seem risky to assert that the opposition would also continue, but now based on considerations of a political type, insofar as the moving of State languages from Community political activity and, subsequently, from the economic one, would be interpreted as a source of serious linguistic imbalances in regard to these languages and it would also have cultural consequences, breaking the linguistic and cultural pluralism that characterises the Europe of the Community. Thus, this is the situation that the regional and minority languages of Europe endure today.

When studying thoroughly the prospects of the materialisation of European linguistic diversity we shall start from this initial consideration. Because the recognition of linguistic diversity is not enough. The recognition of linguistic diversity must be filled with contents by means of the institutional action of the European Union; all the same, the structuring of a true linguistic policy must be demanded, something that, up to now, has not been defined[81].

Indeed, the Union has not acted according to some defined guidelines of linguistic policy because, when using its powers, it has clashed with regional or minority languages (or with internal legislations regarding linguistic requirements). When, by means of the regulatory level, some economic aspects that somehow affect linguistic matters have been regulated, the development of linguistic diversity has neither been the linking point nor the reference of such interventions. We could rather speak of a direction that tries to overcome eventual linguistic hindrances in the exercise of essentially economic rights[82]. This would be the case of the regulation that forbids to reject petitions or documents written in an official language of another Member State in relation with Social Security[83]; the same happens in the case of the regulations regarding the schooling of the children of workers who are immigrants from another Member State[84], or in that

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81 See: N. LABRIE, *op. cit.*, note 1 at 24; B. DE WITTE, *loc. cit.*, note 56, 164.

82 It is impossible for us to analyse in detail the linguistic effects provoked as a consequence of non-linguistic regulations. In this regard, we refer to A. MILIAN i MASSANA, *op. cit.*, note 6 at 187ff.; Bruno DE WITTE, "Surviving in Babel? Language Rights and European Integration", in Yoram DINSTEIN & Mala TABORY (eds.), *The Protection of Minorities and Human Rights*, Dordrecht/Boston/London, Martinus Nijhoff Publishers, 1992 at 287ff.; N. LABRIE, *op. cit.*, note 1 at 160ff., among others.

83 See Article 84(4) of EEC Regulation no. 2001/83 of the Council of 2 June 1983, in which EEC Regulation no. 1408/71 regarding the application of the Social Security regime to employees, to self-employed workers and to the members of their families that are circulating within the Community is modified and updated.

84 Council Directive 77/486/EEC of 25 July 1977, on the education of the children of migrant workers, provides in its Article 3 that "Member States shall, in accordance with their national circumstances and legal systems, and in cooperation with States of origin, take appropriate measures to promote, in coordination with normal education, teaching of the

of the regulations that have been ruling the labelling of food products and that are particularly restrictive in regard to the linguistic rights recognised by the different linguistic normalisation legislations[85], just to mention three examples. The Court of Justice has tried to provide some solutions, case by case, to the conflicts between Community freedoms and the protective regulatory measures of languages. As a result, this task has provided some linguistic delimitation –through the jurisprudence – of Community principles. Thus, in some cases, we could speak about a position of equilibrium between linguistic promotion and the guarantee of the workers' freedom of circulation and that of settlement in a specific place. The *Groener* Judgment, in which the compatibility of linguistic requirements with the principle of the workers' freedom of circulation[86] is asserted, or the *Haim* Judgment

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mother tongue and culture of the country of origin for the children referred to in Article 1". We can make many reflections, but one must be underlined. The aim of regulating the education of workers should not mean a hindrance for the free circulation of people. What counts is favouring the integration of Community workers and not to recognise a standard of linguistic rights. See: A. MILIAN i MASSANA, *Derechos lingüísticos y derecho fundamental a la educación*, Madrid, Generalitat de Cataluña/Civitas, 1994 at 95ff.; B. DE WITTE, *loc. cit.*, note 56, 167; B. DE WITTE, *loc. cit.*, note 82, 290.

85 Council Directive 79/112/EEC of December 18, 1978, on the approximation of the laws of the Member States relating to the labelling, presentation and advertising of foodstuffs for sale to the ultimate consumer, was the object of interpretation by the Judgment of the Court of Justice of 18 June 1991 (C-369/89, *Piagem-Peeters* Case), indicating that the obligation of exclusively using a specific language without recognising the possibility of guaranteeing information to the consumer through other ways is incompatible with the requirements of this Directive and of Article 30 of the Treaty (today's Art. 28). Later on, the Interpretative Communication of the Commission concerning the use of languages in the marketing of foodstuffs (OJEC of December 23, 1993) was published; it also referred to the incompatibility with the Treaty in regard to the requirement of using one or more than one official language (epigraph 26). Directive 79/112 was modified by means of Directive 97/4/EC of the Parliament and the Council of 27 January 1997, so that new Article 13.bis provides in its paragraph 2 that: "Within its own territory, the Member State in which the product is marketed may, in accordance with the rules of the Treaty, stipulate that those labelling particulars shall be given in one or more languages which it shall determine *from among the official languages of the Community*" (italics added). The terms of the provision seem to exclude the use of the non-official regional languages of the Union. This provision has been ratified in Art. 16(2) of Directive 2000/13/EC of the Parliament and the Council of 20 March 2000 on the approximation of the laws of the Member States relating to the labelling, presentation and advertising of foodstuffs. To go deeply into this subject, see: A. MILIAN i MASSANA, *op. cit.*, note 6 at 190, 191, 197 and 198; see also: N. LABRIE, *op. cit.*, note 1 at 166ff.; we may find a jurisprudential analysis on this subject in I. AGIRREAZ-KUENAGA, *op. cit.*, note 21 at 53-64.

86 Judgment of the Court of Justice of 28 November 1989 (C-379/87, Rec. 1989, 3969, 3995). See also the Judgment of the Court of Justice of 6 June 2000, C-281/98 Case, *Roman Angonese* c. *Cassa di Risparmio di Bolzano SpA*, Rec. 2000, I-4139, dealing with the way of certifying the linguistic knowledge required by the internal regulations. The doctrine that declared that the test of linguistic certification must be carried out by means of merely presenting one sole diploma conferred in one sole province of a Member State is established there.

regarding the linguistic requirements related with the freedom of settlement[87] are clear examples of this position; this would also be the case of the *Mutsch*[88] or *Bickel and Franz*[89] Judgments in which the doctrine of the enlargement of the linguistic rights recognised in each State to Community workers is established. However, they show clearly that the enlargement of the rights is not based on the recognition of the European linguistic pluralism that can be exerted in any Member State but on an equal treatment within each one.

Through the jurisprudence, we may say that linguistic pluralism does not predetermine a specific linguistic model that the States should assume. The Community liberties do impinge on the linguistic level, insofar as the linguistic regulations of the States may hinder the former, but Law does not offer a solution to this conflict, thus requiring a judgement of rationality and proportionality in each case. Such legal analysis must be applied without any distinction because of citizenship.

The general reflection that we must make is that, in fact, we cannot speak about lines of linguistic policy oriented towards the fostering of European linguistic diversity. The Union has not defined a true linguistic policy directed towards guaranteeing European linguistic pluralism when exerting its connected competencies. If we can speak today about some linguistic delimitation of Community freedoms, this is due to the jurisprudence of the Court of Justice but not to a work of identification of the juridical bases on which to establish the intervention of the European Union. This is the gap that must be filled with contents[90], clearing the feeling of uncertainty that surrounds the treatment of regional and minority languages by the Union. It will only be possible to clear up this juridical uncertainty by filling the express regulatory recognition of "European linguistic diversity" with contents.

The fact that the Charter does not alter the order of the distribution of competencies does not mean that the Union must not take into consideration the demands derived from the recognition of linguistic diversity when approving European laws, European framework-laws, European regulations or decisions in the matters in which it has power. In this way, there is margin for a linguistic policy of an expan-

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87 Judgment of the Court of Justice of 4 July 2000 (C-424/97, Rec. 2000, p. I-5123).

88 Judgment of the Court of Justice of 11 July 1985 (C-137, Rec. 1985, 2681).

89 Judgment of the Court of Justice of 24 November 1998 (C-274/96, Rec. 1998, I-7637).

90 As Ricardo ALONSO GARCÍA points out in "Las cláusulas horizontales de la Carta de los Derechos Fundamentales", in E. GARCÍA DE ENTERRÍA & R. ALONSO GARCÍA, *op. cit.*, note 13 at 156, one thing is that the Charter does not try to alter the sectorial competencies of the Communities and the Union and another very different one is its role in the Communities and the Union, which must preside each and every sectorial competency.

sive type[91]. Along these lines, we will propose next some brief final comments on the **basic aspects that could be integrated in the definition of European linguistic policy** in regard to regional or minority languages.

1. Linguistic Communities as an Object of Protection

The respect for linguistic diversity cannot limit itself to the mere taking into consideration of European linguistic pluralism when formulating Community policies. The elaboration of specific lines of action especially directed towards this pluralism is demanded. The approach must be clear and specific, based on the principle of attribution competency, its aim being the promotion and protection of the regional and minority languages of the Union as an integral part of the European linguistic heritage. This must be done with the purpose of creating a circle of juridical protection for regional or minority languages that guarantees their development and evolution in those spheres involved in the action of the European Union. Once the Community linguistic policy is defined, it will have to be implemented in a transversal way affecting the attributions of the Union.

This is why we have to start from an action that clarify concepts, spheres of effect and contents structured from the European perspective[92]. The action in favour of linguistic diversity cannot be conceived in a static way, just limited to the mere protection or conservation of languages. We have to move forward towards the guarantee of spheres of development of the languages and the linguistic communities that speak them. Linguistic diversity is based on a social substratum that must be the object of attention by the Community action. When from a European perspective or approach towards the protection

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91 For an overview, see: L.M. DÍEZ-PICAZO, *op. cit.*, note 67 at 36.

92 Despite being used in the institutional practice of the European Union, the very same concept of regional or minority language is not a concept that has been formally defined in the Union's regulations. There is an obvious harmony with the definitions contained in Article 1 of the European Charter for Regional or Minority Languages of the Council of Europe, although their scope has not been defined. Thus, in the Opinion of the Committee of the Regions of 13 June 2001 on the promotion and protection of regional and minority languages (*supra* note 43), these are *defined as "languages (i) traditionally used within a given territory of a State or within a Region of the European Union* by nationals of that State who form a group numerically smaller than the rest of the State's population; (ii) does not include dialects or (iii) the language of migrants." This concept does not fully meet the contents of Article 1 of the Charter of Regional and Minority Languages that considers as such: the languages (i) traditionally used within a given territory of a State by nationals of that State who form a group numerically smaller than the rest of the State's population, and (ii) different from the official language(s) of that State; it does not include either dialects of the official language(s) of the State or the languages of migrants". The differences that the text of the Committee of the Regions shows are the express reference to the territory of a European region to determine its geographical area (we should think about the languages spoken in a cross-border way) and the lack of explicit arguments regarding whether the "dialects" must be the dialects of the official State language or not.

of linguistic diversity we move forwards, the "linguistic community" principle appears as a supranational concept, especially interesting in regard to those regional or minority languages that, as the Basque language, the Catalan language and many other languages, are used in a cross-border way. Linguistic communities are considered the suitable sphere for the action of Community linguistic promotion, which should materialise itself by means of the Union policies and programmes regarding cross-border and transnational cooperation, regional development and European territorial cohesion, spheres that up until now have been absent[93].

2. Exclusion of Restrictive and Limiting Measures

The guarantee of linguistic diversity becomes incompatible with those measures that restrict or limit the use and development of European regional or minority languages. This would be a limit to Community action understood as a hindrance to eventual regressive actions produced by Derived Law. The latter must tend to confer a fair treatment to all the European languages, whether they are official of the Union or non-official. The respect for linguistic diversity does not only imply the condemnation of practices that may directly or indirectly have homogenising or assimilatory effects, but also the lack of legitimacy of those policies or programmes that exclude regional or minority languages just because they are precisely regional or minority ones. The programmes of the Union oriented towards the fostering of European multilingualism cannot limit themselves to exclusively favour some languages in detriment to other European languages[94]. Based on Article 82 of the Constitution, such a distinction would not find any juridical basis that would support it. On the contrary, the European institutions must make an effort to guarantee the conservation and development of regional or minority languages, which would demand their inclusion

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93 The programme currently in force regarding the economic and social cohesion within the Union by means of cross-border, transnational and interregional cooperation planned to favour the balanced and harmonic integration and development of the European territory is the so-called Interreg III, which does not specify in any of its three chapters the promotion of minority languages among the priority action areas of the programme (it may be consulted in the Official Journal C 143 of 23 May 2000; modification published in the Official Journal C 239 of 25 August 2001; modified in turn and published in the Official Journal of 15 May 2001). Nevertheless, the concept of European transnational linguistic region is really a concept used in institutional practice; see the Resolution of the Council of 8 February 1999, regarding the fixed prices for the books in homogeneous transnational linguistic areas (see Official Journal C 42/3 of 17 February 1999).

94 From this perspective, we have to value positively the inclusion of regional or minority languages in the recent Action Plan promoting language learning and linguistic diversity approved by the Commission on 24 July 2003, already commented on.

in every programme of the Union today[95] and not only in those regarding the learning of languages[96].

Another consideration that we could also point out in relation to what we just said regards the effects of Community Law on the internal status of the non-official languages of the Union. The guarantee of European linguistic diversity is very often developed by means of the recognition of the linguistic rights related to regional languages due to internal regulations. Given this fact, we should avoid that Community Law implies limits to the linguistic rights recognised by the internal legislations or to those derived from the juridical or institutional status of regional languages, as it could be the case of the regional languages declared co-official[97]. Community regulations cannot be a factor that restricts or makes the internal status of languages more precarious.

3. Correcting the Imbalances Derived from Community Action

The Community linguistic policy mostly impinges on the spheres affected by its very activity. From this perspective, the Community linguistic policy must aim to counteract the negative effects that the process of European integration produces on regional or minority languages. It must endow itself with substantial contents in regard to linguistic diversity. Article II-82 of the Constitution should be understood not only as a limit to eventual discriminatory effects[98] but also from a dynamic perspective. That is to say, its development cannot limit itself to confirming today's situation of inequality between languages produced by Community action; measures to counteract this effect should also be taken. This provision must be filled with contents by means of specific actions

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95 According to the Resolution of the EU Council on the promotion of linguistic diversity and language learning in the framework of the implementation of the objectives of the European Year of Languages, of 14 February 2002 (Official Journal C 50/01 of 23 February 2002).

96 Along the lines of what was foreseen in the Resolution of the European Parliament of 4 September 2003, with recommendations to the Commission on European regional and lesser-used languages (*supra* note 41), the Commission is urged to "also take the promotion of linguistic diversity into account in other EU programmes"; in addition, there are specific proposals. Also in the Opinion of the Committee of the Regions of 13 June 2001 on the promotion and protection of regional and minority languages (*supra* note 43) in which

> *urges the Commission to take immediate action to ensure that minority (lesser-used) and regional languages are included in the activities of all current European Union programmes: in particular The Fifth Framework Programme for Research and Development, the Culture 2000 Framework Programme, the MEDIA Plus programme, an action plan within pre-existing programmes such as Socrates, Leonardo and Youth , European Union action in support of education and SMEs, Structural Funds and Cohesion Funds, the e-Europe action plan, the e-Content programme, and the action plan on venture capital.*

97 In this regard, see the reflection of A. MILIAN i MASSANA, *op. cit.*, note 6 at 193.

98 We must take into account that Article 81(1) of the Constitution refers to the prohibition of discrimination because of language, whereas Article 82 refers to the guarantee of linguistic diversity. The latter seems to be regarded as a limit to an eventual unconditional application of the non-discrimination principle because of language, as an individual right.

in order to foster the languages put at a disadvantage due to the integration process.

From this perspective, Article II-82 of the Constitution seems to demand the inclusion of language in the reasons referred to in articles III-118 and III-124[99] of the Constitution with a view to implementing actions to fight discrimination[100]. At any rate, such an omission cannot be interpreted as a hindrance or a limit to the policies of positive action in favour of regional or minority languages. Such actions are perfectly framed with regard to this matter in Article III-280 of the Constitution (that will replace Article 151 –former Article 128– of the EC Treaty) in relation to the promotion of European cultural diversity. Consequently, the Council may proceed to its approval according to the procedure regulated in paragraph 5 of this provision.

Within the limits of the powers attributed to the European Union, it seems that a legislative development of Article II-82 in relation to Article III-280 of the Constitution is necessary, through a planned process to foster European regional or minority languages. It would be a legislative development that would support a sectorially structured global programme, a true legislation of linguistic policy or of linguistic normalisation with the aim of guaranteeing substantial equality between European languages in the spheres subject to the Law of the Union[101]. We should avoid the inconsistency implied by the fact that the languages of the linguistic minorities find fewer possibilities for development (and learning) than those guaranteed to the official languages of the Union in the territories that have these languages as their own[102].

4. Taking into Consideration the Processes of Linguistic Normalisation

The fostering of linguistic diversity may find an adequate channel for its development by means of the work done by regional authorities, very often acting as the bodies that

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99 The latter would come to correspond to Article 13 of the EC Treaty (former Art. 6 A).

100 Neither Article III-118 nor Article III-124 (as happened with Art. 13 EC Treaty in its consolidated version) include language among the reasons for discrimination. The first of them provides that: "In defining and implementing the policies and activities referred to in this Part, the Union shall aim to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation". In turn, Article III-124 establishes that: "Without prejudice to the other provisions of the Constitution and within the limits of the powers assigned by it to the Union, a European law or framework law of the Council may establish the measures needed to combat discrimination", mentioning the same reasons as the aforementioned article. Language is not mentioned among the reasons for discrimination that could legitimate the adoption of policies to counteract it.

101 In relation to linguistic normalisation, see: Jaume VERNET i LLOBET, *Normalització lingüística i accés a la funció pública*, Barcelona, Fundació Jaume Callís, 1992 at 55, in which the author highlights that it is not only a matter of defining a result, but especially of determining a path to attain it.

102 See the reflection of T. SKUTNABB-KANGAS & R. PHILLIPSON, *loc. cit.* , note 50, 101 and 102.

are best placed to guarantee it because of their territorial sphere of impact. This would be the case of the processes of linguistic normalisation fostered by substate authorities. The Community principle of respect for linguistic diversity may materialise through a planned process of regional or minority languages promotion operating from regional agencies. In the context of the reformulation of the subsidiarity and collaboration principle, it seems timely to take the role of regional public authorities in the exercise of linguistic competencies into consideration[103] as long as this intervention is in agreement with the principle of guarantee of the Union's linguistic diversity and it does not go against it[104].

The principle of respect for linguistic diversity may also be understood as a point of balance between the freedom of language, associated with the Community liberties themselves and the public intervention regarding the promotion of regional or minority languages; that is to say, the processes of linguistic normalisation. The principle of respect for linguistic diversity must become an additional and essential part in the shaping and the exercise of the liberties of circulation on which the internal market is based. The linguistic delimitation of Community liberties must be carried out on the basis of the respect for linguistic diversity as an aim of the Union.

5. Organisational Projection

To conclude very briefly, it is important to make an observation on the organisational aspect. If what really counts is to define and structure a linguistic policy on a Community scale oriented towards protecting European linguistic diversity, there appears the idea of an organisation that helps to define and implement it. Along this line, there is the proposal of the European Parliament to create a Euro-

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103 See the Protocol added to the European Constitution on the application of the principles of subsidiarity and proportionality in which references to the regional dimension of the policies (Art. 2), to regional legislation (Art. 5) and to regional parliaments with legislative powers (Art. 6) are made. On the expression of the internal political decentralisation of the States in the European Charter of Fundamental Rights, see: L. MARTÍN-RETORTILLO, *loc. cit.*, note 13, 191ff.

104 In this regard, we should highlight the resolution of the General Assembly of the European Bureau for Lesser-Used Languages (EBLUL-BELMR) of 13 September 2003, on the situation of the Basque language in the Autonomous Community of Navarre, which stated that "a series of reforms to the Autonomous Community legislation limiting the use of the Basque language [have been implemented]", to conclude that "consequently, EBLUL denounces the reforms taken by the local government, which would substantially accelerate the extinction of the bilingual landscape of the city and the use of the Basque language by the Basque speakers ... For all these reasons, we request from the local authorities and especially from the members of the local government to review their policy with regard to the Basque language in order to adapt it to the European standards" (it may be consulted at [http://2ww.eblul.org/]).

pean agency for linguistic diversity and language learning[105] to which functions related to implementing action plans in defence of linguistic diversity and its fostering would be attributed. The establishment of an European agency for linguistic diversity could also be interesting for the planning of the Union's intervention in this sphere; that is to say, to define aims, financial guidelines and priorities of intervention on a European scale. In addition, its functionality could be extended in order to act as a consultant to the Member States and the regional authorities responsible for linguistic matters when implementing actions for the promotion of regional languages in their respective territories according to the needs of each linguistic community[106].

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105 See the Resolution of the European Parliament of 4 September 2003, with recommendations to the Commission on European regional and lesser-used languages, *supra* note 41.

106 In this regard, see: N. NIC SHUIBHNE, *op. cit.*, note 2 at 43; see also: M. KRONENTHAL, "De la retòrica a la realitat? La politica lingüística de la UE i la seva aplicació respecte a las llengües minoritàries. Una evaluació crítica", *Working papers/Documents de treball*, no. 13, 2003 at [www.ciemen/org/mercator].